

Manipulating Risk: Immigration Detention through Automation

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ABSTRACT

The U.S. Department of Homeland Security arrests as many as 500,000 migrants per year and detains more than 350,000 of them through Immigration and Customs Enforcement (ICE). Since 2012, ICE has relied on an automated Risk Classification Assessment (RCA) system to recommend whom to detain and whom to release. The authors are the first to obtain access to its algorithm and this article is the first to make that system's methodology public. While purportedly basing these recommendations on indicia of flight risk and risk to public safety, the RCA in fact relies on an algorithm driven by political preferences. By linking detention to enforcement policy rather than risk, the RCA lost its underpinning in the constitution. In addition, compromises in its logic thwarted the program's ability to deliver the harm reduction, transparency, and uniformity it promised. Ultimately, our data and analysis reveal that that manipulation of the RCA resulted in automated detention recommendations for hundreds of thousands of people in violation of the constitution. The RCA thus delivers mass incarceration of immigrants with staggering efficiency. In the end, we argue the RCA supplied a veneer of risk to a tool of punishment.

Introduction

The U.S. Department of Homeland Security (DHS) operates the largest immigration detention system in the world.¹ The agency holds nearly 45,000 adult migrants on any given day² and booked more than 373,000 people into detention in the 2019 fiscal year.³ These numbers are only growing, with Immigration and Customs Enforcement (ICE) holding almost 50,000 adult migrants in detention

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¹ See *United States Immigration Detention Profile*, GLOB. DET. PROJECT (May 2016), <https://www.globaldetentionproject.org/countries/americas/united-states>.

² ICE reported to Congress that, as of October 2018, the average daily population in detention had reached 44,631 people. The number was not made available to the public but was confirmed to the Daily Beast by a congressional office. See Spencer Ackerman, *ICE is Imprisoning a Record 44,000 People*, DAILY BEAST (Nov. 12, 2018, 2:27 PM), <https://www.thedailybeast.com/ice-is-imprisoning-a-record-44000-people>.

³ U.S. IMMIGR. & CUSTOMS ENF'T, FISCAL YEAR 2018 ICE ENFORCEMENT AND REMOVAL OPERATIONS REPORT 5 (2019) [hereinafter 2019 ICE REPORT].

every day as of March 2019⁴ and the Trump Administration seeking funding to increase this number to 52,000.⁵

The costs of maintaining such an expansive detention system are enormous. The bill to taxpayers is \$208 per night per person, or more than \$3 billion a year.⁶ The toll on detained migrants and their families is far higher with the death count on the rise,⁷ inadequate medical care and unhealthy

⁴ See Kate Sullivan & Jeff Mason, *Immigration Detention in the United States: A Primer*, BIPARTISAN POL'Y CTR. (Apr. 24, 2019), <https://bipartisanpolicy.org/blog/immigration-detention-in-the-united-states-a-primer/>. From 2009 until 2017, the country's immigration detention system was maintained through Congress's "bed mandate," which required that ICE maintain a certain number of beds for detention every day to detain migrants and provided corresponding funding. See *Detention Quotas*, DETENTION WATCH NETWORK, <https://www.detentionwatchnetwork.org/issues/detention-quotas> (last visited Mar. 5, 2020). In the last year of the bed mandate, Congress required that DHS have at least 34,000 beds available. See *id.*; Consolidated Appropriations Act of 2016, Division F, Department of Homeland Security Appropriations Act of 2016, Pub. L. No. 114–113, 129 Stat. 2493, 2497–98 (2015). While the law did not require ICE to actually fill these beds, the bed mandate may have provided an incentive to keep them full, pushing some members of Congress to seek its end. See *id.*; Letter from Members of Congress to John Carter, Chairman, House Subcommittee on Homeland Security Appropriations, and Lucille Roybal-Allard, Ranking Member, House Subcommittee on Homeland Security Appropriations (March 15, 2016), http://immigrantjustice.org/sites/immigrantjustice.org/files/FY17AppropsHouseQuotaLetter2016_03_15_1.pdf. While Congress no longer requires ICE to maintain this minimum number of beds, it has provided funding for more and more beds as DHS ramps up detention. See Muzaffar Chishti, et al., *Executive Power Showdown: Congress and White House Quarrel over Immigration Spending*, MIGRATION POL'Y INST. (Feb. 28, 2019), <https://www.migrationpolicy.org/article/executive-power-showdown-congress-white-house-immigration>. The recent immigration bill provides funding to detain a daily average of 45,724 people, more than at any time before. *Id.*; Dara Lind, *Congress's Deal on Immigration Detention, Explained*, VOX (Feb. 12, 2019, 11:00 AM), <https://www.vox.com/2019/2/12/18220323/immigration-detention-beds-congress-cap>. Although this funding is contingent on DHS eventually reducing the number of detained persons to 40,520, the bill allows DHS to reprogram funds it deems necessary from other departments, so long as it notifies Congress. See Chishti, *supra*. In September 2018, Sen. Jeff Merkley released an internal document showing that DHS had re-appropriated some \$200 million, including \$10 million from FEMA's budget, to cover additional detention costs. See Camila Domonoske, *Trump Administration Transferred \$9.8 Million from FEMA to ICE*, NAT'L PUB. RADIO (Sept. 12, 2018, 1:41 PM), <https://www.npr.org/2018/09/12/647021316/trump-administration-transferred-9-8-million-from-fema-to-ice>.

⁵ See U.S. DEP'T OF HOMELAND SEC., FY 2019 BUDGET IN BRIEF 4 (2019); Lind, *supra* note 4.

⁶ Laurence Benenson, *The Math of Immigration Detention, 2018 Update: Costs Continue to Multiply* (May 9, 2018), <https://immigrationforum.org/article/math-immigration-detention-2018-update-costs-continue-multiply/>.

⁷ An NBC analysis of federal data found that 24 people have died in ICE custody during the Trump administration, not including at least four others who died shortly after being released from ICE custody, or those that died in the custody of other federal agencies. See Hannah Rappleye & Lisa Riordan Seville, *24 Immigrants Have Died in ICE Custody During the Trump Administration*, NBC NEWS (June 9, 2019, 4:00 AM), <https://www.nbcnews.com/politics/immigration/24-immigrants-have-died-ice-custody-during-trump-administration-n1015291>. Twelve people died in the 2017 fiscal year alone, more than any year since 2009, with 14 fatalities. In almost all of the death reports there was evidence of "dangerous and subpar medical care practices." HUMAN RIGHTS WATCH, ET AL., CODE RED: THE FATAL CONSEQUENCES OF DANGEROUSLY SUBSTANDARD MEDICAL CARE IN IMMIGRATION DETENTION 3, 39 (2018).

conditions,⁸ claims of slave wages and coerced labor,⁹ and restricted access to counsel and loved ones.¹⁰ DHS has had to justify the scale of immigration detention in the face of these mounting costs. To do so, it turned to automation.¹¹

⁸ On June 3, 2019, the Office of Inspector General (OIG) released the results of an investigation into conditions at four ICE detention facilities. *See* U.S. DEP'T OF HOMELAND SEC. OFFICE OF INSPECTOR GEN., OIG-19-47, CONCERNS ABOUT ICE DETAINEE TREATMENT AND CARE AT FOUR DETENTION FACILITIES (2019) [hereinafter OIG-19-47]. It found violations of food health and safety standards at all four centers, such as “spoiled and moldy food in kitchen refrigerators, as well as food past its expiration date.” *Id.* at 3. Three facilities infringed on detainee rights by employing inappropriate segregation practices, such as the use of restraints, premature disciplinary segregation, and strip-searching. *Id.* at 5. Conditions at two of the facilities in Adelanto, CA and Essex County, NJ were so egregious that the Inspector issued separate reports for each. *Id.* at 3. Bathrooms at both facilities were in “poor condition, including mold and peeling paint on walls, floors, and showers, and unusable toilets.” *Id.* at 8. In Adelanto, homemade nooses were found in 15 of 20 cells visited. U.S. DEP'T OF HOMELAND SEC. OFFICE OF INSPECTOR GEN., OIG-18-86, MANAGEMENT ALERT—ISSUES REQUIRING ACTION AT THE ADELANTO ICE PROCESSING CENTER IN ADELANTO, CALIFORNIA 2 (2018). Guards reported that suicides were not a “high priority,” despite at least seven attempted suicides there in less than a year. *Id.* at 3–4. At the same facility, detainees reported not being given prescriptions, not receiving urgent care, and waiting weeks or months to see a doctor. *Id.* at 8. In Essex County, inspectors found that detainees were being served raw, rotten, or expired food, leading to episodes of severe food poisoning. U.S. DEP'T OF HOMELAND SEC. OFFICE OF INSPECTOR GEN., OIG-19-20, ISSUES REQUIRING ACTION AT THE ESSEX COUNTY CORRECTIONAL FACILITY IN NEWARK, NEW JERSEY, at 4–6 (2019).

⁹ Detention centers are subject to an ICE detention standard called the Voluntary Work Program, which claims to give detainees the “opportunit[y] to work and earn money while confined” U.S. IMMIGR. & CUSTOMS ENFT, PERFORMANCE-BASED NATIONAL DETENTION STANDARDS 2011, at 405 (revised 2016). However, immigrant advocates say that “voluntary” is a misnomer, as the program in reality means forced labor. *See* Victoria Law, *Investigation: Corporations Are Profiting from Immigrant Detainees' Labor. Some Say It's Slavery.*, IN THESE TIMES (May 29, 2018), http://inthesetimes.com/features/ice_immigrant_detention_centers_forced_prison_labor_investigation.html. For one, the pay scale for the Voluntary Work Program has not changed since its codification in 1978. Seth H. Garfinkel, *The Voluntary Work Program: Expanding Labor Laws to Protect Detained Immigrant Workers*, 67 CASE W. RES. L. REV. 1278, 1288 (2017). These corporations are permitted to pay detainees as little as \$1 per hour to clean toilets, do laundry, and prepare food, saving them the necessity of paying minimum wage to non-detainee workers and allowing them to minimize labor costs and maximize profits. *See* Department of State Appropriation Act of 1978, Pub. L. No. 95-86, 91 Stat. 419, 426 (1977); Law, *supra*. There are currently at least five lawsuits pending against the nation’s largest for-profit detention center operators, CoreCivic and GEO Group. *See id.* According to the complaints, the corporations violated the Trafficking Victims Protection Act, as well as other federal and state minimum wage and trafficking laws, by forcing detainees to work for almost nothing under threats of solitary confinement, retaliation, and the withholding of basic items. *See* Complaint for Declaratory & Injunctive Relief & Damages at 2, *Novoa v. Geo Group, Inc.*, No. 5:17-cv-02514 (C.D. Cal. Dec. 19, 2017); Class Action Complaint for Unpaid Wages and Forced Labor at 1, *Menocal v. Geo Group, Inc.*, No. 1:14-cv-02887 (D. Colo. Oct. 22, 2014); Original Complaint and Class Action at 1, *Gonzalez v. CoreCivic, Inc.*, No. 1:18-cv-00169 (W.D. Tex. Feb. 22, 2018); First Amended Complaint at 2–4, *Owino v. CoreCivic, Inc.*, No. 17-CV-01112-JLS-NLS, 2018 WL 7568335 (S.D. Cal. Oct. 12, 2018); Complaint for Declaratory & Injunctive Relief & Damages at 1–2, *Barrientos v. CoreCivic, Inc.*, No. 4:18-cv-00070-CDL (M.D. Ga. Apr. 17, 2018).

¹⁰ The OIG found that one facility routinely denied detainees in-person visits. *See* OIG-19-47, *supra* note 8, at 11. Long wait times and high costs can make it very difficult for loved ones to even call detainees. *See* Shannon Najmabadi, *Detained Migrant Parents Have to Pay to Call Their Family Members. Some Can't Afford to.*, TEX. TRIB. (July 3, 2018), <https://www.texastribune.org/2018/07/03/separated-migrant-families-charged-phone-calls-ice/>. Access to counsel is also an issue, and is crucial to affecting immigration outcomes, especially among detainees. In a study of 1.2 million deportation cases between 2007 and 2012, only 2 percent of detained respondents without a lawyer had a successful case outcome, compared with 21 percent of those with a lawyer. Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PA. L. REV. 1, 50 (2015). However, detained immigrants are far less likely to secure a lawyer than non-detained immigrants. In the same study, only 14 percent of detained respondents, as compared to 66 percent of non-detained respondents, were able to secure counsel. *Id.* at 32. This means non-detained respondents were almost five times more likely to obtain counsel than those detained. *Id.* Even when granted additional time to find counsel, only 36 percent of detained respondents seeking counsel found it, compared to two-thirds of non-detained respondents.

In 2011, DHS developed the Risk Classification Assessment (RCA)—the largest risk assessment tool in the country¹²—as part of its expanding detention apparatus. The RCA would, in theory, measure a migrant’s flight risk and risk to public safety in order to decide whether ICE should detain the individual.¹³ The RCA would thereby align immigration detention with overall risk. The use of a standardized risk assessment to determine the use of civil immigration detention would address criticisms from inside and outside the government that the conditions of immigration detention and criminal incarceration had become indistinguishable.¹⁴ By calibrating the use and conditions of detention to the civil immigration context through risk theory, detained migrants with a low risk to public safety would not be treated like incarcerated criminals. Additionally, an automated risk tool would ensure that civil detention was tied to its limited constitutional purpose: restricting only those migrants who represented a risk of danger to others or a risk of absconding from immigration enforcement. The RCA would function to simultaneously limit and justify DHS’ detention decisions on a national scale.

Policymakers touted the tool as promoting uniformity, transparency, and rationality in immigration detention.¹⁵ The RCA’s proponents also promised the tool would screen out individuals whose health status, gender identity, sexual orientation, or caregiving responsibilities would make detention particularly harmful to them or others.¹⁶ Scholars and immigrant advocates hoped that the RCA would push ICE to use alternatives to detention with much greater frequency and thereby serve

Id. at 34. Location alone poses a significant barrier to obtaining legal aid. According to an analysis of 70 detention centers, 30 percent of detained immigrants are held more than 100 miles away from the nearest government-listed legal aid resource. Kyle Kim, *Immigrants Held in Remote ICE Facilities Struggle to Find Legal Aid Before They’re Deported*, L.A. TIMES (Sep. 28, 2017), <https://www.latimes.com/projects/la-na-access-to-counsel-deportation/>. There have also been complaints that some ICE detention centers make it almost impossible for detainees to communicate with attorneys. *See, e.g.*, Complaint for Injunctive & Declaratory Relief at 3–4, *Torres v. U.S. Dep’t of Homeland Sec.*, No. 5:18-cv-02604 (C.D. Cal. Dec. 14, 2018) (alleging that two detention centers in California severely limited access to telephone calls and private consultation rooms); Letter from Eunice Cho, Staff Attorney, Southern Poverty Law Center, to Government Officials and Stewart Detention Center (March 21, 2016), https://www.splcenter.org/sites/default/files/final_version-letter_re_access_to_counsel-stewart_detention_center.pdf (alleging that a detention center in Georgia did not permit attorneys to schedule calls or appointments with their client in advance, refused to allow clients to call their attorneys for free, and routinely denied, limited, and delayed in-person attorney visits).

¹¹ U.S. DEP’T OF HOMELAND SEC., PRIVACY IMPACT ASSESSMENT UPDATE FOR THE ENFORCEMENT INTEGRATED DATABASE (EID) RISK CLASSIFICATION ASSESSMENT (RCA 1.0), ENFORCE ALIEN REMOVAL MODULE (EARM 5.0), AND CRIME ENTRY SCREEN (CES 2.0) 13 (April 6, 2012) [hereinafter PRIVACY IMPACT ASSESSMENT].

¹² Mark Noferi & Robert Koulish, *The Immigration Detention Risk Assessment*, 29 GEO. IMMIGR. L.J. 45, 51 (2014).

¹³ *See* U.S. DEP’T OF HOMELAND SEC. OFFICE OF INSPECTOR GEN., OIG-15-22, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT’S ALTERNATIVES TO DETENTION (REVISED) 4–5 (Feb. 4, 2015) [hereinafter OIG-15-22].

¹⁴ DR. DORA SCHIRO, U.S. DEP’T OF HOMELAND SEC., IMMIGRATION DETENTION OVERVIEW AND RECOMMENDATIONS 20 (2009).

¹⁵ *See Release of Criminal Detainees by U.S. Immigration and Customs Enforcement: Policy or Politics?: Hearing Before the Committee on the Judiciary*, 113th Cong. 16 (2013) [hereinafter *Morton Testimony*] (written testimony of John Morton, Immigration and Customs).

¹⁶ *Id.* at 16.

as a check on detention rates.¹⁷ In reality, however, we show that the RCA's method for determining risk was compromised from the start and further manipulated over time.¹⁸

In response to of the authors' Freedom of Information Act (FOIA) requests and subsequent litigation in federal court, DHS released the RCA's original risk assessment algorithms, changes to its scoring rubrics, all training materials, and detailed results in thousands of cases. These results reveal that the factors the RCA uses to measure risk to public safety and risk of flight, how these factors are weighed and combined, and how the RCA balances risk with vulnerability. Consequently, we can see which characteristics are most likely to result in immigration detention and how the RCA's algorithm was modified to shift dramatically which characteristics were tied to detention. This article makes public for the first time the methodology of the RCA and its implications for nearly 400,000 migrants every year. After analyzing this data, we arrive at five major conclusions.

First, the RCA failed to deliver on its fundamental promise to rationalize the use of civil detention by aligning it with risk. During the RCA's nationwide rollout, ICE supervisors were told they could override the system's risk-based custody recommendations based on preexisting local policy concerning detention and bond. The RCA's logic was thus shackled from the outset. Further, the RCA's algorithm was modified to reduce the rate at which supervisors overrode the RCA recommendation. Through changes to the scores assigned to certain criminal offenses and to the thresholds defining each risk level, the RCA was altered so that characteristics previously designated as representing a low risk of danger were deemed moderate risks. In addition, the algorithm for the RCA's ultimate recommendations was reconfigured to limit the risk categories for which it recommended release or bond and instead commit these decisions to the discretion of ICE supervisors in the first instance. This change came at the expense of its core purpose. The customary use of immigration detention drove changes to the RCA methodology rather than the reverse. Moreover, many of the flight risk factors were eventually abandoned and replaced with factors tied to enforcement priorities, not risk. The RCA became a vehicle to impose detention on the executive

¹⁷ See, e.g., *Comprehensive Immigration Reform Before the S. Comm. On the Judiciary*, 113th Cong. 377 (2013) (Testimony of Eleanor Acer, Director, Refugee Protection Program, Human Rights First, recommending the use of a "risk classification assessment tool to identify and properly place any detainees who present safety risks in custody"); *MIGRATION & REFUGEE SERVS., ET AL., UNLOCKING HUMAN DIGNITY: A PLAN TO TRANSFORM THE U.S. IMMIGRANT DETENTION SYSTEM* 14 (2015) ("While the RCA generally seeks to assess dangerousness, flight risk and vulnerability . . . ICE has not publicized the actual (evolving) criteria used to make "automated" custody and placement decisions. Thus, it remains difficult to assess whether this new enforcement tool will meaningfully alter custody rates and placement patterns, or will instead automatize continued overreliance on detention."); Alina Das, *Immigration Detention: Information Gaps and Institutional Barriers to Reform*, 80 U. CHI. L. REV. 137, 162–63 (2013) (arguing that a potential risk assessment tool's "impact is limited. Where it does apply, its effectiveness will undoubtedly turn on which criteria are used and how these criteria are weighted. In reviewing an early version of the tool, the United Nations High Commissioner for Refugees expressed concern that the tool 'risks becoming a bureaucratic, tick-box exercise and may lead only to artificial individual assessments rather than real ones' and that its methodology 'appears heavily weighted in favour of detention."); Robert Koulish & Mark Noferi, *Unlocking Immigrant Detention Reform*, *BALT. SUN* (Feb. 20, 2013, 1:47 PM), <https://www.baltimoresun.com/opinion/oped/bs-ed-immigrant-detention-20130220-story.html> ("ICE's new risk-assessment technology allows Congress to take those three steps—ending mandatory detention; imposing criteria and decreasing funding for discretionary detention; and enacting civil detention standards—while empirically demonstrating the lack of additional risk."). See Mark Noferi & Robert Koulish, *The Immigration Detention Risk Assessment*, 29 *GEO. IMMIGR. L. J.* 45, 50 (2015); Robert Koulish, *Immigration Detention in the Risk Classification Assessment Era*, 16 *CONN. PUB. INT. L.J.* 1, 29 (2017) (discussing complications to detention reform presented by supervisor review).

¹⁹ See César Cuauhtémoc García Hernández, *Migrating to Prison: America's Obsession with Locking Up Immigrants* (2019).

branch's least favored migrants, regardless of whether they presented a risk to public safety or a risk of flight.

Second, the RCA failed to standardize detention decisions. Training materials emphasized that the RCA did not supplant local bond and custody policy. Instead, supervisors were instructed to override the system's risk-based recommendations when they conflicted with local policy. Moreover, migrants with moderate risk profiles did not receive an RCA recommendation for detention or release. The RCA designated custody decisions for migrants with moderate risks to the supervisors in the first instance. Consequently, the RCA did not require a standardized process or outcome for a broad swath of individuals. By accepting supervisor overrides for entire categories of migrants and engineering the "supervisor to determine" outcome for moderate-risk individuals, the RCA sacrificed standardization from the start.

Third, the RCA lacks transparency at every level. Obtaining the methodology DHS uses to determine risk took four years and multiple rounds of litigation and negotiation. The risk tool thus lacks fundamental oversight and validation by external experts. Internally, the RCA's methodology is also veiled. Though its detention recommendations are based on risk in name, in reality the factors that generate a "risk" level reflect enforcement priorities instead. As a result, supervisors who are reviewing the RCA's custody recommendations see enforcement goals masquerading as risk. Additionally, the RCA outcome is kept secret from the immigration judges who review ICE's custody determinations, advocates who represent individuals in these custody challenges, and migrants themselves. ICE officers administering the RCA therefore face little accountability for their mistakes and DHS attorneys do not have to defend the detention methodology to adjudicators. Indeed, errors in the RCA's mandatory detention rubric mean that individuals with removal charges related to domestic violence or orders of protection have been erroneously classified as mandatorily detained, even though Congress excluded these charges from the mandatory detention statute. Individuals subject to this error are forced to persist in demanding review by an immigration judge, even though the detention determination ICE provides them says they are ineligible for review.

