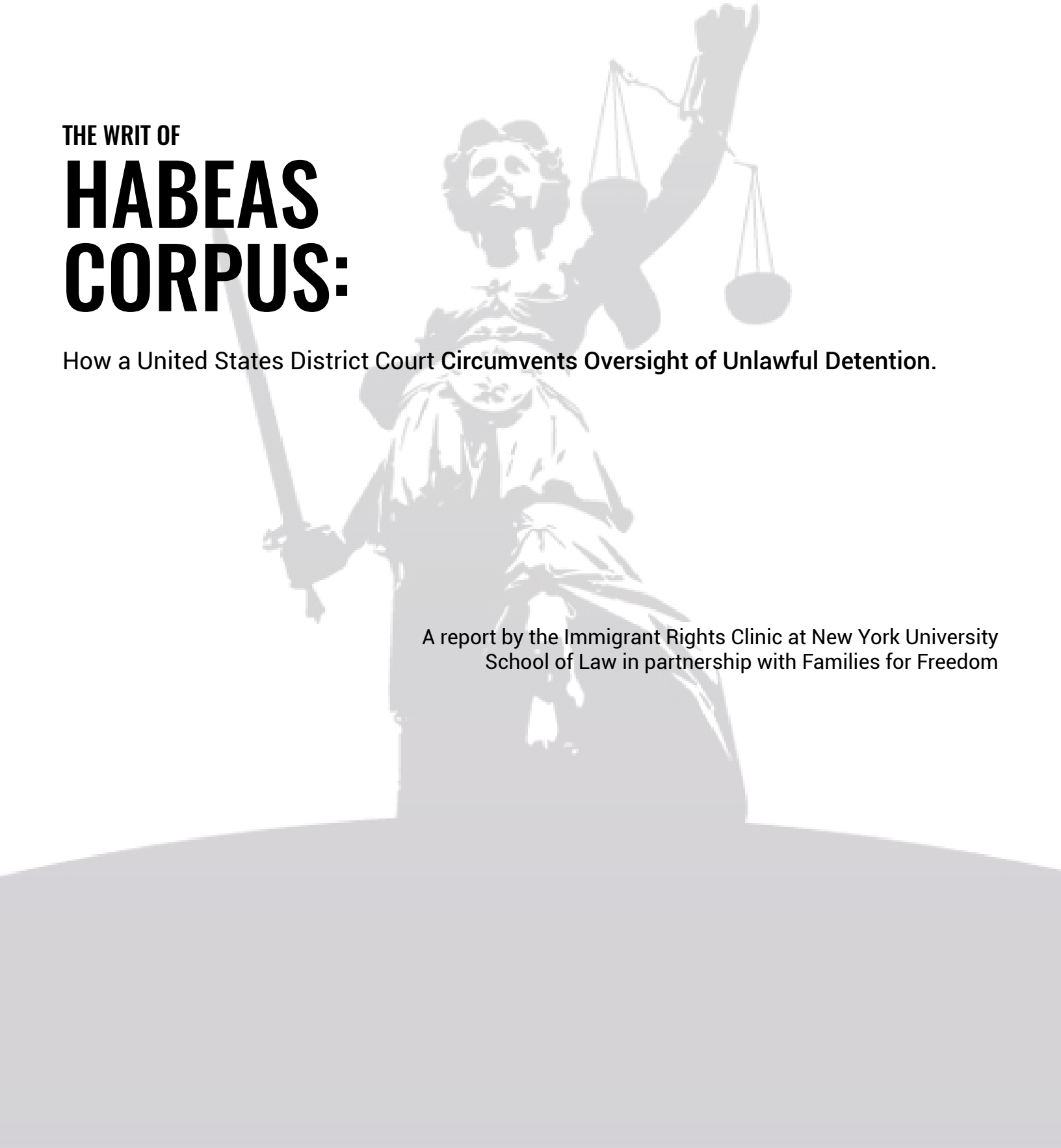

THE WRIT OF

HABEAS CORPUS:

How a United States District Court **Circumvents Oversight of Unlawful Detention.**

A report by the Immigrant Rights Clinic at New York University School of Law in partnership with Families for Freedom

ABOUT US

Families for Freedom

Founded in September 2002, Families for Freedom is a New York-based multi-ethnic human rights organization by and for families facing and fighting deportation. We are current and former detainees, deportees and their loved ones. We come from dozens of countries, across continents. FFF seeks to repeal the laws that are tearing apart our homes and neighborhoods; and to build the power of immigrant communities as communities of color, to provide a guiding voice in the growing movement for immigrant rights as human rights. FFF has evolved into an organizing center against deportation. We are source of support, education, and campaigns for directly affected families and communities -- locally and nationally.

NYU Immigrant Rights Clinic

The Immigrant Rights Clinic at New York University School of Law is a leading institution in both local and national struggles for immigrant rights. Its students engage in direct legal representation of immigrants and community organizations in litigation at the agency, federal court, and Supreme Court level, and in immigrant rights campaigns at the local, state, and national level.[1]

1 The name of the Law School is provided solely for purposes of identification of the clinic's affiliation. The views expressed in this report should not be regarded as the position of the Law School.

Acknowledgements

This report is dedicated to people who were detained by U.S. Immigration and Customs Enforcement and filed a habeas corpus petition in the U.S. courts.

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INTRODUCTION

In 2012, Families for Freedom started receiving an increase in phone calls and messages from detainees in Etowah County Detention Center (Etowah) in Gadsden, Alabama in 2012. Immigrants detained at Etowah file their habeas corpus petitions with the Northern District of Alabama courthouse in Birmingham, Alabama. They do so to draw courts' attention to the profound loss of liberty they are facing. The number of detainees asking specifically about habeas corpus petitions and problems with their travel documents began to rise, and so Families for Freedom and the Immigrant Rights Clinic at New York University School of Law partnered up to investigate.

The writ of habeas corpus lies at the heart of society's protection against the illegal deprivation of liberty by the government. Habeas corpus enables individuals to rattle their cages - to call on judges to use their power to provide a remedy if there is no lawful basis for detention.[1] The writ also exists to "continually [check] executive authority to imprison without process."[2] From at least the seventeenth century onwards, judges have played a central role in protecting individuals from unlawful detention by the state. As the concept of habeas evolved, it merged with the idea of due process to form a "powerful current in the stream of constitutionalism.[3] The writ was most famously used in 1772 by Lord Mansfield to liberate a Jamaican slave who was forcibly brought to the United Kingdom, paving a legal path to the abolition of slavery.[5] In Number 83 of the Federalist Papers, Alexander Hamilton framed the writ as a remedy for "arbitrary punishments" and "judicial despotism."[6] The Judiciary Act of 1789 authorizes federal courts in the United States to grant a writ of habeas corpus for detainees who are held "in custody in violation of the Constitution or laws or treaties of the United States."[7] The Judiciary Act grants this power for detainees regardless of their immigration status.

The U.S. law (28 U.S.C. §2243) that outlines the procedure for filing and adjudicating habeas petitions acknowledges the grave liberty interests at stake. Once a habeas petition has been filed, the court must issue an order requiring the person who has custody over the detainee to provide a "true cause of the detention."[8] The response must be filed within three days. If good cause is shown, the court can grant an extension of up to 20 days. The maximum amount of time the person responsible for the person in custody has to respond is 23 days. After receiving the response, the court is required to schedule a hearing. Unless the habeas petition and response raise only purely legal questions, the detainee has the right to be brought before the judge to make his or her case.

For immigrant detainees the habeas corpus petition is crucial. Immigration detention was once the exception. Immigration violations are civil, not criminal offenses, and enforcement corresponded accordingly. As the War on Drugs and mass incarceration took hold in the political consciousness of the 1980's and 1990's however, incarceration became not only a primary instrument of criminal law enforcement, but immigration law enforcement as well. Congress has authorized mandatory detention of immigrants with certain criminal convictions before they receive a final order of removal and has made the detention of immigrants with final orders of removal mandatory for a short period of time in order to effectuate their removal. This report focuses on immigrants detained at Etowah who have already been ordered removed and have been languishing indefinitely in immigration detention pending their removal.

The deprivation of liberty that detention precipitates cannot be underestimated. The only legal instrument truly available to immigrant detainees who are awaiting removal to another country, is one specific kind of legal petition that is at the core of this report: **the writ of habeas corpus**.

2 Gerald L. Neuman, Habeas Corpus, Executive Detention, and the Removal of Aliens, 98 Colum. L. Rev. 961, 969 (1998).

3 Brandon L. Garrett, Habeas Corpus and Due Process, 98 Cornell L. Rev. 47, 49 (2012).

4 Colin William Masters, On Proper Role of Federal Habeas Corpus in the War on Terrorism: An Argument from History, 34 J. Legis. 190, 195 (2008).

5 Sommerset v. Stewart, Lofft 1, 98 Eng. Rep. 499 (K.B. 1772).

6 The Federalist No. 83 (Alexander Hamilton); Gerald L. Neuman, Habeas Corpus, Executive Detention, and the Removal of Aliens, 98 Colum. L. Rev. 961, 984 (1998).

7 I.N.S. v. St. Cyr, 533 U.S. 289, 302, 305 (2001).

8 28 USC §2243.

