



Immigrant Detention Can ICE Meet Its Legal Imperatives and Case Management Responsibilities?

By Donald Kerwin and Serena Yi-Ying Lin

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Executive Summary

On August 6, 2009, US Immigration and Customs Enforcement (ICE) announced plans to revamp its detention system, with the goal of bringing it in line with the agency's civil detention authorities. The initiative is designed to reduce the agency's reliance on local jails and private prisons, address longstanding concerns related to conditions of confinement, and centralize management of its detention system. The subsequent disclosure by ICE that 10 more detainees died in its custody between 2004 and 2007 than it had previously reported underscores the need for detention reform and, in particular, for reform of ICE information systems.

The report explores whether the ICE database and case tracking system adequately serve the agency's need to adhere to its legal mandates governing bond and parole, to administer its custody review processes for post-removal order detainees, to assess the eligibility of detainees for alternative programs, and to abide by its national detention standards.

As detailed below, ICE may well need *more* information on those in its custody than it currently collects, particularly information that can inform and guide its legal and operational decisions. It will also need *different* information as it creates a detention system more suitable for "civil" detainees.

The report provides a roadmap for meeting the data needs that are essential for the new ICE detention initiative to succeed. It falls into two parts. The first analyzes select data for all 32,000 detainees in ICE custody on January 25, 2009, pursuant to Freedom of Information Act production by ICE to the Associated Press. The second examines the sufficiency of ICE information systems in light of the agency's legal mandates and management imperatives.

Some highlights of the Migration Policy Institute (MPI) analysis of the ICE data on detainees in the system on January 25, 2009:

- Of the 32,000 immigrants in ICE custody, 18,690 had pending removal cases (in other words, they had not received final orders of removal).
- The average length of detention for the 18,690 pre-removal order detainees was 81 days. Seventy-four percent had been detained for less than 90 days, 13 percent for between 90 days and six months, 10 percent for between six months and one year; and 3 percent for a year or more.
- 10,873 detainees (or 34 percent) had received "administratively final" orders of removal. The average length of detention *following* receipt of a removal order for 10,771 detainees (those for whom the database provided the *date* of the final removal order) was 72 days.
- The average length of detention for post-removal order detainees from the first day of detention to January 25, 2009 (i.e., time in detention both *prior* to and *after* receiving a removal order) was 114 days; 1,792 post-removal order detainees had been detained for more than six months.
- A high percentage of detainees (58 percent) did not have criminal records, which is difficult to explain since mandatory detention laws largely apply to criminal aliens;

ICE includes persons who have committed immigration-related offenses in its criminal alien nomenclature; and ICE's expanding Secure Communities program, which places arrested and imprisoned noncitizens into removal proceedings, should be feeding large numbers of immigrants into its detention system.

- The “most serious” convictions for nearly 20 percent of criminal aliens in ICE custody were for traffic-related (13 percent) and immigration-related (6 percent) offenses.
- Noncriminal detainees had been detained for an average of 65 days, compared to 121 days on average for detainees with criminal convictions.
- ICE held detainees in 286 facilities which were concentrated in southern and US-Mexico border states; 68 percent of the total were held in California, Arizona, New Mexico, Texas, Arkansas, Louisiana, Alabama, Georgia, and Florida.
- Nearly 70 percent of detainees were held in state and local prisons pursuant to Intergovernmental Services Agreements, 17 percent in contract detention facilities, 10 percent in service processing centers, 2 percent in federal prisons, and 3 percent in Office of Refugee Resettlement facilities, medical centers, shelters, and other alternative or “soft” detention settings.

The detention data highlight the need for ICE information systems that can meet the substantial challenges of a sprawling detention system — comprised of hundreds of facilities, large and small, public and private, federal and local — that holds a highly diverse population, including men and women, criminal and noncriminal detainees, the medically fragile, and others.

ICE has not provided MPI with a complete summary of the data it collects, whether through its ENFORCE database and case tracking system or other systems. The agency in some cases may be capturing the detainee information that the report recommends that it collect; in other cases, it may not.

Overall, while ENFORCE captures important biographic, immigration status, and detention information, it may be missing information that would allow ICE officials to make informed and timely decisions. To cite a few examples, the system should provide ICE with the information necessary to determine whether a detainee:

- Constitutes a risk and why — information which is crucial in determining eligibility for release, for an alternative program, and for placement within the detention system.
- Meets the criteria for release or parole, even if the detainee otherwise falls within a mandatory detention category.
- May have a claim to US citizenship.
- Has special medical conditions, mental illness, disability, or other humanitarian issues.
- Has complied with the government's attempts to deport him and, if not, what he needs to do in order to comply.
- Has been treated in compliance with ICE's national standards.

The report makes a range of recommendations, among them that ICE:

- Undertake an intensive analysis of its information systems, particularly its detention database and case tracking system, in light of its legal mandates, management imperatives, and detention transformation initiative.
- Comprehensively review its contracts for detention space, with the goal of maximizing the cost savings realized by expanding alternative-to-detention programs.
- Capture information that would allow the agency to adhere to its national standards, including information on when and how the agency has complied with the standards. For standards related to detainee transfers, ICE should record information on the US residence of detainees, their family members, and legal counsel.
- Collect information related to detainee medical needs, interventions, treatment, and causes of death.
- Initiate an exhaustive analysis of its information systems to examine how ENFORCE relates to other databases within the Department of Homeland Security (DHS) and other federal agencies; how ICE collects the information that populates ENFORCE; the fields that ENFORCE contains; and time-series data on all ICE detainees since ENFORCE went into effect.

Many government and nongovernmental organization (NGO) reports have criticized ICE's failure to comply with its legal mandates and management imperatives. This analysis places these criticisms in a new light by asking whether ICE *can* fully comply with the law, effectively manage its sprawling detention system, and create a system better suited to civil detainees.

I. Introduction

On August 6, 2009, US Immigration and Customs Enforcement (ICE) announced plans to revamp its detention system, with the goal of bringing it in line with the agency's civil detention authorities.¹ ICE does not imprison persons serving criminal sentences, and even immigrant detainees deemed to be criminal aliens serve their sentences prior to coming into ICE custody. Yet the US immigrant detention system has long been governed by standards that "are identical to, and modeled after, correctional standards for criminal populations."² As part of the new initiative, ICE intends to reduce its reliance on local jails and private prisons, address longstanding concerns related to conditions of confinement, and centralize management of its detention system. The disclosure by ICE on August 17, 2009, that 10 more detainees died in its custody between 2004 and 2007 than it had previously reported underscores the need for detention reform and, in particular, for reform of ICE's information systems.³ As detailed below, ICE may well need *more* information on those in its custody than it currently collects, and it will certainly need *different* information as it creates a detention system more suitable for "civil" detainees.

This report provides a roadmap for meeting the data needs that are essential for the new initiative to succeed. It falls into two parts. The first analyzes select data for all 32,000 detainees in ICE custody on January 25, 2009. The second examines the sufficiency of ICE information systems in light of the agency's legal mandates and management imperatives.

A. Snapshot of ICE Custody Data

ICE provided the January 25, 2009 detainee data to Associated Press reporter Michelle Roberts pursuant to a Freedom of Information Act (FOIA) request. In a March 16, 2009 article, Roberts reported that:

- Of the 32,000 persons in ICE custody that January night, 18,690 did not have criminal convictions.⁴
- More than 400 detainees without criminal records had been held for a year or more.
- 950 persons had been detained for more than six months after receiving a final removal order, despite a Supreme Court decision holding that removal must, in most cases, be effected within six months.⁵

Roberts also reported that it cost an average of \$141 a night to detain an immigrant,

¹ US Immigration and Customs Enforcement, "2009 Immigration Detention Reforms," (fact sheet, August 6, 2009), http://www.ice.gov/pi/news/factsheets/2009_immigration_detention_reforms.htm.

² US Commission on International Religious Freedom, *Report on Asylum Seekers in Expedited Removal* vol. I "Finding and Recommendations," (Washington, DC: United States Commission on International Religious Freedom, 2005), 48-49.

³ US Immigration and Customs Enforcement, "ICE Identification of Previously Un-Tracked Detainee Deaths Highlight Importance of Detention Reform" (press release, August 17, 2009), <http://www.ice.gov/pi/nr/0908/090817washington.htm>.

⁴ Michelle Roberts, "Immigrants Face Long Detention, Few Rights," Associated Press, March 16, 2009, <http://www.deseretnews.com/article/705291116/Immigrants-face-long-detention-few-rights.html>.

⁵ *Zadvydas v. Davis*, 533 U.S. 678, 701 (2001). MPI's analysis found that 992 persons had been detained as of January 25, 2009 for at least six months *following* receipt of a removal order.

compared to \$13 a night for an alternative-to-detention program. She arrived at the \$141 figure by dividing the annual ICE budget for custody operations by its total yearly detention nights.⁶ ICE's past estimates of its average nightly detention costs have been in the \$95 range,⁷ although the agency plans to initiate a more thorough study of these costs.

