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A CONSERVATIVE APPROACH TO IMMIGRATION DETENTION REFORM

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BACKGROUND

Recent [reports](#) of inadequate medical care provided at immigration detention centers, as well as mismanagement of [COVID-19 outbreaks](#), have prompted calls for an investigation into the conditions of these facilities. Past investigations have generally resulted in negative assessments of immigration facility conditions.

A Department of Homeland Security's Office of Inspector General (DHS OIG) [investigation](#) of ICE and Customs and Border Patrol (CBP) detention facilities revealed a lack of capacity to deal with the COVID-19 outbreak, which immigration [advocates have compared](#) to previous mishandlings of contagious outbreaks in immigration detention centers. Immigration and Customs Enforcement's (ICE) Civil Rights and Civil Liberties Office [noted](#) that ICE has "systematically provided inadequate medical and mental health care and oversight to immigration detainees in facilities throughout the U.S."

IMMIGRATION DETENTION: SCOPE AND POLICY FRAMEWORK

Immigration and Customs Enforcement (ICE) [detained](#) 510,854 individuals in FY2019 and averaged a daily population of 50,165 people. Both numbers represent large increases from the prior two years in response to an increase in apprehensions at the southern border as well as the administration's preference for detaining immigrants instead of releasing them on supervision. ICE detention is a form of civil confinement in which immigrants go through an administrative removal process, which is different than receiving a punishment for committing a crime.

The Immigration and Naturalization Act (INA) contains [four provisions](#) which largely govern the immigration detention scheme. These provisions dictate which classes of aliens are subject to mandatory detention and which classes are entitled to various alternatives to detention.

[Two entities](#) inspect ICE facilities for compliance with confinement standards: ICE's Office of Detention Oversight (ODO) and a private company, the Nakamoto Group, which is an ICE contractor. Facilities are subject to annual inspections from The Nakamoto Group and a more thorough inspection from ODO every three years. Both inspectors can impose financial penalties or contract cancelations for inspection failures.

GOALS OF IMMIGRATION DETENTION

Detention is necessary to deter illegal immigration and to allow for the expeditious removal of illegal immigrants who represent serious public safety or national security threats. A coherent conservative approach to immigration detention should center on public safety, fiscal responsibility, and protecting constitutional liberties and human dignity.

While there is some deterrent benefit to detention, the evidence for detention as a deterrent to illegal immigration is relatively [weak](#), and detention incurs significant taxpayer costs. Notably, [most immigrant](#) detainees have never been convicted of a crime, and most of those who have were convicted of minor crimes for which they have already served sentences in jail or prison.

Given these realities and the documented instances of neglect and abuse in facilities, conservative reforms to immigration detention should center on reserving detention for pressing public safety threats, expanding alternatives to detention and increasing oversight of ICE and CBP facilities.

RECOMMENDED SOLUTIONS

- Expand alternatives to detention (ATDs)
 - ♦ ICE relies on [several different approaches to ATDs](#), including electronic monitoring, case management, monetary bond and check-ins. While the success of ATDs vary by program, ICE's primary ATD programs have [proven to be highly effective](#). [According to government analyses](#), more than 90 percent of participants comply with court orders [and nearly 100 percent](#) attend immigration court dates.
 - ♦ ICE spent between [\\$137](#) and [\\$208](#) per person per day to detain someone in an immigration detention facility in FY2018. For those held in family detention, the cost can regularly exceed [\\$300 per person](#) per day. In contrast, the average daily cost per participant across ATD programs in FY2018 was \$4.16. Supervision programs are substantially more cost-effective and humane than detention.
- Reform INA to narrow the scope of detention
 - ♦ Roughly [70 percent](#) of immigrant detainees are subject to mandatory detention, often with little basis in public safety or a compelling government interest. Congress should modify the INA to reduce the number of individuals covered by mandatory detention.
 - ♦ INA Section 236(c) mandates detention for aliens removable on certain criminal activity grounds, but with no limit on when the crime occurred. The law currently mandates detention, for example, for an [alien who committed a minor crime](#) 15 years ago with no activity in the meantime. Over 1,400 detained aliens [in July of 2019](#) were confined for a conviction 15 years or older. This section should include a statute of limitations for certain low-level crimes.
 - ♦ INA Section 235(b) creates the process of expedited removal for certain classes of aliens. Many asylum seekers are subject to mandatory detention under Section 235(b) even if they have passed an initial credible fear screening. Asylum seekers have high court appearance rates and represent no discernible public safety threat. This section should remove all such aliens from mandatory detention and create a policy favoring release.
 - ♦ INA Section 241(a) generally mandates the detention of aliens during a 90-day period after formal removal proceedings. This provision should remove from mandatory detention those who were lawfully admitted and are appealing an order of removal. These individuals have likely developed strong, legitimate ties to the country and merit more robust procedural safeguards.
 - ♦ INA Section 236(a), which permits DHS to release aliens not under mandatory detention on bond or a supervision program, contains an arbitrary monetary bond floor of \$1,500. Bond should be reformed to an individual's ability to pay, otherwise it is a harsher standard than is used in the criminal detention context. Likewise, Department of Justice regulations place the burden of proof that "release would not pose a danger to property or persons, and that the alien is likely to appear for any future proceeding" on the immigrant. New legislation should shift this burden of proof to the government, otherwise it is more stringent than the criminal justice system. This section could also be updated to include a presumption of release for certain populations, such as family units, pregnant women and asylum seekers who have passed credible fear screenings.

- Increase facility oversight and accountability
 - ♦ A [report](#) from DHS OIG revealed that current facility inspections fail to ensure any meaningful compliance. The report states that ICE fails to “systematically hold facilities accountable” and that “some deficiencies remain unaddressed for years.” The report quotes an ICE official as referring to inspections as “useless.”
 - ♦ The 2010 DHS Appropriations Act required the agency to cancel contracts with any detention facility failing two consecutive inspections, but [ICE's self-inspections](#) rarely lead to negative reviews, and penalties for negative reviews are [even rarer](#).
 - ♦ Instead of relying on the agency to inspect and hold itself accountable, lawmakers should update the INA to vest inspection and discipline authority with the DHS OIG or another independent auditing entity.
 - ♦ Thorough inspections should be annually conducted at each facility, instead of once every three years, with the potential for an additional, though less intensive, unannounced inspection (all current inspections are preannounced, limiting their effectiveness).
 - ♦ The INA should be updated to include the language of the 2010 appropriations bill mandating contract termination for facilities that fail consecutive inspections. Inspection results should be subject to Freedom of Information Act queries and the DHS website should publish a list of all recently failed facilities.

CONTACT US

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