Fourth, the RCA is ill equipped to reduce harm. Poor screening mechanisms, the broad scope of supervisory discretion, and the absence of any structured communication between RCA administrators and officers in detention facilities regarding vulnerabilities and harm identified result in limited progress against this goal. Indeed, according to DHS' own figures, ICE detained 63% of individuals who were not subject to mandatory detention and possessed a special vulnerability. Despite officials' promises to address the increased risk of death, disease, and injury immigration detention presents to vulnerable migrants and the harm imposed on others through detention of primary caregivers, nearly two-thirds of this group were forced to confront these harms in immigration detention.

Finally, in light of the RCA's manipulation and misdirection away from risk, the result is a system that recommends unconstitutional civil detention for hundreds of thousands of people. The Supreme Court has accepted immigration detention, including automatic detention for certain categories of migrants, when detention is rooted in flight risk and dangerousness. The use of the RCA as a political tool to impose detention based on characteristics unrelated to risk rendered it unlawful. The fact that the RCA employs the nomenclature of risk, but not its logic, has obscured this fundamental infirmity.

In 2011, DHS set out to address the harm and arbitrariness that characterized immigration detention. A decade later, it has still failed to do so. At present, the RCA automates a system of

unconstitutional detention. Instead of dramatically reducing the rate of detention by recognizing the low risks presented by immigrants, as advocates and scholars had hoped, the tool cloaked mass incarceration in the language of risk. As such, its use to inflict detention on the least favored immigrants, without regard to risk, provides further support for calls to dismantle the immigration detention system in its entirety.¹⁹

To explain the RCA's methodology and the conclusions that result, this Article proceeds in five parts. Part I and an accompanying appendix describe the process required to obtain this data. Part II reviews how the RCA is deployed throughout the immigration enforcement system and its role in determining the custody of hundreds of thousands of migrants. In Part III, we describe the RCA's algorithm and its manipulation over time. Part IV of the article evaluates the RCA against each of its purported goals to demonstrate how the system fails to deliver rationality, uniformity, transparency, or harm reduction in immigration detention. We conclude in Part V that the RCA's algorithm at inception and through its subsequent manipulation imposed unconstitutional detention at a scale and speed made possible through automation.

I. The FOIA Odyssey

The authors are making the results of their FOIA requests public for the first time through this article and the electronic repository of DHS' response.²⁰ To explain the nature and scope of the RCA documents now available, this part reviews the categories of materials sought. It also summarizes the administrative and judicial challenges that were necessary to force production of any information concerning the RCA and its methodology. An appendix to this article describes the FOIA process in greater detail, with citations to the various administrative and federal court filings, for the benefit of those readers facing similar obstacles to enforcing government transparency. Above all, this section demonstrates DHS' deep-seated recalcitrance to any oversight of its detention decisions.

Extracting information about the RCA's scale and methodology required extensive FOIA requests, several rounds of administrative appeals, federal district court litigation with *pro bono* counsel, and a protracted settlement agreement, all of which took more than six years. The process began in 2011, as the RCA was piloted in ICE's Baltimore and Washington field offices.²¹ Professors Robert Koulish and Mark Noferi filed FOIA requests for the results of the new RCA system in these two locations.²² DHS initially released several batches of RCA detailed summaries in the form of a one- or two-page printout of the RCA outcome for each migrant. These summaries showed that the RCA was comprised of separate modules that assess a migrant's flight risk and risk to public safety as well as whether the individual has a "special vulnerability" or is subject to mandatory detention. The

¹⁹ See César Cuauhtémoc García Hernández, *Migrating to Prison: America's Obsession with Locking Up Immigrants* (2019).

²⁰ See CONSOLIDATED RCA FOIA DOCUMENT RELEASE 2016-ICLI-00018, DUKE L. SCHOLARSHIP REPOSITORY [hereinafter CONSOLIDATED FOIA RESPONSES], https://scholarship.law.duke.edu/faculty_scholarship/3994/.

²¹ U.S. Gov't Accountability Office, GAO (441213), *ICE Alternatives to Detention: Questions Regarding the Risk Classification Assessment* [hereinafter *GAO Questions Regarding the RCA*], in CONSOLIDATED FOIA RESPONSES, *supra* note 19, at 33.

²² FOIA requests on file with author Robert Koulish. See also Robert Koulish, *Using Risk to Assess the Legal Violence of Mandatory Detention*, LAWS, (July 5, 2016), at 8 n.29 ("ICE provided 505 RCA Detailed Summaries to the authors through a non-adversarial FOIA process, in a series of four productions from September 2013 to June 2014. All were from ICE's Baltimore Field Office (which spans the state of Maryland), in four batches labeled 'March 2013', 'April 2013', 'May 2013', and 'June 2013' (ICE represented that the last batch was incomplete).").

summaries also revealed that the RCA combined the results of each module in some way to produce an overall recommendation regarding whether to detain the migrant, whether to set a bond, and if so, for what amount.²³ A supervisor then reviewed the RCA recommendation and either approved or modified the result.²⁴ The RCA summaries, however, did not disclose the method used to measure or combine flight risk, dangerousness, special vulnerabilities, or mandatory detention.²⁵

To address the core question of how DHS decides who to detain, the authors submitted five separate requests in the fall of 2014, targeting the different components of the RCA system as well as data on its results nationwide.²⁶ The first FOIA request focused on the component of the RCA that evaluated whether a migrant was “subject to mandatory detention.”²⁷ To understand how an automated system determined this critical and threshold question, we requested the business rules and protocols that produced a mandatory detention determination; materials discussing how the system would be updated to account for changes in law; and any training materials for officers and supervisors on how to apply the mandatory detention module and verify its results.²⁸ A second FOIA request addressed the RCA’s components on flight risk and risk to public safety.²⁹ This request asked for all materials describing the assessment methodology for each component, including the scoring rubrics, as well as the method for combining the two separate assessments of risk into a single recommendation for detention or release.³⁰ We also requested materials on the use of the RCA to determine DHS bond amounts and protocols for modifying the RCA’s algorithms for flight risk and risk to public safety.³¹ We submitted a third request for information about how the RCA determined whether a migrant possessed a “special vulnerability.”³² We asked for any documents and other materials describing how special vulnerabilities were defined and assessed; how the presence of a special vulnerability interacted with the RCA’s other components; and the protocols, if any, for communication between ICE and the detention facility regarding the presence of a special vulnerability that was identified by either entity.³³ Two final FOIA requests sought the detailed

²³ U.S. Immigration & Customs Enforcement Office of Enforcement and Removal Operations, RCA Scenario Playbook, Version 1.0 (Sept. 2012) [hereinafter *RCA Scenario Playbook, Version 1.0*], in CONSOLIDATED FOIA RESPONSES, *supra* note 19, at 289.

²⁴ U.S. Immigration & Customs Enforcement, Lesson #939 (Oct. 17, 2013, 9:59:07 PM) [hereinafter *ICE Lesson #939*], in CONSOLIDATED FOIA RESPONSES, *supra* note 19, at 133, 166.

²⁵ *RCA Scenario Playbook, Version 1.0*, *supra* note 23, at 289.

²⁶ See *infra app. at ___* for additional details on the content of the FOIA requests and the process required to extract our results. The electronic repository includes copies of all of the initial FOIA requests. See FOIA Requests, DUKE L. SCHOLARSHIP REPOSITORY [hereinafter CONSOLIDATED FOIA RESPONSES], https://scholarship.law.duke.edu/faculty_scholarship/3994/. The FOIA requests were submitted jointly by Kate Evans, Robert Koulish, Mark Noferi, Ben Casper Sanchez, and Linus Chan. The requestors then became joint plaintiffs in the subsequent FOIA litigation in the U.S. District Court for the District of Minnesota.

²⁷ See Freedom of Information Act Request from Katherine Evans, Teaching Fellow, Univ. of Minn., et al. to U.S. Immigration & Customs Enft Freedom of Info. Act Office, 4–5 (Oct. 15, 2014) [hereinafter *RCA Mandatory Detention FOIA Request*].

²⁸ See *id.* at 4.

²⁹ See Freedom of Information Act Request from Katherine Evans, Teaching Fellow, Univ. of Minn., et al. to U.S. Immigration & Customs Enft Freedom of Info. Act Office, 4 (Oct. 15, 2014) [hereinafter *RCA Components FOIA Request*].

³⁰ See *id.* at 5–7.

³¹ See *id.* at 7.

³² See Freedom of Information Act Request from Katherine Evans, Teaching Fellow, Univ. of Minn., et al. to U.S. Immigration & Customs Enft Freedom of Info. Act Office, (Nov. 18, 2014) [hereinafter *RCA Special Vulnerabilities FOIA Request*].

³³ See *id.*

summaries the RCA produced for all ICE field offices since the system had been deployed nationwide³⁴ as well as a subset of detailed summaries for one of the field offices, which might allow us to compare a migrant's history and case outcome with the RCA's risk profile and detention recommendation.³⁵

DHS's initial response to these requests was incoherent and nonsensical. DHS stated that it had "no records responsive" to our requests for information on the RCA risk algorithms and mandatory detention tool.³⁶ In essence, DHS took the position that, despite publicizing the creation and function of the RCA in broad terms to Congress and the press,³⁷ there was not a single document that defined the RCA's parameters or trained DHS personnel on how to implement the new nationwide tool.

Faced with these implausible responses, attorneys from Dorsey & Whitney LLP³⁸ agreed to represent us on a *pro bono* basis. For the next two years, counsel for the authors perfected all administrative appeals, sued in federal district court, and negotiated a stipulated settlement requiring DHS to produce a wide array of documents and data. The parties signed the settlement agreement the day before the Trump Administration took office to avoid any delay or renegotiation that turnover in the U.S. Attorney's office might cause.³⁹ Despite having a final detailed settlement agreement, we had to challenge DHS' compliance in producing the agreed-upon documents.⁴⁰ Negotiations with the U.S. Attorney's office that accompanied the federal litigation and the stipulated settlement resulted in the release of the following documents:

- The business rules used to develop the first version of the RCA;
- Flow charts outlining the process for running the RCA in the course of arresting individuals for immigration violations;
- The Virtual University training module used to train front-line ICE officers in how to deploy the RCA;
- Accompanying training manuals and reference guides for ICE officers;

³⁴ See Freedom of Information Act Request from Katherine Evans, Teaching Fellow, Univ. of Minn., et al. to U.S. Immigration & Customs EnFt Freedom of Info. Act Office, (submitted on Oct. 15, 2014) [hereinafter *RCA Detailed Summaries Nationally FOIA Request*].

³⁵ See Freedom of Information Act Request from Katherine Evans, Teaching Fellow, Univ. of Minn., et al. to U.S. Immigration & Customs EnFt Freedom of Info. Act Office, (submitted on Oct. 21, 2014) [hereinafter *RCA Detailed Summaries for St. Paul FOIA Request*].

³⁶ See First Amended Complaint at Exhs. 4, 13, *Casper v. U.S. Dep't of Homeland Sec.*, No. 0:16-cv-00380-ADM-BRT (D. Minn. May 31, 2016) (hereinafter *Casper FAC*) (Final Response Letter re RCA Components FOIA Request from Catrina M. Pavlik-Keenan, FOIA Officer to Kate Evans and Final Response Letter re RCA Mandatory Detention Request from R. Gowins & Catrina M. Pavlik-Keenan, FOIA Officers to Kate Evans (both dated Nov. 7, 2014)).

³⁷ See *Morton Testimony*, *supra* note 15, at 34; PRIVACY IMPACT ASSESSMENT, *supra* note 11, at 14; *Secretary Napolitano and ICE Assistant Secretary Morton Announce New Immigration Detention Reform Initiatives*, U.S. DEP'T OF HOMELAND SEC. (Oct. 6, 2009), <http://www.dhs.gov/news/2009/10/06/new-immigration-detention-reform-initiatives-announced> (announcing, among other things, ICE's plans to "develop an assessment tool to identify aliens suitable for ATD [alternatives to detention]," and to "develop a risk assessment and custody classification," to "enable detainees to be placed in an appropriate facility").

³⁸ Attorneys Shannon L. Bjorklund, Colin Wicker, Michelle Grant, and Emily Mawer from Dorsey & Whitney LLP assisted with the authors' administrative and judicial challenges.

³⁹ See Stipulation of Settlement and Dismissal, *Casper v. Dep't of Homeland Sec.*, No. 0:16-cv-00380-ADM-BRT (D. Minn. Jan. 19, 2017).

⁴⁰ See letters from the authors' counsel to the AUSA dated August 17, 2017 and December 19, 2017; email from the authors' counsel to the AUSA dated April 2018.

- Presentations to ICE leadership on the basic methodology of the RCA, the categories of migrants who must be evaluated by the RCA, and the timing of national deployment;
- Memoranda to ICE officers regarding major changes to the RCA algorithms;
- Crime severity levels and changes to these levels over time;
- The scoring values for all public safety risks and flight risks assessed and their changes over time;
- Changes to all business rules over time;
- Certification that DHS had produced all existing documents relating to (1) guidance given to supervisors on when they may override the RCA recommendations, (2) protocols on how ICE officers enter information on crimes that would indicate migrants are subject to mandatory detention, and (3) training materials and protocols on communication between detention facilities and RCA users regarding a migrant's special vulnerabilities;⁴¹
- Summary data on the outcomes of the RCA for 1.4 million individual assessments;
- Detailed data on the application of all RCA factors as well as its detention recommendations and the final supervisor decisions for 2,500 individual assessments.

Notably, we requested documents describing the data validating the choice of risk factors and their relative weight along with the evidence used to support changes to the risk algorithms, but received no documents that illustrated the source of the RCA's risk logic.

The following Part describes how the RCA is used by officials engaged in immigration enforcement across the country and why its recommendations are often insulated from further review and therefore frequently conclusive on the question of detention.

II. Deploying the Risk Classification Assessment to Determine Immigration Detention.

The RCA uses a malleable algorithm to automatically assign civil immigration detention. The nature of the rules that make up this algorithm—the factors assessed, the weight given to each, the thresholds for each risk level, the custody recommendation per risk level, and the scope of discretion allocated to ICE supervisors—have enormous consequences. Until now, the RCA's program for recommending custody and its alterations have been buried in arcane business rules and spreadsheets. Here, we pull back the curtain to reveal DHS's automated detention methodology. This Part explains the role of the RCA as well as the framework it uses to assess risk and allocate custody for tens of thousands of migrants every day. With an understanding of the algorithm and its manipulations as background, the Article then turns to its policy implications and legal significance.

A. The Significance and Scope of the RCA Recommendations.

⁴¹ See Letter from Catrina M. Pavlik-Keenan, FOIA Officer, to Colin Wicker & Shannon Bjorklund, Dorsey & Whitney LLP (May 25, 2018) [hereinafter *Letter Concerning Casper Case*] (concerning *Casper v. Dep't of Homeland Sec.* case) (on file with the authors).

The RCA has different implications for different types of immigration detention. Broadly speaking, immigration detention can be divided into two categories: mandatory and discretionary. Mandatory detention applies to individuals who are subject to expedited removal due to their recent entrance and location of apprehension; individuals with previous orders of removal, which are reinstated upon their re-entry to the United States; individuals with final removal orders who have not departed the United States in certain circumstances; and individuals with particular types of criminal convictions defined by Congress. All other migrants can be detained pending a final removal decision at the discretion of DHS and the Attorney General, but do not have to be.⁴²

For migrants who are not subject to mandatory detention, the initial RCA recommendation has a particular significance. These individuals receive an initial decision by DHS as to whether they will be held in custody, and if so, whether they will be granted a bond of any amount, the payment of which would permit them to leave detention. These decisions regarding custody and bond are based on the RCA's recommendations, using the algorithm described below, and the subsequent decision by a supervisor. Migrants subject to discretionary detention, with or without a bond, can challenge DHS' determinations in a "redetermination hearing" before an immigration judge.⁴³ However, review of DHS' custody determinations is not automatic.⁴⁴

The burden is on the detainee to request a hearing before an immigration judge.⁴⁵ Many detainees do not have counsel to navigate this process, and therefore may not secure a custody or bond redetermination hearing at all.⁴⁶ Even if one is able to secure a hearing, release is far from guaranteed. The most recent data shows that since 2001, immigration judges have denied bond in approximately 55% of all custody redetermination hearings.⁴⁷ Success often depends, at least in part, on having counsel⁴⁸ and in many cases, even with counsel, a hearing before an immigration judge is not likely to improve conditions for release. Scholars argue that bond hearings do not provide any meaningful review of the initial decision to detain, but rather serve only to review the bond amount set.⁴⁹ The financial burden placed on detainees to pay bond is extremely high. The minimum bond amount possible is \$1,500,⁵⁰ an amount that many people in this country cannot afford.⁵¹ The median bond amount after review in an immigration court is much greater at \$8,000.⁵² Consequently, many

⁴² See 8 USC § 1226(a); see also *infra*, notes 136-37 and accompanying text.

⁴³ See Denise Gilman, *To Loose the Bonds: The Deceptive Promise of Freedom from Pretrial Immigration Detention*, 92 *IND. L.J.* 157, 187-88 (2016) at (explaining custody review process).

⁴⁴ 8 C.F.R. § 1236.1(d) (2012).

⁴⁵ See *id.*

⁴⁶ Eagly & Shafer, *supra* note 10, at 70.

⁴⁷ *Immigration Court Bond Hearings and Related Case Decisions*, TRAC IMMIGR., <https://trac.syr.edu/phptools/immigration/bond/> (search "all" in both "Bond Hearing Immigration Court State" and "Nationality;" then search "Not Granted" in "Bond Hearing Outcome") (last visited Apr. 4, 2020).

⁴⁸ Eagly & Shafer, *supra* note 10, at 70; Emily Ryo, *Detained: A Study of Immigration Bond Hearings*, 50 *L. & SOC'Y REV.* 117, 143 (2016).

⁴⁹ See, e.g., Gilman, *supra* note 43, at 188; see also Das, *supra* note 17, at 155-59 ("[M]any immigration judges constrain themselves even further by interpreting the law as prohibiting them from releasing noncitizens on any conditions other than bond.").

⁵⁰ 8 U.S.C. § 1226(a) (2012).

⁵¹ See *Discretionary Detention by Numbers*, ACLU ANALYTICS & IMMIGRANTS' RTS. PROJECT, <https://www.aclu.org/issues/immigrants-rights/immigrants-rights-and-detention/discretionary-detention> (last visited Mar. 8, 2020).

⁵² *Importance of Nationality in Immigration Court Bond Decisions*, TRAC IMMIGR. (Feb, 12, 2019), <https://trac.syr.edu/immigration/reports/545/>.

individuals remain in detention solely for their financial inability to pay.⁵³ In light of these circumstances, the RCA's initial recommendation often becomes the final word on a person's detention and conditions for release.

The RCA is not only extremely consequential but also broad in scope. As of January 2013, the RCA guides the decisions on whether to detain or release between 350,000 and 450,000 individuals every year.⁵⁴ The system was first piloted in the Baltimore and Washington field office areas of responsibilities beginning July 2012.⁵⁵ Lessons learned from the pilot phase in these offices then informed the rollout to the other field office areas.⁵⁶ Between November 2012 and the end of January 2013, the RCA was implemented nationwide.⁵⁷ By the end of this period, ICE officers and agents were required to complete an RCA for every adult committed to ICE custody with two narrow exceptions. The RCA was not required for migrants subject to mandatory detention who would likely depart or be removed within five days, or for migrants benefiting from ICE's decision to exercise prosecutorial discretion and not issue a charging document against the person.⁵⁸

B. *The Role of the RCA in the Apprehension and Detention Process*

ICE Enforcement and Removal Officers (EROs) complete the RCA during the initial intake process.⁵⁹ This initial intake process is critical because much of the RCA's algorithm depends on the data collected before the RCA is even launched. For migrants arrested by an enforcement and removal officer, the ERO ensures that the individual is identified in ICE's database as a new encounter or linked to an existing record if the person has encountered ICE in the past.⁶⁰ The officer must also ensure that all criminal history is captured in the Federal Bureau of Investigation's National Crime Information Center (NCIC) database and update this information accordingly.⁶¹ Finally, the officer

⁵³ See NYU SCHOOL OF LAW IMMIGRANT RIGHTS CLINIC, ET AL., *INSECURE COMMUNITIES, DEVASTATED FAMILIES: NEW DATA ON IMMIGRANT DETENTION AND DEPORTATION PRACTICES IN NEW YORK CITY* 11 (July 23, 2012).

⁵⁴ See 2018 ICE REPORT, *supra* note 3, at 8; U.S. IMMIGR. & CUSTOMS ENF'T, *FISCAL YEAR 2017 ICE ENFORCEMENT AND REMOVAL OPERATIONS REPORT* 11 (2017); U.S. IMMIGR. & CUSTOMS ENF'T, *ICE ENFORCEMENT AND REMOVAL OPERATIONS REPORT FISCAL YEAR 2015*, at 2 (2015).

⁵⁵ U.S. Immigration & Customs Enforcement, United Nations High Commissioner for Refugees Bi-National Roundtable on Alternatives to Detention: Buffalo, N.Y. & Fort Erie, Ontario (Sept. 25, 2012) [hereinafter *UNHCR Roundtable*], in *CONSOLIDATED FOIA RESPONSES*, *supra* note 19, at 30. ICE divides its operations into 24 field office areas of responsibility (AOR). Each field office is designated by the largest city it encompasses. *Enforcement and Removal Operations Field Offices*, U.S. IMMIGR. & CUSTOMS ENF'T. (Jan. 3, 2018), <https://www.ice.gov/contact/ero>.

⁵⁶ *UNHCR Roundtable*, *supra* note 54, at 30.