Although the January 25, 2009 data offer only a snapshot of the ICE detention system, the Migration Policy Institute (MPI) analysis of the data provides a telling look at the demographic characteristics of ICE detainees, the facilities in which they are held, and the length of detention for detainees in removal proceedings (pre-removal order detainees) and those who have received an "administratively final" order of removal (post-removal order detainees).⁸ The data point to significant trends that the agency will need to take into account as it works to reform its detention system and its underlying information systems.

B. Sufficiency of ICE Information

The second part of the report explores whether the ICE database and case tracking system adequately serve the agency's need to adhere to its legal mandates governing bond and parole, to administer its custody review processes for post-removal order detainees, to assess the eligibility of detainees for alternative programs, and to abide by its national detention standards. These issues cannot be definitively answered based on the January 25, 2009 data, which does not include all of the detainee information tracked by ICE. Since MPI was not able to review all of the data fields contained within the ICE detention database and case management system, we cannot say conclusively what information ICE does not track that it should.

The report makes specific recommendations on the detainee information that ICE must collect. In some cases, ICE records this information and, in other cases, it does not. Overall, it appears from MPI's analysis that while ICE collects valuable biographic, immigration, and detention information, it does not always collect the information that would allow its agents to make informed decisions on custody, release, eligibility for alternative-to-detention programs, and adherence to its standards. The report recommends that ICE undertake an intensive analysis of its information systems, particularly its detention database and case tracking system, in light of its legal mandates, management imperatives, and the detention transformation initiative.

⁶ ICE officials disagree with the Associated Press methodology, arguing that administrative, transportation, and case-processing costs should not be included in per-night detention costs.

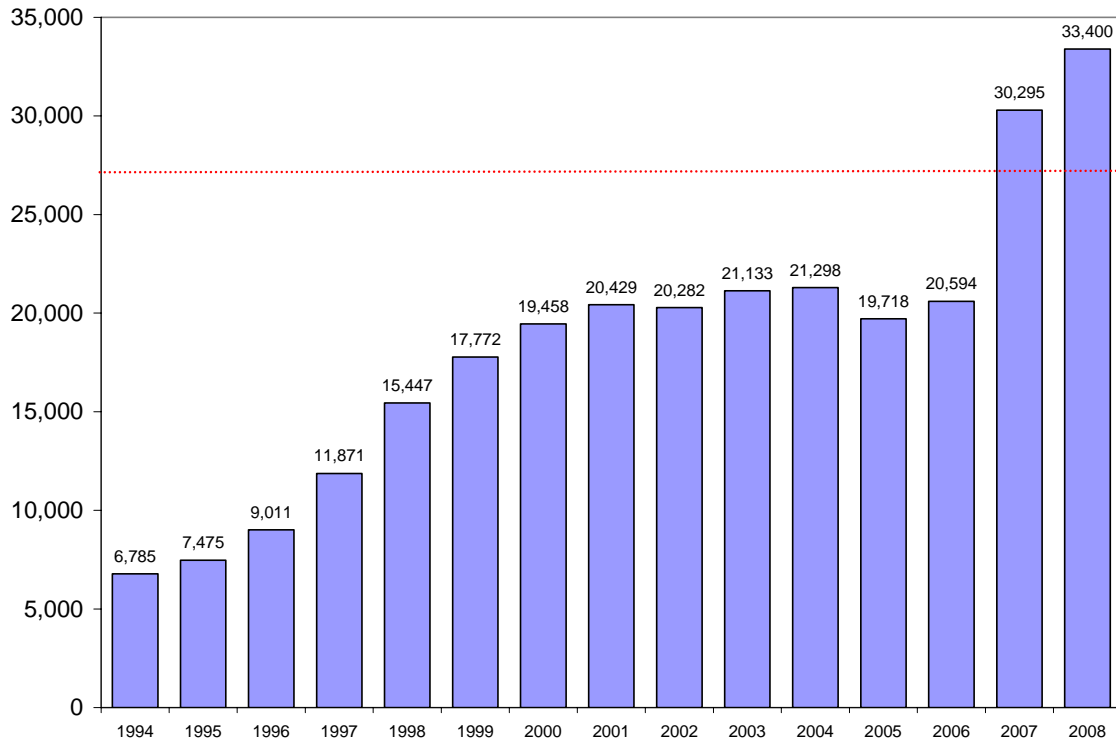
⁷ Doris Meissner and Donald Kerwin, *DHS and Immigration: Taking Stock and Correcting Course* (Washington, DC: Migration Policy Institute, 2009), 54, http://www.migrationpolicy.org/pubs/DHS_Feb09.pdf

⁸ An "administratively final" order of removal refers to an order entered by an immigration judge or, if administratively appealed, upheld by the Board of Immigration Appeals (BIA).

II. Background

Since 1994, the immigration detention system has expanded six-fold, from 6,785 beds per night to 33,400,⁹ spurred by passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA).¹⁰ (See Figure 1.) IIRIRA increased the crimes for which noncitizens could be removed and expanded the categories of persons subject to mandatory detention.¹¹

Figure 1. Number of INS/ICE Detainees per Day, 1994-2008



Sources: 1994 to 2003: Congressional Research Service (CRS), *Immigration-Related Detention: Current Legislative Issues* (Washington, DC: Congressional Research Service, 2004), <http://www.fas.org/irp/crs/RL32369.pdf>; 2004 to 2007: CRS, *Health Care for Noncitizens in Immigration Detention* (Washington, DC: Congressional Research Service, 2008), http://assets.opencrs.com/rpts/RL34556_20080627.pdf; 2008: Doris Meissner and Donald Kerwin, *DHS and Immigration: Taking Stock and Correcting Course* (Washington, DC: Migration Policy Institute, 2009), 51, http://www.migrationpolicy.org/pubs/DHS_Feb09.pdf.

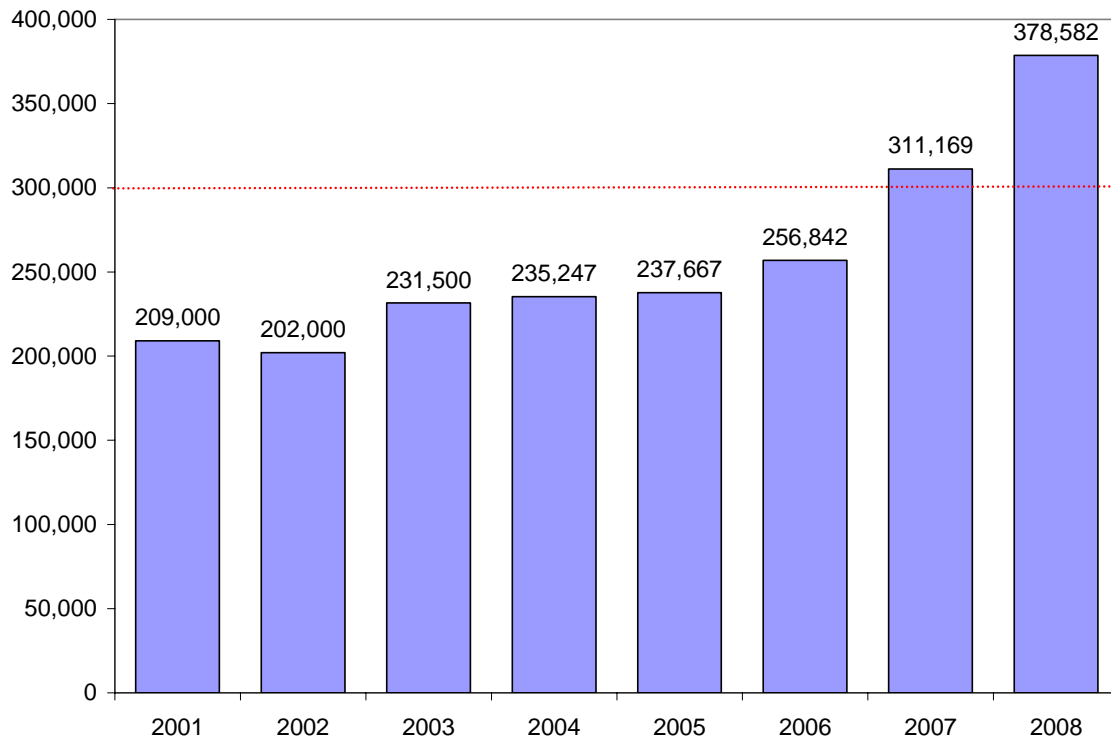
⁹ Doris Meissner and Donald Kerwin, *DHS and Immigration: Taking Stock and Correcting Course*, 51.

¹⁰ Pub. L. No. 104-208, 110 Stat. 3009 (September 30, 1996).

¹¹ Catholic Legal Immigration Network, Inc., *The Impact of Our Laws on American Families* (Washington, DC: Catholic Legal Immigration Network, Inc., 2000), <http://www.cliniclegal.org/sites/default/files/atrisk1.pdf>; American Bar Association, *American Justice Through Immigrants' Eyes* (Chicago, Ill.: American Bar Association, 2004), 23-44, 59-71.