METHODOLOGY

The authors of this report first analyzed the records of habeas petitions and their ensuing adjudication were first analyzed through the Public Access to Court Electronic Records system (PACER). PACER is an electronic public access service of United States federal court documents, allowing users to obtain case and docket information from the United States district courts, among others. Remotely, the authors of the report were able to view:

- Lists of all parties and participants in cases, including judges and attorneys
- A chronology of dates of case events entered in the case record, beginning with the filing of the habeas petition and ending with the publishing of an opinion by a judge
- The types of documents, motions, and supplements filed by detainees, government attorneys, and judges

This report's authors quickly discovered that electronic access to habeas corpus petitions filed with the Northern District of Alabama courthouse is extremely limited. From a distance, the the authors could only access the names of individuals who had filed habeas petitions and how many habeas petitions had been filed. The actual habeas petitions filed by immigrant detainees were not available for viewing, as they are considered sensitive and therefore kept confidential under Federal Rule of Civil Procedure 5.2(c)(2)(b). Thus some basic information such as the petitioner's country of origin, and the nature of their habeas claims was not accessible. In the NDAL magistrate judges (judges whose work had been delegated to them by district judges or statute) typically made recommendations on an immigrant's habeas petition, which were then summarily adopted by the district court judge. Under FRCP 5.2(c)(2)(b) however, magistrate judges' opinions were also considered sensitive and therefore kept confidential, and as a result could not be viewed remotely.

The only way to access documents or to figure out the outcome of habeas petitions filed in the Northern District of Alabama was to travel to the courthouse in Birmingham and physically print out the documents. The report's authors traveled to the courthouse in Birmingham and the detention center in Etowah in order to obtain physical copies of all habeas petitions filed in the past five years and to meet with detainees. Documents were then shipped back to New York City, where they were analyzed and summarized in this report. Thanks to the accompaniment of a local immigration attorney, the authors were also able to visit several Families for Freedom members detained at Etowah. Information shared by those detainees and others has also been crucial to the shaping of this report.

The authors read through the entire case files for 243 habeas petitions filed in the NDAL. Typically an individual case file consisted of a habeas petition including various exhibits, a government response to the habeas petition, a petitioner's response to the government's filings and either a judicial decision on the habeas petition or a motion by the government to dismiss the case as moot. These documents contained significant qualitative data that helped the authors develop a better understanding of what is actually happening with habeas petitions filed by immigrant detainees from Etowah.

In addition to basic information such as name, Alien Registration Number, and the dates of
various filings, data was collected on the following categories:

- Whether the petitioner had an attorney;
- The petitioner's country of origin and immigration status;
- The number of extensions of filing deadlines granted to the government;
- The date the petitioner was first taken into ICE custody;
- The number of days between each filing;
- The main arguments that petitioners' raised in their habeas petitions;
- Whether or not the petitioner received a POCR review;
- Any available information on the petitioner's travel documents
- Whether the petitioner was removed or released prior to the adjudication of the habeas and how much time between filing and removal or release.

After the first round of data was analyzed, the authors grouped the cases into a series of qualitative, overlapping categories. The categories included issues like government contradictions in their filings; inadequate POCR; attempts to deport detainees with suspicious travel documents; and communications from embassies denying the issuance of travel documents.

KEY FINDINGS

The aggregate data on habeas petitions filed by immigrants detained at Etowah Detention Center (Etowah) from 2010-2015 reveals allegations of shocking and alarming patterns of unlawful detention by Immigration Customs and Enforcement (ICE) and deceit towards the detainees as well as the Northern District of Alabama federal court. In light of such serious allegations, every single habeas petition filed by detainees from Etowah requires robust judicial oversight. ICE's Post-Order Custody Review (POCR) process, the only internal oversight mechanism to evaluate the lawfulness of an immigrant's continued detention, appears to be inadequate, and often intentionally misleading. When ICE claims they are having difficulty removing individuals, they can merely label detainees as failing to comply with their deportation order which further prolongs the detention period. Although a 2007 internal Department of Homeland Security (DHS) investigation shed light on ICE's misconduct in applying the failing to comply label, the data from Etowah reveals that ICE continues to engage in this abusive practice.

ICE routinely holds immigrants from countries to which they know they cannot be deported, even when detained immigrants provide letters from their Consulate or Embassy stating that travel documents will not be issued. What is perhaps even more suspicious is when ICE has released all immigrants from a certain country because they cannot secure travel documents except for one individual. This inconsistency, paired with allegations of fraud raises serious red flags that the Court in the Northern District of Alabama has a duty to investigate.

Ultimately, careful review of hundreds of petitions raises a multitude of questions about ICE's behavior in lieu of the Court's oversight. These are the very questions courts should be asking and would be asking, were they to engage in the truly individualized inquiry with which they are tasked. Every question raised in every case we will discuss in this report remains unanswered and leaves hundreds more people vulnerable to indefinite and prolonged detention. This will remain true until the Northern District of Alabama takes seriously the liberty of immigrants detained at Etowah and the irreversible, devastating consequences of their detention.

1.

Almost all (94.2%) of habeas corpus petitions filed by immigrants detained at Etowah County were filed without a lawyer.

2.

Since 2010, the Northern District of Alabama **has not granted a single habeas corpus petition.**

3.

The only habeas corpus petitions the Northern District of Alabama has formally adjudicated and published opinions for have been denials.

4.

Despite the factual disputes between immigrant detainees and ICE raised in every petition filed, the Court did not hold a single hearing. Even in cases where there were allegations that ICE was attempting to deport people with fraudulent foreign travel documents or to countries where the person had never been to, the Court failed to fulfill its their obligations under the Habeas statute and inquire further into the allegations.

5.

In the rare instances when the Northern District of Alabama has called for a hearing to assess the legality of an immigrant's continued detention, ICE removes or releases the detainee and moves to dismiss the habeas petition as moot, thereby circumventing judicial review and leaving the immigrant with no adjudication of the claims that prolonged detention was illegal. Those released face re-detention without any adjudication of claims that they cannot be deported to the designated country.

6.

Almost all (98%) of the 243 habeas corpus petitions filed between April 2010 and September 2015 analyzed in this report were outright denied or dismissed in cookie cutter opinions. As a result, there is no case law or elaboration of what a Zadvydas showing would require - of what would constitute a lack of reasonable foreseeability to a detainee's removal. Immigrant detainees, 94% of whom do not have lawyers, are thus completely in the dark about how frame their habeas petitions in order to secure their freedom. Furthermore, there are no judicial decisions to protect immigrants who are released on orders of supervision from re-detention without new cause.

7.

The habeas corpus challenges unlawful deprivation of liberty; therefore the process is designed for expediency. The Court, however, summarily granted 100% of all extensions sought by ICE providing them with unreasonably long periods to respond to a habeas corpus petitions, further prolonging the detention of the immigrant.

Without the outside interventions of courts, ICE is completely unaccountable, free to abuse its own internal review system for evaluating detention, removing people to countries without valid entry documents, rendering them undocumented, and deporting people to countries that do not legally recognize them. When ICE skirts judicial review by releasing detainees who have filed habeas petitions, ICE prevents the detainee from having a judicial adjudication of his past claim to use as a defense and ICE has re-detained such individuals with no new cause.

RECOMMENDATIONS

The Etowah County Detention Center should not detain immigrants. We support the shutting down of the immigrant detention center at Etowah.

Pending the closure we recommend the following;

1.

The Court in the Northern District of Alabama should order and hold evidentiary hearings in all cases where there are factual disputes as is required by the Habeas Corpus statute, immediately after the government has responded. Circumstances in which hearings should be held include but are not limited to:

a. When there are factual disputes regarding the likelihood of travel documents being issued;

b. When ICE alleges that a detainee is failing to comply;

c. When a detainee alleges that ICE has procured fraudulent travel documents.

2.

The Court should only grant extensions to the government when it has shown good cause. Habeas corpus cases challenge unlawful deprivation of liberty; therefore it is crucial that courts expedite review of the legality of the person's ongoing detainment.

3.

The Court should require ICE to always provide proof of valid travel documents used to deport detainees. The Court should also require ICE to list and provide proof as to the country to which detainees were removed.

4.

The Court should require ICE to provide detailed information as to attempts to secure travel documents (embassy contact attempts, letters, interviews, etc.).

5.

The Court should summarily grant habeas corpus petitions where detainees have included proof that travel documents will not be issued by their embassies, paying particular attention when detainees have been re-detained after previous release. Under Zadvydas, the Court should view proof that travel documents will not be issued as evidence that removal is not reasonably foreseeable.

6.

The Court should publish case law prohibiting ICE from submitting stock language as evidence that a detainee's removal is reasonably foreseeable. The likelihood of travel document issuance turns on highly individualized factors and the Court should require specific evidence.The fact that ICE has previously been able to remove other detainees to a country is not sufficient evidence that ICE will be able to remove a current detainee to that country.