⁵⁷ *Id.*

⁵⁸ Memorandum from Gary Mead, Executive Associate Director, Enforcement and Removal Operations (ERO), U.S. Immigration & Customs Enforcement, to All ERO Employees (Aug. 15, 2012, 4:44 PM), in *CONSOLIDATED FOIA RESPONSES*, *supra* note 19, at 1; Risk Classification Assessment (RCA) Module: Lessons Learned Phase 1-6 (Feb. 5, 2013) [hereinafter *2012 Lessons Learned RCA Module*], in *CONSOLIDATED FOIA RESPONSES*, *supra* note 19, at 827; U.S. Immigration & Customs Enforcement, RCA Overview: Field Operations Briefing [hereinafter *2013 RCA Overview*], in *CONSOLIDATED FOIA RESPONSES*, *supra* note 19, at 229 (with metrics as of February 2013).

⁵⁹ U.S. Immigr. & Customs Enf't, Risk Classification Assessment (RCA) in EARM 5.3 Quick Reference Guide (Aug. 2013) [hereinafter *RCA Quick Reference Guide*], in *CONSOLIDATED FOIA RESPONSES*, *supra* note 19, at 1740; COMBINED RCA VIRTUAL UNIVERSITY RELEASE, DUKE L. SCHOLARSHIP REPOSITORY 180 (2012) [hereinafter *RCA SYSTEMS TRAINING*], https://scholarship.law.duke.edu/faculty_scholarship/3994/.

⁶⁰ Memorandum on Helpful Hints When Starting an RCA for Detain/Release Decision & Using the RCA Generally 2 (Dec. 3, 2012) [hereinafter *2012 RCA Helpful Hints*], in *CONSOLIDATED FOIA RESPONSES*, *supra* note 19, at 819.

⁶¹ *Id.*; *RCA SYSTEMS TRAINING*, *supra* note 58, at 180; *RCA Quick Reference Guide*, *supra* note 59, at 1740.

identifies and enters the statutes and allegations under which the person is charged with removability.⁶² For individuals arrested by an external office—such as Border Patrol, the Office of Field Operations within Customs and Border Protection, Homeland Security Investigations, Criminal Alien Program officers in state and federal prisons, or state and local police officers designated to enforce the immigration laws through the 287g program—much of the initial intake and charging process is completed by the external arresting officer. In this scenario, ICE EROs are responsible only for reviewing the charging and custody documents and updating the ICE and NCIC databases with any missing information when they book the person into an ICE holding cell.⁶³ At the end of the intake process, a migrant’s biographic information, immigration history, criminal history, supervision history, immigration case status, and removal charges are captured in ICE’s various databases.⁶⁴ Additionally, either an ICE ERO or an officer at an external agency has generated a charging document. This data is then used to auto-populate many of the factors evaluated in the RCA.⁶⁵

Once the intake process is complete, the ICE officer launches the RCA.⁶⁶ The RCA combines the data gathered through intake with the migrant’s responses to structured interview questions and generates recommendations regarding detention or release, whether a bond will be set and if so the amount, the custody classification level if detained, and the supervision level if released.⁶⁷ In total, the RCA uses hundreds of factors to produce these recommendations.

The next Part of the article uses more than 1,700 pages of FOIA results encompassing business rules, training materials, internal memoranda and presentations, and scoring changes to describe the RCA’s methodology, its changes over time, as well as the impact of these changes on the

⁶² 2012 *RCA Helpful Hints*, *supra* note 58, at 819; *RCA Quick Reference Guide*, *supra* note 59, at 1740; RCA SYSTEMS TRAINING, *supra* note 59, at 180.

⁶³ *RCA Quick Reference Guide*, *supra* note 59, at 1740; RCA SYSTEMS TRAINING, *supra* note 59, at 180; See also Tim Gibney & Beth Mangum, Risk Classification Assessment Release 1.0 Business Requirements Version 1.8 (Aug. 19, 2011) [hereinafter *RCA Release 1.0 Business Requirements*], in CONSOLIDATED FOIA RESPONSES, *supra* note 19, at 939 (describing the intake responsibilities of “External Apprehending Entities”). U.S. Border Patrol is the law enforcement arm of Customs and Border Protection (CBP) that is responsible for monitoring the U.S. border between ports of entry. See *Executive Assistant Commissioners’ Offices*, U.S. CUSTOMS & BORDER PROT. (Nov. 19, 2019), <https://www.cbp.gov/about/leadership-organization/executive-assistant-commissioners-offices>. The Office of Field Operations is the largest component of CBP and is responsible for monitoring border security, trade, and travel into the United States at more than 300 Ports of Entry (POE) around the country and abroad. *Id.* Homeland Security Investigations (HSI) is the investigative arm of the Department of Homeland Security, mainly devoted to “combating criminal organizations illegally exploiting America’s travel, trade, financial and immigration systems. See *Homeland Security Investigations*, U.S. IMMIGR. & CUSTOMS ENF’T, (Aug. 15, 2019), <https://www.ice.gov/hsi>. The Criminal Alien Program (CAP) within ICE provides “direction and support in the biometric and biographic identification, arrest, and removal of priority aliens who are incarcerated within federal, state, and local prisons and jails, as well as at-large criminal aliens that have circumvented identification.” See *Criminal Alien Program*, U.S. IMMIGR. & CUSTOMS ENF’T (Jan 3, 2018), <https://www.ice.gov/criminal-alien-program>. Section 287(g) of the Immigration and Nationality Act allows the Director of ICE to enter into agreements with state and local law enforcement agencies so as to permit designated officers to perform certain immigration law enforcement functions. See *Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act*, U.S. IMMIGR. & CUSTOMS ENF’T (Oct. 4, 2019), <https://www.ice.gov/287g>.

⁶⁴ U.S. Immigration & Customs Enforcement, Risk Classification Assessment: Briefing for Council 118, PowerPoint Presentation (June 16, 2011) [hereinafter *2011 Briefing for Council 118*], in CONSOLIDATED FOIA RESPONSES, *supra* note 19, at 781. See also Anil Kalhan, *Immigration Surveillance*, 74 MD. L. REV. 1, 31–35 (2014) (explaining various ICE tracking mechanisms).

⁶⁵ *GAO Questions Regarding the RCA*, *supra* note 21, at 33; *2011 Briefing for Council 118*, *supra* note 64, at 781; *RCA Quick Reference Guide*, *supra* note 59, at 1756.

⁶⁶ *RCA Quick Reference Guide*, *supra* note 59, at 1742–43; RCA SYSTEMS TRAINING, *supra* note 59, at 180.

⁶⁷ *GAO Questions Regarding the RCA*, *supra* note 21, at 33–34.

likelihood of detention for broad categories of migrants. The Parts that follow then argue that manipulation of the RCA resulted in its failure to achieve its policy goals and created an automated system of unconstitutional detention. Accordingly, this article focuses on the RCA's design, its modifications, and its consequences for detention law and policy. The authors anticipate that future publications will describe the demographics of the detained population produced by the RCA, using the summary outcomes and detailed data also obtained through the FOIA litigation.

III. The RCA's Methodology and Its Manipulations

This section describes the algorithm used to determine and combine the various components that generate the RCA recommendations for custody or release and associated conditions. The scoring rubric and its alterations are described below. Before outlining the RCA's method in detail, we provide an overview of the RCA's components and their interactions to guide this discussion. We reconstructed the RCA algorithm from the Business Rules, memoranda and guides to changes in the RCA provided as part of the documents released, and the rules matrix released as an excel document outlining the logic based rules and their changes over time along with the scores for each factors and their changes over time.

The first section of the RCA requires the ICE officer to identify any "special vulnerability" the migrant has through an interview and observations. Once the ICE officer finishes the special vulnerabilities assessment, the RCA next requires an evaluation of mandatory detention. This section is supposed to be entirely automatic, using the inputs from the various ICE databases that are updated during the intake process. After the special vulnerabilities and mandatory detention components are complete, the RCA evaluates the person's risk to public safety using a scoring rubric that relies principally on static criminal history pulled from other databases combined with a few additional inputs determined by the ICE officer. Taken together, the RCA generates a public safety risk level of high/medium/low. The ICE officer then moves to the flight risk component, which is based largely on responses to interview questions the user must ask. The flight risk factors are scored and the RCA generates a flight risk level of high/medium/low. Based on the combination of risk levels, the RCA generated one of four recommendations: release, supervisor to determine, detain-eligible for bond, or detain in the custody of DHS (i.e., no bond set).

For those migrants that received a recommendation of detain-eligible for bond, the RCA also recommends a bond amount. For individuals receiving a detention recommendation, the RCA recommends a custody classification level of low, low/medium, medium/high, or high. For individuals receiving a release recommendation, the RCA recommends release without technology, with technology, or leaves that condition for the supervisor to determine. Finally, the ICE officer must indicate if he or she agrees with the RCA recommendations and provide reasons for any disagreement. Then an ICE supervisor must review the RCA recommendation and the ICE officer's comments and make a final decision with respect to the person's custody and any conditions for detention or release.

From the outset, DHS officials acknowledged that the RCA does not take into account certain factors that should be considered when deciding whether to detain someone. Specifically, the RCA does not account for threats to national security, eligibility for relief, eligibility for a U or T visa, length

of lawful status in the U.S., entry as a minor, lack of ties to the home country, conditions in the home country, or nationality that renders removal unlikely.⁶⁸

The RCA uses a highly configurable assessment rubric that was modified in significant ways during our study period. DHS official altered the risk levels periodically so that factors that once generated a medium public safety risk later generated a high public safety risk. The RCA detain/release logic was also modified so that the combination of two medium risk levels, which once resulted in a supervisor to determine recommendation, later led to a detain (no bond) recommendation.⁶⁹ The different algorithms can be divided into three separate time periods: the first version was in effect from October 2012 to December 2013; the second scoring system spanned January 2014 to January 2015; and the third version was implemented in February 2015 and remained in place through the end of the study period in October 2015.⁷⁰ With each change, RCA recommendations increasingly reflected the Obama Administration's political enforcement priorities, rather than indicia of flight risk or risks to public safety. Indeed, the changes in February 2015 nullified nearly all flight risk factors and replaced them with date of entry so that immigration detention simply mirrored the administration's enforcement policy for recent entrants. The explanations for these changes, to the extent they exist, are discussed in Part IV. Here, we focus on the algorithmic and scoring changes that alter the resulting risk levels, notwithstanding the fact that underlying characteristics generating these heightened assessments remain constant.

A. RCA's Initial Rubric: July 2012—January 2014 (Period 1)

This section describes the baseline scoring system initially deployed by the RCA to arrive at detention recommendations. We then review the major changes that progressively converted the RCA into a tool that tied detention to enforcement priority level and abandoned most measures of risk.

Special Vulnerabilities (Period 1)

Screening for special vulnerabilities is the first component of the RCA. This module requires ICE officers to identify individuals who have a serious physical illness; a serious mental illness; a disability; are elderly, pregnant, nursing; have sole caregiving responsibility; face risks based on sexual orientation or gender identity; are victims of persecution or torture, sexual abuse, a violent crime, or human trafficking. Users can also select "other" and provide comments.⁷¹ The list of vulnerabilities can be modified to adapt to new and different concerns,⁷² but no changes were made to this list during the Obama Administration. Among this list of 11 specified vulnerabilities, seven were identified as

⁶⁸ U.S. Immigration & Customs Enforcement, Risk Classification Assessment: Training SME & Key User Training (May 2012) [hereinafter *2012 Key User Training*], in CONSOLIDATED FOIA RESPONSES, *supra* note 19, at 1101, 1136; RCA SYSTEMS TRAINING, *supra* note 59, at 11.

⁶⁹ *Id.*

⁷⁰ FOIA results show 19 different versions in all. Some of these versions related to the pilot RCA from July–September 2012. The first version was in effect from July 2012 through mid-January 2014. New versions were also implemented on January 11, 2014, January 12, 2014, and January 13, 2014. We have consolidated these changes and examined the scoring system as it existed from January 13, 2014 until the next major set of changes in February 2015. Though the FOIA responses show a few occasional changes during each time period, the major changes to the algorithm occur at three points in time: October 2012, January 2014, and February 2015. For ease of analysis, we consolidate all changes within these time periods and describe the algorithm as a whole.

⁷¹ *RCA Release 1.0 Business Requirements*, *supra* note 63, at 872.

⁷² *Id.* at 871.

“priorities”: serious physical illness, serious mental illness, disability, elderly, pregnant, nursing, and primary caretaker.⁷³

To assess serious physical illness, officers are prompted to review any medical records and prescription medications in the person’s possession and ask whether the individual has been hospitalized in the past six months, is taking prescription medication, requires daily medical care, or is terminally ill.⁷⁴ The quick reference guide for special vulnerabilities identifies diabetes, seizures, HIV/AIDS, heart problems, cancer, and epilepsy as examples.⁷⁵ The RCA Playbook, created to train officers using different scenarios, includes an example of someone identified as having a “serious physical illness” based on hospitalization for diabetes, medication for diabetes and blood pressure, and reported kidney problems.⁷⁶

Yet, this example of a special vulnerability—the only one in the RCA training materials—also comes with a caveat that undermines the screening tool’s fundamental purpose. The training guide states that the presence of a special vulnerability based on these factors was agreed upon by a panel of RCA developers and ICE officials, “however, they do not represent the required decisions that must be reached when using the system.” Instead, the circumstances of each case “and each field office will influence” the decision-making process.⁷⁷ While the officer recommends release in the training materials due to the special vulnerability identified, this outcome is not required for similar cases.⁷⁸

For serious mental illness, the pop-up window in the RCA directs officers to ask if the individual has been hospitalized or treated for a mental illness or is taking medications for a mental illness.⁷⁹ They are supposed to observe whether the person appears disoriented, is unaware of their surroundings, is unable to focus on instructions, is hearing voices, or is expressing irrational or violent thoughts toward themselves or others.⁸⁰ The quick reference guide adds rambling nonsensical speech or loud rapid speech and severe withdrawal to the list of observations.⁸¹

To assess disability, officers are to ask if the person requires assistance in daily living activities such as bathing, eating, toileting, and dressing and should observe whether the person uses a wheelchair, cane, crutches, walker or has a prosthesis and if the person is blind, deaf, mute, an amputee or has other disabilities.⁸² For the elderly vulnerability, officers are instructed to observe whether the person is “infirm” due to age, not whether the person is over 65 years old.⁸³

⁷³ 2013 RCA Overview, *supra* note 58, at 234.

⁷⁴ U.S. Immigration & Customs Enforcement Office of Enforcement and Removal Operations, Risk Classification Assessment (RCA) Quick Reference Guide, Version 3.0 (March 2013) [hereinafter *RCA Quick Reference Guide 3.0*], in CONSOLIDATED FOIA RESPONSES, *supra* note 19, at 1339.

⁷⁵ Office of Enforcement Removal Operations, U.S. Immigration & Customs Enforcement, Special Vulnerabilities Quick Reference Guide (n.d.) [hereinafter *Special Vulnerabilities Quick Reference Guide*], in CONSOLIDATED FOIA RESPONSES, *supra* note 19, at 1491.

⁷⁶ *RCA Scenario Playbook, Version 1.0*, *supra* note 23, at 283, 308.

⁷⁷ *Id.* at 285.

⁷⁸ *Id.* at 321.

⁷⁹ *RCA Quick Reference Guide 3.0*, *supra* note 74, at 1366.

⁸⁰ *Id.*

⁸¹ *Special Vulnerabilities Quick Reference Guide*, *supra* note 75, at 1491.

⁸² *Id.*

⁸³ *RCA Quick Reference Guide 3.0*, *supra* note 74, at 1339.

Women should be asked if they are pregnant or have reason to believe they are pregnant as well as whether they are nursing an infant or toddler.⁸⁴ When identifying primary caretaking responsibility, officers are instructed to ask if the individual arrested is primarily responsible for a child or elderly person and note the circumstances of the dependent including age, nature of infirmity, and who is currently caring for that person.⁸⁵ The quick reference guide adds whether others are financially dependent on them and instructs officers to ask if they fear for their children's safety if they are cared for by someone else.⁸⁶

Officers should ask if the person arrested fears harm in detention due to his or her sexual orientation or gender identity.⁸⁷ The quick reference guide notes that individuals may not identify themselves as LGBT to ICE agents and instructs officers to ask if the person has experienced abuse or harassment, fears being placed in a particular gender wing within a facility, or has recently received hormone therapy.⁸⁸

Officers must also assess whether the individual is the victim of harm. They are instructed to ask if the person is a victim of persecution or torture and to assess the country of origin, documentation of the claim, and evidence of trauma.⁸⁹ They must also provide the number for the United Nations Refugee Agency to those who answer affirmatively.⁹⁰ The RCA pop-up windows provide no questions to ask to assess persecution. If the officer refers to the quick reference guide, it instructs officers to ask if the person has been harmed or tortured in their home country or fears such harm.⁹¹ Agents must also ask if the person is a victim of sexual abuse or violent crime and review evidence substantiating the claim. If the answer is yes, officers must provide the number for the National Domestic Violence Hotline, which can assess eligibility for U visas.⁹²

Finally, officers assess human trafficking by asking whether since entering the U.S. the person has been intimidated, deceived, obligated, or forced to engage in prostitution or labor against the person's will.⁹³ If the answer is yes, the officer should contact Homeland Security Investigations (HSI) and provide basic details for further investigation. The special vulnerabilities quick reference guide provides additional sources of assessment: whether the person was working in a situation they could not escape; was paid for their labor; was free to live on their own or forced to live where the employer designated; lacked possession of their documents; displayed unreasonable fear, anxiety, or submissiveness; displayed signs of physical or sexual abuse, physical restraint or malnourishment, or untreated illness.⁹⁴

For the first two years of implementation, if a special vulnerability was identified, the RCA did not recommend detention unless the person was subject to mandatory detention based on the removal

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Special Vulnerabilities Quick Reference Guide*, *supra* note 75, at 1492.

⁸⁷ *RCA Quick Reference Guide 3.0*, *supra* note 74, at 1339.

⁸⁸ *Special Vulnerabilities Quick Reference Guide*, *supra* note 75, at 1492.

⁸⁹ *RCA Quick Reference Guide 3.0*, *supra* note 74, at 1339.

⁹⁰ *Id.*

⁹¹ *Special Vulnerabilities Quick Reference Guide*, *supra* note 75, at 1492.

⁹² *RCA Quick Reference Guide 3.0*, *supra* note 74, at 1339.

⁹³ *Id.*

⁹⁴ *Special Vulnerabilities Quick Reference Guide*, *supra* note 75, at 1492.

charges or had departed the country after receiving a final removal order and then re-entered the U.S.⁹⁵ Migrants with a special vulnerability that the RCA determined were a low flight risk and a low risk to public safety were recommended for release.⁹⁶ The remaining people in this group received an RCA recommendation that the “supervisor . . . determine” whether to detain or release the person regardless of their risk profile.⁹⁷ The recommendation of “supervisor to determine” obviated the need for the supervisor to override an RCA recommendation of detain or release and provide a justification for the override, thus allowing supervisors to wield their discretion more freely. For vulnerable individuals subject to mandatory detention, officers were told to consult their office of chief counsel for guidance, but the RCA generated a detain recommendation nonetheless.⁹⁸

Risk to Public Safety (Period 1)

While the special vulnerabilities screening functions as an on/off switch in the RCA algorithm, the public safety component involves a complex and multi-layered scoring system. The goal of the RCA was to better assess public safety risk and assign custody levels by aligning the scoring methodology to criminological classification literature.⁹⁹ The RCA, therefore, measures patterns of violence for severity and frequency and discounts criminal history the further back in time it occurred.¹⁰⁰ It measures immigrants as it would people accused of crimes, in effect, criminalizing immigrants. It relies on automatic inputs from ICE’s other databases concerning an individual’s identity and criminal history as well as data gathered by the officer through the RCA interview process.¹⁰¹

The Public Safety Risk Assessment section starts with an evaluation of the charges and/or convictions—if any—that are the reason for the encounter with ICE. Notably, the RCA scores all charges and convictions including those that are pending or dropped; but it does not score charges that are dismissed.¹⁰² The charge’s severity is evaluated using a mapping table that lists NCIC codes and offense descriptions with the corresponding severity level assigned in the RCA.¹⁰³ The encounter charge or conviction is then scored based on its severity.¹⁰⁴ In the case of multiple charges, users are

⁹⁵ See ATP RULES MATRIX v. 3, DUKE L. SCHOLARSHIP REPOSITORY (n.d.) [hereinafter RCA RULES AND SCORING], https://scholarship.law.duke.edu/faculty_scholarship/3994/ (Logic Based Rules).

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ 2012 *Key User Training*, *supra* note 68, at 1120.

⁹⁹ Memorandum to Phyllis Coven, Acting Dir., Office of Detention Policy & Planning on the Simulation of Custody Levels Under the Current Detention Standard and the Proposed Changes to Intake Processing (Nov. 18, 2010) in CONSOLIDATED FOIA RESPONSES, *supra* note 19, at 506–07.

¹⁰⁰ *Id.*

¹⁰¹ 2012 *RCA Helpful Hints*, *supra* note 58, at 819.

¹⁰² *Id.*; U.S. Immigration & Customs Enforcement Office of Enforcement & Removal Operations, Risk Classification Assessment (RCA) Frequently Asked Questions, Version 1 (revised July 2012) [hereinafter 2012 FAQ], in CONSOLIDATED FOIA RESPONSES, *supra* note 19, at 1325, 1328. The RCA documents do not provide a description of the difference between dropped and dismissed charges or what documents are used to distinguish between the two dispositions.

¹⁰³ RCA RULES AND SCORING, https://scholarship.law.duke.edu/faculty_scholarship/3994/ (Crime Codes)

¹⁰⁴ *RCA Release 1.0 Business Requirements*, *supra* note 63, at 873, 968–69. RCA RULES AND SCORING, https://scholarship.law.duke.edu/faculty_scholarship/3994/ (Point Based Scoring Rules)

instructed to use the one that generates the highest score.¹⁰⁵ Once a charge or conviction has been utilized in the Public Safety Risk score calculation, it cannot be used again.¹⁰⁶

Severity	Score
Low	2
Moderate	4
High	6
Highest	7

During Period 1, low severity crimes included, for example: possession of fraudulent immigration documents, driving under the influence of drugs or alcohol, all traffic offenses other than hit-and-run or transporting dangerous materials, general property crimes, domestic violence, prostitution, and drug possession. Moderate severity crimes included: illegal entry, illegal re-entry, drug trafficking, assault, embezzlement and stolen property crimes, petty larceny, and sex crimes involving minors. High severity offenses included crimes such as military desertion, negligent manslaughter, sexual assault, robbery, burglary, aggravated assault, drug smuggling, and arson. Classified at the highest severity level were intentional homicide, treason and espionage, kidnapping, rape, and state offenses for crimes labeled terroristic threats, which can range from offensive touching to assault causing serious injury.¹⁰⁷

Both the severity level and the score assigned to the severity level could be changed. Changes to both fields were made in January 2014 and again in February 2015.

