



## **Moving the Nation Forward by Leaving Immigration Detention Behind**

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In the past two decades, the gross overuse of detention for immigration purposes has resulted in unsafe confinement conditions, unlawful and abusive practices, and the steady escalation of the numbers of people in custody. Today, the cost of detention borne by U.S. taxpayers exceeds \$2 billion annually. Even more importantly, detention has been wrongfully applied as an instrument of punishment and deterrence—aims that are inappropriate for immigration purposes. Trapped in detention, adults, children, and families are unable to communicate meaningfully with their legal counsel and communities, and as a result, are denied due process and a fair chance at obtaining asylum or other legal relief. These practices are abhorrent to American values and simply cannot continue.

The Biden administration and the new Congress have the opportunity to transform the horribly mismanaged and broken immigration detention system. Since early 2020, due to the worldwide pandemic and related bans on asylum seekers and other border entrants, detention levels have dropped precipitously to a daily level of about [14,000 people—less than half of what was expected](#). The president and Congress should seize upon this moment to reverse the nation's overwhelming reliance on, and overuse of, detention that has grown rapidly like a cancer during the past two decades. Even with the increase in the number of people arriving at the southern U.S. border, the Department of Homeland Security (DHS) can reduce detention levels by using its authority to allow people to enter the country via a grant of parole. While temporary influx facilities and shelters may be necessary to process seasonal migration flows, people and children journeying to our borders should not then be funneled into interior adult and family detention centers. America's elected leaders can usher in a future in which individuals are set up to succeed in complying with immigration requirements through community-based supervision and case management, as needed. The solutions recommended by AILA in this policy brief will ensure that the immigration system is not only orderly and efficient, but also fair, humane, and welcoming to immigrants.

## Immigration Detention in the United States

Today, noncitizens are detained across the United States in [a sprawling network of private and public](#)<sup>1</sup> detention facilities currently funded to have a combined capacity to detain up to 34,000 people on any given day.<sup>2</sup> These are distinct from the facilities used to temporarily house children once they are transferred from U.S. Customs and Border Protection’s custody (CBP) and into the care of the Office of Refugee Resettlement (ORR). Immigration detention facilities operate through contracts between Immigration and Customs Enforcement (ICE) and state or county localities, which frequently subcontract with private prison companies. These contracts create financial incentives for localities to support immigration detention, and, frequently, there is little if any justification for increasing the availability of detention space. According to a report by the Government Accountability Office, from fiscal years 2017 through 2020, ICE opened 40 new detention facilities, 28 of which did not have documentation justifying the need for additional space.<sup>3</sup>

Numerous government and nongovernmental entities have issued reports demonstrating that the federal government is fundamentally incapable of caring for the men, women, and children held in immigration detention in a safe and responsible manner.<sup>4</sup> Immigration detention facilities, regardless of the type of contract under which they operate, have been the sites of serious and repeated allegations of abuse, including allegations of sexual assault, violations of religious freedom, medical neglect, and the punitive use of solitary confinement. Last year, the United States had the [highest number of deaths](#) in immigration detention since 2005.

In 2020, a federal court ordered ICE to conduct custody reviews and releases for all medically high-risk individuals in light of the COVID-19 pandemic due to evidence that ICE’s policies and delayed response to the pandemic likely endangered detainees’ lives.<sup>5</sup> Two years later, that same federal court [appointed](#) an independent third party to ensure ICE’s compliance after it continued to hold medically vulnerable people in detention facilities in violation of the earlier court order. A 2020 report by Detention Watch Network, a national immigration rights membership

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<sup>1</sup> American Immigration Council, “Factsheet: Immigration Detention in the United States by Agency” (Jan. 2, 2020), <https://www.americanimmigrationcouncil.org/research/immigration-detention-united-states-agency>.

<sup>2</sup> U.S. Senate Committee on Appropriations, “Summary: The Department of Homeland Security Fiscal Year 2021 Appropriations Bills” (Dec. 21, 2021), <https://www.appropriations.senate.gov/imo/media/doc/1Fiscal%20Year%202021%20Omni%20Summary.pdf>.

<sup>3</sup> U.S. Government Accountability Office, “Immigration Detention: Actions Needed to Improve Planning, Documentation, and Oversight of Detention Facility Contracts” (Jan. 13, 2021), <https://www.gao.gov/products/gao-21-149>.