THE COURT

THE SUPREME COURT OF THE UNITED STATES REQUIRES LIMITS
to how long a person can be detained after they have been ordered deported

Fifteen years ago the Supreme Court of the United States - the highest court in the country - reminded federal courts of their constitutional duty to protect the liberty of detained immigrants.[9] In 1996, Congress had amended the immigration laws to increase the use of immigration detention to hold immigrants who had been ordered deported while their removal was pending.[10] The consequences of the rise of incarceration for immigrants were extreme – detainees were deprived of their liberty, detained far from their families and communities, and held in many cases indefinitely while the government attempted to secure an entry document for their deportation to another country. The Supreme Court responded on June 28th, 2001, in Zadvydas v. Davis – urging courts not to "[abdicate] their legal responsibility," and providing courts with vital criteria through which to judge the detention of immigrants while the government is in theory attempting to secure documents for a detainee's entry into the receiving country. The release of this report marks the 15th anniversary of the Supreme Court ruling and chronicles its legacy, in one detention center in particular; Etowah County Detention Center in Gadsden, Alabama.

In Zadvydas, the Supreme Court recognized that detainees awaiting deportation were disappearing into a legal black hole and that habeas petitions provided the only path out. Prior to the Supreme Court decision, indefinite detention was routine.[11]

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9 Zadvydas v. Davis, 533 U.S. 678, 680 (2001)

10 Faiza W. Sayed, Challenging Detention: Why Immigrant Detainees Receive Less Process Than "Enemy Combatants" and Why They Deserve More, 111 Colum. L. Rev. 1833, 1836-37 (2011)

11 Section 241 of the INA governs the detention of immigrants with final orders of removal. Under the statue, the government "shall remove" an immigrant within 90 days. There are a number of provisions in the section that affect how the removal period is calculated and additionally, §241(6) states "Inadmissible or criminal aliens.-An alien ordered removed who is inadmissible under section 212 , removable under section 237(a)(1)(C) ,237(a)(2) , or 237(a)(4) or who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, may be detained beyond the removal period and, if released, shall be subject to the terms of supervision in paragraph (3)."

In response to the significant constitutional questions raised by the possibility of indefinite detention, the Supreme Court reminded courts of their duty to take seriously the habeas petitions of detainees who had been ordered deported. The Court instructed federal courts to ask whether a detainee's removal was not reasonably foreseeable, and therefore, indefinite. This question of reasonable foreseeability is precisely the kind of factual issue that federal courts are supposed to investigate. The Supreme Court understood that federal courts take into account the immigration-related expertise of immigration enforcement agencies when determining the reasonable foreseeability of deportation, but warned courts not to abdicate their independent legal responsibility to review the lawfulness of an immigrant's detention. Before the Supreme Court got involved, the government already had 90 days to remove an immigrant who was detained. The Supreme Court, recognizing that securing an entry document for detainees often took longer (for reasons discussed below), gave the government another 90 days before the detention would become 'presumptively unreasonable.' After 180 days, in other words, an immigrant could file a habeas petition challenging his or her continued detention, and the government would bear the burden of proving that the immigrant's removal was reasonably foreseeable. If a judge was satisfied by the government's showing, the judge could deny the habeas corpus petition and allow the immigrant's detention to continue. If the immigrant's removal was not reasonably foreseeable, the court instructed the court to grant release.

Immigration and Customs Enforcement (ICE) is required to obtain valid travel documents from the government of the receiving country. While immigrants are required to cooperate with ICE to whatever extent possible while they are detained, ICE is ultimately responsible for following up with consulates and embassies to ensure that the documents are valid and secured.[12]

These processes are, in theory, designed to "ensure that individuals are deported to countries where they have recognized status," upon arrival and to ensure compliance with foreign and international law. Travel documents to the receiving country should thus be viewed as entry documents that grant the person access to rights and services.[13]

The Supreme Court's ruling in Zadvydas recognizes the need for oversight over the process of securing travel documents, particularly when an immigrant has been held in detention for longer than six months. The Supreme Court's ruling in Zadvydas recognizes the need for oversight over the process of securing travel documents, particularly when an immigrant has been held in detention for longer than six months.

THE COURT HAS ABDICATED ITS CONSTITUTIONAL RESPONSIBILITY
as the primary protector of individual liberty in Etowah

Judges in the Northern District of Alabama have abdicated their responsibility to rigorously oversee the detention of people awaiting deportation. In Etowah, the overwhelming majority - 94.2% - of detainees who filed habeas petitions between 2010 and 2015 did not have a lawyer, only underscoring the need for meaningful engagement by the Court. The Court failed to adhere to the guidelines of the habeas corpus statute – it provided ICE with unreasonably long periods to respond to habeas corpus petitions, summarily granted every extension sought by ICE and never held a single evidentiary hearing. The Court did not grant a single habeas corpus petition in the five-year period analyzed in this report. In many cases, ICE removed, transferred or released the individual from Etowah before the Court decided on the habeas corpus petition, thereby circumventing judicial oversight of detention and denying detainees' the right to be heard before a court. In other cases, the petitions were summarily denied without any kind of hearing. The Court had numerous opportunities to fulfill its constitutional duty. In reality, however, the courts have failed to intervene - to ask questions about allegations of fraudulent removal attempts and travel documents or to resolve factual disputes as to who is the source of delay and obstruction in procuring travel documents. In failing to exercise rigorous judicial inquiry into immigrants' habeas petitions, the Court is abdicating its constitutional responsibility: to issue guidance on the meaning of the law. It is also leaving the immigrants who are released with no protection from detention in any of ICE's far-flung detention centers, and requiring a new round of habeas litigation. In this judicial vacuum, ICE has ample opportunity to abuse its power and inflict harm on detainees - results that will be explored in depth in the following two sections.

THE COURT HAS FAILED TO COMPLY WITH THE HABEAS LAW

As discussed in the proceeding section, under the habeas statute (28 U.S.C. §2243), once a habeas petition has been filed, courts are required to quickly issue an order to show cause directed at the person who has custody of the petitioner.[14]

12 Families for Freedom, Smuggled into Exile: Immigration and Customs Enforcement's Practice of Deporting Non-citizens without Valid Travel Documents. 14 New York, NY: September 2015; U.S.

13 DROPMM, 16.

14 28 USC §2243.

Despite the fact that the statute calls for a response within three days (and sets a maximum of 23 days), in 100% of the cases filed in the last 5 years, the Court granted ICE **thirty days** to respond. This thirty-day period is longer than the maximum amount of time allowed under the habeas statute, even when the government shows good cause for an extension. Furthermore, the Court in the Northern District of Alabama granted **every extension** requested by ICE/DHS without any explanation or any acknowledgement for the added detention that the petitioner faced as a result.

The Court in the Northern District of Alabama is not fulfilling its "legal responsibility to review the lawfulness of an alien's continued detention." [15] By failing to adjudicate habeas corpus petitions with the expediency required by the law, the Court prolongs the deprivation of liberty faced by detainees. Despite the broad range of factual disputes present in the hundreds of habeas petitions filed between April 30, 2010 and September 8, 2015, the Court only ordered evidentiary hearings in **four** cases. Not a single one of these hearings was actually held and thus the Court **did not hold a single hearing** during this five-year period. In failing to even schedule hearings where factual disputes could be independently investigated, the Court effectively deferred to ICE's renditions of the facts and failed to allow people to exercise their right to appear in court to advocate for their release. Even in cases where detainees alleged that ICE was attempting to remove them with fraudulent travel documents or to countries where the detainee had never previously set foot, the Court failed to inquire further, as is their duty.

CASE STUDIES

Cesar arrived in the United States in November of 2012 as an asylum seeker from Eritrea. After his application for asylum was denied, he was detained by ICE. Cesar had no criminal convictions and had never served any time in prison. In Cesar's habeas corpus petition, he contested ICE's allegations that he was failing to comply by detailing his personal attempts to secure a travel document from the Eritrean consulate, by making phone calls and supplying ICE with all of his documents. His habeas corpus petition alleges that the Consulate informed him on April 15th, 2014 that they did not recognize him as a citizen of Eritrea, and that they would not issue a travel document. His habeas corpus petition further alleges that ICE informed him that the El Salvadorian consulate would take care of his travel documents. Cesar states clearly in his habeas corpus petition that he is obviously not from El Salvador and should not be deported to that country.

Twenty-two days after Mr. Cesar filed his habeas corpus petition, the Court ordered the ICE to respond within twenty days. It did not order any specific Nine days before a response was due, ICE requested an extension of time, which the Court granted on the same day. Sixteen days later ICE released Cesar on an order of supervision after a year and a half in detention, completely circumventing judicial review. The Court never made findings on whether or not ICE was attempting to remove Cesar to El Salvador. Cesar was denied his right to present his case in Court, remained vulnerable to re-detention at any moment and remained vulnerable to deportation to a country to which he has no connection.

ICE. In every case that was not mooted out, the Court found that the removal of detainees was foreseeable and therefore no one should be released. In most instances, the Court simply waited for ICE to remove, transfer or temporarily release the

detainee; in rare cases, they published opinions articulating their denial. In one case, where the detainee alleged that the travel documents ICE provided him were fraudulent, the Court published a rare opinion stating that "regardless of whether Mr. N's signature on the travel document is a forgery, Mr. N fails to state a claim for relief under Zadvydas because he "has not provided evidence of a good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future." Without any guidance from the Court as to what an adequate showing of "not reasonably foreseeable" might look like, detainees – who are filing their habeas corpus petitions without a lawyer or legal expertise - have no way of knowing whether their claims are sufficiently stated. They have no notice as to what a Zadvydas showing requires and now way to ensure that they are framing their claims appropriately for their release. The Supreme Court explicitly cautioned against courts deferring to ICE's reasoning as truth - indeed, they equated mere acceptance of ICE's rationale as an abdication of authority.[16]

Thus in the context of what the Supreme Court demanded in 2001, the Northern District of Alabama's behavior is a total abdication of their constitutional responsibility as the primary protector of individual liberty interests in Etowah.