Additional points are assigned for *charges or convictions* for offenses that are identified as “Special Public Safety Factors.”¹⁰⁸ During Periods 1 & 2, these offenses were limited to domestic violence (DV) and driving under the influence of alcohol or drugs (DUI).¹⁰⁹ If the charge prompting the encounter with ICE is a special public safety factor, the crime is given a score of seven regardless of its severity rating. Any remaining *charges or convictions* for special public safety factors are then added to the public safety score.¹¹⁰ One special public safety factor not yet scored generates 7 points; two or more special public safety factors that have not yet been scored generate 11 more points.¹¹¹ If an individual has a restraining order but no associated criminal charge, the restraining order is not assessed as part of the public safety section but officers are instructed to note this in connection with the RCA detain/release decision for supervisors to consider.¹¹²

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ RCA RULES AND SCORING, https://scholarship.law.duke.edu/faculty_scholarship/3994/ (Crime Codes)

¹⁰⁸ *Id.*

¹⁰⁹ RCA RULES AND SCORING, https://scholarship.law.duke.edu/faculty_scholarship/3994/ (Crime Codes)

¹¹⁰ *Id.* at 875.

¹¹¹ RCA RULES AND SCORING, https://scholarship.law.duke.edu/faculty_scholarship/3994/ (Point Based Scoring Rules)

¹¹² 2012 FAQ, *supra* note 102, at 1328.

Using any remaining criminal history not yet scored, the most severe *conviction* is then assessed based on its severity level and length of decay.¹¹³ Here, convictions (not charges) are required.¹¹⁴ The conviction generating the highest score is then added as follows:¹¹⁵

Severity	Age			
	< 5 years	5 – 10 years	10 – 15 years	> 15 years
Low	2	1	0	0
Moderate	4	3	2	1
High	6	6	5	5
Highest	7	6	5	5

If, after the first three steps, a migrant had other *convictions* that had not been tallied, they are then scored based on quantity and felony or misdemeanor status.¹¹⁶ The RCA considers an offense to be a felony if the sentence was more than 365 days and a misdemeanor if the sentence was 365 days or less.¹¹⁷ The greatest number of points possible based on either the number of felony convictions or misdemeanor convictions (but not both) is added to the total score.¹¹⁸

Number of unscored convictions (regardless of age)	Score
1-2 remaining misdemeanors	1
1 remaining felony, or 3-4 remaining misdemeanors	2
2 or more remaining felonies, or 5 or more remaining misdemeanors	4

The final step for the automated component based on criminal history is to score any residual *charges* that have not yet generated points under the prior rules. Remaining charges are assessed for whether they are categorized as violent crimes. Each NCIC crime code is mapped to a violence determination in the RCA system.¹¹⁹ Only charges for violent crimes result in additional points and only if there are at least two charges for violent crimes that have not yet been scored, using the date of the most recent charge.¹²⁰ Domestic Violence is characterized as a special public safety factor and

¹¹³ RCA Release 1.0 Business Requirements, *supra* note 63, at 875.

¹¹⁴ *Id.* at 973.

¹¹⁵ *Id.* at 975. RCA RULES AND SCORING, https://scholarship.law.duke.edu/faculty_scholarship/3994/ (Point Based Scoring Rules)

¹¹⁶ *Id.* at 976.

¹¹⁷ See RCA RULES AND SCORING, *supra* note 95, at tbl.2 (Logic Based Scoring Rules); RCA Quick Reference Guide 3.0, *supra* note 74, at 1375. Two points are added for one remaining felony conviction; four points are added for two or more remaining felony convictions (regardless of age). RCA Release 1.0 Business Requirements, *supra* note 63, at 979. For misdemeanor convictions, one or two convictions equals one additional point; three or four convictions equals two more points; and five or more misdemeanor convictions adds four points. *Id.*

¹¹⁸ RCA Release 1.0 Business Requirements, *supra* note 63, at 979.

¹¹⁹ RCA RULES AND SCORING, *supra* note 95, at tbl.3 (Crime Codes).

¹²⁰ RCA Release 1.0 Business Requirements, *supra* note 63, at 982–83.

a violent crime. The RCA prioritizes scoring DUI charges for the special public safety factor calculation over DV charges when both are present so that DV charges can be added through this residual scoring factor.¹²¹

	Age of Most Recent Charge			
	>15 years	10-15 years	5-10 years	<5 years
2 or more Violent Charges	1	2	3	5

The Public Safety component then requires a series of manual entries related to warrants, prior supervision history, and security threat group. Users must determine if any open warrant exists and then categorize it as violent or non-violent.¹²² If the warrants are for violent crimes, regardless of age or quantity, 5 points are added to the total public safety risk score. Agents are instructed to refer to the federal definition of a crime of violence to answer this question by determining whether the offense “has as an element the use, attempted use, or threatened use of physical force against the person or property of another” or is a felony that “by its nature involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.”¹²³ In 2018, the U.S. Supreme Court determined that the second definition of violent crime was unconstitutionally vague.¹²⁴ It is not clear whether ICE officers have been instructed to assess the violent nature of open warrants differently in light of this decision.

Users must also gather information concerning any prior supervision violations with the following scores. Only the highest point value from this history is used.¹²⁵

Supervision History	Score
Attempted escape from a Non-Secure Facility	4 (reduced to 3 on 11/20/12)
Prior Revocation of criminal supervised release	4 (reduced to 3 on 11/20/12)
Violations of conditions of supervision	4 (reduced to 3 on 11/20/12)
Escape or attempted escape from a secure facility	7

Finally, the individual is assessed for security threat group (STG) or gang affiliation. Initially, 7 points were added if the officer determined that the migrant is affiliated with a gang; the scoring was later modified in Periods 2 and 3.¹²⁶ A member of an STG is defined as “any individual, or group of

¹²¹ *Id.* at 970.

¹²² *Id.* at 876.

¹²³ *RCA Quick Reference Guide 3.0*, *supra* note 74, at 1377.

¹²⁴ *Sessions v. Dimaya*, 138 S. Ct. 1204, 1223 (2018).

¹²⁵ *RCA Release 1.0 Business Requirements*, *supra* note 63, at 877.

¹²⁶ *Id.* at 987. RCA RULES AND SCORING, https://scholarship.law.duke.edu/faculty_scholarship/3994/ (Point Based Scoring Rules)

individuals, who through association, ideology, common name, identifying symbol(s), or whose activities and/or conduct (both inside and outside custodial environments) pose a threat to the safety of the community, and the security of the ICE staff, ICE facilities, and/or those in ICE custody.”¹²⁷

Tallying the total public safety risk score provides the raw material for the critical determination of the public safety risk level. It is the risk level that drives the detention recommendation. During Period 1, the public safety scores were mapped to risk levels as follows:

Public Safety Risk Levels	
Low	0 – 4
Medium	5 – 11
High	12 - 53

Based on the public safety algorithm in place from October 2012 through December 2013, an arrest for a DUI or domestic violence offense, regardless of conviction, rendered the person a medium public safety risk. So too did any suspected gang affiliation. Because illegal entry and illegal reentry are both considered a moderate offense, a conviction for either of these within the past five years, or a charge for either resulting in the ICE encounter, plus a traffic offense also generated a medium public safety risk level. More than two traffic offenses in the last five years made the person a medium public safety risk.

Risk of Flight (Period 1)

The public safety risk level was combined with the flight risk assessment to generate an overall custody recommendation. Unlike the public safety component of the RCA, which is largely automated, using data from other ICE sources, nearly all risk of flight information must be gathered by the ICE officer. The scoring here includes positive numbers to account for community ties as well as negative numbers to account for indicia of flight.

The public safety component begins by scoring any immigration violation history using records from an internal database on the individual’s encounter history.¹²⁸ This first scoring factor evaluates the number of voluntary returns and voluntary departures the person has received.¹²⁹

Encounter History	Score
1 – 2 Voluntary Returns or Departures	2
3 or more Voluntary Returns or Departures	5

The RCA automatically pulls information on case status, immigration violation history and substance abuse factors using ICE databases, which the officer is required to review and update.¹³⁰

¹²⁷ *RCA Quick Reference Guide 3.0*, *supra* note 74, at 1377.

¹²⁸ *RCA Release 1.0 Business Requirements*, *supra* note 63, at 880.

¹²⁹ *Id.* at 990. The RCA Quick Reference Guide from March 2013 indicates that the higher score was shifted to two or more voluntary returns, but this change is not reflected in the ATP Rule Matrix report on all scoring and factor changes. *RCA Quick Reference Guide 3.0*, *supra* note 74, at 1343.

¹³⁰ *2012 RCA Helpful Hints*, *supra* note 60, at 819.

The ICE officer next looks for a history of absconding and other supervision violations.¹³¹ These factors are thus assessed *and scored* in both the public safety and flight risk components. The end-user must also assess substance abuse and determine whether the migrant has a documented history of drug use or is a current drug user. In the 2013 training materials, this factor includes alcohol use and agents are told to look at an individual’s history of DUI charges.¹³² Consequently, DUI offenses will result in increased scores in both the public safety and risk of flight components. The individual’s case status also affects their flight risk level.¹³³ Other general flight risk factors concern identification documents.¹³⁴

General Flight Risk Factors	Score
Previously fled or avoided removal after a final order	1
Revocation of supervision in prior immigration case	1
Violation of conditions of supervision in a prior immigration case	1
Bond breach in an immigration or criminal case	1
Walk-away from a non-secure facility or alternatives to detention program	1
History of Drug Use	1
Current drug user	2
Final Removal Order Pending Appeal	-1
Final Order with no Appeal Pending	5
In Immigration Proceedings	0
Valid government identification	-1
False identification document	+1 per unique false name up to +2 total

An individual’s community ties are then reviewed with the following scores attached during this initial period of the RCA.¹³⁵ Partners who meet the requirements of a common law marriage or civil union are supposed to count as spouses for this section.¹³⁶

Community Ties	Score
Individual lives with immediate family members	-1
Individual has lived at address for 6 months or more	-1
Individual has a stable address but has lived there for less than six months	0
Individual has no stable address	+2
Benefit application is pending with USCIS	-2

¹³¹ *RCA Release 1.0 Business Requirements*, *supra* note 63, at 991; *RCA RULES AND SCORING*, *supra* note 95, at tbl.1 (Point Based Scoring Rules).

¹³² *RCA Quick Reference Guide 3.0*, *supra* note 74, at 1343; *RCA SYSTEMS TRAINING*, *supra* note 59, at 160 (Risk of Flight: Substance Abuse).

¹³³ *RCA Release 1.0 Business Requirements*, *supra* note 63, at 885.

¹³⁴ *Id.* at 886.

¹³⁵ *Id.* at 883, 931–32.

¹³⁶ 2012 FAQ, *supra* note 102, at 1329.

Service in the U.S. Armed forces by the migrant or spouse	-2
Individual has a U.S. citizen spouse or child	-2
If no U.S. citizen spouse or child, then migrant has spouse or child or other family members in the local community	-1
If no U.S. citizen spouse or child then whether the migrant has family in the US but not in the local community	0
Individual is enrolled in school or a training program	-1
Individual has work authorization	-1
Individual owns property or considerable assets in the community	-1
Individual has legal representation	-1
No established family or community support	+2

The scores were then assigned to a risk level as follows:

Flight Risk	
Low	None to -5
Medium	-4 to +1
High	+2 to none

The only high scoring factors in the flight risk rubric during this time were three or more voluntary returns and having a final order that was not under appeal—each worth 5 points and generating a high flight risk level in the absence of other significant mitigating factors. Low flight risk scores were quite difficult to achieve though, as they required multiple community ties to arrive at a -5.

Combining the RCA Factors to Arrive at a Detain/Release Recommendation (Period 1):

The RCA combines the results of the special vulnerability, mandatory detention, public safety, and flight risk assessments to generate one of four recommendations: First, “detain in the Custody of this Service,” which meant that no bond was set by ICE and thus any terms of release required a favorable decision from an immigration judge. Second was “detain, bond eligible,” meaning that ICE set a bond that could be paid immediately to allow for release or could be reviewed by an immigration judge to potentially lower the bond set. Third was “supervisor to determine—detain or release on community supervision” so that the RCA made no recommendation with respect to detention or bond. The fourth option was “release on community supervision,” which allowed the individual to leave custody under varying levels of supervision by ICE, but did not require paying a bond.¹³⁷

For the group the RCA recommends Detain Eligible for Bond, the RCA also calculates a bond recommendation by multiplying the public safety score by \$1000 and the flight risk score by \$1000 (which could be a negative number) and adding the two together.¹³⁸ RCA administrators made clear,

¹³⁷ *RCA Release 1.0 Business Requirements*, *supra* note 63, at 888.

¹³⁸ *Id.* at 892; RCA RULES AND SCORING, *supra* note 95, at tbl.2 (Logic Based Scoring Rules).

however, that the bond methodology was not intended to replace local practice and thus could be overridden by the local supervisor.¹³⁹

During Period 1, only people who had mandatory detention removal charges or had a prior removal order and reentered the U.S. received the recommendation of detain in the custody of the service (i.e., without bond). The former category of migrants is statutorily subject to mandatory detention before any final determination of removal is made,¹⁴⁰ the latter category are subject to a process called reinstatement and detained under a different statute.¹⁴¹ For all other migrants, the RCA recommendations followed this table.¹⁴²

		Public Safety			
			Low	Medium	High
Flight Risk			0 to 4	5 to 11	12 or higher
	Low	-5 or lower	Release	Supervisor Determine to	Detain, Eligible for Bond
	Medium	-4 to 1	Supervisor Determine to	Supervisor Determine to	Detain, Eligible for Bond
	High	2 or higher	Detain, Eligible for Bond	Detain, Eligible for Bond	Detain, Eligible for Bond

Because a release recommendation was limited to individuals with both low public safety and low flight risk scores, release was recommended only for individuals with criminal history limited to few low severity offenses and significant community ties. A conviction for illegal entry plus a traffic offense put a release recommendation out of reach. The large swath of moderate risk scores generated a recommendation leaving the detain/release determination to the ICE supervisor in the first instance.

Mandatory Detention (Period 1)

The mandatory detention assessment is completed after the special vulnerabilities screening but the release/detain recommendations are dependent on the public safety and flight risk scores for certain groups of migrants and so we explain the mandatory detention algorithm here. The mandatory detention assessment is supposed to be entirely automatic based on the data entered at the time of the immigration arrest and the links to ICE's other databases regarding immigration history, case

¹³⁹ 2012 FAQ, *supra* note 102, at 1326.

¹⁴⁰ 8 U.S.C. § 1226(c). The removal charges that make an alien subject to mandatory detention are outlined in 8 U.S.C. § 1226(c)(1)(A)–(D). They range from serious crimes, such as participation in terrorist activity or espionage, to a host of minor offenses, including violations of “any law or regulation of a State, the United States, or a foreign country relating to a controlled substance; being a drug abuser or addict; conviction of a crime of “moral turpitude” with a sentence of longer than one year; a firearms offense; and certain immigration fraud offenses, such as making a false statement on an application or using a false permit.

¹⁴¹ 8 U.S.C. § 1231(a)(1)–(3) (2012); 8 C.F.R. § 241.8(f) (2019).

¹⁴² *RCA Release 1.0 Business Requirements*, *supra* note 63, at 892. RCA RULES AND SCORING, https://scholarship.law.duke.edu/faculty_scholarship/3994/ (Logic Based Scoring Rules)

processing type, and removal charges.¹⁴³ Except for those individuals subject to expedited removal, a person's flight risk and risk to public safety were assessed regardless of whether he was designated as mandatorily detained.

The RCA will designate a migrant as subject to mandatory detention based on whether the person has a final order of removal and the type of removal charges lodged. If the person has a final order of removal, the evaluation proceeds down one path. If not, the RCA evaluates whether the charges in the Notice to Appear trigger mandatory detention under 8 U.S.C. § 1226(c)¹⁴⁴ and recommends that the migrant be detained without bond accordingly.¹⁴⁵ A review of the removal allegations is performed only if there is no final order of removal.¹⁴⁶

If the person has a final order of removal, the RCA evaluates whether or not it has been executed, meaning the person has left the U.S. after receiving a final order. For those people with final executed orders of removal, the RCA recommended detention without bond during Period 1.¹⁴⁷

If the migrant was subject to a final order but had not departed the United States—so that the order was not executed—the RCA collected information on whether the order was less than ninety days old, and for those people with orders older than ninety days, whether removal was likely in the reasonably foreseeable future.¹⁴⁸ For those final orders that are less than 90 days old, an accompanying draft instructions document provides that this group could be released if they were not inadmissible or deportable on criminal or terrorism-related grounds.¹⁴⁹ For those who were found inadmissible or deportable on these grounds, officers could nonetheless release them within 90 days of the order if the person had been granted withholding of removal or deferral of removal under the Convention Against Torture and DHS was not pursuing removal to a third country likely to accept the person.¹⁵⁰

For those final orders more than 90 days old, the RCA system pulls in data from the case status database regarding the reason the individual was not previously removed so that the officer can review whether the reasons the person was not previously removed remain.¹⁵¹ The list includes: citizenship/nationality not determined, country conditions, deferred action, expressed fear of return, medical hold, not in ICE custody, per Office of Chief Counsel, per ICE headquarters, per DOJ Office of Immigration Litigation, removal unlikely in the foreseeable future, stay in federal court, stay from ICE field office, stay from immigration court, unable to obtain travel document due to migrant's lack of cooperation, unable to obtain a travel document due to country refusal, and other.¹⁵² If the case

¹⁴³ *RCA Quick Reference Guide 3.0*, *supra* note 74, at 1339.

¹⁴⁴ *Id.* at 1340; RCA SYSTEMS TRAINING, *supra* note 59, at 60; U.S. Immigration & Customs Enforcement Office of Enforcement and Removal Operations, *RCA Scenario Playbook*, Version 1.1 (Sept. 2012) [hereinafter *2012 RCA Scenario Playbook*], in CONSOLIDATED FOIA RESPONSES, *supra* note 19.

¹⁴⁵ *RCA Release 1.0 Business Requirements*, *supra* note 63, at 939.

¹⁴⁶ *RCA Quick Reference Guide 3.0*, *supra* note 74, at 1339; RCA RULES AND SCORING, *supra* note 95, at tbl.2 (Logic Based Scoring Rules).

¹⁴⁷ *RCA Release 1.0 Business Requirements*, *supra* note 63, at 939; RCA SYSTEMS TRAINING, *supra* note 59, at 60.

¹⁴⁸ *RCA Quick Reference Guide*, *supra* note 59, at 1745, 1776–78.

¹⁴⁹ U.S. Immigration & Customs EnFt, *RCA Paper-based Implementation, Risk Classification Assessment Worksheet Instructions and Procedures* (revised Aug. 23, 2011) [hereinafter *RCA Worksheet Instructions*], in CONSOLIDATED FOIA RESPONSES, *supra* note 19, at 1659.

¹⁵⁰ *Id.*

¹⁵¹ See *ICE Lesson #939*, *supra* note 24; *RCA Release 1.0 Business Requirements*, *supra* note 63, at 890.

¹⁵² *RCA Release 1.0 Business Requirements*, *supra* note 62, at 8–37.

status indicates a category such as a country’s refusal to issue a travel document, then the mandatory detention section of the RCA showed that the person was not likely to be removed in the reasonably foreseeable future. If the case status did not include a reason prohibiting removal, the RCA showed that removal was likely in the reasonably foreseeable future.¹⁵³

The RCA Playbook provides an example of someone initially detained based on re-entry after an executed removal order whose detention was reassessed after 90 days with the determination that removal was unlikely because of a change in conditions in the home country.¹⁵⁴ As a result, the officer initiated a reassessment and indicated his disagreement with the detention decision, noting the change in comments. The supervisor then changed the detain/release decision to release on community supervision.¹⁵⁵

Despite collecting information regarding the actual likelihood of removal, the detain/release recommendation for anyone with an unexecuted removal order is based only on the presence of special vulnerabilities and the public safety and flight risk levels as follows:¹⁵⁶

		Public Safety		
		Low	Medium	High
Flight Risk	Low	Release	Supervisor to Determine	Detain
	Medium	Supervisor to Determine	Supervisor to determine	Detain
	High	Detain	Detain	Detain

If there is no final order, the mandatory detention module uses the removal allegations entered at the time of the encounter to auto-populate the RCA. This assessment is based on the immigration charges entered, not the criminal convictions listed.¹⁵⁷ This means that even if an immigrant has been convicted of an offense triggering mandatory detention, if the individual is not charged as removable for that offense, the RCA will not designate them as subject to mandatory detention.¹⁵⁸ Officers must verify that the individual’s arrest record is complete in its other enforcement databases for this feature in the RCA to function.¹⁵⁹ For those individuals with mandatory detention charges, the recommendation is detain in the custody of this service and the public safety risk score is used only to generate a custody classification recommendation.¹⁶⁰ Having a special vulnerability does not alter the detention recommendation. Therefore, a supervisor would have to override the detain recommendation and explain the basis for that override in order to release someone with a special vulnerability from detention if their removal charges fell under the mandatory detention statute.¹⁶¹

¹⁵³ *RCA Quick Reference Guide 3.0*, *supra* note 74, at 1371–72.

¹⁵⁴ *2012 RCA Scenario Playbook*, *supra* note 144, at 351.

¹⁵⁵ *Id.* at 355.