In recent years, the growth of the immigrant detention system has accelerated. Since FY 2005, ICE detention bed space has increased by 78 percent.¹² During 2008, ICE detained a record 378,582 persons, representing a 60 percent increase from 2005.¹³ (See Figure 2.) Between 2005 and 2009, the ICE budget for custody operations nearly doubled from \$860 million to \$1.72 billion (see Figure 3). If its detention system operates at full capacity in FY 2009, ICE will accommodate 12.2 million nights in detention (see Figure 3).

Figure 2. Number of INS/ICE Detainees per Year, 2001-2008

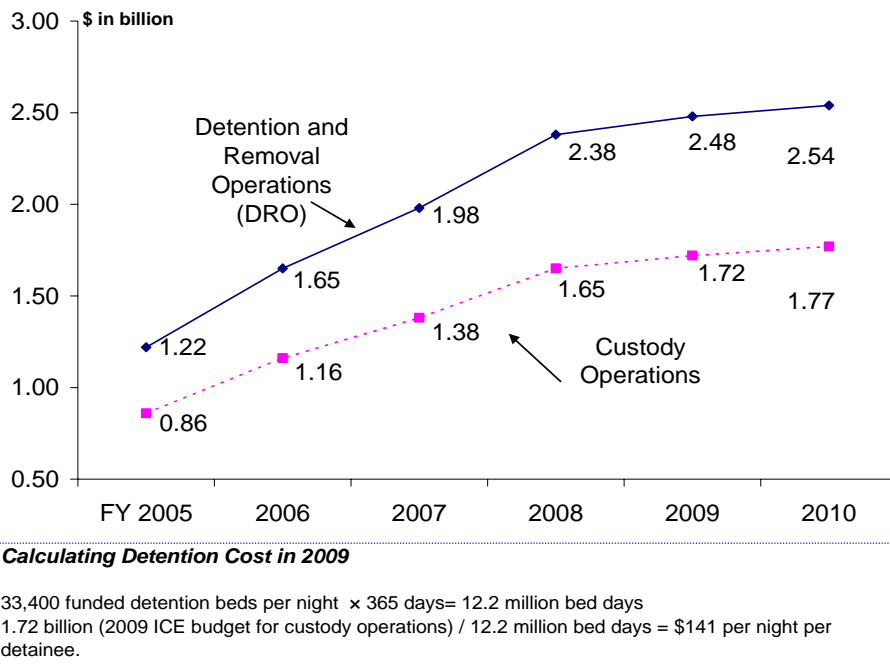


Source: 2001 to 2002: Immigration and Naturalization Service, Office of Immigration Statistics *Statistical Yearbook*, various years, <http://www.dhs.gov/files/statistics/publications/archive.shtm>; 2003 to 2008: Department of Homeland Security, Office of Immigration Statistics, *Immigration Enforcement Actions*, selected years, (Washington, DC: Office of Immigration Statistics).

¹² Congressional Research Service, *Immigration-Related Detention: Current Legislative Issues* (Washington, DC: Congressional Research Service, 2004), <http://www.fas.org/irp/crs/RL32369.pdf>.

¹³ US Department of Homeland Security, Office of Immigration Statistics, *Immigration Enforcement Actions: 2008* (Washington, DC: Office of Immigration Statistics, 2009), 3, http://www.dhs.gov/xlibrary/assets/statistics/publications/enforcement_ar_08.pdf.

Figure 3. Annual Budgets for Detention and Removal Operations (DRO) and Custody Operations, FY 2005 to 2010



Source: ICE “Budget Fact Sheet,” various years, <http://www.ice.gov/pi/news/factsheets/index.htm>.

ICE holds most immigrant detainees in 350 state prisons and local jails under Intergovernmental Services Agreements (IGSAs).¹⁴ Virtually all of the expansion in its detention system since FY 2006, more than 6,500 beds in total, has occurred through IGSAs.¹⁵

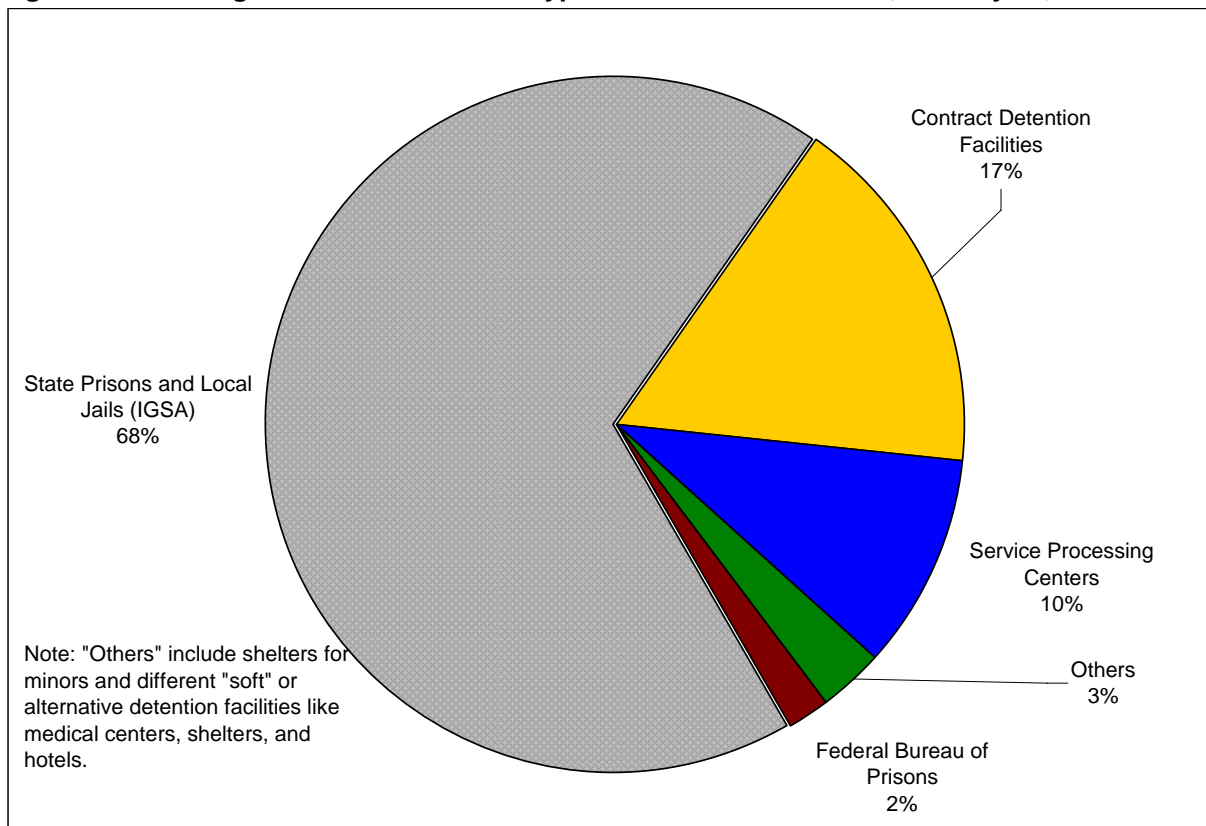
ICE also houses immigrants in for-profit prisons known as Contract Detention Facilities (CDFs), in its own Service Processing Centers (SPCs), in the federal Bureau of Prisons (BOP) system, in shelters for minors run by the Office of Refugee Resettlement (ORR), and in different “soft” or alternative-detention facilities like medical centers, shelters, and hotels (see Figure 4).¹⁶ On the evening of January 25, 2009, ICE detainees were held in 286 different facilities.

¹⁴ US Department of Homeland Security, Office of Inspector General, *Immigration and Customs Enforcement: Detention Bedspace Management* (Washington, DC: Office of Inspector General, 2009), 2, <http://www.aila.org/content/default.aspx?bc=1016%7C6715%7C16871%7C28831>.

¹⁵ *Ibid.*

¹⁶ The Office of Refugee Resettlement within the Department of Health and Human Services oversees the care of unaccompanied minors.

Figure 4. Percentage of Detainees in Five Types of Detention Facilities, January 25, 2009



Source: MPI Analysis of ICE Database on January 25, 2009.

A. ICE Database and Custody Information

On September 30, 2007, ICE replaced its Deportable Alien Control System (DACS) with the ENFORCE database and case tracking system.¹⁷ According to Department of Homeland Security (DHS) officials, ENFORCE incorporates all the data originally collected by DACS, as well as new data. The ENFORCE Integrated Database includes biographic and case information collected by DHS related to booking, the removal process, and detention. This information forms the basis of the ENFORCE case tracking system.

The key “modules” or “screens” that feed into this system allow ICE to:

- record information on persons it investigates, arrests, and places in removal proceedings through the ENFORCE Alien Booking Module (EABM);
- capture detention history through the ENFORCE Alien Detention Module (EADM); and
- manage cases through the agency’s entire range of contacts with immigrants through

¹⁷ US Department of Homeland Security, Office of Inspector General, *Immigration and Customs Enforcement’s Tracking and Transfers of Detainees* (Washington, DC: US Department of Homeland Security, Office of Inspector General, 2009), 3, http://www.dhs.gov/xoig/assets/mgmt/rpts/OIG_09-41_Mar09.pdf.

the ENFORCE Alien Removal Module (EARM).¹⁸

ICE plans to develop a fourth module on alternatives to detention. Unlike with DACS, the ENFORCE booking, detention, and removal modules interface with each other.