<sup>4</sup> DHS Office of Inspection General, “Capping Report: Observations of Unannounced Inspections of ICE Facilities in 2019” (Jul. 1, 2020), <https://www.oig.dhs.gov/sites/default/files/assets/2020-07/OIG-20-45-Jul20.pdf>. See also DHS Office of Inspection General, “Concerns About ICE Detainee Treatment and Care at Four Detention Facilities” (Jun. 3, 2019), <https://www.oig.dhs.gov/sites/default/files/assets/2019-06/OIG-19-47-Jun19.pdf>, and American Immigration Council, “Complaint Demands Investigation into Inadequate Medical and Mental Health Care Condition in Immigration Detention center” (Jun. 4, 2018), <https://www.americanimmigrationcouncil.org/advocacy/immigrants-inadequate-medical-care-aurora>.

<sup>5</sup> *Faour Abdallah Fraihat, et al v. U.S. Immigration and Customs Enforcement, et al*, Case No. 5:19-cv-01546-JGB-SHK (C.D. Cal. Apr. 20, 2020), ECF No. 132.

organization, found that ICE detention [directly contributed to the spread of the virus](#)<sup>6</sup> with spikes in infection occurring in many facilities.

### **Current System of Discretionary Release Is Inadequate**

The federal government already has at its disposal the necessary tools to move away from an immigration enforcement model that relies so heavily upon detention. Upon apprehension, ICE has the discretionary authority to release individuals in a variety of manners, including the individual's own recognizance, on "Orders of Supervision," on bond, or on a grant of parole. ICE is supposed to take into consideration whether the person is a risk to public safety or a flight risk. DHS's own regulations specifically list certain categories of people who should be considered for release on parole including those "who have serious medical conditions," are pregnant, or "whose continued detention is not in the public interest."<sup>7</sup> The regulations also provide a required 90-day custody review process for someone who has been ordered deported but remains in detention.<sup>8</sup> Even with this protection, individuals with deportation orders often remain in prolonged detention.<sup>9</sup>

ICE should apply a standard that presumes release for noncitizens facing removal. Statistically, noncitizens commit crimes at lower rates than the U.S.-born population.<sup>10</sup> ICE should require officers to document evidence of public safety risk rather than presuming it. Furthermore, the fact that someone is a recent arrival does not automatically mean that they are a flight-risk. Significant numbers of arriving noncitizens already have family and community contacts with whom they expect to reside. Unfortunately, ICE increasingly uses detention instead of discretionary release. For example, pursuant to a [2018 ICE directive](#), even vulnerable individuals like pregnant women were no longer presumed for release. Thousands of people who are currently detained, including vulnerable individuals, such as families and asylum seekers, could be released if ICE would use its discretionary authority. Yet, the mistaken belief that only detained immigrants will appear for their hearings has contributed to a harmful reliance on detention and has been proven incorrect.<sup>11</sup>

In cases where ICE has determined that physical detention is not necessary or justified, it commonly requires noncitizens to participate in the Intensive Supervision Appearance Program

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<sup>6</sup> Detention Watch Network, "Hotbeds of Infection: How ICE Detention Contributed to the Spread of COVID-19 in the United States" (Dec. 9, 2020), [https://www.detentionwatchnetwork.org/sites/default/files/reports/DWN\\_Hotbeds%20of%20Infection\\_2020\\_FOR%20WEB.pdf](https://www.detentionwatchnetwork.org/sites/default/files/reports/DWN_Hotbeds%20of%20Infection_2020_FOR%20WEB.pdf).

<sup>7</sup> 8 CFR § 212(d)(5)(b).

<sup>8</sup> 8 CFR § 241.4.

<sup>9</sup> American Immigration Council, "Policy Brief: Increase in Indefinite ICE Detention without Foreseeable Removal Dates during Covid-19" (Jan. 6, 2021), <https://www.americanimmigrationcouncil.org/research/increase-indefinite-ice-detention-without-foreseeable-removal-dates-during-covid-19>.

<sup>10</sup> Walter Ewing, Daniel E. Martínez, and Rubén G. Rumbaut, American Immigration Council, "The Criminalization of Immigration in the United States" (Jul. 13, 2015), <https://www.americanimmigrationcouncil.org/research/criminalization-immigration-united-states>.