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[14] 28 USC §2243.

[15] 15 Zadvydas v. Davis, 533 U.S. 678, 680 (2001)response in relation to the allegations about ICE securing travel documents and the removal attempts to El Salvador.

[16] Zadvydas v. Davis, 533 U.S. 678, 680 (2001) ("We recognize, as the Government points out, that review must take appropriate account of the greater immigration-related expertise of the Executive Branch, of the serious administrative needs and concerns inherent in the necessarily extensive INS efforts to enforce this complex statute...But we believe that courts can take appropriate account of such matters without abdicating their legal responsibility to review the lawfulness of an alien's continued detention.")

Machar was born in South Sudan in 1968 and came to the US as a refugee in 2001. He has a wife and six children who are all either Legal Permanent Residents or U.S. Citizens. Machar first entered ICE detention in July 2007, but was released on an order of supervision in May 2008. In June 2013, he was unexpectedly re-detained. At the time of filing his habeas corpus petition, Machar had already been detained in Etowah for almost a whole year. ICE's argument for continuing to detain Machar was based on his convictions prior to 2007 when he was first detained, and therefore was considered a danger to the community. However, ICE had previously released him indicating that despite the prior convictions they had not found him to be a danger to the community.

ICE acknowledged that Machar was a citizen and native of South Sudan and they discussed attempts to secure documents from the Consulate of South Sudan in Washington D.C. In their final review dated January 16, 2015, ICE stated that they were working with the government of Sudan to secure travel documents for his removal. Machar expressed fear and concerns about being deported to Sudan, a country that he is not from and that has been in armed conflict with South Sudan. The Court never ordered a hearing and failed to acknowledge these fears about being deported to the wrong country. The Court also did not require ICE to provide any more details about the process of securing travel documents from South Sudan. After holding Machar in post-final order detention for a second time for fourteen months, ICE released him on an order of supervision. ICE then moved to dismiss Machar's habeas petition as moot, thereby circumventing judicial inquiry into whether ICE was attempting to deport Machar to the wrong country.

THE NORTHERN DISTRICT OF ALABAMA HAS FAILED
to Adhere to the Protections Established BY THE SUPREME COURT

The Supreme Court clearly states that detention while awaiting removal becomes presumptively unreasonable after 180 days, and that courts must inquire into the "reasonable foreseeability" of a detainee's removal after this 180-day point. The decision requires that courts imbue some substantive meaning to "reasonable foreseeability"; that they, over time, generate standards as to what circumstances lead to a detainee's release under Zadvydas and what circumstances justify continued detention.

In the Northern District of Alabama, 89% of detainees who filed habeas petitions were detained for over 250 days after their removal order and some were detained as long as 1,122 days. Some of these cases include concrete proof that no travel document would be forthcoming, and some involve deceit or potential fraud on the part of ICE. Many habeas petitions filed in the NDAL were dismissed as moot without receiving any judicial review over the factual disputes between detainees and ICE. In every case that was not mooted out, the Court found that the removal of detainees was foreseeable and therefore no one should be released. In most instances, the Court simply waited for ICE to remove, transfer or temporarily release the detainee; in rare cases, they published opinions articulating their denial. In one case, where the detainee alleged that the travel documents ICE provided him were fraudulent, the Court published a rare opinion stating that "regardless of whether Mr. N's signature on the travel document is a forgery, Mr. N fails to state a claim for relief under Zadvydas because he "has not provided evidence of a good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future." Without any guidance from the Court as to what an adequate showing of "not reasonably foreseeable" might look like, detainees – who are filing their habeas corpus petitions without a lawyer or legal expertise - have no way of knowing whether their claims are sufficiently stated. They have no notice as to what a Zadvydas showing requires and now way to ensure that they are framing their claims appropriately for their release.

The Supreme Court **explicitly** cautioned against courts deferring to ICE's reasoning as truth - indeed, they equated mere acceptance of ICE's rationale as an abdication of authority.[8] Thus in the context of what the Supreme Court demanded in 2001, the Northern District of Alabama's behavior is a total abdication of their constitutional responsibility as the primary protector of individual liberty interests in Etowah.

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[16] Zadvydas v. Davis, 533 U.S. 678, 680 (2001) ("We recognize, as the Government points out, that review must take appropriate account of the greater immigration-related expertise of the Executive Branch, of the serious administrative needs and concerns inherent in the necessarily extensive INS efforts to enforce this complex statute...But we believe that courts can take appropriate account of such matters without abdicating their legal responsibility to review the lawfulness of an alien's continued detention.")

THE PRISON

THE ETOWAH COUNTY DETENTION CENTER AND WHY IT MATTERS

Etowah County Detention Center (Etowah) has been repeatedly denounced by human rights advocates as one of the worst immigrant detention centers in the country.[17] It is an open secret that Etowah is ICE's preferred location for warehousing immigrants subject to prolonged detention. Etowah is a strategic location for several reasons: its low cost to the federal government, its remote location within the jurisdiction of a federal district court and appeals court that are highly likely to side with the government and against detainees, and the infamously poor conditions within the jail, which lead many detainees to lose hope and give up on challenging their removal.

Etowah is a county jail in Gadsden, Alabama run by the Etowah County Sheriff's Department. Gadsden is a small, economically depressed city in northeastern Alabama, located about 60 miles northeast of Birmingham and 120 miles northwest of Atlanta, the closest major urban center. Etowah County has had a contract known as an intergovernmental service agreement, or IGSA, with the federal government to house immigrant detainees in the jail since 1997.[18] ICE detainees are housed in several dedicated units within the jail. Etowah currently holds approximately 300 male[19] immigrant detainees who come from all over the U.S. and were born in countries all over the world: Cameroon, Jamaica, Ethiopia, El Salvador, Kenya, Brazil, and many more. A disproportionate share of Etowah detainees are stateless or from countries where it is incredibly difficult to deport someone due to internal strife or a lack of a repatriation treaty with the U.S. Many Etowah detainees are fighting their deportation out of fear of torture or persecution in their countries of origin.

For-profit, corporate-owned immigrant detention centers have garnered significant negative attention in recent years,[20] and right fully so. IGSA facilities like Etowah, however, are subject to many of the same perverse profit incentives as for-profit detention centers. Under the current contract, ICE pays the Etowah County Sheriff one of the lowest per diem rates in the country: $45 per detainee per day,per day[21] compared with the average national cost of $164 per day.[22] Despite this already extremely low price, advocates and detainees have routinely complained that the Sheriff cuts corners in ways that further jeopardize the basic health and safety of both detainees and ECDC personnel, for example by feeding detainees insufficient portions and rotten food, and understaffing the detention units.[23]

In fact, an obscure Alabama law permits sheriffs to personally pocket the savings on such contracts.[24] Etowah is located in a remote area of the country, two and a half hours from Atlanta and hundreds or thousands of miles from most detainees' families, home communities, and legal counsel (for the few detainees that actually have counsel). This extreme isolation goes against ICE's own policy of locating detention centers closer to metropolitan areas where detainees can access services and family visitation.[25] There is no Legal Orientation Program at Etowah, and the vast majority of detainees do not have lawyers.[26] The sense of desolation in Etowah is further exacerbated by the fact that little or no programming is available to de-

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[18] The IGSA contract can be viewed at http://www.documentcloud.org/documents/2157329-etowah-county-al-usms-contract.html

[19] ECDC previously housed both male and female detainees, but the women were transferred out and the facility began detaining only men around the time of its near-closure in 2010-11. See infra note 17 and accompanying text.

[20] See, e.g., Bethany Carson and Eleana Diaz, "Payoff: How Congress Ensures Private Prison Profit with an Immigrant Detention Quota, April 2015, http://grassrootsleadership.org/sites/default/files/reports/quota_report_final_digital.pdf

[21] See supra note 2 (IGSA contract for ECDC)

[22] Detention Watch Network, "About the U.S. Detention and Deportation System," http://www.detentionwatchnetwork.org/resources

[23] See, e.g., Politicized Neglect, supra note 1; Expose & Close, supra note 1; CIVIC Complaint, supra note 1

[24] Adam Nossier, "As His Inmates Grew Thinner, a Sheriff's Wallet Grew Fatter," New York Times, Jan. 8, 2009, http://www.nytimes.com/2009/01/09/us/09sheriff.html

[25] Expose & Close, supra note 1 (citing Immigration Detention Overview and Recommendations, Immigration and Customs Enforcement, October 6, 2009, http://www.ice.gov/doclib/about/offices/odpp/pdf/ice-detention-rpt.pdf)

[26] Written Statement of Carl Takei, ACLU National Prison Project, before the U.S. Commission on Civil Rights, Hearing on The State of Civil Rights at Immigration Detention Facilities, January 30, 2015

tainees.[27] Visitation is only permitted by video monitor for a maximum of one half hour, even when loved ones travel long distances to visit detainees. There is no privacy in the video visitation area, and monitors have malfunctioned, prohibiting visitation entirely.[28] Etowah's isolation has been a point of repeated criticism by human rights advocates, including in a searing report by the Women's Refugee Commission (WRC).[29] A statement by the ACLU National Prison Project to the U.S. Commission on Civil Rights described Etowah as "one of the most notorious examples" of detention facilities located far from detainees' families and legal assistance.[30]