B. Timeliness and Reliability of Data Entry

Any database and case tracking system depends on the timeliness and reliability of the data entered. Local ICE offices collect and update detention information each day, and ICE's national office merges this information into a single report.¹⁹ The DHS Office of Inspector General (OIG) in a November 2006 report criticized ICE's inability to locate and track many of those in its custody. It determined that at five of the eight detention facilities studied, information was not entered into DACS for 10 percent of new detainees within five days of their detention or transfer.²⁰ At six facilities, DACS reported detainees at the wrong facility, or erroneously logged the presence of detainees who had either been released or deported.²¹ In response to the OIG report, ICE issued a policy requiring that the DACS system be updated within a day of transferring detainees or placing them in detention.²²

A 2009 OIG report found a 6 percent inaccuracy rate in locating a sample of 459 detainees, due to delays in data input.²³ The report highlighted the stakes involved in effective case tracking, concluding that:

*Continuous knowledge of each detainee's location is imperative to ensure the safety of the public, detention facility staff, and other detainees. If ENFORCE is not updated in a timely and accurate way, family members and legal representatives could be misinformed of the whereabouts of detainees. In addition, there is a potential risk of improperly accounting for dangerous detainees.*²⁴

The 2009 report also found that local detention facilities maintained alternate "tracking systems, including log books, Excel spreadsheets, contractor records, and locally developed systems."²⁵ The inspector general recommended the elimination of "locally developed ICE detainee tracking systems in lieu of ENFORCE."²⁶ In February 2009, ICE issued an

¹⁸ ENFORCE interfaces with other databases, including the FBI National Crime Information Center (NCIC), and two DHS databases: the National Automated Inspections Lookout System (NAILS) and the Automated Biometric Identification System (known as IDENT).

¹⁹ Letter from Dr. Dora Schriro, Special Advisor, Office of the Assistant Secretary, US Immigration and Customs Enforcement, to Donald Kerwin, Vice President for Programs, Migration Policy Institute (received July 2, 2009).

²⁰ US Department of Homeland Security, Office of Inspector General, *Review of US Immigration and Customs Enforcement's Detainee Tracking Process*, OIG-07-08 (Washington, DC: US Department of Homeland Security, Office of the Inspector General, 2006), 3, http://www.dhs.gov/xoig/assets/mgmt/rpts/OIG_07-08_Nov06.pdf.

²¹ *Ibid.*, 4-5

²² US Department of Homeland Security, Office of Inspector General, *Immigration and Customs Enforcement's Tracking and Transfers of Detainees*, 3, 26.

²³ *Ibid.*, 4.

²⁴ *Ibid.*, 5-6.

²⁵ *Ibid.*, 6.

²⁶ *Ibid.*, 12.

instruction to this effect.²⁷

Recommendation: We concur with the OIG recommendation that all relevant information on ICE detainees, wherever it is held, should be consolidated into the ENFORCE system, that data entry should take place in a consistently reliable and timely way, and that duplicative tracking systems — whether maintained by ICE or its contractors — should be eliminated.

III. Findings

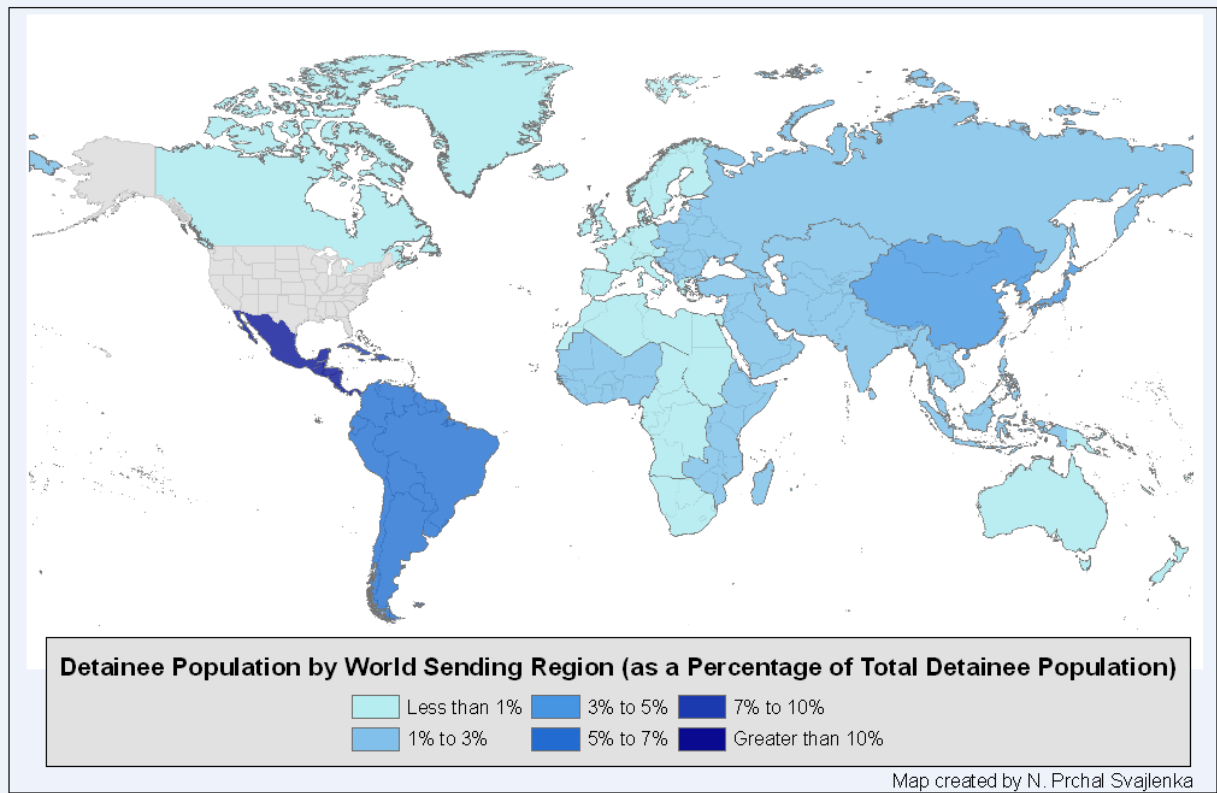
The detainee data provided to the AP covered just one night and included only a few fields in the agency's database and case tracking system. Nonetheless, MPI's analysis of this data provides a revealing glimpse at the demographics of immigration detainees, the detention facilities used by ICE, the length of detention for pre- and post-removal order cases, the criminal backgrounds of detainees, and other significant data points.

A. Demographic Information on Detainees

- Of the 32,000 immigrants in ICE custody on January 25, 2009, 91 percent were male and 9 percent were female.
- The detainees came from 177 countries, with 37 percent from Mexico, 28 percent from Central America, 7 percent from the Caribbean, and 6 percent from South America (see Map 1 and Table 1).

²⁷ Ibid., 13.

Map 1. Regions of Origin for Persons in Detention on January 25, 2009



Source: MPI Analysis of ICE database of January 25, 2009.

Table 1. Top Ten Regions (Country) of Origin for ICE Detainees on January 25, 2009

Region	% of Total Detainee Population (32,000)
Mexico	37
Central America	28
Caribbean	7
South America	6
Eastern Asia	4
Western Africa	3
South Central Asia	3
South Eastern Asia	2
Eastern Europe	2
Western Asia	1
Other	8

Note: Mexico is the top sending country, so we treat it as a distinct entity.

Source: MPI Analysis of ICE database of January 25, 2009.