¹⁵⁶ RCA SYSTEMS TRAINING, *supra* note 59, at 58–60 (Mandatory Detention section). RCA RULES AND SCORING, https://scholarship.law.duke.edu/faculty_scholarship/3994/ (Logic Based Scoring Rules)

¹⁵⁷ *2012 RCA Scenario Playbook*, *supra* note 144, at 361.

¹⁵⁸ *Id.*

¹⁵⁹ *2012 RCA Helpful Hints*, *supra* note 60, at 819; *RCA Release 1.0 Business Requirements*, *supra* note 63, at 889.

¹⁶⁰ *RCA Release 1.0 Business Requirements*, *supra* note 63, at 889.

¹⁶¹ RCA RULES AND SCORING, *supra* note 95.

Significantly, the RCA training materials acknowledge that some removal grounds that trigger mandatory detention do not represent a high risk to public safety. The national training course on the RCA includes an example of a person who is designated as mandatorily detained based on statutes and regulations for a drug possession conviction but is determined to represent a low risk to public safety and thus generates a low custody classification.¹⁶²

If mandatory detention will be required after a final order is approved under the Administrative Removal process, the individual is not designated as mandatorily detained in the RCA unless a mandatory detention charge is entered through the separate arrest record.¹⁶³ If an individual is, or will be, subject to an administrative removal order but is not appearing as mandatorily detained, officers are instructed that they can highlight the issue so that supervisors override the RCA recommendation and choose detain in the custody of the service.¹⁶⁴

Initially, individuals who were processed through expedited removal¹⁶⁵ were not identified as mandatorily detained and received an RCA recommendation based on their flight risk and public safety score. Between February 2013 and August 2013, DHS changed this aspect of the RCA algorithm so that when a person's case processing disposition was designated as expedited removal, the RCA would automatically recommend detention without bond.¹⁶⁶ Officers could still run the full RCA to determine the custody classification level, but were not required to.¹⁶⁷

Supervisory Review

All of the RCA recommendations are generated automatically based on inputs for the various factors and the scores and rules assigned to those factors. An ICE officer may need to elicit information to complete the RCA but its recommendations flow automatically from that data. Once the RCA recommendation process is complete, the system requires human oversight.

First, the ICE officer who performs the RCA can indicate whether they agree with all of the recommendations and add explanatory comments for a supervisor to consider. A supervisor must then decide whether to accept or override the RCA recommendation.¹⁶⁸ The supervisor review screen shows the person's name, country of birth, citizenship, age, case status, and the results of each RCA component: special vulnerability status, mandatory detention determination, public safety risk level, flight risk level, detain/release recommendation and bond recommendation, if any.¹⁶⁹ The review page also includes alert icons if the person is subject to a final order of removal or has a criminal history.¹⁷⁰ Though the supervisor may review the individual factors that generate the RCA detain/release

¹⁶² RCA SYSTEMS TRAINING, *supra* note 59, at 58–60.

¹⁶³ 2012 RCA Helpful Hints, *supra* note 60, at 819.

¹⁶⁴ *Id.*

¹⁶⁵ Expedited removal is a process by which immigration officers can order a noncitizen removed without a hearing or review by an immigration judge. 8 U.S.C. § 1225(b)(1)(A)(iii)(II) (2012). Expedited removal applies to any individual seeking entry at the border who is inadmissible for making misrepresentations or lacking valid entry documents, unless the individual indicates that they plan to apply for asylum. *Id.* An individual apprehended anywhere else is subject to expedited removal if they have not been admitted or paroled and cannot show that they have been continuously present in the U.S. for two years. *Id.*

¹⁶⁶ 2013 RCA Overview, *supra* note 58, at 236.

¹⁶⁷ RCA Quick Reference Guide, *supra* note 59, at 1744.

¹⁶⁸ *Id.* at 1756.

¹⁶⁹ RCA Scenario Playbook, Version 1.0, *supra* note 23, at 323.

¹⁷⁰ *Id.*

recommendation, they are not required to.¹⁷¹ If they disagree with the recommendation, an explanation is required in a “comments/justification” field.¹⁷² After the supervisor makes a final decision regarding custody and conditions, the ICE officer prints out an RCA detailed summary for the individual’s immigration file and issues a custody determination.¹⁷³

B. The RCA Rubric: January 2014—February 2015 (Period 2)

Changes to the Public Safety Rubric in Period 2

Although the general trend in the RCA was to create a risk tool that is increasingly stringent, severity levels were ratcheted up and down from period 1 to period 2. Offenses reduced from moderate to low severity included: the immigration crimes of trafficking in fraudulent documents and illegal reentry; passing a fraudulent check; burglary; petty larceny; stolen property offenses; deceptive business practices; not performing duties as a government official; or a licensing violation.¹⁷⁴ With these changes, many property crimes, immigration crimes, and business crimes generated lower public safety scores. Individuals with petty larceny charges received half the points they previously would have and could achieve a low public safety risk assessment in Period 2.¹⁷⁵

On the other side of the equation, offenses increased from low to moderate severity included: domestic violence; drug possession (with the exception of marijuana); indecent exposure; bestiality; failure to register as a sex offender; necrophilia; offenses involving obscene material; prostitution offenses; and civil rights offenses.¹⁷⁶ Indecent exposure to a minor and a generic code for crimes involving the sexual exploitation of a minor were moved from low to high.¹⁷⁷ Offenses related to the enticement of a minor for indecent purposes and procuring minors for prostitution were raised from moderate to high severity.¹⁷⁸ The scores attached to levels of severity and age of decay did not change, however.¹⁷⁹ Additionally, the score for any gang association was reduced to 5 (down from 7), but was still scored higher than a recent moderate severity crime.¹⁸⁰

At the same time, the offense levels were adjusted for certain crimes, the maximum score for each public safety risk level was reduced so that more people would receive medium-risk and high-risk assessments and fewer would receive low-risk assessments.¹⁸¹ The new levels were as follows (prior score is struck through) and stayed the same for the remainder of our study period:¹⁸²

Public Safety Risk		
	Minimum	Maximum
Low	0	4 (Period 1)

¹⁷¹ 2012 *RCA Helpful Hints*, *supra* note 60, at 821.

¹⁷² *RCA Quick Reference Guide*, *supra* note 59, at 1758.

¹⁷³ 2012 *Lessons Learned RCA Module*, *supra* note 58, at 824; RCA SYSTEMS TRAINING, *supra* note 59, at 180.

¹⁷⁴ RCA RULES AND SCORING, https://scholarship.law.duke.edu/faculty_scholarship/3994/ (Crime Codes)

¹⁷⁵ *Id.* (Point Based Scoring Rules), (Logic Based Scoring Rules).

¹⁷⁶ *Id.* (Crime Codes)

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* (Point Based Scoring Rules)

¹⁸⁰ *Id.*

¹⁸¹ RCA RULES AND SCORING, https://scholarship.law.duke.edu/faculty_scholarship/3994/ (Logic Based Scoring Rules)

¹⁸² *Id.*

		3 (Period 2)
Medium	5 (Period 1) 4 (Period 2)	44 (Period 1) 8 (Period 2)
High	12 (Period 1) 9 (Period 2)	53

During this period, a low public safety risk assessment was impossible with any criminal history unless a sole offense was rated as low severity or was moderate severity and was at least five years old. Just two traffic offenses within the last five years would place someone in the medium public safety risk category. So too did a single drug possession conviction within the last five years, with its new moderate severity rating.¹⁸³ These offenses, therefore, precluded a release recommendation. Likewise, if within the last 10 years, someone with a single drug possession charge had any other conviction (including a traffic offense), it would be impossible to receive a recommendation of release. As with the prior levels, a single charge for DUI or DV (regardless of age or actual conviction), would render someone a medium flight risk. Yet under the new risk levels, two charges would make the person a high safety risk, akin to having a conviction for arson within the past 5 years. Conversely, individuals with petty larceny charges received half the points they previously would have and could achieve a low public safety score with the January 2014 changes.

Changes to the Flight Risk Rubric in Period 2:

The RCA system allows for manipulation of the assessment of risk through adjusting the scoring factors, the points assigned to each factor, and the risk level assigned to total points. Changes to any one of these rubrics affects the detain/release recommendation. While the public safety risk assessment system was manipulated in various ways between 2012 and 2015, the changes to how flight risk was assessed and how the public safety and flight risk levels were combined to generate detention and release recommendations were particularly dramatic.

The points for prior voluntary returns or departures remained the same, but the scores for many of the other factors were changed (original score is struck through below).¹⁸⁴

General Flight Risk Factors	Score
Previously fled or avoided removal after a final order	4 2
Revocation of supervision in prior immigration case	4 2
Violation of conditions of supervision in a prior immigration case	4 2
Bond breach in an immigration or criminal case	4 2
Walk-away from a non-secure facility or alternatives to detention program	4 2
History of Drug Use	1
Current drug user	2

¹⁸³ See RCA RULES AND SCORING, *supra* note 95, at tbl.1 (Point Based Scoring Rules).

¹⁸⁴ *Id.* (Logic Based Scoring Rules)

Final Removal Order Pending Appeal	-4 -2
Final Order with no Appeal Pending	5
In Immigration Proceedings	0
Valid government identification	-1
False identification document	+1 per unique false name up to +2 total

Community Ties	Score
Individual lives with immediate family members	-4 -3
Individual has lived at address for 6 months or more	-4 -3
Individual has a stable address but has lived there for less than six months	0
Individual has no stable address	+2
Benefit application is pending with USCIS	-2
Service in the U.S. Armed forces by the migrant or spouse	-2 -3
Individual has a U.S. citizen spouse or child	-2 -3
If no U.S. citizen spouse or child, then migrant has spouse or child or other family members in the local community	-1
If no U.S. citizen spouse or child then whether the migrant has family in the US but not in the local community	0
Individual is enrolled in school or a training program	-1
Individual has work authorization	-1
Individual owns property or considerable assets in the community	-4 -3
Individual has legal representation	-1
No established family or community support	+2

The changes to the flight risk scoring rubric weighed certain community ties more heavily to reduce the Flight Risk scores while simultaneously adjusting the risk thresholds. Together these changes increased the number of migrants assigned a low risk of flight.¹⁸⁵ The new flight risk levels during Period 2 were:¹⁸⁶

Flight Risk		
	Minimum	Maximum

¹⁸⁵ E-mail from ERO Taskings on behalf of Marc Rapp, Assistant Dir. For Law Enft Sys. & Analysis, regarding changes to the RCA Scoring Methodology, to Field Office Directors, Deputy Field Office Directors and Assistant Field Office Directors (Jan. 6, 2014, 05:17 EST) [hereinafter *2014 RCA Scoring Methodology Change*], in CONSOLIDATED FOIA RESPONSES, *supra* note 19, at 39.

¹⁸⁶ RCA RULES AND SCORING, https://scholarship.law.duke.edu/faculty_scholarship/3994/ (Logic Based Scoring Rules)

Low	none	-5 -2
Medium	-4 -1	-4 2
High	2 3	none

Changes to RCA Detain/Release Recommendation in Period 2:

In combination, the changes to the public safety and flight risk rubrics in 2014 aimed at reducing the rate of supervisor overrides by increasing the recommendations to detain individuals with a criminal history and increasing the recommendations to release individuals with community ties and no criminal history.¹⁸⁷ Specifically, the RCA rubric was changed so that no individual would receive a detain recommendation based on high flight risk but low public safety risk; this combination of risk factors instead resulted in a recommendation for the supervisor to determine detention or release.¹⁸⁸ And those with a low public safety score and a medium flight risk score were recommended for release.¹⁸⁹

		Public Safety		
		0 to 4 0 to 3	5 to 11 4 to 8	12 or higher 9 or higher
Flight Risk	-5 or lower -2 or lower	Release	Supervisor to Determine	Detain, Eligible for Bond
	-4 to -1 -1 to 2	Supervisor to Determine Release	Supervisor to Determine	Detain, Eligible for Bond Detain
	2 or higher 3 or higher	Detain, Eligible for Bond Supervisor to determine	Detain, Eligible for Bond	Detain, Eligible for Bond Detain

At the same time, individuals with high public safety scores and medium or high flight risk scores, who were not subject to mandatory detention, no longer received a bond recommendation. This change coincided with ratcheting up scores assigned to certain criminal history so that more people would be categorized high risk to public safety and receive no bond unless they had overwhelming community ties.¹⁹⁰ The shift shrunk the group of individuals who would receive a bond recommendation from ICE and increased the number of migrants recommended for detention without bond even though they were eligible for one.¹⁹¹ Supervisors could override and assign a bond,

¹⁸⁷ E-mail from ERO Taskings on behalf of Marc Rapp, Assistant Dir. For Law Enft Sys. & Analysis, regarding changes to the RCA Scoring Methodology, to Field Office Directors, Deputy Field Office Directors and Assistant Field Office Directors (Jan. 6, 2014, 05:17 EST) [hereinafter *2014 RCA Scoring Methodology Change*], in Consolidated FOIA Responses, *supra* note 19, at 39.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* See also RCA RULES AND SCORING, https://scholarship.law.duke.edu/faculty_scholarship/3994/ (Logic Based Scoring Rules)

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

but the default for this group became no bond. As a result, if supervisors did not override the RCA recommendation and set a bond, migrants who were bond-eligible often had to wait weeks in order to seek a bond from an immigration judge despite their statutory eligibility for release.

Changes to the Mandatory Detention Rubric in Period 2:

The mandatory detention rubric was also changed in January 2014 to allow for more people to be released without requiring the supervisor to override the detain recommendation. Individuals who had a final order of removal, and had left the United States and later returned, no longer received an RCA recommendation of detain in the Custody of the Service (without bond) if they had a special vulnerability, which includes being a victim of trauma, and did not have a high public safety score.¹⁹² The determination was left to the supervisor in these cases. This change meant that individuals fleeing harm who had passed a reasonable fear interview were not categorically recommended for detention without bond and could be released (with or without a bond) directly by ICE. With this change, a special justification for deviating from the RCA recommendation was no longer required. Thus, if a special vulnerability was identified, the RCA recommendations allowed for far more supervisor discretion.¹⁹³

		Public Safety		
		Low	Medium	High
Flight Risk	Low	Detain Supervisor to Determine	Detain Supervisor to Determine	Detain
	Medium	Detain Supervisor to Determine	Detain Supervisor to Determine	Detain
	High	Detain Supervisor to Determine	Detain Supervisor to Determine	Detain

Additionally, individuals with an unexecuted removal order (i.e., had not left the United States) could be allowed to leave detention with or without bond, at the supervisor’s discretion, if the individual had a high flight risk score but low public safety score.¹⁹⁴

		Public Safety		
		Low	Medium	High
Flight Risk	Low	Release	Supervisor to Determine	Detain
	Medium	Supervisor to Determine	Supervisor to determine	Detain
	High	Detain Supervisor to Determine	Detain	Detain

C. The RCA Rubric: February 2015—October 2016 (Period 3)

President Obama’s 2014 announcement of a new three-tiered priority enforcement policy prompted major revisions to the RCA’s factors and scoring methodology in February 2015. These

¹⁹² See RCA RULES AND SCORING, *supra* note 95, at tbl.1 (Point Based Scoring Rules).

¹⁹³ *Id.* (Logic Based Scoring Rules)

¹⁹⁴ *Id.*

revisions were intended to align the RCA with the new prosecutorial priorities.¹⁹⁵ The February 2015 changes cemented the use of the RCA as a tool to align detention with enforcement priorities. At this point, the RCA no longer used classic indicia of flight risk and manipulated the scoring of certain crimes so that drug possession and the offenses labeled serious misdemeanors would generally result in a medium risk public safety assessment and thus the recommendation for no-bond detention. We address the implications of this major shift in the RCA's orientation in Part IV. We describe the specific changes to the algorithm here.

Changes to the Public Safety Rubric in Period 3:

The public safety rubric saw two major changes in the third period of this study. The first was the creation of a new offense severity level: “lowest.”¹⁹⁶ The lowest severity level offenses included traffic offenses (except those for hit and run, DUI, and transporting dangerous materials) and a general traffic offense code. These offenses had previously been categorized as low and therefore would have generated two points for the public safety score if they were the basis for the ICE encounter, or occurred within the last five years prior to the February 2015 changes.¹⁹⁷ This addition finally took offenses like driving without a license—common in states that do not provide drivers' licenses to residents without proof of immigration status—out of the public safety risk evaluation. Under the prior rubric, two traffic offenses within the last five years equated to a medium public safety risk level. The February 2015 change recalibrated that assessment to better reflect actual threats to public safety.¹⁹⁸

Severity	Score
Lowest	0
Low	2
Moderate	4
High	6
Highest	7

The other major change was the addition of a new Special Public Safety Factor called “serious misdemeanors.” These crimes generate 7 points and thus make detention without bond the most likely recommendation. The new Special Public Safety Factors included drug distribution and weapons offenses.¹⁹⁹

¹⁹⁵ 2014 RCA Scoring Methodology Change, *supra* note 185 at 39; E-mail from ERO Taskings on behalf of Marc Rapp, Assistant Dir. For Law EnFt Sys. & Analysis, regarding changes to the RCA Scoring Methodology, to Field Office Directors, Deputy Field Office Directors and Assistant Field Office Directors (Feb. 11, 2015, 1:03 PM), in CONSOLIDATED FOIA RESPONSES 15-16.

¹⁹⁶ RCA RULES AND SCORING, https://scholarship.law.duke.edu/faculty_scholarship/3994/ (Crime Codes)

¹⁹⁷ *Id.* (Crime Codes), (Point Based Scoring Rules)

¹⁹⁸ *Id.* (Point Based Scoring Rules)

¹⁹⁹ NCIC Offense Severity Mapping Spreadsheet, in CONSOLIDATED FOIA RESPONSES, *supra* note 19, at 908–929. The new NCIC codes designated as serious misdemeanors and thus Special Public Safety Factors: carrying a concealed weapon, carrying a prohibited weapon, weapon registration violation, unauthorized possession of a weapon, firing a weapon, trafficking weapons, other weapons offenses, drug trafficking, and distributing hallucinogens. *See also* RCA RULES AND SCORING, https://scholarship.law.duke.edu/faculty_scholarship/3994/ (Crime Codes), (Point Based Scoring Rules)

In addition to these two major changes, the score for gang affiliation was increased to 9.²⁰⁰ This meant that any suspected association alone resulted in a high public safety score and a recommendation to detain without bond. The risk levels assigned to the public safety scores remained unchanged from January 2014 and were as follows:

Public Safety Risk		
	Minimum	Maximum
Low	0	4 (Period 1) 3 (Period 2 & 3)
Medium	5 (Period 1) 4 (Period 2 & 3)	4 (Period 1) 8 (Period 2 & 3)
High	4 (Period 1) 9 (Period 2 & 3)	53

Changes to the Flight Risk Rubric in Period 3:

The real action in Period 3 was to the flight risk algorithm. Here, the changes jettisoned most indicia of risk. Prior encounter history was eliminated as a factor. Instead, date of entry was the prime determinant of flight risk level with 14 points assigned to Obama's high priority category of recent entrants.²⁰¹

Encounter History Entry Date	Score
1–2 Voluntary Returns or Departures	2
3 or more Voluntary Returns or Departures	5
Entry without authorization after January 1, 2014	14
Unknown date of entry	1
Entry without authorization before January 1, 2014	0

The scores generated by most general flight risk factors and indicia of community ties were nullified and again replaced with scores keyed to the January 1, 2014 cut-off date under the policy on enforcement priorities.²⁰²

General Flight Risk Factors	Score
Previously fled or avoided removal after a final order	1 (Period 1) 2 (Period 2)
Revocation of supervision in prior immigration case	1 (Period 1) 2 (Period 2)
Violation of conditions of supervision in a prior immigration case	1 (Period 1) 2 (Period 2)
Bond breach in an immigration or criminal case	1 (Period 1) 2 (Period 2)

²⁰⁰ RCA RULES AND SCORING, https://scholarship.law.duke.edu/faculty_scholarship/3994/ (Point Based Scoring Rules)

²⁰¹ RCA RULES AND SCORING, https://scholarship.law.duke.edu/faculty_scholarship/3994/ (Point Based Scoring Rules)

²⁰² *Id.*

Walk away from a non-secure facility or alternatives to detention program	1 (Period 1) 2 (Period 2)
Abuse of a visa or visa waiver program	7
History of Drug Use	4
Current drug user	2
Final Removal Order Pending Appeal	-1 -2
Final Order with no Appeal Pending	5
In Immigration Proceedings	0
Final order before Jan. 1, 2014 and previously removed	7
Final order before Jan. 1, 2014 and not previously removed	1
No final order	0
Valid government identification	-1
False identification document	+1 per unique false name up to +2 total

Community Ties	Score
Individual lives with immediate family members	-1 (Period 1) -3 (Period 2) -1
Individual has lived at address for 6 months or more	-1 (Period 1) -3 (Period 2) -1
Individual has a stable address but has lived there for less than six months	0
Individual has no stable address	+2
Benefit application is pending with USCIS	-2
Service in the U.S. Armed forces by the migrant or spouse	-2 (Period 1) -3 (Period 2) -1
Individual has a U.S. citizen spouse or child	-2 (Period 1) -3 (Period 2) -1
If no U.S. citizen spouse or child, then migrant has spouse or child or other family members in the local community	-1
If no U.S. citizen spouse or child then whether the migrant has family in the US but not in the local community	0
Individual is enrolled in school or a training program	-1
Individual has work authorization	-1
Individual owns property or considerable assets in the community	-1 (Period 1) -3 (Period 2) -1
Individual has legal representation	-1
No established family or community support	+2

The calibration of public safety scores to risk levels also saw major changes in February 2015.²⁰³

Flight Risk		
	Minimum	Maximum
Low	none	-5 (Period 1) -2 (Period 2) 1 (Period 3)
Medium	-4 (Period 1) -1 (Period 2) 2	+1 (Period 1) 2 (Period 2) 8
High	2 (Period 1) 3 (Period 2) 9	none

These changes made a few new politically-based factors determinative of the risk level. Entry after January 1, 2014, put a migrant in the high-risk category with 14 points for that factor alone. A migrant with an unknown entry date and a final removal order from before January 1, 2014, who was not previously removed would receive 2 points and a medium risk classification if they did not have mitigating community ties or home stability. Someone who abused their visa or the visa waiver program or had received a removal order before January 1, 2014, and had been previously removed would almost always be classified as a medium flight risk with 7 points. Indicators of strong ties to the United States and commitment to the immigration process, such as a pending benefits application, work authorization, legal counsel, or a pending appeal, were eliminated from the risk assessment altogether. Therefore, with only six possible negative points for community ties, it was nearly impossible for any person with any of these large point factors to be classified as low risk. At the same time, prior indicators of risk such as a history of absconding, previous immigration encounters, or having a final order with no appeal pending were not taken into account.