Etowah has become emblematic of many of the most damning aspects of the United States detention and incarceration system: detainees are subject to physical violence and verbal abuse, unconstitutional prolonged and indefinite detention, highly restrictive prison-like conditions, insufficient nutrition, inadequate mental health and medical care, excessive use of solitary confinement, and lack of access to in-person visitation, outdoor recreation, meaningful programming, and—because of Etowah's extremely remote location—family and community contact, legal orientation, representation, and social services.[31] In light of Etowah's record of systemic human rights violations, multiple civil society groups have called for its immediate closure.[32]

In fact, ICE was on the brink of terminating its contract with Etowah County in 2010. But Etowah County officials and Alabama Congressional representatives, including Sen. Richard Shelby, Rep. Mike Rogers, and Rep. Robert Aderholt (chair of Homeland Security subcommittee of House Appropriations Committee) pressured ICE to delay and then abandon its plans for Etowah's closure. ICE announced in April 2011 it would continue detaining immigrants there.[33]

Recently, DHS's own internal watchdog, the Office of Civil Rights and Civil Liberties, singled out Etowah in its annual report, noting the frequency of civil rights complaints and renewing a call for ICE to stop using the facility to house detainees.[34] Nonetheless, despite repeated complaints from detainees, human rights advocates, and even DHS itself, Etowah has passed its recent inspections with flying colors. A recent report by the National Immigrant Justice Center and Detention Watch Network on ICE's failed inspections process highlighted Etowah as one of the most glaring examples of the disconnect between inspections ratings and the reality on the ground.[35]

The extent of the isolation faced by detainees at Etowah cannot be understated - detainees are held far away from their families, communities and the public at large. Judges in the Northern District of Alabama are the only impartial actors who can bear witness to the plight of these detainees. What courts choose to do after habeas petitions are filed is thus of the utmost importance.

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[27] Politicized Neglect, supra note XX (Etowah's programming been ranked as "acceptable" by ICE inspectors, based on the fact that the facility "claims to offer a wide range of programs for detained people" including "'World Aquaculture Program,' 'Puppies without Borders,' and 'Adventure Programming.'"); Lives in Peril, supra note 1 at XX (detainees reported that "these programs were effectively nonexistent and in reality the facility had a nothing more than a broken fish tank and a rock-climbing wall in a room the size of a cell.")

[28] Politicized Neglect, supra note 1 at 5-6; Expose & Close, supra note 1 at XX; Detention Watch Network, Expose & Close, One Year Later, supra note 1 at 4

[29] Politicized Neglect, supra note 1 at 6 ("With limited or no proximity to legal providers, and only a few ICE deportation officers to handle requests, many detainees languish in Etowah without any legal assistance. . . . In allowing Etowah to continue to detain immigrants, despite its inappropriate and inhumane conditions and distance from legal services providers and ICE's own regional field operations, the agency is creating reasonable doubt regarding its commitment to centralization and reform.")

[30] Written Statement of Carl Takei, supra note 10 at 8 ("Etowah is isolated from lawyers who specialize in immigration law; there are no nearby legal or other service providers who have been able to provide legal orientation or 'know your rights' programs at the facility. Since July 2011, the facility has primarily held men who are expected to remain in immigration custody for a long period of time, often because of diplomatic problems between the United States and their home countries that keep them in limbo for months or years. Many could petition the courts to release them from custody based on this state of limbo, but the lack of access to immigration attorneys in the area makes it extremely difficult for detainees at Etowah to successfully navigate the process.")

[31] See reports cited in note 1, supra

[32] See, e.g., Expose & Close, supra note 1; CIVIC Complaint, supra note 1; Advocates' Sign-on Letter to Sec. Johnson, supra note 1

[33] Politicized Neglect, supra note 1 at 2 (citing articles by Lisa Rogers in the Gadsden Times)

[34] See Department of Homeland Security Office for Civil Rights and Civil Liberties, "Fiscal Year 2015 Annual Report to Congress" (June 10, 2016) at 28, 35, https://www.dhs.gov/sites/default/files/publications/crcl-fy-2015-annual-report.pdf

[35] See Lives in Peril, supra note 1.

THE VACUUM

THE VACUUM CREATED BY THE NORTHERN ALABAMA DISTRICT COURT

Without the Court in the Northern District of Alabama, Immigration and Customs Enforcement (ICE), a non-judicial entity, determines who stays locked up in immigration detention at Etowah County Detention Center (Etowah) and who gets released. The internal review system for an immigrant's detention, or Post Order Custody Review (POCR), is rote, highly generalized and sometimes abusive. ICE misuses the Failure to Comply status to deny the constitutional review of an immigrant's detention. Failure to comply is defined as "refusing to comply with a request for a **concrete action**...."[36] When ICE issues a failure to comply notice, they are no longer required under their regulations to conduct POCR, including at the 180 day mark, where ICE is required to conduct a more rigorous inquiry.[37] Put simply, once a detainee has been labeled as failing to comply, ICE claims the authority to detain them **indefinitely**. Even when ICE releases detainees on Orders of Supervision, they re-detain individuals who it knows cannot be removed, without cause. ICE often generalizes, an axiomatically individualized process of securing travel documents – frequently claiming that travel documents will be issued on the basis of specious assumptions. Detainee's allegations also raise widespread concern that ICE is falsifying travel documents and attempting to remove detainees to countries with which they have no relationship.

ICE'S INTERNAL CUSTODY REVIEW PROCESS IS AN INSUFFICIENT PROTECTION AGAINST PROLONGED DETENTION

ICE is tasked with evaluating a person's detention in the context of the foreseeability of deportation to ensure that immigrants are not held indefinitely. ICE's detention review process is called Post-Order Custody Review, or POCR. Courts are supposed to buttress the indefinite detention of an immigrant under the Supreme Court case Zadvydas especially when a habeas corpus petition is filed and the concerns raised are the kinds of factual disputes that the Courts should be reviewing. The absence of independent and judicial intervention has given ICE the opportunity to conduct cursory, generalized reviews without any kind of outside check.

Immigrants receive a review of their detention or POCR after 90 days and 180 days of post-final order detention (and at intervals after 180 days). The criteria for 90-day POCR and 180-day POCR are different, in accordance with the Supreme Court case Zadvydas. The Supreme Court rendered post-final order detention unreasonable after 180 days unless the government could prove that a detainee's removal was reasonably foreseeable, the criteria necessarily shift the greater focus on the foreseeability of removal. In theory, POCR is designed to evaluate an immigrant's candidacy for release on an Order of Supervision.

Immigrants often file the results of their custody review (called "Decision to Continue Detention") as addenda to their habeas corpus petitions, to substantiate allegations that their detention is unjustified and that they do not have access to adequate procedural protections. If the Court in the Northern District of Alabama were to look more closely at the POCR documents submitted into the record, they would find that ICE makes mistakes, such as failing to list the correct country of removal or any country at all. The Court would also see that ICE consistently employs stock language to satisfy the regulatory requirements of 90- and 180-day POCR. In using this generic language to satisfy the POCR requirements, ICE often mischaracterizes the detainee's criminal histories in order to cast them as dangerous and flight risks, and fabricates the likelihood of their removal. ICE frequently provides courts with misleading information about the foreseeability or the existence of travel documents.

ICE uses the justification that travel documents are forthcoming, which is only appropriate at the 90 day review period, at the 180 day review. Stronger judicial oversight of habeas corpus petitions would provide a check on ICE and would help to curb some of ICE's more concerning behaviors in the POCR process.

After detainees file habeas corpus petitions, essentially threatening ICE with judicial oversight of their actions, ICE removes or temporarily releases many of the detainees. The fact that ICE releases an individual who has received multiple POCR reviews only after they file a habeas petitions suggests that the POCR review process is inadequate. A more pessimistic view of ICE releasing detainees out of Etowah only after they have filed a habeas corpus petition and only after continuances is that ICE was misleading or dishonest in its initial claim that these detainees' deportation was foreseeable. It is undoubtedly true that in some instances, the uncertainty of whether a detainee's deportation was foreseeable led ICE to continue their detention. However, there are plenty of instances where detainees should have been released under POCR – where evidence abounded that travel documents would not be forthcoming, for example. Instead, immigrants were needlessly locked up for countless months. The following stories highlight just a few examples of where ICE continued detention through the POCR review but later released detainees who had brought their detention to the Court's attention. The language of their POCR review indicates the flippancy with which ICE treats the continued detention of immigrant detainees:

Akele was born in a remote East African bush camp, where there was no government presence – no towns, no hospitals and therefore no birth certificates. In his habeas petition, Akele stated "Basically, Petitioner is stateless." He communicated this to ICE, and yet his POCR read: "ICE is currently working with the government of Ethiopia to secure a travel document for your removal from the United States. A travel document from the Government of Ethiopia is expected, therefore you are to remain in ICE custody at this time." After filing a habeas corpus petition in the Northern District of Alabama, ICE released Akele on an order of supervision despite the fact that all of his POCRs alleged that travel documents would be forthcoming. Akele remained vulnerable to re-detention at any moment without new cause despite the fact that ICE was unable to secure travel documents from Ethiopia after nearly a year of trying. Despite his habeas petition, he was left with no court finding on his claims.