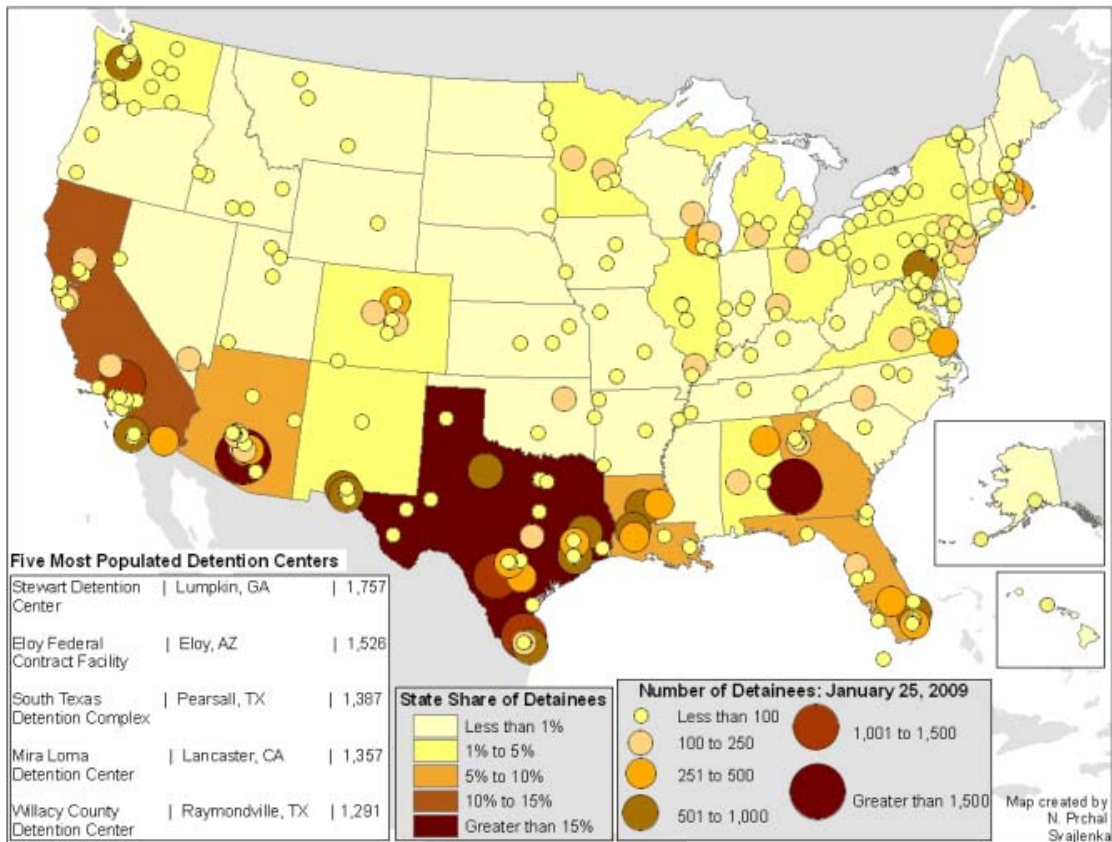
B. Detention Facilities

- ICE held detainees in 286 facilities which were concentrated in southern and US-Mexico border states; 21,813 detainees (68 percent of the total) were held in

California, Arizona, New Mexico, Texas, Arkansas, Louisiana, Alabama, Georgia, and Florida. Detention facilities in the four US-Mexico border states accounted for 47 percent (15,098 detainees) of the total detainee population. (See Map 2).

- 219 detention facilities (77 percent) each held fewer than 100 detainees (see Map 2).
- The disparity between the 350 detention facilities at ICE’s disposal and the 286 facilities used by the agency on January 25, 2009, indicates that many of its contract facilities do not house any immigrant detainees on a given night.

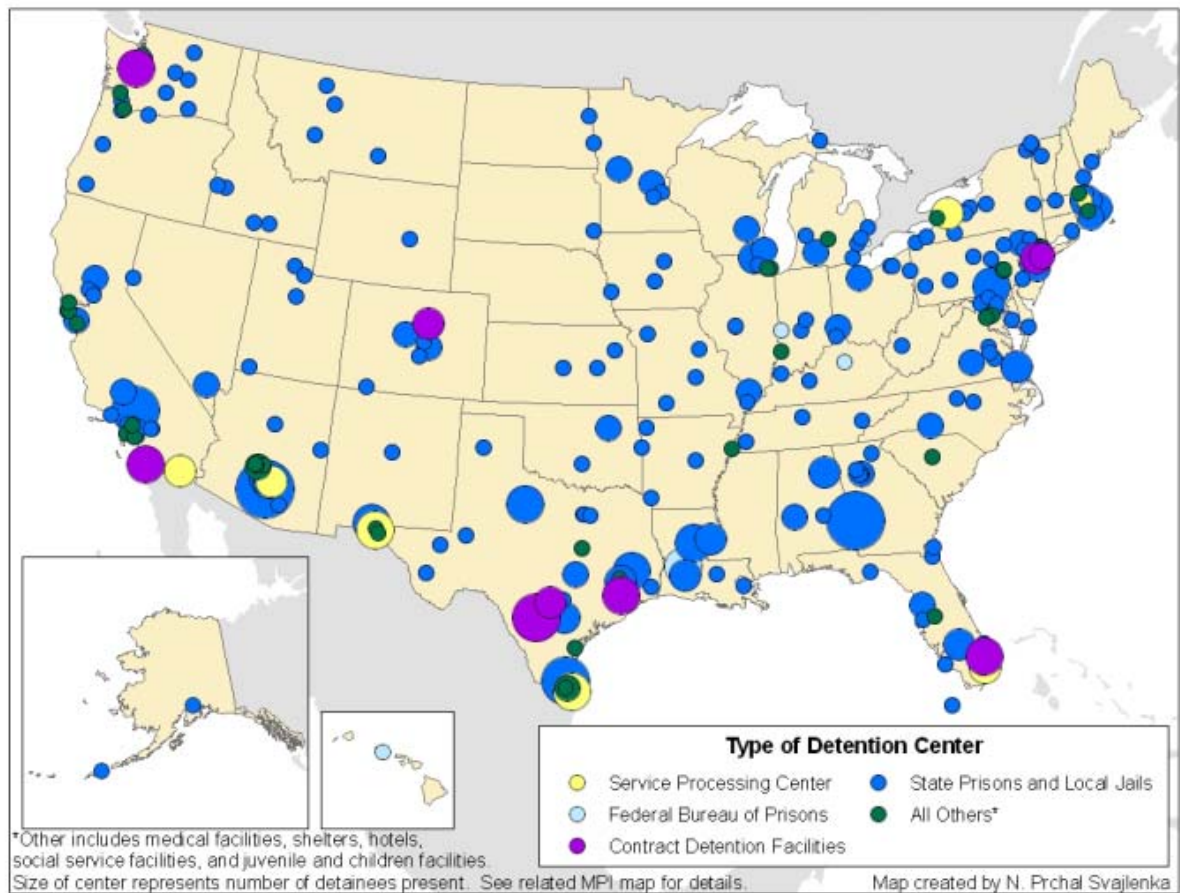
Map 2. Detention Facilities and Concentration of Inmates, January 25, 2009



Source: MPI Analysis of ICE database for January 25, 2009.

- Sixty-eight percent of detainees were held in state and local prisons pursuant to IGSA, 17 percent in contract detention facilities (CDFs), 10 percent in service processing centers (SPCs), 2 percent in federal prisons, and 3 percent in ORR facilities, medical centers, shelters, and other alternative or “soft” detention settings. (See Figure 4 and Map 3.)

Map 3. Locations and Types of Detention Centers Used by ICE, January 25, 2009



Source: MPI Analysis of ICE database of January 25, 2009.

- Five facilities each held more than 1,000 detainees, and 17 each held more than 500 detainees (see Table 2).
- The detention centers with more than 1,000 detainees were:
 - Stewart Detention Center (Lumpkin, Georgia): 1,757 detainees.
 - Eloy Federal Contract Facility (Eloy, Arizona): 1,526 detainees.
 - South Texas Detention Complex (Pearsall, Texas): 1,387 detainees,
 - Mira Loma Detention Center (Lancaster, California): 1,357 detainees.
 - Willacy County Detention Center (Raymondville, Texas): 1,291 detainees.
- The 17 most immigrant-populated facilities held 16,158 detainees (51 percent).²⁸ Of these facilities, six were built after 2004; they collectively added more than 10,000 beds to the detention system. The 17 facilities included nine IGSA prisons or jails, five CDFs, two SPCs, and one federal prison. (See Table 2.)

²⁸ These detention centers have been characterized as “mega-jails.” Human Rights First, *U.S. Detention of Asylum Seekers: Seeking Protection, Finding Prison* (New York, NY: Human Rights First, 2009), 25-27, <http://www.humanrightsfirst.org/pdf/090429-RP-hrf-asylum-detention-report.pdf>.

- Twelve of the 17 facilities were managed by for-profit correctional companies. Only two of the nine IGSA facilities (among the 17) were directly managed by localities: Mira Loma Detention Center by Los Angeles County and the York County Jail; the rest were managed by private subcontractors.²⁹ (See Table 2.)
- Of the 16,158 detainees held in these 17 facilities, 75 percent were held in facilities managed by private contractors (see Figure 5).