In February 2015, the detain/release recommendations based on combined public safety and flight risk scores were changed again. With this revision, the RCA no longer generated a bond recommendation for anyone. It thus recommended detention without bond for more than double the risk classifications. Further, the public safety thresholds did not change even though the recommendation to detain without bond was applied to all medium and high public safety groups.²⁰⁴

Public Safety			
		Low	Medium
			High

²⁰³ RCA RULES AND SCORING, https://scholarship.law.duke.edu/faculty_scholarship/3994/ (Logic Based Scoring Rules)

²⁰⁴ RCA RULES AND SCORING, https://scholarship.law.duke.edu/faculty_scholarship/3994/ (Logic Based Scoring Rules)

Flight Risk	Low	0 to 3 0 to 4	4 to 8 5 to 11	9 or higher 12 or higher	
		5 or lower 2 or lower 1 or lower	Release (All Periods)	Supervisor to Determine (All Periods)	Detain, Eligible for Bond (Period 1 & 2) Detain (Period 3)
	Medium	4 to 1 1 to 2 2 to 8	Supervisor to Determine (Period 1) Release (Period 2) Supervisor to Determine	Supervisor to Determine (Period 1 & 2) Detain (Period 3)	Detain, Eligible for Bond (Period 1) Detain (Period 2 & 3)
		2 or higher 3 or higher 9 or higher	Detain, Eligible for Bond (Period 1) Supervisor to determine (Period 2 & 3)	Detain, Eligible for Bond (Period 1 & 2) Detain (Period 3)	Detain, Eligible for Bond (Period 1) Detain (Period 2 & 3)
	High				

As a consequence of the February 2015 changes, an individual who entered the U.S. after January 1, 2014, typically received the RCA recommendation of either “supervisor to determine” or detain without bond, depending on the public safety score.²⁰⁵ People identified as abusers of the visa or visa waiver program also typically received a recommendation of a supervisor to determine even if they had no criminal history.²⁰⁶ If the supervisor wanted to detain a person based on this factor alone though, additional approval was needed from the Field Office Director.²⁰⁷

Changes to the Mandatory Detention Rubric in Period 3:

The mandatory detention rubric was restricted in February 2015 to increase the categories of individuals with unexecuted removal orders the RCA recommended for detention without bond. Now individuals with medium flight risk and public safety scores were recommended for detention without bond along with those with low public safety scores and high flight risk scores. Given the changes to the flight risk algorithm, high flight risk was simply a function of the date of a removal order or entry after January 1, 2014.

		Public Safety		
Flight Risk		Low	Medium	High
	Low	Release	Supervisor to Determine	Detain

²⁰⁵ U.S. Immigration & Customs Enforcement Office of Enforcement and Removal Operations, RCA Executive Action Scoring Updates Guide (Feb. 2015), in CONSOLIDATED FOIA RESPONSES, *supra* note 19, at 1496.

²⁰⁶ *Id.* at 1497.

²⁰⁷ *Id.*

	Medium	Supervisor to Determine	Supervisor to determine (Period 1 and 2) Detain (Period 3)	Detain
	High	Detain (Period 1) Supervisor to Determine (Period 2) Detain (Period 3)	Detain	Detain

Conversely, more individuals who had executed orders and returned to the United States were recommended for release. For individuals with special vulnerabilities, the supervisor was given the decision whether to detain or release even for those with a high public safety risk score. And the RCA was altered so that a special vulnerability was no longer required to avoid a recommendation of detain without bond for a few groups of people who represented a low risk to public safety.

D. The RCA under Trump

The final change to the RCA algorithm that has been documented occurred in 2017. Despite the Obama Administration’s move to eliminate bond from the custody recommendation given by the RCA, the Trump Administration made the system yet more punitive. In 2017, Reuters News reported DHS eliminated the release recommendation altogether.²⁰⁸ With this additional manipulation, a person seeking to leave immigration detention, regardless of their low risk of flight and low risk to public safety, had to rely on a supervisor exercising favorable discretion or wait weeks to challenge their detention in immigration court. After striking the release recommendation, the rate of detention of individuals with no criminal history tripled.²⁰⁹

The RCA was designed to be highly configurable, with alterations possible to the factors assessed; the scores assigned to each factor; the severity of every criminal offense; the range of scores designating high, medium, or low risk levels; and the ultimate recommendation generated for various combinations of flight and public safety risk levels. Manipulation of any one of these variables has the power to increase or decrease the likelihood of custody for thousands of migrants. Our FOIA results reveal that DHS did indeed change the RCA’s algorithm in each of these ways. While adaptation of the algorithm is not inherently problematic, here the changes were not to calibrate risk measurements and limit unjustified detention; the changes instead largely abandoned risk and recommended expanded detention. The next Part examines the impact of particular manipulations as well as the RCA’s overall design on its ability to accomplish its stated purpose.

IV. The RCA’s Failure to Achieve Policy Goals

The architects of the RCA touted the system as a means to reduce harm to vulnerable individuals in detention²¹⁰ and increase transparency, standardization, and rationality in the use of civil immigration detention.²¹¹ The way in which the RCA was implemented and manipulated, however,

²⁰⁸ Mica Rosenberg & Reade Levinson, *Trump’s Catch-and-Detain Policy Snares Many Who Have Long Called U.S. Home*, REUTERS (June 20, 2018, 3:18 PM), <https://www.reuters.com/investigates/special-report/usa-immigration-court/>.

²⁰⁹ *Id.*

²¹⁰ UNHCR Roundtable, *supra* note 55, at 25.

²¹¹ See **RCA playbook and power points as well as FOIA request FNs.**

subverted these goals. This Part examines the RCA tool against each of its policy objectives and identifies the design choices and subsequent changes to its algorithm that co-opted the tool for political ends.

A. Rationalization

The most significant shortcomings of the RCA relate to its central tenet: ensuring risk-based custody decisions. The break with the RCA's fundamental purpose stems from two policy choices. The first is tied to the primacy of local practice, such that the tail wags the dog. Instead of local ICE officers and supervisors conforming their detention decisions to risk-based assessments, the RCA algorithm and scoring rubric was altered to match preexisting policy and minimize supervisor overrides. Second, the RCA's architecture conflates risk with enforcement preferences. This confusion was present to some degree in the RCA's initial business rules; it was laid bare through subsequent manipulations of the RCA algorithm. By keying the flight risk assessment and the public safety risk assessment to prosecutorial priorities, the RCA ties detention recommendations to enforcement policy. This link lacks an underlying logic, however. Enforcement priorities do not necessarily correlate with a risk to public safety or risk of flight. The characteristics used to determine an individual's priority for enforcement have no inherent bearing on the need for detention. The RCA, however, stopped distinguishing indicia of risk from political preference.

Turning first to the primacy of local policy, the RCA architects not only allowed field offices to override the system's recommendations independent of risk, they also re-engineered the methodology to conform to local custom. The RCA's scoring system was changed significantly in January 2014.²¹² With these changes, ICE headquarters issued a memo to all field offices explaining that the changes were made to “strengthen alignment both with ICE priorities and with the actual Detain/Release decisions currently being generated by ERO RCA end users.”²¹³ The anticipated result being “a decrease in the number of times supervisors need to override RCA recommendations.”²¹⁴ This included responsive scoring changes that would “place greater emphasis on aliens' criminal records” so that fewer migrants received a public safety score of low.²¹⁵

The scoring changes included increasing the severity of drug possession crimes, which are generally misdemeanor offenses, from low to medium.²¹⁶ At the same time, the threshold scores for assessment as low risk and as moderate risk were lowered.²¹⁷ The combination of these changes meant the RCA would no longer recommend release for someone with a single drug possession charge within the past five years. Even if the possession conviction was nearly ten years old, if the migrant had a single subsequent traffic offense (not DUI), the individual would be deemed a moderate public safety

²¹² See *infra* app. at ___ (discussing all changes to the RCA rubric from January 2014 to February 2015).

²¹³ U.S. Immigration & Customs Enforcement Office of Enforcement and Removal Operations, Risk Classification Assessment (RCA) in EARM 5.3 Quick Reference Guide 5-6 (revised Aug. 2013) [hereinafter *RCA in EARM 5.3, Quick Reference Guide*], in CONSOLIDATED FOIA RESPONSES, *supra* note 19, at 1734–44.

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ See *infra* app. at ___. The January 2014 scoring changes did not universally ratchet up the consequences for criminal history though. Petty larceny offenses and immigration crimes, such as illegal reentry, were reduced in severity so that individuals with criminal history involving theft or border crossing could receive an assessment of low risk and be recommended for release. *Id.*

²¹⁷ See *infra* app. at ___.

risk and would not be recommended for release. Similarly, someone with two traffic offenses (not DUI) within the last five years was now deemed a moderate risk.²¹⁸ Instead, those migrants labeled as a moderate risk to public safety would either receive the “supervisor to determine” outcome or detain, eligible for bond recommendation. Consequently, for many of these migrants, now deemed moderate risks based on the same characteristics previously deemed low risk, there would be no record of supervisors overriding release recommendations nor the requirement that they explain that decision.

To be clear, the FOIA results show that these changes were based on supervisors’ decisions to detain individuals with criminal history, not evidence that individuals the RCA previously labeled as low risk to public safety had indeed been released and committed new crimes. Conduct that had previously been evaluated as low risk to others was simply relabeled as moderate. Changes intended to reduce supervisor overrides of the RCA recommendation mean that end users’ detention practices were generating the risk assessment methodology rather than the reverse. Instead of industry-standard risk methodology informing the use of civil detention, the customary use of detention was driving the methodology.

The second driver away from risk-based detention lies with the use of the RCA to implement the executive branch’s immigration enforcement priorities. An early frequently-asked-questions resource makes clear that the RCA “was developed to better support ICE immigration enforcement priorities.”²¹⁹ The link between enforcement policy and risk assessment is fundamentally flawed. The RCA’s “risk” levels mirrored the executive branch’s enforcement priorities, but enforcement priorities do not necessarily correspond to the danger someone poses or their likelihood of flight. A person who has recently entered the United States to seek asylum is not inherently dangerous or likely to evade enforcement. In fact, data show the opposite to be true.²²⁰ These migrants have been priorities for enforcement under both the Obama and Trump administrations. Regardless of one’s views on the lack of wisdom and humanity embodied by those policies, the fact that these migrants are an enforcement priority does not render them high risks. The automated system, however, imposed detention on groups of migrants identified as enforcement priorities, whether or not the groups shared characteristics associated with risk of flight or dangerousness. Indeed, with the changes in Period 3, actual indicia of risk became nearly irrelevant to the system’s determination that a migrant represented a high, medium, or low risk of flight. Here, the FOIA results reveal that the RCA broke with its fundamental purpose.

A guide to the overhaul of the RCA algorithm in February 2015 is explicit about the system’s redesign to align detention with enforcement policy, not risk. The guide sets out the executive’s

²¹⁸ See *infra* app. at ____.

²¹⁹ 2012 FAQ, *supra* note 102, at 1326.

²²⁰ AM. IMMIGRATION COUNCIL, IMMIGRANTS AND FAMILIES APPEAR IN COURT: SETTING THE RECORD STRAIGHT 1 (2019) (“Comprehensive analyses of the government’s own data show that in the vast majority of situations, immigrants placed into removal proceedings appear for all of their court hearings.”); WALTER A. EWING, DANIEL E. MARTÍNEZ, & RUBÉN G. RUMBAUT, THE CRIMINALIZATION OF IMMIGRATION IN THE UNITED STATES 1 (“[I]nnumerable studies have confirmed two simple yet powerful truths about the relationship between immigration and crime: immigrants are less likely to commit serious crimes or be behind bars than the native-born, and high rates of immigration are associated with lower rates of violent crime and property crime.”); *Most Released Families Attend Immigration Court Hearings*, TRAC, SYRACUSE U. (June 18, 2019), <https://trac.syr.edu/immigration/reports/562> (finding that the vast majority of “newly arriving” asylum seekers attend their initial court hearings).

priorities alongside the recommendations the RCA would typically generate after the changes to its rubric:²²¹

Priority 1	Known or suspected terrorists	Detain (no bond)
	Aliens apprehended at the border	Supervisor to determine or detain
	Suspected Gang affiliation	Detain (no bond)
	Felons	Detain (no bond)
	Aggravated Felons	Detain (no bond)
Priority 2	3 or more misdemeanors	Supervisor to determine or detain
	Significant misdemeanor	Supervisor to determine or detain (due to a special public safety factor designation)
	Entry after 1/1/14	Supervisory to determine or detain (if high flight risk score)
	Abuse of visa or visa waiver program	Supervisor to determine (if medium flight risk score)
Priority 3	Final order after 1/1/14	Supervisor to determine (if medium flight risk score)
Non-Priority	All other	Release (will receive low safety and low flight risk scores)

These changes to the RCA custody recommendations were implemented largely through the flight risk component. Many of the factors to measure home stability, community ties, and prior immigration encounters and absconding became largely irrelevant and were replaced with factors keyed to January 1, 2014—the date determined by the Obama Administration as indicating a recent entry or recent order of removal—even though this date is not inherently indicative of a high risk of flight.²²² These changes made a few new politically-based factors determinative of risk level.

The use of the RCA to impose detention based on enforcement priority level is evident to a lesser degree in the public safety component. Here, the algorithm is designed to weigh heavily any criminal history, including charges alone, for certain offenses that coincide with enforcement policy. These offenses are identified as “Special Public Safety Factors.”²²³ From the RCA’s creation until February 2015, they were limited to domestic violence (DV) and driving under the influence of alcohol or drugs (DUI) at which point drug distribution and weapons offenses were added to the list. These crimes are scored equivalently to the highest severity offenses notwithstanding the fact that both DUI and DV offenses were initially designated as low severity crimes. As a result, the RCA deems a charge for DUI akin to a charge of arson that endangers life, kidnapping, or intentional homicide.²²⁴

The RCA’s architects understood the fundamental disconnect between the scores assigned the special public safety factors and their relation to risk. The designers compensated for the overvaluation of these offenses in the detention determination rubric by their excessive score from the custody

²²¹ RCA in EARM 5.3, *Quick Reference Guide*, *supra* note 213, at 1789.

²²² Ingrid Eagly, et al., *Detaining Families: A Study of Asylum Adjudication in Family Detention*, 106 CALIF. L. REV. 785, 811 (2018).

²²³ See *infra* app. at ____ (discussing special public safety factors).

²²⁴ RCA RULES AND SCORING, https://scholarship.law.duke.edu/faculty_scholarship/3994/ (Point Based Scoring Rules)

classification system. For those individuals to be detained, the RCA recommends a low, medium/low, medium/high, or high custody classification level.²²⁵ The custody classification is designed to match the detention facility's security measures to the individual's dangerousness. This custody classification uses the public safety score minus the special public safety score. Instead, the custody classification algorithm scores those offenses according to their severity level, which was low or moderate depending on the offense and time period.²²⁶ Were the special public safety offenses to represent dangerousness, their score should not vary based on their use. From the outset, however, the risk score used to determine the detain/release recommendation gave them disproportionate weight, while the rubric determining the security precautions required weighed them according to their actual dangerousness. Because the offenses were enforcement priorities, detention was designed to follow. Again, the RCA subordinates indicia of risk to political preference for detention.

Migrants with gang affiliations were also designated as a high enforcement priority under the Obama administration. Like with date of entry or DUI charge, the RCA gave this factor disproportionate weight. The FOIA results show that gang affiliation was also weighted as high as or higher than the highest severity offenses for much of the RCA's history.²²⁷ This is particularly significant given how broadly this factor was applied. RCA users are instructed to designate a migrant as gang affiliated in the following circumstances: self-identifying as a member, having tattoos identifying a specific STG, being seen displaying STG signs or symbols, being identified through an untested informant, being arrested with other STG members on at least two occasions, being identified as a member by the facility warden or administrator, being identified as a member in a written correspondence, possessing other STG indicia, or being identified as a member through documented reasonable suspicion.²²⁸

A key training document underscores the strictness with which this factor is to be applied.²²⁹ The manual describes the person as having gang-related tattoos visible and being identified as a gang member by Homeland Security Investigations in a raid.²³⁰ The manual explains that the ICE officer determines that the person was "strongly connected with the gang in his teens, but has since distanced himself, choosing instead to focus on the support of his siblings."²³¹ Despite this, the manual indicates that he should be scored as affiliated with a gang, receiving the same number of points as someone who currently self-identifies as an active member of a gang.²³² The high number of points assigned for a suspected affiliation and the breadth of this factor means that migrants will not be recommended for release regardless of the strength of the evidence on which affiliation is based or the current status of that affiliation.

By eliminating many of the factors that reflect risk and replacing many of them with policy-based metrics, the RCA's algorithm lost the ability to measure true risk. Instead, it became a tool of prosecution, pairing detention with enforcement preference regardless of risk.

²²⁵ *RCA Release 1.0 Business Requirements*, *supra* note 63, at 899.

²²⁶ *Id.* at 1030, 1036–37.

²²⁷ See *infra* app. at ___. (describing the security threat group or gang affiliation factor and its scoring over time).

²²⁸ *RCA Worksheet Instructions*, *supra* note 149, at 1647.

²²⁹ *2012 RCA Scenario Playbook*, *supra* note 144, at 305–15.

²³⁰ *Id.* at 311.

²³¹ *Id.* at 312.

²³² *Id.* at 315.

B. Standardization

A principal goal of the RCA was to standardize custody decisions across ICE Enforcement and Removal Operations' twenty-four field offices.²³³ By accepting supervisor overrides for entire categories of migrants based on field office policy and declining to make detention or release recommendations for large groups of moderate-risk individuals, the RCA sacrificed standardization from the start. Instead, geography continues to drive detention, in place of risk.

Standardization appeared to be a high priority for the RCA. A document to all ERO personnel accompanying the RCA's rollout explained that the automated program "provides officers and supervisors with a standardized recommendation and decision tool based on ICE policies, procedures and enforcement priorities."²³⁴ It would result in "consistent recommendations" for the use of immigration custody.²³⁵ At the same time, the goal of standardization and uniformity had to be balanced against the role of supervisor discretion. An automated program deciding whether to detain or release someone without human review would be unacceptable. Individual officers needed to retain ultimate responsibility for the final decisions to detain or release the migrants before them. Thus, from the beginning, the twin objectives of standardizing custody decisions and retaining human oversight sat in inevitable tension. The RCA, however, engaged in very little balancing of these dual goals. Instead, the RCA prioritized the policies of individual field offices and preferences of supervisors again and again such that standardization could never result.

With its initial communication to RCA users, DHS officials made clear that the RCA "does not replace local bond guidance and discretion."²³⁶ Shortly after the RCA was implemented nationally, DHS officials quantified the impact of local policy. As of February 2013, supervisors were overriding the RCA recommendation 25% of the time.²³⁷ The single biggest cause of overrides was expedited removal. At the time, these cases were receiving "detain, eligible for bond" recommendations, which supervisors were changing to "detain in the custody of the service."²³⁸ The second largest reason for supervisor overrides was criminal history that included an arrest or conviction for driving under the influence. In roughly 30% of cases involving a conviction or charge for DUI, supervisors were overriding the RCA's recommendation of "detain, eligible for bond" and choosing to detain without bond.²³⁹ The response of the RCA's designers was not to align the policy of those "field offices [that] do not offer bond to aliens w[ith] DUI/DWI in their criminal record" with the system's risk-based custody recommendation, but rather to "ensure [that] DUI cases are scored according to current ICE policy and make scoring changes, if necessary."²⁴⁰ DHS accepted this variation and prioritized local policy over standardized decision-making in the RCA.²⁴¹ Indeed, DHS acknowledged the primacy of local policy as a challenge to the RCA's implementation in its report to the Government Accountability Office. DHS officials stated that "[f]or example, there are varying local policies and procedures on

²³³ *Morton Testimony*, *supra* note 15, at 16; *GAO Questions Regarding the RCA*, *supra* note 21, at 37.

²³⁴ 2012 FAQ, *supra* note 102, at 1326.

²³⁵ *Id.*; *GAO Questions Regarding the RCA*, *supra* note 21, at 37.

²³⁶ 2012 FAQ, *supra* note 102, at 1326.

²³⁷ *2013 RCA Overview*, *supra* note 58, at 232.

²³⁸ *Id.*

²³⁹ *Id.* at 233.

²⁴⁰ *Id.* at 238.

²⁴¹ *GAO Questions Regarding the RCA*, *supra* note 21, at 37.

how aliens encountered for DUI offenses are processed—some field offices automatically detain these aliens while others set a standard \$25,000 bond amount” and explained that “supervisors in a specific location may find that they are continually required to override the RCA generated recommendations for aliens with specific characteristics.”²⁴²

Structurally, the RCA avoids standardizing the custody recommendation for migrants evaluated as middling risks. The RCA includes the recommendation of “supervisor to determine,” which obviates the need for a supervisor to override the system or provide a justification. Functionally, the “supervisor to determine” result, is a blank slate, not a recommendation. For this group of migrants, the RCA contains no custody guidance. The decision depends exclusively on the supervisor’s discretion. The FOIA release showed that this no-recommendation recommendation was issued by the RCA for different risk classifications over time. Initially, anyone with some combination of medium-low flight and public safety risk levels was delegated to the supervisor to determine.²⁴³ This outcome was extended to individuals with low public safety risk but high flight risk levels in January 2014 (accompanied by an increase in the threshold for high flight risk).²⁴⁴ It was subsequently removed for individuals with medium flight and public safety risks and replaced with a detain (no bond) recommendation.²⁴⁵ With a large swath of migrants receiving no real custody recommendation from the RCA, the automated system could never standardize the decision-making process or the detention outcomes the way its proponents promised.