Noor had no country to claim citizenship - indeed, his deportation order made a finding of law that he was stateless. Yet, with more than 220 days in detention and three POCR reviews, ICE alleged the foreseeability of his removal and the existence of a passport that only could have been fraudulent: "The DHS has submitted your name for the next charter flight to Palestine. Your removal to Palestine is imminent." Then, 30 days later: "You have a valid passport. Your removal to Palestine is expected to occur in the reasonably foreseeable future; therefore you are to remain in ICE custody at this time." And, 30 days after that: "You have a valid passport. Your removal to Palestine is expected to occur in the reasonably foreseeable future; therefore you are to remain in ICE custody at this time." After filing a habeas corpus petition, ICE released Noor on an order of supervision. Noor's case is a good example of how ICE's internal custody review system fails to adequately assess the likelihood of an individual's removal and the significant liberty interests implicated by these failures. ICE's release of Noor circumvented any judicial inquiry into the eventual foreseeability of Noor's removal and Noor was left without protection from re-detention by ICE at any moment without new grounds despite the fact that Noor was found by an Immigration Court to be stateless.

Anputu was convicted of marijuana possession, failure to appear, and shoplifting, for which he served a total of 90 days in jail. At his 90 day-custody review, ICE said "Your various arrests and/or convictions demonstrate a history of failing to follow legal and judicial orders and indicate to ICE that you are not a likely candidate for release at this time. ICE is aggressively pursuing efforts to obtain a travel document for your removal. ICE believes your removal will occur in the reasonably foreseeable future." Later, they simply used stock language to allege the imminence of his removal: "A request for a travel document was submitted to the government of Thailand and ICE is currently working with the government of Thailand in securing a travel document for your removal from the United States. There is no reason to believe at this time that your removal will not take place within the reasonably foreseeable future." After filing a habeas corpus petition, ICE released Anputu on an order of supervision before the Court could hear his case leaving Anputu without a decision and subject to re-detention.

On its face, the phrase is a mechanical recitation of what the Supreme Court required in their ruling on Zadvydas, in order to prolong an immigrant's detention beyond the six month point. ICE believes that as long it claims that a detainee is removable in the 'reasonably foreseeable future', it is compliant with the Supreme Court ruling. However, the range of circumstances with which ICE uses this phrase suggests that the Courts should be rigorously reviewing these claims and require a greater evidentiary showing in order to continue the detention of an immigrant. Furthermore, securing travel documents is an inherently individualized process that turns on numerous factors that could take a very long time to resolve. These factors include the existence of birth records and ability to locate them and confirm their validity, embassy cooperation and sworn affidavits from family members who can attest to a detainee's citizenship.

Splitting the phrase ICE uses to justify ongoing detention into its component parts and analyzing each in the context of various types of issues raised in the Etowah habeas petitions, demonstrates that ICE's submissions are conclusory and cannot justify ongoing detention:

The first part of ICE's generic statements on travel documents - "[t]he Government of XYZ has not declined to issue a travel document in the Petitioner's case," is merely a vague claim and in many instances, ICE is ignoring concrete individualized evidence that the embassy will not issue travel documents. ICE should not be able to use the fact that the embassy has not declined to issue documents as evidence that such documents will be forthcoming. When an embassy cannot identify a detainee as a citizen or will not issue travel documents – as is its right as a sovereign nation – detainees often secure the denial in writing. Detainees share these documents with ICE, and if they file habeas corpus petitions, often include such official letters as proof that their removal is not reasonably foreseeable. The following is an example of ICE's disregard of such official letters:

In the case of five Somalis detained at Etowah the petitioners included an official attestation from the Somali Permanent Mission to the United Nations stating that "it is impossible to retrieve any records concerning civil status" from Somalia and that there were no "consulate services for issuing travel documents or repatriation procedures". Still, the government response to their habeas corpus petitions included the following language: "the government of Somalia has not indicated

that they would not authorize a travel document for" the detainees, that their "deportation is in the very foreseeable future," and that "there is no reason to believe that [they] will not be removed in the very foreseeable future." When they raised this issue in the Court, ICE released four detainees and removed one to an unnamed place before the Court could inquire. ICE can and has re-detained Somalis periodically despite the fact that the Somali Permanent Mission continues to state that it cannot issue travel documents. Thus, without the court's protection these Somali's continue to live in fear of arbitrary, indefinite detention.

Ibrahim, who submitted to the Court the same letter from the official at the Somali Permanent Mission to the United Nations stating that travel documents would not issued, was the only one of the five Somalis to be removed. ICE put Ibrahim on a plane leaving the United States before the Court reviewed his case. Because the Court does not require ICE to submit proof of travel documents or even the country to which a detainee was deported, we have no way of knowing to which country Ibrahim was deported.

The second part of ICE's generic statement is about the likelihood of securing travel documents: "the Government of XYZ has issued travel documents in the past, and there is no reason to believe that the Government of XYZ will not issue a travel document in this matter," is inherently misleading. A review of habeas corpus petitions filed in the NDAL reveals that although ICE may have been able to remove some immigrants to a particular country, ICE was unable to secure travel documents for many other habeas corpus petitioners from the same country. Put another way, ICE's historic ability to secure travel documents for some set of individuals from a particular country is not a sufficient indication of the likelihood of removal in the future or in the particular case at hand. There are any number of obstacles to a country's ability to issue travel documents - from petitioner's having come to the United States at such an early age, before records were digitized, to being born in rural areas where there was no government presence to issue birth certificates, to not being able to identify living family members who can substantiate an individual's citizenship. These are highly individualized factors; for ICE to ever claim with 100% certainty that travel documents are forthcoming simply because some individuals have been deported to a specific country, as ICE regularly does with the courts, is wholly misleading.

IMMIGRANTS ARE BEING DENIED CUSTODY REVIEW OF THEIR DETENTION BECAUSE OF ICE'S FRIVOLOUS ACCUSATIONS

Our review of habeas corpus petitions in the Northern District of Alabama revealed ICE's continuing misuse of the failure to comply status to prolong the detention period for immigrants who are unlikely to be removed. When ICE issues a failure to comply notice, it is no longer required to conduct POCR, including at the 180 day mark, where ICE is required to conduct a more rigorous inquiry.[38] Put simply, once a detainee has been labeled as failing to comply, ICE claims the authority to detain that person **indefinitely**. An internal Department of Homeland Security (DHS) Office of the Inspector General Report published in 2007 found that there were many cases where ICE incorrectly issues a Failure To Comply warning or issues one without sufficient evidence or adequate justification.[39] Our review of habeas petitions filed since revealed that problems with ICE's use of the failure to comply status persist.

ICE misuses the failure to comply status. The fact that when an immigrant who has filed a habeas corpus petition in the Court is released on an order of supervision after ICE issued multiple failure to comply notices provides at least some evidence that ICE recognizes that the continued detention of the immigrant is unconstitutional.

The case of William, who arrived in the United States by boat from Jamaica in the 1990s at the age of 10, illustrates ICE's use of failure to comply status to prolong an immigrant's confinement. William was abandoned by his mother in Jamaica and had no other stated family. ICE believed that William was a citizen of Trinidad and Tobago. ICE claimed that William failed to provide any identification and that his only excuse for lack of documentation was his "lack of family." In other words, despite the fact that William came to the US by boat as a ten year old child ICE blamed him for his lack of family and for the fact that he has no proof of Trinidadian identity.

William spent a year and half in detention after receiving a final order of removal despite the fact that the Embassy of the Republic of Trinidad and Tobago provided an official letter stating that they were not able to confirm William's identity and therefore could not legally issue travel documents. Although ICE clearly had this information, they continued to detain William and actually filed criminal charges against William in January 2012 for failing to comply. This charge was dismissed by the District Court of New Mexico in May 2012. Despite this dismissal and a letter from the Embassy of the Republic of Trinidad and Tobago denying the issuance of travel documents, ICE detained William for another five months, until he filed a habeas corpus petition. When William finally signaled his unlawful detention to the Court in the Northern District of Alabama, ICE released William on an order of supervision. There was no judicial scrutiny over ICE's behavior in this case and William remains vulnerable to re-detention.

DHS itself has recognized field officers' abuse of the failure to comply label. The abuse of this label enables ICE to prolong the detention of individuals even in cases where ICE knows it will not be able to effectuate the immigrant's removal. The fact that ICE sometimes releases immigrants they have charged with failure to comply once the detainees filed habeas corpus petitions is an indication of ICE"s concerns that its actions would not hold up to rigorous judicial scrutiny. However, in the ab-

sence of such scrutiny as is the case in the Northern District of Alabama, ICE is not held accountable for indefinitely detaining immigrants.