Table 2. Selected Detention Facilities with More than 500 Detainees, January 25, 2009

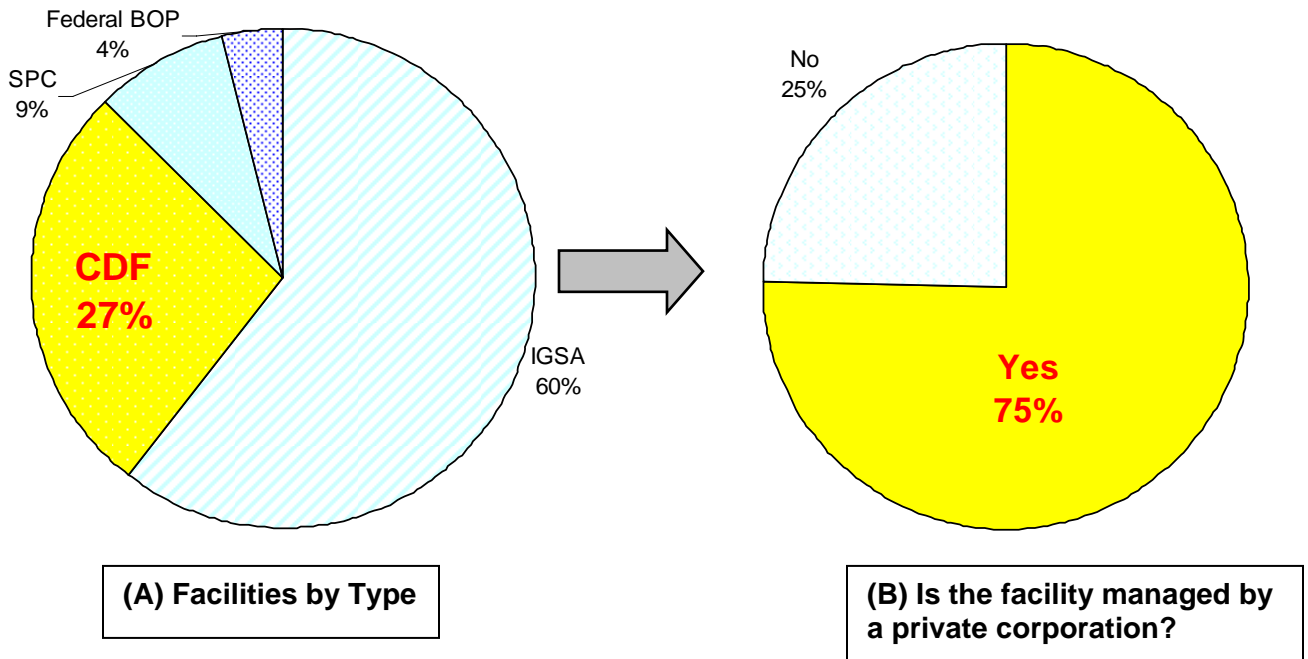
Detention Facility	State	Number of Detainees	Year Opened	Facility Type	Private Contractor*	Bed Space
Stewart Detention Center	GA	1,757	2006	IGSA	CCA	1,752
Eloy Federal Contract Facility	AZ	1,526	1994	IGSA	CCA	1,500
South Texas Detention Complex	TX	1,387	2005	CDF	GEO	1,904
Mira Loma Detention Center	CA	1,357	-	IGSA	N/A	1,400
Willacy County Detention Center	TX	1,291	2006	IGSA	MTC	3,086
Jena/Lasalle Detention Facility	LA	966	2007	IGSA	GEO	1,160
Northwest Detention Center	WA	959	2004	CDF	GEO	1,030
Polk County Jail	TX	879	-	IGSA	CEC	1,056
Otero County Processing Center	NM	865	2008	IGSA	MTC	1,088
Houston Contract Detention Facility	TX	808	1984	CDF	CCA	905
El Paso SPC	TX	764	1967	SPC	N/A	800
Otay Detention Facility	CA	654	1998	CDF	CCA	1,154
Port Isabel SPC	TX	641	-	SPC	N/A	1,100
Oakdale Federal Detention Center	LA	631	1986	federal BOP	N/A	-
York County Jail	PA	606	mid-1990s	IGSA	N/A	2,500
Broward Transitional Center	FL	538	2002	CDF	GEO	700
Rolling Plains Detention Center	TX	529	2001	IGSA	Emerald Companies	555
Subtotal of 17 facilities' detainee population of 32,000 total		16,158				

* CCA refers to Corrections Corporation of America, GEO to The GEO Group Inc., MTC to Management & Training Corporation, and CEC to Community Education Center Inc.

Source: MPI Analysis of ICE database for January 25, 2009, and from the web sites of the detention facilities and private prison corporations.

²⁹ For example, Management & Training Corporation (MTC), a Utah-based company, manages Willacy County Detention Center and Otero County Processing Center, although ICE has entered IGSA's with these counties.

Figure 5. Presence of Private Contractors in 17 Most Immigrant-Populated ICE Detention Facilities³⁰



Source: MPI Analysis of ICE database of January 25, 2009.

C. Length of Detention

- Of the 32,000 detainees in ICE custody, 18,690 had pending removal cases; that is, they had not received final orders of removal.³¹ (See Table 3.)
- The average (mean) length of detention for the 18,690 pre-removal order detainees as of January 25, 2009 was 81 days.³²
- Of the 18,690 pre-removal order detainees: 13,842 (74 percent) had been detained for less than 90 days; 2,486 (13 percent) had been detained for between 90 days and six months; 1,792 (10 percent) had been detained for between six months and one year; and 570 (3 percent) had been detained for one year or more.
- 10,873 detainees (or 34 percent) had received “administratively final” orders of removal.

³⁰ Figure 4 refers to the 17 facilities that each housed more than 500 detainees.

³¹ The 18,690 figure includes six cases in which a final order of removal *date* has been entered, but the “final order” code indicates that no final order had been entered. The authors counted these cases as pre-final removal order detainees.

³² The median length of detention as of January 25, 2009 for pre-removal order detainees was 40 days.

- The average length of detention *following* receipt of a removal order for 10,771 detainees (those for whom the database provided the *date* of the final removal order) was 72 days.³³
- The January 25, 2009 database included 2,437 detainees who were not listed as either pre-final order or post-final order detainees.
- The average length of detention for post-removal order detainees from the first day of detention to January 25, 2009 (i.e., time in detention both *prior* to and *after* receiving a removal order) was 114 days; 1,792 post-removal order detainees had been detained for more than six months.³⁴
- Of the 10,771 post-removal order detainees: 8,513 (79 percent) had been detained (*following* receipt of their removal orders) for less than 90 days; 1,266 (12 percent) had been detained for between 90 days and six months; 676 (6 percent) had been detained for between six months and one year; and 316 (11 percent) had been detained for one year or more.
- More than one-half of the 316 detainees in custody for more than one year post-removal order came from the following ten countries: Mexico (28 cases), China (28 cases), El Salvador (19 cases), India (19 cases), Jamaica (17 cases), the Philippines (13 cases), Haiti (13 cases), Dominican Republic (12 cases), Russia (nine cases), and Kenya (eight cases).
- Ten detention facilities held detainees for an average of one year or more. These facilities tended to hold smaller number of detainees, with many being “soft” detention or social service centers. (See Table 4.)

Some specific examples of lengthy detention:

- A Mexican man “detained” in an Econo Lodge motel in Washington State had been in ICE custody for 319 days as of January 25, 2009.
- Four Honduran boys, age unknown, had been in a foster care center in Houston for at least 200 days.
- The post-removal order detainee held for the longest period was a Vietnamese man without a criminal record who received his final removal order on November 16, 1999 and was booked into the Columbia Care Center on March 24, 2000; he had been detained for 3,230 days as of January 25, 2009.
- Of the 52 Cubans in detention, all had received final removal orders.³⁵ Their average length of detention was 113 days. Forty-seven Cubans had been detained

³³ The ICE database does not include information on the *date* of the final order of removal for 102 post-removal order detainees. The authors could not determine the length of detention post-removal order in these cases. Thus, the paper’s length-of-detention analysis covers 10,771 post-removal order cases, not 10,873 cases. The median length of detention following receipt of a removal order was 28 days.

³⁴ The median length of detention for post-removal order detainees from their initial book-in date to January 25, 2009 was 49 days.

³⁵ The absence of Cuban nationals in detention with *pending* removal cases comes as a surprise. However, one would not normally expect large numbers of pre-removal order Cuban detainees due in part to the

for less than 90 days since being ordered removed and five had been in ICE custody for 90 days or more.³⁶

- One Cuban had been ordered removed on February 3, 1994, and was booked into the US Penitentiary in Terre Haute, Indiana on April 17, 2001; as of January 25, 2009, he had been administratively detained for 2,841 days.³⁷

Table 3. Length of Detention by Final Order Status

	Pre-removal order detainees	Post-removal order detainees	
Total	18,690	10,771	
Average detention length	(1)	(2)	(3)
	81 days	72 days	114 days
Number of Detainees by Detention Length			
< 90 days	13,842	8,513	7,400
90-180 days in detention	2,486	1,266	1,579
180-365 days in detention	1,792	676	1,050
At least 365 days	570	316	742

Notes: (1) refers to length of detention since detained, (2) refers to length of detention following receipt of a removal order, and (3) includes time in detention both prior to and after receiving a removal order. The data from the ICE database for January 25, 2009 did not indicate whether or not a final order had been entered for 2,437 detainees. In addition, the database was missing a final-order *date* for 102 post-removal order detainees.

Source: MPI Analysis of ICE database of January 25, 2009.

Cuban Refugee Adjustment Act of 1966 which allows natives or citizens of Cuba and their immediate relatives to apply for lawful permanent residence one year after they have been inspected and admitted or paroled into the United States. Pub. L. No. 89-732, 80 Stat. 1161 (November 2, 1966).

³⁶ This figure contrasts dramatically with the 2,350 Cubans in detention in August 1999, including 1,750 who had arrived as part of the Mariel boatlift. See Catholic Legal Immigration Network, Inc., *The Needless Detention of Immigrants in the United States* (Washington, DC: Catholic Legal Immigration Network, Inc., 2000), 24, <http://www.cliniclegal.org/sites/default/files/atrisk4.pdf>.