The center group of risk combinations with no actual custody or release recommendation reflect the system’s attempt to incorporate prosecutorial discretion and its inability to standardize this process. In addition to its other goals, the system “support[ed] the use of prosecutorial discretion by capturing important factors that agents/officers and supervisors should consider in making informed custody decisions.”²⁴⁶ The use of the RCA to facilitate prosecutorial discretion came at the expense of standardization and transparency, however.

The RCA simply did not capture and consolidate all factors the Obama administration identified as relevant or guide supervisors when they were present. Positive factors included the length of presence in the U.S., circumstances and age at the time of entry, educational history, service in the military, ties to the U.S., ties to and conditions in the home country, age, close family members with status in the U.S., likelihood of being granted relief through a family member or as a victim of crime or persecution, and participation in law enforcement efforts.²⁴⁷ Negative factors included risks to national security, criminal history that includes serious felonies or numerous offenses, known gang members, and individuals with a record of illegal re-entry or immigration fraud.²⁴⁸ Some of these factors were incorporated into the RCA’s algorithm, such as criminal history, gang involvement, re-entry violations, military service, and eligibility for family-based visas. Conversely, ICE officials acknowledged from the outset that the RCA does not take into account other factors that should be considered when deciding whether to detain someone, specifically: being a threat to national security,

²⁴² *Id.*

²⁴³ See *infra* app. at ___.

²⁴⁴ See *infra* app. at ___.

²⁴⁵ See *infra* app. at ___.

²⁴⁶ 2012 *Key User Training*, *supra* note 68, at 1109.

²⁴⁷ *Id.* at 1110.

²⁴⁸ *Id.* at 1111.

eligibility for a U or T visa, length of lawful status in the U.S., entry as a minor, lack of ties to the home country, conditions in the home country, or nationality that renders removal unlikely.²⁴⁹ Under the Obama administration, supervisors were instructed to consider all factors when deciding whether to agree with the RCA recommendation or make a detain/release determination in the first instance.²⁵⁰ These factors are not displayed automatically. Rather, the supervisor must click on an “info” link to generate a pop-up window with the additional prosecutorial discretion factors for consideration.²⁵¹ The RCA did not produce standardized recommendations based on these factors, nor did it require supervisors to document when and why they were exercising discretion, so that the goal of transparency was not served either.

Generally, supervisors used their discretion to impose detention without bond. Within a month of its national rollout, an RCA was completed for 83% of migrants taken into custody.²⁵² At that time, the RCA recommended detention (no bond) for 47% of the migrants processed; 33% received a recommendation of detention with a bond; .8% were recommended for release; and 20% received the recommendation that the supervisor should determine whether to detain or release the individual.²⁵³ The actual decisions approved by the supervisors skewed heavily toward no bond detention with 76% detained without bond; 15% detained with a bond; and 10% released on community supervision.²⁵⁴

The FOIA results make clear that as between centralized policy-makers and dispersed ERO supervisors, the latter won out. With that fundamental choice in place, the system is unable to standardize the process and outcomes of ICE’s detention decisions.

C. Transparency

Former ICE Director John Morton told Congress that the RCA would “improve transparency and uniformity in detention custody and classification decisions.”²⁵⁵ Likewise, the RCA’s designers introduced the program to all ICE personnel as one that “not only increases standardization, but also increases transparency for detention and community supervision decisions.”²⁵⁶ The promise of increased transparency, however, did not extend to immigration judges, attorneys representing those detained, or the migrants themselves. Further, the system’s design and its outcomes have long been hidden from scholars and experts in risk assessment and immigration detention. The prolonged process required to force compliance with our FOIA requests is emblematic of DHS’ resistance to any oversight of the RCA.

ICE alone sees the assessment of risk. After the RCA is complete, ICE officers are instructed to print a detailed summary of the RCA results and place that document in the individual’s A-file (the

²⁴⁹ 2012 *Key User Training*, *supra* note 68, at 1136; RCA SYSTEMS TRAINING, *supra* note 59, at 11.

²⁵⁰ RCA SYSTEMS TRAINING, *supra* note 59, at 11.

²⁵¹ RCA *Quick Reference Guide 3.0*, *supra* note 74, at 1385.

²⁵² 2013 *RCA Overview*, *supra* note 58, at 229. Initial rates of completing the RCA were much lower in the jurisdictions covered by the San Antonio, Dallas, and El Paso field offices. *Id.* This may have been the result of the initial requirement that an RCA was completed for individuals subject to expedited removal, which was later changed.

²⁵³ *Id.* at 230.

²⁵⁴ *Id.*

²⁵⁵ Morton *Testimony*, *supra* note 15, at 16.

²⁵⁶ RCA *Quick Reference Guide*, *supra* note 59, at 1739.

file that captures all immigration-related matters for the individual) and the person's detention file.²⁵⁷ The person recommended for detention or release does not receive a copy of the RCA detailed summary. This document is not generally released as part of a migrant's request for her own A-file but is instead redacted. For those people detained by ICE who challenge the terms of that detention in immigration court, neither the immigration judge nor the migrant's attorney receive the RCA detailed summary to review in that process. The attorney is unable to challenge the flight risk and public safety risk levels assigned through the RCA, as they are not disclosed. Until now, advocates could not have known the factors the RCA uses to recommend detention, release or bond, which would allow them to examine the reliability of the facts underlying the risk assessments and provide countervailing evidence. Furthermore, the secrecy surrounding the RCA's methodology means that attorneys have been unaware of the changes that moved the RCA away from measuring indicia of risk and toward detaining anyone who was a prosecutorial priority, regardless of her risk level. Immigration judges reviewing ICE's custody determinations are also kept in the dark as to the RCA recommendations and methodology and are thus hampered in their ability to scrutinize ICE's assertions of risk and ensure that civil detention is indeed justified.²⁵⁸ With no transparency of the RCA in bond hearings, ICE officers are not accountable for their mistakes in administering the RCA and DHS attorneys do not have to defend the methodology to adjudicators.

More broadly, the RCA's algorithm and outcomes have been shielded from public view for years. Extracting documents from DHS required numerous administrative appeals, multiple complaints in federal court by *pro bono* experts in FOIA litigation, a lengthy settlement period, and continued pressure to release all information DHS had previously agreed to in the settlement.²⁵⁹ Additionally, the FOIA results include no indication that the RCA's methodology was adjusted based on evidence of its accuracy in predicting risk of flight or risk to public safety. The program's designers state that "the methodology is based on current industry standard risk assessment techniques."²⁶⁰ The FOIA results, however, do not contain information on the substance of this "industry standard," how it accommodates the purported civil nature of immigration detention,²⁶¹ or any sign it was recalibrated to reflect actual flight or public safety outcomes—information that is commonly available for analysis and critique in criminal risk assessment tools.²⁶²

²⁵⁷ 2012 FAQ, *supra* note 102, at 1328.

²⁵⁸ Noferi & Koulish, *supra* note 12, at 84–85; *see also* Gilman, *supra* note 18, at 187–190 (arguing that bond hearings do not provide any meaningful review of the initial decision to detain, but rather serve only to review the bond amount set). As a form of "civil" detention, non-detention is the default. *Id.* at 172. Detention is usually only justified when the person has been shown to be a flight risk or danger to the community through an individualized determination. *Id.*

²⁵⁹ *See supra* Part I.

²⁶⁰ *RCA Quick Reference Guide*, *supra* note 59, at 1739.

²⁶¹ Legal scholar César Cuauhtémoc García Hernández argues that, despite persistent characterization as such by the media and legal professionals alike, the immigration detention framework was not actually meant to be a civil system. *See* César Cuauhtémoc García Hernández, *Immigration Detention as Punishment*, 61 *UCLA L. REV.* 1346, 1350 (2014). Instead, it was developed alongside the aggressively antidrug policies and mass incarceration legislation of the 1980s and 1990s and was similarly meant to serve as a deterrent to drug activity. *Id.* As a result, "[t]oday, immigration detention stands apart from other types of detention deemed civil and instead looks to people outside and inside the hundreds of jails, prisons, and stand-alone detention facilities that have been used for this purpose as if those confined are being punished just the same as people serving time for a conviction." *Id.*

²⁶² Comparison of the RCA with the methodology and development of risk assessment tools used in the criminal justice system is necessary to identify opportunities for reform and persistent shortcomings of risk assessment algorithms across

Years of secrecy have allowed errors and inaccuracies to go undetected and therefore unchallenged by advocates and scholars. The most dramatic example we found was an apparent error in designating who is subject to mandatory detention. The FOIA results show that the mandatory detention component of the RCA was coded to designate a conviction for the crime of violating an order of protection as triggering mandatory detention under the INA.²⁶³ A conviction for this category of crimes does render a migrant removable.²⁶⁴ It does not, however, render the person subject to mandatory detention.²⁶⁵ Congress did not include this allegation of removability in its list of removal grounds triggering mandatory detention. The error in the RCA's programming to include this removal ground in the mandatory detention rubric may well have led to thousands of migrants receiving the custody recommendation and decision of "detain in the custody of the service" (i.e. no bond) instead of "detain, eligible for bond" with an accompanying bond recommendation based on risk scores.

The RCA may deliver some degree of transparency within ICE as to the characteristics of migrants detained by different field offices across the country²⁶⁶ but its custody decisions remain otherwise opaque. Without public scrutiny, the program's impact on detained migrants has gone unchallenged and the manipulation of its algorithm to jettison indicia of risk has up to now evaded review.

D. Harm Reduction

Finally, the RCA was developed in part to respond to mounting reports of men and women dying or suffering severe harm in immigration detention.²⁶⁷ U.S. officials described the system to the

context. This comparative analysis is beyond the scope of this article. We hope that with the mechanics of the RCA now made public through this article, further evaluation that builds on the substantial literature on risk tools in the criminal justice system will be possible. *See e.g.*, Brandon L. Garrett, John Monahan, *Judging Risk*, 108 Cal. L. Rev. 439 (2020) (describing the use of risk assessment in pre-trial bail determinations, sentencing, parole, and probation and their empirical results); John Monahan & Jennifer L. Skeem, *Risk Assessment in Criminal Sentencing*, 12 ANN. REV. CLINICAL PSYCHOL. 489, 493–94 (2016) (describing use of risk assessment in sentencing); Jessica M. Eaglin, *Constructing Recidivism Risk*, 67 EMORY L.J. 59, 88–101 (2017) (describing the process of developing risk tools). Risk assessment tools in criminal justice systems, particularly in the federal system, are characterized by greater transparency and review than for the RCA. Brandon L. Garrett, *Federal Criminal Risk Assessment*, 41 Cardozo L. Rev. 101 (2020) (describing the transparency, validation, annual evaluation, and public review of bias in decision-making required in the Formerly Incarcerated Reenter Society Transformed Safely Transitioning Every Person (FIRST STEP) Act); Virginia State Crime Commission, VIRGINIA PRE-TRIAL DATA PROJECT: PRELIMINARY STATEWIDE FINDINGS (Dec 13, 2019). This is not to say that increased transparency and scrutiny is sufficient, as numerous scholars have argued these tools are ineffective in overcoming racial bias and mass incarceration in the criminal justice system. *See e.g.*, Garrett and Monahan, *Judging Risk* (advocating for increased regulation concerning the use of risk assessment); Sandra G. Mayson, *Bias In, Bias Out*, 128 YALE L. J. 2218 (2019) (critiquing the use of risk assessment that is not race conscious) Sonja B. Starr, *Evidence-Based Sentencing and the Scientific Rationalization of Discrimination*, 66 STAN. L. REV. 803 (2014) (critiquing use of risk assessment at sentencing). The availability of data on the deployment of these tools in criminal justice though has allowed for a rigorous debate regarding the impact of these tools that has not been possible with respect to the effect of the RCA on mass immigration incarceration to date. *See generally* David G. Robinson and Logan Koepke, *Civil Rights and Pretrial Risk Assessment Instruments* (Dec. 2019) (describing the debates regarding the use of actuarial risk tools in pretrial detention) available at <http://www.safetyandjusticechallenge.org/wp-content/uploads/2019/12/Robinson-Koepke-Civil-Rights-Critical-Issue-Brief.pdf>

²⁶³ *See* RCA RULES AND SCORING, *supra* note 95 (listing allegations of removability under INA § 237(a)(2)(E)(ii), 8 U.S.C. § 1227(a)(2)(E)(ii) as subject to mandatory detention per statutes and allegations).

²⁶⁴ 8 U.S.C. § 1227(a)(2)(E)(ii) (2012).

²⁶⁵ *See* 8 U.S.C. § 1226(a); 8 U.S.C. § 1226(c) (2012).

²⁶⁶ *See generally* RCA SYSTEMS TRAINING, *supra* note 59.

²⁶⁷ UNHCR Roundtable, *supra* note 55, at 24–25.

United Nations High Commissioner for Refugees (UNHCR) as a means for ensuring that ICE agents screen immigrants for special vulnerabilities and do not detain vulnerable individuals unless mandated by statute.²⁶⁸ Prior to the RCA's creation, information concerning an individual's vulnerabilities was not captured in any of ICE's databases. The RCA thus required documentation of any vulnerability and allowed DHS to standardize custody determinations for this population as well as track their overall detention rates.²⁶⁹ The FOIA results show though that poor screening mechanisms, the broad ambit of supervisor discretion, and the absence of any feedback loop between RCA users and detention center administrators thwarted the system's ability to deliver on this promise.

Guidance to RCA users on how to assess the presence of a special vulnerability is minimal despite the context of the interview and the sensitivity of the information sought. ICE officers can access pop-up windows that contain a list of questions to ask and observations to make for each vulnerability, but the RCA provides no training on how to effectively elicit responses.²⁷⁰ The RCA includes a link to a quick reference guide for special vulnerabilities and a summary of other resources.²⁷¹ The guide reiterates the guidance from the pop-up windows and suggests a few additional questions and observations.²⁷² The summary of other resources directs agents to ICE's other courses on immigration benefits available for victims of sexual abuse or domestic violence, victims of human trafficking, asylum seekers, and USCIS's guide on adjudicating LBGTI asylum claims.²⁷³ The RCA implementation materials do not require officers to complete these trainings, but reference them for information about the circumstances of these crimes and how to identify victims.²⁷⁴ The RCA training materials provide no guidance regarding the location to conduct these screenings, nor do the FOIA results indicate that they were carried out in a private and confidential setting.

Additionally, the RCA does not include a mechanism or instructions for communication between RCA users and the officers who administrator the detention facility. Because physical and mental illnesses are diagnosed in and caused by immigration detention,²⁷⁵ we requested information about whether the RCA was rerun if a special vulnerability was later identified or emerged at the

²⁶⁸ *Id.*

²⁶⁹ 2012 *Key User Training*, *supra* note 68, at 1119.

²⁷⁰ *RCA Quick Reference Guide 3.0*, *supra* note 74, at 1365–68.

²⁷¹ *Special Vulnerabilities Quick Reference Guide*, *supra* note 75, at 1491–92. U.S. Immigration & Customs Enforcement Office of Enforcement and Removal Operations, Summary of Other Resources that can be Linked to Special Vulnerability Training [hereinafter *Summary of Other Resources*], in CONSOLIDATED FOIA RESPONSES, *supra* note 19, at 1674–75.

²⁷² See app. at ___, which outlines the guidance provided for assessing the designated special vulnerabilities.

²⁷³ *Summary of Other Resources*, *supra* note 271, at 1674–75.

²⁷⁴ *Id.*

²⁷⁵ See, e.g., AM. CIVIL LIBERTIES UNION, HUMAN RIGHTS WATCH, & NAT'L IMMIGRANT JUSTICE CTR., JUSTICE FREE ZONES: U.S. IMMIGRATION DETENTION UNDER THE TRUMP ADMINISTRATION 31–43 (2020) (detailing the detention conditions that lead to physical and mental illness); Jessica Leung et al., *Mumps in Detention Facilities that House Detained Migrants – United States, September 2018–August 2019*, 68 MORBIDITY & MORTALITY WKLY. REP. 749 (2019) (CDC report detailing mumps outbreak in detention centers); Nora Ellman, Immigration Detention Is Dangerous for Women's Health and Rights, CTR. FOR AM. PROGRESS (Oct. 21, 2019 9:04 AM), <https://www.americanprogress.org/issues/women/reports/2019/10/21/475997/immigration-detention-dangerous-womens-health-rights> (identifying the ways in which detention erodes the “maternal health, reproductive autonomy, and mental health” of women); Matthew Haag, Thousands of Immigrant Children Said They Were Sexually Abused in U.S. Detention Centers, Report Says, NY TIMES (Feb. 19, 2019), <https://www.nytimes.com/2019/02/27/us/immigrant-children-sexual-abuse.html> (detailing findings from the Office of Refugee Resettlement on sexual abuse of detained unaccompanied minors).

detention center. The RCA *is* rerun based on subsequent disciplinary infractions.²⁷⁶ We also requested any guidance on informing the detention center of any special vulnerability identified through the RCA.²⁷⁷ As part of the settlement, we required a certification that DHS had released all documents addressing communication between RCA users and detention centers about the presence of special vulnerabilities. The FOIA response contained no indication that communication regarding special vulnerabilities occurred in either direction, but DHS certified that any related documents were included in the FOIA release. Therefore, it appears the RCA provides no direction or avenue to reassess detention based on the detection of a special vulnerability at the detention facility nor any formal means of alerting detention center operators that the migrant possesses a vulnerability and needs to be accommodated. As a result, the RCA omits the most likely source of data on detained migrants with special vulnerabilities: the detention centers themselves. And the RCA squanders the opportunity to protect vulnerable detainees through standardized communication with the detention facilities.

Even if a special vulnerability is detected, the RCA recommendation delegates broad discretion to the supervisor with respect to imposing detention. Furthermore, the RCA's designers recognized from the beginning that this discretion could be wielded differently across field offices based on their divergent policies. The RCA Playbook and online RCA training course use scenarios involving three migrants. One of the migrants is identified as having a "serious physical illness" based on his hospitalization for diabetes, medication for diabetes and high blood pressure, and reported kidney problems.²⁷⁸ Yet, this example of a special vulnerability—the only one in the RCA training materials—also comes with a caveat that undermines the screening tool's fundamental purpose. While the officer in the training materials recommends release due to the special vulnerability, the official guidance explicitly states this outcome is not required even for similar cases.²⁷⁹ The training guide also explains that the presence of a special vulnerability based on these factors was agreed upon by a panel of RCA developers and ICE officials, "however, they do not represent the required decisions that must be reached when using the system." Instead, the circumstances of each case "and each field office will influence" the decision-making process.²⁸⁰

The RCA recommendation for nearly all migrants with an identified special vulnerability is for the "supervisor to determine" whether to detain or release the person; those with low flight and public safety risk levels are recommended for release.²⁸¹ The training course recommends that individuals with identified special vulnerabilities and low or medium public safety and flight risk scores be considered for release.²⁸² Training to supervisors on how to exercise their discretion directs them to consider the nature and severity of the vulnerability, the crimes committed, the risk factors involved, and the capacity of the facility to address the vulnerability when deciding whether to detain the person.²⁸³

²⁷⁶ **NEED SUPPORT**

²⁷⁷ See *RCA Special Vulnerabilities FOIA Request*, *supra* note 32, at 7.

²⁷⁸ *RCA Scenario Playbook, Version 1.0*, *supra* note 23, at 310.

²⁷⁹ *Id.* at 321.

²⁸⁰ *Id.* at 285.

²⁸¹ RCA RULES AND SCORING, *supra* note 95.

²⁸² RCA SYSTEMS TRAINING, *supra* note 59, at 80.

²⁸³ *Id.*

Initial data from the FOIA results reveal that the RCA was far less effective in preventing the detention of individuals with special vulnerabilities than U.S. officials represented to UNHCR. Six months after the RCA was rolled out, the RCA Working Group reported that 6.3% of individuals processed through the system were identified as having one or more special vulnerabilities and that of this population 27% were released.²⁸⁴ Thirty-seven percent of migrants with a special vulnerability and no basis for mandatory detention were released.²⁸⁵ Those most likely to be released had no final order, no mandatory detention charge and were disabled, elderly, pregnant, nursing, a primary caretaker, had a serious mental illness, or serious physical illness. Additionally, 20% of those who had a special vulnerability plus either a final order or were subject to mandatory detention or expedited removal were released.²⁸⁶ In the reverse, the RCA's early results reflect that 63% of individuals with no basis for mandatory detention were held in custody despite their identified special vulnerabilities. Though presence of a special vulnerability may substantially increase the likelihood of a migrant's release, these early data also show that the majority of people designated as vulnerable are detained by ICE notwithstanding ICE's statutory power to release them and the RCA's purpose to reduce their harm.

V. The RCA's Manipulation Results in an Automated System of Unconstitutional Detention

The constitutionality of civil immigration detention remains contested and the subject of recent Supreme Court review.²⁸⁷ According to the Court, government detention violates the Due Process clause "unless the detention is ordered in a *criminal* proceeding with adequate procedural protections" or, in the case of civil detention "in certain special and 'narrow' nonpunitive 'circumstances.'"²⁸⁸ These circumstances are limited to mitigating an individual's "danger to the community"²⁸⁹ and risk of "[non-]appearance . . . at future immigration proceedings."²⁹⁰ For the past twenty years, the Court has reaffirmed that immigration detention satisfies due process when it is based on the risk an individual will abscond or engage in criminal activity if released.²⁹¹ Even when upholding mandatory detention for certain categories of migrants, the Court has found that the defining characteristics relate to risk.²⁹²

This section focuses on the implications of the RCA for people who are not subject to mandatory detention and are thus entitled to seek release from an ICE officer, an immigration judge, or both.²⁹³ Parts III and IV trace the ways in which the RCA algorithm deviated from a true risk tool. Flaws in the RCA's initial design and subsequent changes resulted in a system that recommends

²⁸⁴ 2013 *RCA Overview*, *supra* note 58, at 234.

²⁸⁵ *Id.*

²⁸⁶ *Id.*

²⁸⁷ See generally *Nielsen v. Preap*, 139 S. Ct. 954 (2019); *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018).

²⁸⁸ *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001); see also *Hernández*, *supra* note 235, at 1349.

²⁸⁹ *Zadvydas*, 533 U.S. at 690.