ABUSE

ICE FLOUTS THE SUPREME COURT BY GENERALIZING THE PROCESS OF SECURING TRAVEL DOCUMENTS – AN INHERENTLY INDIVIDUALIZED PROCESS

Immigration and Customs Enforcement uses stock language in its submissions to the Courts about the likelihood of travel documents being issued that are often dishonest or internally contradictory. In instances where filing a habeas corpus petition does not immediately result in a detainee's removal from the United States or release on an Order of Supervision, ICE, represented by the U.S. Attorney's office, files a response with the Court. In the 97.5% of habeas corpus petitions that claimed that travel documents were the source of their prolonged detention, the response essentially recites the facts of an immigrant's conviction, deportation case, and custody, and lists ICE's attempts to secure a travel document and concludes with a variation of the exact same language, the overwhelming majority of the time:

> **"The Government of XYZ has not declined to issue a travel document in the Petitioner's case. The government of XYZ has issued travel documents in the past, and there is no reason to believe that the Government of XYZ will not issue a travel document in this matter. Based upon this officer's experience and expertise, I believe that ICE will secure a travel document for the petitioner from the Government of XYZ in the reasonably foreseeable future."**

On its face, the phrase is a mechanical recitation of what the Supreme Court required in their ruling on Zadvydas, in order to prolong an immigrant's detention beyond the six month point. ICE believes that as long it claims that a detainee is removable in the 'reasonably foreseeable future', it is compliant with the Supreme Court ruling. However, the range of circumstances with which ICE uses this phrase suggests that the Courts should be rigorously reviewing these claims and require a greater evidentiary showing in order to continue the detention of an immigrant. Furthermore, securing travel documents is an inherently individualized process that turns on numerous factors that could take a very long time to resolve. These factors include the existence of birth records and ability to locate them and confirm their validity, embassy cooperation and sworn affidavits from family members who can attest to a detainee's citizenship.

Splitting the phrase ICE uses to justify ongoing detention into its component parts and analyzing each in the context of various types of issues raised in the Etowah habeas petitions, demonstrates that ICE's submissions are conclusory and cannot justify ongoing detention:

The first part of ICE's generic statements on travel documents - "[t]he Government of XYZ has not declined to issue a travel document in the Petitioner's case," is merely a vague claim and in many instances, ICE is ignoring concrete individualized evidence that the embassy will not issue travel documents. ICE should not be able to use the fact that the embassy has not declined to issue documents as evidence that such documents will be forthcoming. When an embassy cannot identify a detainee as a citizen or will not issue travel documents – as is its right as a sovereign nation – detainees often secure the denial in writing. Detainees share these documents with ICE, and if they file habeas corpus petitions, often include such official letters as proof that their removal is not reasonablyforeseeable. The following is an example of ICE's disregard of such official letters:

In the case of **five Somalis detained at Etowah** the petitioners included an official attestation from the Somali Permanent Mission to the United Nations stating that "it is impossible to retrieve any records concerning civil status" from Somalia and that there were no "consulate services for issuing travel documents or repatriation procedures". Still, the government response to their

habeas corpus petitions included the following language: "the government of Somalia has not indicated that they would not authorize a travel document for" the detainees, that their "deportation is in the very foreseeable future," and that "there is no reason to believe that [they] will not be removed in the very foreseeable future." When they raised this issue in the Court, ICE released four detainees and removed one to an unnamed place before the Court could inquire. ICE can and has re-detained Somalis periodically despite the fact that the Somali Permanent Mission continues to state that it cannot issue travel documents. Thus, without the court's protection these Somali's continue to live in fear of arbitrary, indefinite detention.

Ibrahim, who submitted to the Court the same letter from the official at the Somali Permanent Mission to the United Nations stating that travel documents would not issued, was the **only one** of the five Somalis to be removed. ICE put Ibrahim on a plane leaving the United States before the Court reviewed his case. Because the Court does not require ICE to submit proof of travel documents or even the country to which a detainee was deported, we have no way of knowing to which country Ibrahim was deported.

The second part of ICE's generic statement is about the likelihood of securing travel documents: "the Government of XYZ has issued travel documents in the past, and there is no reason to believe that the Government of XYZ will not issue a travel document in this matter," is inherently misleading. A review of habeas corpus petitions filed in the NDAL reveals that although ICE may have been able to remove some immigrants to a particular country, ICE was unable to secure travel documents for many other habeas corpus petitioners from the same country. Put another way, ICE's historic ability to secure travel documents for some set of individuals from a particular country is not a sufficient indication of the likelihood of removal in the future or in the particular case at hand. There are any number of obstacles to a country's ability to issue travel documents - from petitioner's having come to the United States at such an early age, before records were digitized, to being born in rural areas where there was no government presence to issue birth certificates, to not being able to identify living family members who can substantiate an individual's citizenship. These are highly individualized factors; for ICE to ever claim with 100% certainty that travel documents are forthcoming simply because some individuals have been deported to a specific country, as ICE regularly does with the courts, is wholly misleading.

The final sentence in ICE's stock language: "Based upon this officer's experience and expertise, I believe that ICE will secure a travel document for the petitioner from the Government of XYZ in the reasonably foreseeable future," is also misleading. Before ICE lists this stock paragraph it often recites its attempts to secure a travel document. The combination is often contradictory. Sometimes ICE will have contacted an embassy literally dozens of times, enlisted the help of the Headquarters Travel Document Unit (ICE HQTDU) and submitted formal applications to the embassy or consulate, and still have no meaningful result or response. Other times, ICE uses this generic language with respect to countries where they have not been able to secure travel documents in the past few years. After all of that, claiming that 'based on experience and expertise, a travel document is forthcoming', is meaningless. If anything, officer's experience and expertise should reveal that travel documents could be forthcoming, they could take months or years to be issued, or they could never come at all.

THE COURTS' FAILURE TO ADJUDICATE HABEAS PETITIONS HAS LEFT AN OPEN QUESTION AS TO WHETHER ICE OBTAINS FRAUDULENT TRAVEL DOCUMENTS

Multiple habeas corpus petitions contained allegations by detainees that ICE was attempting to deport them with fraudulent travel documents. Because of the total lack of involvement by the Court, the validity of these allegations remains unexamined. The following allegations by detainees raise serious concerns as to the lengths that ICE will go to when a travel document is not readily available.

Robert is a native of Togo, who cooperated fully with ICE's attempts to secure travel documents. Presumably when it could not secure a document from Togo, ICE attempted to remove him anyway. According to his habeas corpus petition, ICE took him to a staging ground at Alexandria, Louisiana, where a Deportation Officer (DO) told him that they had no travel documents for him and so they would return him to LaSalle. Five minutes later, the same DO received a text message saying that they had secured travel documents. The next day, ICE took Robert to the Atlanta airport - he asked to see the travel documents multiple times but ICE would not allow him to until they were inside the plane. Inside the plane, they showed Robert an expired Belgian passport with which they were going to send him to Belgium. After that, he refused to comply. Robert's relationship, if he had one at all, to Belgium was unclear. After Robert raised the incident in his habeas corpus petition in the courts ICE released him on an order of supervision. There was never any judicial inquiry into the validity of the travel documents that ICE allegedly secured for Robert.

The case of William, who arrived in the United States by boat from Jamaica in the 1990s at the age of 10, illustrates ICE's use of failure to comply status to prolong an immigrant's confinement. William was abandoned by his mother in Jamaica and had no other stated family. ICE believed that William was a citizen of Trinidad and Tobago. ICE claimed that William failed to provide any identification and that his only excuse for lack of documentation was his "lack of family." In other words, despite the fact that William came to the US by boat as a ten year old child ICE blamed him for his lack of family and for the fact that he has no proof of Trinidadian identity. William spent a year and half in detention after receiving a final order of removal despite the fact that the Embassy of the Republic of Trinidad and Tobago provided an official letter stating that they were not able to confirm William's identity and therefore could not legally issue travel documents. When ICE could not secure a travel document for **William**, it brought criminal charges against him for failing to comply (failing to comply is a federal crime for which prison sentences can be imposed, but unlike regular FTC status, require actual criminal proceedings). At the time ICE had him charged with failing to comply, William already had a letter in his possession from the Embassy of the Republic of Trinidad and Tobago stating: "After exhaustive searches of the records held at the Immigration Division, Ministry of National Security, and the Register of Births and Deaths of the Registrar General's Department, no record was found pertaining to the birth of William, born on July 5th, 1965 in Trinidad and Tobago neither was there any record of the issue of any travel document to anyone holding that biometric information…it will not be possible to issue a travel document in his favour." Although ICE clearly had this information, they continued to detain William and actually filed criminal charges against William in January 2012 for failing to comply. This charge was dismissed by the District Court of New Mexico in May 2012. Despite this dismissal and a letter from the Embassy of the Republic of Trinidad and Tobago denying the issuance of travel documents, ICE detained William for another five months, until he filed a habeas corpus petition. When William finally signaled his unlawful detention to the Court in the Northern District of Alabama, ICE released William on an order of supervision. There was no judicial scrutiny over ICE's behavior in this case and William remains vulnerable to re-detention.

Johnathan expressed grave concern that the emergency travel document allegedly procured from Nigeria for him had been procured without his signature. His wife spoke to the consulate who said that in order for such a certificate to be produced, the consulate would have to speak to the detainee - something that never occurred. His habeas corpus petition was denied by the Court, who stated that "[r]egardless of whether J's signature on the travel document is a forgery, J fails to state a claim for relief under Zadvydas because he "has not provided evidence of a good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future." We do not know what happened to him.