<sup>11</sup> Ingrid Eagly and Steven Shafer, American Immigration Council, "Measuring *In Absentia* Removal in Immigration Court" (Jan. 28, 2021), <https://www.americanimmigrationcouncil.org/research/measuring-absentia-removal-immigration-court>.

(ISAP) as an alternative to detention. In practice, ISAP imposes significant burdens upon noncitizens through its use of 24-hour electronic surveillance mechanisms like ankle monitors and phone tracking. Ankle monitors present physical and mental health concerns and result in criminal stigmatization for those required to wear them. There is a perception that ankle monitoring is an attractive option to detention. The reality, however, is that they are painful, can cause burns, restrict mobility, and retraumatize survivors of domestic and sexual violence.<sup>12</sup>

A better solution is community-based case management<sup>13</sup> which relies upon local nonprofit organizations to provide supervision and support for people when they are released from custody. These programs connect noncitizens to social services, legal services, and mental health providers to facilitate their transition into local communities and provide information about the legal system, the forms of legal relief for which they may be eligible, and their legal obligations to appear at court. Community-based organizations are typically better equipped to deliver these services in a culturally appropriate and trauma informed manner, which increases the likelihood that the person understands and trusts the information they are being given and will comply with their legal obligations. Community-based case management in the family detention context has been shown to be highly effective at ensuring court appearances and is far less costly than detention.<sup>14</sup>

Legal representation is a critical component to facilitating the reduction of detention while simultaneously improving the efficiency of the immigration legal process. While federal law guarantees people the right to legal counsel in removal proceedings, the government does not guarantee counsel if the person is unable to afford one. According to a 2016 study<sup>15</sup> by the American Immigration Council, only 37 percent of people facing removal were represented and only 14 percent of detained people acquired legal counsel. The difference in outcomes is staggering—people in detention are twice as likely to win their cases if they have legal counsel. People who were never detained were five times more likely to obtain legal relief. Studies have also shown that attorneys and legal education programs make court proceedings more efficient and reduce government costs.<sup>16</sup>

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<sup>12</sup> Julie Pittman, California Law Review, “Released into Shackles: The Rise of Immigrant E-Carceration” (Apr. 2020), <https://www.californialawreview.org/print/released-into-shackles/#clr-toc-heading-8>.

<sup>13</sup> American Immigration Council and Women’s Refugee Commission, “Factsheet: Community Support for Migrants Navigating the U.S. Immigration System” (Feb. 26, 2021), <https://www.americanimmigrationcouncil.org/research/community-support-migrants-navigating-us-immigration-system>.

<sup>14</sup> Ingrid Eagly, Steven Shafer, and Jana Whalley, American Immigration Council, “Detaining Families: A Study of Asylum Adjudication in Family Detention” (Aug. 16, 2018), <https://www.americanimmigrationcouncil.org/research/detaining-families-a-study-of-asylum-adjudication-in-family-detention>.

<sup>15</sup> Ingrid Eagly and Steven Shafer, American Immigration Council, “Access to Counsel in Immigration Court” (Sept. 28, 2016), <https://www.americanimmigrationcouncil.org/research/access-counsel-immigration-court>.

<sup>16</sup> Ingrid Eagly and Steven Shafer, American Immigration Council, “Measuring *In Absentia* Removal in Immigration Court” (Jan. 28, 2021), <https://www.americanimmigrationcouncil.org/research/measuring-absentia-removal-immigration-court>.

## AILA's Recommendations

AILA urges Congress and President Biden to implement the following recommendations:

- **Review all detained people's cases for release.** ICE should conduct an immediate, individualized review of all detention cases to determine if detention is necessary and justified under law in each case.
- **Establish a presumption of release.** ICE should establish new guidelines for custody determinations presuming release from custody and requiring the least onerous method of supervision to ensure appearance. A place to start is the interim guidance on civil immigration enforcement and removal priorities.<sup>17</sup> ICE has the authority to release people subject to "mandatory detention" for compelling humanitarian reasons and should issue guidance instructing officers to exercise that authority.
- **Electronic surveillance should not be used unless determined to be necessary and justified.** ICE should establish guidance requiring specific documentation in each case when restrictive conditions of supervision, such as electronic monitoring, are imposed. ICE should be required to use the least restrictive and least onerous form of supervision, such as release on recognizance unless there is evidence demonstrating that more restrictive methods are necessary.
- **Implement community-based case management and supervision programs.** To facilitate the rapid reduction of detention, DHS should immediately scale up community-based case management, supervision, and legal counsel programs that are highly effective at ensuring appearance at court, far less costly than detention, and more humane.
- **Reduce detention funding dramatically.** For FY2022, Congress should reduce detention and custody funding to an annual level of approximately \$700 million based on a goal of reducing overall detention by 75 percent. The 75 percent reduction in funding would support an Average Daily Population (ADP) of 8,500 people.
- **Stop subsidizing private prisons at taxpayer expense.** DHS should impose a moratorium on future contracts for detention facilities or expansions of detention and implement a plan to terminate all existing contracts with private prisons and county jails within one year. Private prisons have been found to provide substandard medical care resulting in death, provide inadequate access to legal services, and fail to report and respond to sexual assault.<sup>18</sup>
- **Ensure people in custody have access to legal representatives.** People in immigration detention face tremendous barriers to meaningful and confidential legal representation. The new administration should ensure all people in detention have expanded access to legal

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<sup>17</sup> Memorandum from Tae D. Johnson, Acting Director to all ICE Employees, "Interim Guidance: Civil Immigration Enforcement and Removal Priorities" (Feb. 18, 2021), [https://www.ice.gov/doclib/news/releases/2021/021821\\_civil-immigration-enforcement\\_interim-guidance.pdf](https://www.ice.gov/doclib/news/releases/2021/021821_civil-immigration-enforcement_interim-guidance.pdf).

<sup>18</sup> Homeland Security Advisory Council, "Report of the Subcommittee on Privatized Immigration Detention Facilities" (Dec. 2016), <https://www.dhs.gov/publication/homeland-security-advisory-council-report-subcommittee-privatized-immigration-detention>.

counsel, interpreters, mental health professionals, and other members of their legal team. This includes, but is not limited to, expanded visitation policies, the ability to schedule and receive legal phone calls, better provision of private and confidential meeting space, and free video and telephonic services.

- **Provide funding for legal representation.** President Biden should announce a commitment to guarantee legal counsel for all persons facing removal who cannot afford it. In fiscal years 2021 and 2022, Congress and the president should rapidly expand the existing pilot programs that provide legal counsel to ensure the most vulnerable populations, including people in detention or who have been released from detention, receive legal counsel.
- **End family detention and policies that result in the separation of families immediately.** While President Biden has announced plans to end the previous administration’s family separation policies, families are still being separated. At the border, fathers and mothers who arrive together with children are held in separate detention spaces or separated by geographic location when they are sent to different facilities from the border. In the interior of the United States, parents are routinely held in detention away from their children while their immigration court cases proceed slowly. ICE should establish robust policies to ensure release of families from custody.

### Henry’s Story\*<sup>19</sup>

All people, including recent border arrivals, should be granted the freedom to appear unshackled and out of jumpsuits when making their case before the Immigration Courts. We share for example the experience of Henry, an asylum seeker from Cameroon and pro bono client of AILA’s joint initiative with the American Immigration Council: [The Immigration Justice Campaign](#). Henry was forced to wait in Mexico for three months before being allowed into the United States to seek asylum. When he was finally allowed into the United States, he was detained and denied release from detention three times. With the assistance and persistence of his pro bono attorneys, Henry was finally released from detention to continue with his asylum case.

After nearly 18 months in ICE detention, Henry said his release felt like Christmas Day: “It felt like the darkness had finally been lifted. I had dreamed of my freedom for so long and now I was finally given a fresh start.”

For more information and for AILA’s continued advocacy on reducing and phasing out detention, please visit our website’s [featured issue page on immigration detention](#).<sup>20</sup>

<sup>19</sup> \*Indicates use of a pseudonym.

<sup>20</sup> “Featured Issue: Immigration Detention” (Mar. 22, 2021), AILA Doc. No. 21031937, <https://www.aila.org/advocacy/media/issues/all/featured-issue-immigration-detention>.