²⁹⁰ *Id.*

²⁹¹ *Demore v. Kim*, 538 U.S. 510, 527 (2003); *Nielsen*, 139 S. Ct. at 960; *Jennings*, 138 S. Ct. at 836; *Zadvydas*, 533 U.S. at 690.

²⁹² *Nielsen*, 139 S. Ct. at 960.

²⁹³ We note that the discussion here of the RCA's constitutional implications is preliminary and deserves additional attention. We wanted to highlight, however, the profound and far-reaching implications of the choice to divorce detention from risk in the RCA's methodology: the custody of hundreds of thousands of people without a constitutional justification.

detention based on characteristics largely unrelated to risk. Accordingly, the RCA automatically recommends that thousands of people be detained in violation of the constitution.

The RCA advertises itself as fulfilling the Court's edicts through its name and the labels of its constituent parts. Its methodology, however, became unmoored from the constitutional constraints. Nominally, the public safety component measures an individual's "danger to the community"²⁹⁴ and the flight risk component measures an individual's likelihood of "appearance . . . at future immigration proceedings."²⁹⁵ In reality, however, the RCA came to measure the date of entry or a prior removal order but called that measurement flight risk. Its public safety risk component elevates allegations of gang affiliation or a few low severity crimes over most other factors. Though the RCA was presented as a means of ensuring that immigration detention is tied to its constitutional purpose, the RCA's automated custody recommendations moved further and further away from any basis in risk.

A low risk to public safety assessment became very difficult to attain along with its recommendation for release. As the RCA was modified to increase the points assigned to certain offenses and the maximum score for a low rating was reduced, the same underlying conduct was deemed riskier. The risk profile remained the same while the label changed from low to moderate. The FOIA results include no indication that this shift was in response to evidence that the offenses were tied to recidivism. Instead, the FOIA documents show that the goal was to minimize the override rate. ICE supervisors chose to detain people with certain criminal history even though the RCA's initial risk logic said this history was low risk and detention was unnecessary. To eliminate the deviation between these two sources, the RCA's designers reworked the algorithm to generate a moderate risk level instead. These changes allowed supervisors to detain people the RCA once considered low public safety risks, without having to justify their decisions. The manipulation thus recognized the practice by supervisors to detain absent indicators of danger and accommodated it.

Further, the architecture itself acknowledges that offenses designated as special public safety factors are overestimated and result in inaccurate assessments of risk. Yet these offenses generally result in a detention recommendation. Special public safety factors are scored equal to arson and intentional homicide. The algorithm recognizes that they do not in fact represent the same level of danger though. To arrive at its assessment of the security measures needed in custody, the RCA recalculates the public safety score using the actual severity levels of the special public safety offenses. One would expect the RCA's recommendation with respect to an individual's security level in custody to avoid underestimating dangerousness. Instead, this score must be adjusted downward to eliminate the inflated weight given to these offenses in the detain/release algorithm. The high score assigned to special public safety factors drives detention, again, absent a corresponding level of risk.

The constitutional implications of the changes to the flight risk module are especially clear. By eliminating nearly all factors associated with flight risk from the rubric, the alterations to this algorithm render its "flight risk" levels nothing of the sort. The detention recommendations that result are likewise unrelated. Instead, the RCA aligns detention with characteristics corresponding to enforcement decisions not risk. The result is a brazen violation of the constitution's demands.

²⁹⁴ *Zadvydas*, 533 U.S. at 690.

²⁹⁵ *Id.*

In addition, recommendations for release became harder and harder to get. By the end of the Obama administration, the RCA algorithm eliminated bond from its custody recommendations and recommended no-bond detention for more than double the risk classifications. Only migrants deemed low risk in both categories were recommended for release by the end of the Obama administration. The Trump administration further modified the RCA to jettison the release recommendation entirely.²⁹⁶ Even if a migrant is able to seek oversight by an immigration judge, the RCA recommendation of detain without bond means weeks of detention, given the lag between the time a migrant is processed through the RCA and her access to review. The same is true for the supervisor to determine recommendation when the decision is to detain without bond. The predictable and lengthy detention created by the elimination of bond and release recommendations in the RCA may not prevent release, but it certainly delays it. Here too, the RCA's unconstitutional logic deprives people of their liberty for extended periods of time.

Moreover, the way in which the RCA was manipulated obscures the system's true measures to the supervisors who are supposed to oversee it. Supervisors review the RCA custody recommendation based on summary outputs alone. They see someone designated as a high flight risk or high risk to public safety and the corresponding custody recommendation, but they do not see that the risk designation is due to entry date, the increased weight of drug possession, or modifications to the threshold for each level so that the designation of low risk to public safety became significantly harder to achieve. Not only did the RCA lose its constitutional footing, but it did so behind closed doors.

In the end, the RCA became a tool of immigration incarceration.²⁹⁷ Recent entry means the RCA specifically delegates to supervisors the discretion to detain so that detention can be widely applied with the goal of discouraging others from coming to the U.S., regardless of their claims for protection and low risk to public safety. Though the use of detention as a deterrent was rejected by a federal court after Obama administration lawyers cited this goal explicitly in bond hearings²⁹⁸ and the Trump administration has been at pains to avoid the term, deterrence is embedded in the automated system designed to determine detention. The result is automated recommendations to detain hundreds of thousands of migrants in violation of the constitution.

Conclusion

Since 2012, ICE has relied on the country's largest risk assessment system for recommendations on whom to detain and whom to release. While purporting to base these recommendations on indicia of risk of flight and risk to public safety, in reality the Risk Classification Assessment (RCA) system was manipulated to link detention to enforcement choices. In doing so, the system lost its underpinnings in the constitution. Additionally, compromises in the RCA's methodology thwarted its ability to deliver the harm reduction, transparency, and uniformity it promised. Ultimately, manipulation of the system's logic resulted in recommendations to detain hundreds of thousands of migrants unlawfully. The RCA was heralded as a means of promoting alternatives to detention at a large scale and pushing back against the expansion of immigration detention. The RCA, however, was not designed in the end to measure true indicia of risk, based on

²⁹⁶ See Rosenberg & Levinson, *supra* note 208.

²⁹⁷ Hernández, *supra* note 235, at 1363.

²⁹⁸

established factors that are reevaluated and revised in light of outcomes and evidence. Nor were its assessments subject to review by immigration judges, advocates, and the people it detains. Further, until pressed through federal litigation, ICE kept its methodology hidden, creating opportunities for further corruption of its design. The RCA became a tool to impose detention on immigrants disfavored by the Obama and Trump administrations and to punish those groups for their presence. The failure of the RCA on such a dramatic scale, and the resulting harm to hundreds of thousands of people, calls into question the legitimacy of detention of any immigrant. And the subversion of its purpose from the beginning demonstrates a deep commitment to detention at all costs, even if the basis is feigned. Consequently, instead of the RCA justifying detention, the manipulation and mischief evident here support ending immigration detention altogether.

APPENDIX

The process required to force DHS to comply with its obligations under the Freedom of Information Act was extensive and protracted. The authors were forced to spend nearly a year perfecting their administrative appeals in light of DHS' delays and incomplete document production. They then spent two and a half more years litigating their requests in federal court and challenging compliance with a negotiated settlement. For those readers interested in the mechanics of the administrative and judicial challenges required, we have described in detail the initial FOIA requests that served as the basis for all subsequent challenges, as well as the final stipulated settlement. We also review the administrative appeals, federal litigation, and settlement negotiations that occurred in parallel to arrive at the final document production.

From the outset, we anticipated the need to sue DHS to force it to comply with our FOIA requests, so we drafted our initial requests to describe the documents we sought in various ways with as much specificity as possible. Our goal was to create FOIA requests that provided no room to argue that we had failed to request certain types of documents while also providing sufficient description and detail so as to be deemed reasonable and feasible requests. Accordingly, we created separate FOIA requests to target each major component of the RCA, based on what we could glean from the summary printouts Professors Robert Koulish and Mark Noferi had received in response to their initial requests for data on Baltimore and New York. The FOIA request focused on the mandatory detention module requested fourteen categories of documents. These included all business rules, criteria, protocols, scoring factors, structured fields, or lists of values for the module; documents discussing agency and federal court decisions addressing whether particular offenses were encompassed by the Immigration and Nationality Act (INA)'s provision on mandatory detention; materials discussing how the system would be updated to account for changes in law; and any training materials for officers and supervisors on how to apply the mandatory detention module and verify its results.²⁹⁹ We were concerned here that a computer was making complicated decisions as to whether an individual's criminal conviction was a categorical match to a removal ground and if ICE officers or ICE attorneys reviewed this critical determination of mandatory or discretionary custody reflected in the RCA.

The second FOIA request focused on the methodology used to assess flight risk and risk to public safety.³⁰⁰ This request asked for all materials describing the scoring rubrics, the algorithm for combining the two separate assessments of risk into a single recommendation for detention or release.³⁰¹ We also requested materials on the role of ICE contractors in applying the RCA, and the ability of and guidance to ICE officers and supervisors on reviewing and overriding the RCA assessment and recommendation. Additionally, this request covered documents on the timing of the RCA in the charging process; the use of the RCA to determine DHS bond amounts; whether the RCA incorporated criminal or medical records; the circumstances, if any, for re-running the RCA after its initial application; and guidance or protocols on modifying the RCA's algorithms for flight risk and risk to public safety.³⁰² This request was intended to reveal the meat of the RCA: what criteria did it

²⁹⁹ See *RCA Mandatory Detention FOIA Request*, *supra* note 27, at 5.

³⁰⁰ See *RCA Components FOIA Request*, *supra* note 29, at 7.

³⁰¹ *Id.*

³⁰² *Id.*

use to measure flight risk and risk to public safety; how were these factors weighed and combined; and whether the algorithm was altered over time. We also wanted to understand the allocation of responsibility between man and machine in this process. We knew that a supervisor made a final determination regarding custody and bond, but we did not know the process for this final determination and the interaction between officers, the supervisor, and the RCA.

Our third request concerned the identification and consequence of a “special vulnerability.”³⁰³ We were particularly concerned about ICE’s persistent failure to prevent migrants from being harmed by immigration custody and to respond to harms documented by detention facilities. In this request, we asked for any documents and other materials describing how special vulnerabilities were defined and assessed; how the presence of a special vulnerability interacted with the RCA’s other components on mandatory detention, flight risk, and risk to public safety; whether the special vulnerability assessment took into account the results of a credible or reasonable fear interview³⁰⁴; whether the RCA’s special vulnerability tool incorporates information from medical records or prescription medications; how the RCA component interacts with the agency’s obligation to report mental illness or disability so as to assess mental competency; whether the presence of a special vulnerability identified by the RCA was communicated to the detention facility; and the protocols, if any, for re-running the RCA based on a vulnerability identified by the detention facility.³⁰⁵ Our goal with the first three FOIA requests was to publish the methodology of the RCA so that scholars and advocates could evaluate its efficacy in aligning civil immigration detention with its constitutional purpose and preventing civil detention from causing or exacerbating harm to individual migrants.

Our other two requests focused on the outcomes of the RCA. With these requests, we wanted to better understand the actual impact of the RCA on who was detained and changes to this population over time. These FOIA requests sought the detailed summaries the RCA produced for all ICE field offices since the system had been deployed nationwide³⁰⁶ as well as a subset of detailed summaries for one of the field offices, which might allow us to compare a migrant’s history and case outcome with the RCA’s risk profile and detention recommendation.³⁰⁷ All FOIA requests were submitted during the fall of 2014.

³⁰³ See *RCA Special Vulnerabilities FOIA Request*, *supra* note 32, at 1.

³⁰⁴ “Asylum Officers conduct a credible fear of persecution or torture interview when a person who is subject to expedited removal expresses an intention to apply for asylum, expresses a fear of persecution or torture, or expresses a fear of return to his or her country. Any person subject to expedited removal who raises a claim for asylum or expresses a fear of harm or return will be given the opportunity to explain his or her fears to an Asylum Officer.” *Credible Fear FAQ*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Oct. 15, 2008), <https://www.uscis.gov/faq-page/credible-fear-faq#t12831n40090> (discussing circumstances under which asylum officers conduct credible fear interviews); see also the credible fear determination provision at 8 U.S.C. § 1225(b)(1)(B)(v) (2012) (Credible fear of persecution is defined as “a significant possibility, taking into account the credibility of the statements made by the alien in support of his or her claim and such other facts as are known to the officer, that the alien could establish eligibility for asylum under Section 208 [of the Immigration and Nationality Act]”). On the other hand, if an asylum applicant has been ordered removed and fears returning to the country to which the individual has been ordered removed, ICE must refer the individual’s case to an asylum officer who will determine the presence of a reasonable fear of persecution or torture. If reasonable fear is found, the applicant is given an opportunity to seek withholding of removal or deferral of removal before an immigration judge. *Questions and Answers: Reasonable Fear Screenings*, U.S. CITIZENSHIP & IMMIGR. SERVS. (June 18, 2013), <https://www.uscis.gov/humanitarian/refugees-asylum/asylum/questions-answers-reasonable-fear-screenings>.

³⁰⁵ See *RCA Special Vulnerabilities FOIA Request*, *supra* note 32, at 5–8.

³⁰⁶ See *RCA Detailed Summaries Nationally FOIA Request*, *supra* note 34, at 2.

³⁰⁷ See *RCA Detailed Summaries for St. Paul FOIA Request*, *supra* note 35, at 2.

Additionally, we sought a waiver of associated fees for each request based on the likelihood that the information requested would “contribute significantly to [the] public understanding of the operations or activities of the government.”³⁰⁸ In response to our requests for information on the mandatory detention component, risk algorithms, and detailed RCA summaries, DHS denied our petitions for fee waivers for four of the five requests but granted the fee waiver for our special vulnerabilities request, though our arguments were identical in each request.³⁰⁹ Further, we had to contend with DHS’ absurd response that it had no records responsive to our requests for documents describing the creation and implementation of the nation’s largest risk assessment system.

For the next four months, DHS and the authors disputed the timeliness and mootness of the various appeals and the inconsistent fee waiver decisions.³¹⁰ We also challenged the adequacy of DHS’s search for records responsive to our requests, identifying RCA documents by name and date that we were aware existed and listing the ICE offices DHS had failed to search.³¹¹ Eventually, the administrative appeals led to production of a redacted excel spreadsheet with some, but not all, fields in the RCA detailed summaries, and remand of our FOIA requests on the mandatory detention tool and the risk methodology to the ICE FOIA office “for processing and retasking to the appropriate agency.”³¹² By July 2015, DHS had granted our fee waiver requests associated with the RCA methodology and mandatory detention tool³¹³ but denied a fee waiver for the RCA detailed summary requests on new grounds.³¹⁴ Throughout the remainder of 2015, author Robert Koulish attempted to negotiate with DHS regarding the data fields and format for production of the RCA detailed summaries.³¹⁵

By February 2016, we had final agency decisions on the fee waiver requests. Additionally, the statutory deadline had passed for responses to the remanded requests for information on the RCA

³⁰⁸ See FOIA fee waiver provisions at 5 U.S.C. § 552(a)(4)(A)(iii) (2012); 6 C.F.R. § 5.11(k) (2019).

³⁰⁹ See *Casper FAC*, *supra* note 36, at Exhs. 2, 11 *Casper v. U.S. Dep’t of Homeland Sec.*, No. 0:16-cv-00380-ADM-BRT (D. Minn. May 31, 2016) [hereinafter *Casper FAC*] (E-mails from ICE FOIA Office to Katherine Evans regarding RCA Detailed Summaries Nationally FOIA Request and RCA Detailed Summaries for St. Paul FOIA Request).

³¹⁰ See *id.* exhs. 3, 12, 22 (Letters from Debbie Seguin, Chief, Gov’t Info. Law Div., ICE Off. of the Principal Legal Advisor, to author, regarding appeal of fee waiver denial for the RCA Risk Component FOIA Request on July 24, 2015, the RCA Mandatory Detention Tool FOIA Request on July 23, 2015, and the RCA Nationally Detailed FOIA on Feb. 3, 2015); Letter from Katherine Evans, Teaching Fellow, Univ. of Minn. L. Sch., et al. to Gov’t Info. Law Div., U.S. Immigration & Customs Enft (Feb. 2, 2015) (regarding appeal of “no records responsive” for the RCA Mandatory Detention Tool FOIA Request No. 2015-ICAP-00117) [hereinafter *Evans Letter re Mandatory Detention Tool*] (on file with author Kate Evans); Letter from Katherine Evans, Teaching Fellow, Univ. of Minn. L. Sch., et al. to Gov’t Info. Law Division, U.S. Immigration & Customs Enft (Feb. 2, 2015) (regarding appeal of “no records responsive” for the RCA Components FOIA Request No. 2015-ICAP-00118) [hereinafter *Evans Letter re Components Tool*] (on file with author Kate Evans).

³¹¹ *Evans Letter re Components Tool*, *supra* note 310; *Evans Letter re Mandatory Detention Tool*, *supra* note 310.

³¹² See *Casper FAC*, *supra* note 36, exhs. 20, 34, (Final Response Letters from Catrina M. Pavlik-Keenan, FOIA Officer to Katherine Evans, Univ. of Minn. L. Sch., concerning St. Paul RCA Detailed Summaries FOIA Request No. 2015-ICFO-02993 on Apr. 9, 2015 and RCA Detailed Summaries FOIA Request No. 2015-ICFO-03004 on Apr. 7, 2015); see also *id.* exhs. 9, 17 (Letters from Debbie Seguin, Chief, Gov’t Information Law Division to Katherine Evans, Univ. of Minn. L. Sch., remanding RCA FOIA Request Nos. 2015-ICFO-03041/2015-ICAP-00118/2015-ICAP-00276 and RCA FOIA Request Nos. 2015-ICFO-03027/2015-ICAP-00117/2015-ICAP-00277, both on Apr. 23, 2015).

³¹³ *Id.* ex. 26 or 28 (Letter from Debbie Seguin, Chief, Gov’t Info. Law Div. to Katherine Evans, Univ. of Minn. L. Sch., reconsidering denial of RCA Methodology and Mandatory Detention Tool FOIA Request Nos. 2015-ICFO-00434/2015-ICAP-02993 on July 7, 2015).

³¹⁴ See *Casper FAC*, *supra* note 36, exh. 21; Complaint. at exh. 24–25, *Casper v. U.S. Dep’t of Homeland Sec.*, No. 0:16-cv-00380 (D. Minn. Feb. 16, 2016) [hereinafter *Casper Complaint*].

³¹⁵ See *Casper FAC*, *supra* note 36, exhs. 28–33, 39–41; *Casper Complaint*, *supra* note 314, exh. 31.

risk methodology and mandatory detention tool. DHS had also refused to engage further with attempts to produce satisfactory data on the RCA detailed summaries in the St. Paul Field office.³¹⁶ With this combined proof that we had exhausted our administrative remedies to enforce our FOIA requests, we could file a complaint in federal district court alleging that DHS failed to comply with the Freedom of Information Act with respect to three of our five FOIA requests.³¹⁷ Additionally, in the fall of 2015, DHS finally responded to the request for materials concerning the RCA's special vulnerabilities component.³¹⁸ The authors challenged the exemptions applied, and DHS agreed, in February 2016, "there may be additional non-exempt information that can be released to you."³¹⁹ In December 2015, DHS also produced a new excel spreadsheet with data from the national deployment of the RCA but continued to redact key fields.³²⁰ With the final agency response for the national RCA detailed summaries in hand and the elapse of the statutory deadline for the remand of the special vulnerabilities request, *pro bono* counsel filed an amended complaint in May 2016 consolidating our challenges to production, redaction, and fee waivers for all five of our requests.³²¹ As a result, we could pursue consolidated settlement negotiations with an assistant U.S. attorney under the threat of discovery and judicial review in federal court.

The district court litigation prompted a far swifter and more comprehensive response to our FOIA requests. The Assistant U.S. Attorney offered a series of document production covering the three requests for information on the RCA's design.³²² As this production progressed, the parties were also subject to a court-ordered discovery schedule and settlement conference. In the end, we entered a stipulated settlement agreement the day before the Trump administration took office. This agreement guaranteed production of specified documents we learned existed through the initial disclosures negotiated in 2016; production of substantially similar documents to the ones identified; certification that certain categories of documents do not exist if they were not produced; a summary of 1.4 million RCA entries with limited data fields, and a total of 2500 RCA entries with expanded data fields.³²³ This production occurred over the course of 2017 and 2018, resulting in over 1700 pages, printouts of the RCA online training course for ICE officers, matrices of the RCA's algorithm and scoring rubric for evaluating risk and recommending detention including every change during the first five years.³²⁴ Finally, DHS certified that it had produced all existing documents, if any, relating to (1) guidance given to supervisors on when they may override the RCA recommendations, (2) protocols on how ICE officers enter information on crimes that would indicate they are subject to mandatory detention, and (3) all training materials and protocols on communication between detention facilities and RCA users regarding a migrant's special vulnerabilities.³²⁵ We sought this certification as a way to

³¹⁶ See *Casper Complaint*, *supra* note 314, at 13.

³¹⁷ See *id.* at 2.

³¹⁸ See *Casper FAC*, *supra* note 36, exhs. 46–47.

³¹⁹ See *id.* exh. 48.

³²⁰ See *id.* at 28.

³²¹ See generally *id.*

³²² See e-mails with *pro bono* and opposing counsel on file with the authors.

³²³ See Stipulation of Settlement and Dismissal, *supra* note 39, at 2–6.

³²⁴ See CONSOLIDATED FOIA RESPONSES, *supra* note 20; RCA SYSTEMS TRAINING, *supra* note 59; MANDATORY DETENTION INA CHARGES, *supra* note 95.

³²⁵ See *Letter Concerning Casper Case*, *supra* note 41.

prove the negative: if DHS did not produce information relating to these areas, no guidance or protocols existed.

After challenging DHS' compliance with stipulated settlement,³²⁶ the agency's final data production in May 2018 at last revealed the RCA's algorithm and its changes over time. With this data plus the background documents, we could begin analyzing the RCA's role in determining the custody of hundreds of thousands of migrants every year.

³²⁶ See letters from the authors' counsel to the AUSA dated August 17, 2017 and December 19, 2017.