³⁷ MPI's analysis of the length of time between book-in date and January 25, 2009 produced figures equaling those recorded in ICE's "detention days" field for all detainees, except for Cubans. Disparities between the length of detention listed in the "detention days" field and MPI's calculations vary from four days to 2,741 days for Cuban detainees. MPI cannot explain these disparities.

Table 4. Selected Detention Facilities with Long Length of Detention

Detention Facilities	State	Number of Detainees	Average Days of Detention
Lakeland Nursing Home	LA	1	3,244
Terre Haute Federal Correctional Complex	IN	2	2,140
St Jerome's Group Home	TX	2	798
Columbia Care Center	SC	26	695
Portland District Office	OR	1	648
San Bernardino County Jail	CA	1	634
Carroll County Detention Center	MD	8	507
Lutheran Community Services Northwest	WA	4	477
SND District Staging	CA	7	428
Catholic Social Services	WA	11	368
Bethany Christian Service	MI	11	360

Source: MPI Analysis of ICE database of January 25, 2009.

Note: Detention length includes time in detention both prior to and after receiving a removal order.

In addition, ICE reported a 30-day average length of detention for FY 2008 based on the time in custody for all detainees who were released during the year.³⁸ ICE reports that roughly 25 percent of those who pass through its detention system in a given year remain in detention for a day or less. This high volume of short-term detainees moves through the system quickly, and thus is not given the same weight in MPI's one-day snapshot analysis.³⁹

MPI found that 4,154 persons in custody on January 25, 2009 had already been detained for more than six months *as of that date*. However, many more of the January 25, 2009 detainees (than MPI counted) would ultimately have been detained for more than six months.⁴⁰ Only 16 detainees on January 25, 2009 had been in custody for one day or less.

³⁸ Immigration and Custom Enforcement, "Detention Management," (November 20, 2008), http://www.ice.gov/pi/news/factsheets/detention_mgmt.htm. MPI's length-of-detention averages are based on the sample of detainees in custody as of January 25, 2009.

³⁹ MPI's snapshot analysis shows that pre-removal detainees in ICE custody on January 25, 2009 had been detained on average for 81 days and that post-removal order detainees had been detained on average for 114 days *up to that date*. These figures do not conflict with ICE's yearly length-of-detention average. Since MPI analyzed data on all detainees in custody on a given day, and not over the course of a year, its sample contains more long-term detainees. This is because long-term detainees — who by definition spend a substantial amount of time in custody — are more likely to be found in custody on any particular date. Conversely, ICE's average length of detention for all detainees over the course of a year is lower, since it represents more of the short-term detainees not present on the day for which MPI has records.

⁴⁰ Similarly, average length of detention could be calculated based on the total time in custody for those detained on January 25, 2009. To make this calculation would require information (not available to MPI) on the date that each of the January 25, 2009 detainees was ultimately released. This methodology would necessarily yield higher averages than the "snapshot" figures found by MPI since most of the January 25, 2009 detainees would remain in custody beyond that date and (of course) none would be detained for a shorter period.

As ICE’s length-of-detention averages and MPI’s figures on longer-term detainees highlight, ICE must not only accommodate an extremely diverse detention population by nationality, age, gender, background, immigration status, and potential eligibility for relief from removal, but it must, in effect, operate two detention systems within one — one for immediate returnees and one for a larger group of detainees held on average for far longer than 30 days.

D. Criminal Charges

- Fifty-eight percent (18,690) of the 32,000 detainees held on January 25, 2009 did not plead or were not proven guilty of a crime; in other words, they did not have criminal convictions.
- Noncriminal detainees had been detained for an average of 65 days as of January 25, 2009, compared to 121 days on average for the 13,310 detainees with criminal convictions.
- Of the 13,310 detainees who been convicted of a crime, the most common *individual* offenses (corresponding with the NCIC uniform offense code) were “driving under the influence of liquor” (1,141 cases), “dangerous drugs” (1,045 cases), and “assault” (821 cases). (See Table 5.)
- Applying the more general “offense classifications” from NCIC, MPI has determined that 30 percent of the detainees with criminal records had been convicted of “dangerous drug”-related offenses, 13 percent of “traffic”-related offenses, 10 percent of “assault”-related offenses, and 6 percent of “immigration”-related offenses, including illegal entry, smuggling, and false claims to citizenship. (See Table 6.)

Table 5. Ten Most Common Offenses for Detainees Convicted of Crimes, January 25, 2009

Offense	Number of Detainees
Driving Under Influence Liquor	1,141
Dangerous Drugs	1,045
Assault	821
Cocaine – Possession	787
Marijuana – Possession	577
Traffic Offense	534
Larceny	471
Robbery	461
Illegal Entry	459
Cocaine – Sell	410

Note: These are the most common individual offenses in the ICE database that correspond with the 4-digit NCIC uniform offense codes.

Source: MPI Analysis of ICE database of January 25, 2009.

Table 6. Most Common Criminal Charges by Offense Classifications, January 25, 2009

Detainees by Conviction Status and Offense Classification		% of Total Detainee Population (32,000)
No criminal convictions	18,690	58
Detainees with criminal convictions	13,310	42
Criminal charges by Offense Classifications		
Dangerous drugs	4,033	30
Traffic	1,738	13
Assault	1,329	10
Immigration	812	6
Larceny	573	4
Robbery	549	4
Burglary	443	3
Sexual assault	443	3
Fraudulent activities	365	3
Weapon offense	341	3
Public peace and public order	335	3
Family offense	320	2
Sexual offense	292	2
Forgery/Counterfeiting	281	2
Stolen property	163	1
Stolen vehicle	163	1
Homicide	156	1
Obstruct police	147	1
Obstruct judiciary, Congress, legislature or a commission	144	1
Invasion of privacy	136	1
Other	547	4

Note: The immigration category includes individual offenses such as illegal entry, smuggling of aliens, and false claims to citizenship.

Source: MPI Analysis of ICE database for January 25, 2009.

E. Trends Highlighted by MPI's Analysis

Despite the data limitations, MPI's findings highlight the following broad policy trends:

- There has been substantial growth in: (1) the number of ICE detainees held pursuant to IGSA's with localities; (2) the degree to which for-profit prisons (both directly and through IGSA's) operate ICE facilities; and (3) the immigrant detainees held in large-scale IGSA prisons and jails.
- A small number of facilities (17 in total) each hold more than 500 immigrants per night and collectively hold the majority of ICE detainees, compared to a far larger set of facilities with relatively modest numbers of detainees.

- ICE detainees are concentrated in the southern United States, particularly in US-Mexico border states.
- ICE detains large numbers of persons for more than six months: 4,154 as of January 25, 2009, including 2,362 pre-removal order detainees and 1,792 post-removal order detainees.
- There is substantial country-of-origin diversity of post-removal order detainees who had been detained for more than a year. Only a modest percentage came from any one nation. Before the 2001 and 2005 Supreme Court decisions on indefinite detention,⁴¹ this population consisted of large numbers of Cubans, Vietnamese, and citizens from just a handful of other nations.⁴²
- A high percentage of ICE detainees (58 percent) do not have criminal records, which is difficult to explain since:
 - mandatory detention laws largely apply to criminal aliens;
 - ICE includes persons who have committed immigration-related offenses in its criminal alien nomenclature,⁴³ and
 - ICE's expanding Secure Communities program places large numbers of arrested and imprisoned noncitizens into removal proceedings.⁴⁴
- The “most serious” convictions for nearly 20 percent of criminal aliens in ICE custody were for traffic-related (13 percent) and immigration-related (6 percent) offenses.

In short, the data highlight the need for ICE information systems that can meet the substantial challenges of a sprawling detention system — comprised of hundreds of facilities, large and small, public and private, federal and local — that holds a highly diverse population consisting of:

- men, women, families, and unaccompanied children (the latter housed by ORR);
- detainees from 177 nations (as of January 25, 2009);
- unauthorized immigrants, asylum seekers, torture survivors; lawful permanent residents, and persons with claims to US citizenship;
- a minority who have criminal records;
- a high volume of short-term detainees, and significant numbers of long-term

⁴¹ *Zadvydas v. Davis*, 533 U.S. 678 (2001); *Clark v. Martinez*, 543 U.S. 371 (2005).

⁴² Catholic Legal Immigration Network, Inc., *The Needless Detention of Immigrants in the United States*, 24.

⁴³ US Department of Homeland Security, Office of Immigration Statistics, *Immigration Enforcement Actions: 2008*, 4.

⁴⁴ In FY 2008, for example, ICE initiated removal proceedings against 221,000 persons in federal, state, and local jails. See Immigration and Customs Enforcement, “Border Security and Immigration Enforcement” (fact sheet, October 23, 2008), http://www.dhs.gov/xnews/releases/pr_1224777640655.shtm. Since ICE's prison screening program feeds directly into its detention system, one would expect a high number of criminal aliens in its detention system. See Doris Meissner and Donald Kerwin, *DHS and Immigration: Taking Stock and Correcting Course*, 46.