ICE ABUSE HAS DEVASTATING IMPACTS ON THE LIVES OF DETAINEES AND THEIR LOVED ONES

The defining characteristic of detention in civil immigration facilities is a profound loss of liberty. Immigrants are locked up, unable to enjoy basic freedoms and incapable of accessing their families and communities. Unlike individuals detained under the criminal system who often have specific sentences – with a start and end date - there is no definitive end for detained immigrants. There are so many variables in the removal process and so few procedural protections to ensure that detainees have some sense of the duration of their detention. While civil detention is allegedly non-punitive and administrative in nature, and criminal incarceration is rehabilitative and punitive, even a general look at the reality of immigration detention renders the distinction meaningless.

DETAINEES' FAMILIES AND COMMUNITIES SUFFER GREATLY

Beyond the sheer trauma of being detained pending deportation, isolated from family, friends and community, immigrants and their loved ones have no certainty over when they might be free from detention. Detention has fear reaching consequences on immigrant families and their communities. Below are stories about immigrants' equities and how families are being impacted by detention.

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[36] Department of Homeland Security Office of the Inspector General, ICE's Compliance with Detention Limits for Aliens with a Final Order of Removal from the United States, 18 (February, 2007) [hereinafter DHS OIG Report].
[37] Id at 5.
[38] DHS OIG Report, 5.
[39] Id at 1.

Jose wrote in his habeas corpus petition that while he was detained, his nine year old U.S. citizen daughter “was inappropriately touched" by a friend of the family. The incident was reported to the police, criminal charges have been brought against the perpetrator of the offense, and the child is undergoing therapy. The little girl has been crying, acting out, and telling the therapist, “My daddy is in jail but this bad man is not in jail." The continued detention of Jose is causing tremendous psychological harm to him and his young daughter, especially after her abuse. He is needed at home by his family and his daughter to provide her with a source of comfort and strength through this ordeal.

Bedford's mother wrote: “Three years ago I had a stroke and also in a coma and was hospitalized for over three months and during that time Bedford never left my side according to the doctors and my family he met with the doctors each day discussing my treatment plan and he even slept at the hospital…in my recovery I totally depended on Bedford due to his flexible work schedule as a plumber to do constant doctor visits, grocery shopping and preparing my meals he also assisted me financially. My prescriptions are very expensive and Bedford could also help me with this expense. We also spent time together sitting in front of the porch talking about the past, taking me to lunch and also sharing his cook food with me too. Bedford was always available all the time making time to help me out all the time however, all of this change since he has been incarcerated." He owned two homes, had two children, and was held in detention for more than a year despite an official letter explaining that because of his lack of property and kin in country XYZ, a travel document would not be issued.

Emilio had four children at the time of his detention at Etowah (in addition to a job, familial and spiritual support, and a place to live). He wrote “I am the father of four children who are American citizens ranging from 10 to 2 years old. It is important to me to become a part of their lives once again and to help raise them…Each and every day I'm held in detention continues to hurt my children mentally and financially since I'm unable to provide for them." He was in detention for a year and a half while his family suffered.

Mfefe's fiancée submitted a letter of support in favor of his habeas corpus petition. She wrote, “I want to do everything in my power to help Mfefe because he is the love of my life and I can't see going one more day without Mfefe being here with me. All I want to do is to marry him and have a family, but him being in Alabama isn't helping this to happen. I cannot move on with him because he is in Alabama." Mfefe had no criminal record. He was held for almost a year.

STORIES

CASE STUDIES

MACHAR

Machar was born in South Sudan in 1968 and came to the US as a refugee in 2001. He has a wife and six children who are all either Legal Permanent Residents or U.S. Citizens. Machar first entered ICE detention in July 2007, but was released on an order of supervision in May 2008. In June 2013, he was unexpectedly re-detained. At the time of filing his habeas corpus petition, Machar had already been detained in Etowah for almost a whole year. ICE's argument for continuing to detain Machar was based on his convictions prior to 2007 when he was first detained, and therefore was considered a danger to the community.However, ICE had previously released him indicating that despite the prior convictions they had not found him to be a danger to the community. ICE acknowledged that Machar was a citizen and native of South Sudan and they discussed attempts to secure documents from the Consulate of South Sudan in Washington D.C. In their final review dated January 16, 2015, ICE stated that they were working with the government of Sudan to secure travel documents for his removal. Machar expressed fear and concerns about being deported to Sudan, a country that he is not from and that has been in armed conflict with South Sudan. The Court never ordered a hearing and failed to acknowledge these fears about being deported to the wrong country. The Court also did not require ICE to provide any more details about the process of securing travel documents from South Sudan. After holding Machar in post-final order detention for a second time for fourteen months, ICE released him on an order of supervision. ICE then moved to dismiss Machar's habeas petition as moot, thereby circumventing judicial inquiry into whether ICE was attempting to deport Machar to the wrong country.

CESAR

Cesar arrived in the United States in November of 2012 as an asylum seeker from Eritrea. After his application for asylum was denied, he was detained by ICE. Cesar had no criminal convictions and had never served any time in prison. In Cesar's habeas corpus petition, he contested ICE's allegations that he was failing to comply by detailing his personal attempts to secure a travel document from

the Eritrean consulate, by making phone calls and supplying ICE with all of his documents. His habeas corpus petition alleges that the Consulate informed him on April 15th, 2014 that they did not recognize him as a citizen of Eritrea, and that they would not issue a travel document. His habeas corpus petition further alleges that ICE informed him that the El Salvadorian consulate would take care of his travel documents. Cesar states clearly in his habeas corpus petition that he is obviously not from El Salvador and should not be deported to that country. Twenty-two days after Mr. Cesar filed his habeas corpus petition, the Court ordered the ICE to respond within twenty days. It did not order any specific response in relation to the allegations about ICE securing travel documents and the removal attempts to El Salvador. Nine days before a response was due, ICE requested an extension of time, which the Court granted on the same day. Sixteen days later ICE released Cesar on an order of supervision after a year and a half in detention, completely circumventing judicial review. The Court never made findings on whether or not ICE was attempting to remove Cesar to El Salvador. Cesar was denied his right to present his case in Court, remained vulnerable to re-detention at any moment and remained vulnerable to deportation to a country to which he has no connection.

NOOR

Noor had no country to claim citizenship - indeed, his deportation order made a finding of law that he was stateless. Yet, with more than 220 days in detention and three POCR reviews, ICE alleged the foreseeability of his removal and the existence of a passport that only could have been fraudulent: “The DHS has submitted your name for the next charter flight to Palestine. Your removal to Palestine is imminent."Then, 30 days later: “You have a valid passport. Your removal to Palestine is expected to occur in the reasonably foreseeable future; therefore you are to remain in ICE custody at this time." And, 30 days after that: “You have a valid passport. Your removal to Palestine is expected to occur in the reasonably foreseeable future; therefore you are to remain in ICE custody at this time." After filing a habeas corpus petition, ICE released Noor on an order of supervision. Noor's case is a good example of how ICE's internal custody review system fails to adequately assess the likelihood of an individual's removal and the significant liberty interests implicated by these failures. ICE's release of Noor circumvented any judicial inquiry into the eventual foreseeability of Noor's removal and Noor was left without protection from re-detention by ICE at any moment without new grounds despite the fact that Noor was found by an Immigration Court to be stateless.

WILLIAM

The case of William, who arrived in the United States by boat from Jamaica in the 1990s at the age of 10, illustrates ICE’s use of failure to comply status to prolong an immigrant's confinement. William was abandoned by his mother in Jamaica and had no other stated family. ICE believed that William was a citizen of Trinidad and Tobago. ICE claimed that William failed to provide any identification and that his only excuse for lack of documentation was his “lack of family.” In other words, despite the fact that William came to the US by boat as a ten year old child ICE blamed him for his lack of family and for the fact that he has no proof of Trinidadian identity. William spent a year and half in detention after receiving a final order of removal despite the fact that the Embassy of the Republic of Trinidad and Tobago provided an official letter stating that they were not able to confirm William's identity

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IBRAHIM

The name of the story is Ibrahim. In the case of five Somalis detained at Etowah the petitioners included an official attestation from the Somali Permanent Mission to the United Nations stating that "it is impossible to retrieve any records concerning civil status" from Somalia and that there were no "consulate services for issuing travel documents or repatriation procedures". Still, the government response to their habeas corpus petitions included the following language: "the government of Somalia has not indicated that they would not authorize a travel document for" the detainees, that their "deportation is in the very foreseeable future," and that "there is no reason to believe that [they] will not be removed in the very foreseeable future." When they raised this issue in the Court, ICE released four detainees and removed one to an unnamed place before the Court could inquire. ICE can and has re-detained Somalis periodically despite the fact that the Somali Permanent Mission continues to state that it cannot issue travel documents. Thus, without the court's protection these Somali's continue to live in fear of arbitrary, indefinite detention. Ibrahim, who submitted to the Court the same letter from the official at the Somali Permanent Mission to the United Nations stating that travel documents would not issued, was the only one of the five Somalis to be removed. ICE put Ibrahim on a plane leaving the United States before the Court reviewed his case. Because the Court does not require ICE to submit proof of travel documents or even the country to which a detainee was deported, we have no way of knowing to which country Ibrahim was deported.