- detainees (i.e. those held more than six months);
- persons with different legal statuses and claims to remain in the United States;
- persons who cannot be released, who should be considered for release, and who must be released;
- persons eligible for alternative-to-detention programs and for population-specific custody review programs.

IV. Sufficiency of ICE Information Systems to Meet Core Agency Mandates

A. Data Fields

ICE has not provided MPI with a complete summary of the detainee data it collects, whether through ENFORCE or other systems. Nor does ICE make available its Data Systems Manual, which presumably explains what data it collects and how. In addition, ICE officials have indicated that they are making significant additions to the ENFORCE database.

MPI has obtained information on the detainee data tracked by ICE from three sources. First, MPI received the January 25, 2009 data that ICE provided in response to the AP FOIA request, as well as clarification from ICE on the meaning of several of the fields in that report.⁴⁵ Some of the fields are straightforward, including gender, citizenship, ICE office with responsibility over the detention facility (known as “area of responsibility”), detention facility code, and detention facility. ICE also provided the AP with data from the following fields:

- “Book-in Date,” which refers to the date that the noncitizen entered a detention facility.⁴⁶
- “Detention Days – Stay,” which represents the total number of days in ICE custody.
- “Final Order Date,” which refers to the date that the detainee’s removal order became “administratively final.”
- “Criminal Yes/No,” which denotes whether the detainee has been convicted of a crime.
- “Most Serious Criminal Charge,” which records ICE’s determination of the most serious federal, state, or local crime for which the detainee has been convicted based on criminal codes from the NCIC database.⁴⁷

Second, MPI received information in response to a different FOIA request, which reveals that the ENFORCE system also tracks alien number, date of birth, age, the field office with

⁴⁵ Letter from Dr. Schriro to Donald Kerwin, July 2, 2009.

⁴⁶ It appears that this field captures continuous time in detention, not just time in one facility. However, ICE has not confirmed this understanding.

⁴⁷ The criminal conviction listed under “most serious criminal charge” is not necessarily the conviction that forms the basis of removability or detention.

jurisdiction over the case record (known as the docket control office), and several other fields, including:

- “Code Category” which refers to the status of the removal case; for example, “hearing not commenced,” “excludable/inadmissible,” or “absconder;”
- “Code Depart-CLRD” which refers to the type of case closure, for example by deportation or removal;
- “Code Entry CL” which refers to the status of the detainee at the time he entered the country — whether as a nonimmigrant, lawful permanent resident, parolee, refugee, or without inspection;
- “Code Initial Charge” which indicates the “initial” charge of removability or inadmissibility;⁴⁸
- “Date Travel Document Requested;”
- “Date Travel Document Received” from a nation willing to accept detainee’s return;
- “Date Travel Document Expires;”
- “Hearing Type;”
- “Hearing Code Decision” which refers to the decision in the case; and
- “Final Order Active/Inactive.”

Third, ICE has publicly reported that it collects data from ICE’s “record of deportable alien” form (Form I-213),⁴⁹ which records the method of apprehension; immigration record (including past removals); removal charges; the detainee’s US address; the US address of his last or current employer; spouse’s name, address, and nationality; and the number and nationality of any children. ENFORCE also captures information on the detainee’s attorney.⁵⁰

MPI’s analysis of the January 25, 2009 data and its review of ICE data fields raise the issue of whether ICE’s information systems, particularly the ENFORCE database and case tracking system, allow the agency to meet its legal responsibilities and its management imperatives. While ENFORCE captures important biographic, immigration status, and detention information, it may be missing information that would allow ICE officials to make informed and timely decisions. To cite a few examples, the system should provide ICE with the information necessary to determine whether a detainee:

- Constitutes a risk and why — information which is crucial in determining eligibility for release, for an alternative program, and for placement within the detention system.
- Meets the criteria for release or parole, even if otherwise subject to mandatory detention.
- May have a claim to US citizenship.

⁴⁸ The charge may be changed during the immigration process.

⁴⁹ US Department of Homeland Security, Office of Immigration Statistics, *Immigration Enforcement Actions: 2008*, 2.

⁵⁰ US Department of Homeland Security, Office of Inspector General, *Immigration and Customs Enforcement’s Tracking and Transfers of Detainees*, 15.

- Has special medical conditions, mental illness or disability, or other humanitarian issues.
- Has complied with the government’s attempts to deport him and, if not, what he needs to do in order to comply.
- Has been treated in compliance with ICE’s national standards.

Overall, we recommend that ICE initiate a thorough inventory and review of its information systems, including ENFORCE, to ensure that they allow for informed decisions related to the substance and timing of:

- **who ICE must detain and who it must consider for release, with a particular focus on when “mandatory” detainees become eligible for release;**
- **which detainees must be allowed to participate in ICE’s two post-removal order, custody review processes;⁵¹**
- **who should be placed in ICE’s alternative-to-detention programs; and**
- **ICE’s adherence to its national detention standards.**

ICE’s legal responsibilities are outlined below, with recommendations on the specific information that the agency must capture and track to meet its responsibilities.

B. Legal Standards and Procedures

The primary legal categories that should be reflected in ICE’s database and case tracking system include:

- “Arriving aliens;”⁵²
- Pre-removal order detainees, which can include inadmissible noncitizens (those who have not formally entered the country) and deportable noncitizens;
- Post-removal order detainees;
- Lawful permanent residents (LPRs) and persons who may have claims to US citizenship;
- Persons in the above categories who must be detained, can be released, or must be released.

ICE has the initial authority to set bond for immigrants not subject to mandatory detention. Immigration judges can subsequently conduct bond redetermination hearings. They can also conduct hearings to determine if an alien is “properly included” in a mandatory detention category.⁵³ Under the standard enunciated by the Board of Immigration Appeals (BIA), an LPR will not be deemed “properly included” if DHS is “substantially unlikely” to establish

⁵¹ As discussed below, ICE administers a post-order custody review process for persons ordered removed, and a distinct custody review process for “Mariel” Cubans who have been ordered removed.

⁵² “Arriving aliens” are applicants for admission who are coming or attempting to come into the United States at a port of entry, seeking transit through the United States at a port of entry, or have been interdicted at sea and brought to the United States. See 8 CFR § 1.1(q).

⁵³ 8 CFR § 1003.19(h)(2)(ii).

the charge or charges that would subject him to mandatory detention.⁵⁴

ICE also oversees two custody review processes for immigrants who have been ordered removed by an immigration judge, but whom ICE cannot physically remove. In addition, it manages three overlapping alternative-to-detention programs.

A brief description of the relevant legal categories follows.

Arriving Aliens

Under the Immigration and Nationality Act (INA), an arriving alien “not clearly and beyond a doubt” entitled to admission “shall be detained” for a removal proceeding.⁵⁵ Individuals seeking admission can be “paroled” out of custody for “urgent humanitarian reasons or significant public benefit.”⁵⁶ By regulation, however, parole is available only to noncitizens who are neither a flight risk nor a danger to the community, and who fall into one of a handful of narrow categories: (1) persons with serious medical conditions; (2) pregnant women; (3) juveniles; (4) witnesses in legal or legislative proceedings; and (5) persons whose continued detention is not in the public interest.⁵⁷

Asylum seekers who arrive at a US port of entry with no documents or insufficient documents “shall be detained pending a final determination of credible fear of persecution.”⁵⁸ If they are found not to have a credible fear of persecution, they “shall be detained . . . until removed.”⁵⁹ If they are found to have a credible fear, they can be “paroled.” Immigration parole is a legal status that carries no criminal connotation and does not lead to a permanent status.

We recommend that ICE’s information systems capture the criteria that mandatory detainees must meet in order to qualify for humanitarian or public-benefit parole, and record whether asylum seekers have been found to possess a credible fear of persecution and, thus, can be released.

Pre-Removal Order Detainees

Most of those in ICE custody are in removal proceedings. DHS “may” detain all immigrants pending a decision on their removal.⁶⁰ It “may” release a nonmandatory detainee on a bond of at least \$1,500, or on conditional parole.⁶¹

ICE “shall take into custody” any alien who is inadmissible or deportable based on a broad swath of criminal and national security grounds “when the alien is released” from criminal custody.⁶² DHS “may release” immigrants who would otherwise be subject to mandatory

⁵⁴ *Matter of Joseph*, 22 I & N Dec. 799, 805-806 (BIA 1999).

⁵⁵ Immigration and Nationality Act (INA) § 235(b)(2)(A).

⁵⁶ INA § 212(d)(5).

⁵⁷ 8 CFR § 212.5(b).

⁵⁸ INA § 235(b)(1)(B)(iii)(IV).

⁵⁹ *Id.*

⁶⁰ INA § 236(a).

⁶¹ INA, § 236(a)(2).

⁶² In particular, DHS “shall take into custody” those who are: (1) inadmissible on criminal and related grounds; (2) deportable due to conviction for two or more crimes of moral turpitude, an aggravated felony,

detention if necessary to protect a witness (or their close relation), a potential witness, or a person cooperating with an investigation of major criminal activity, provided that the detainee will not endanger the community and does not pose a flight risk.⁶³

The statutory language raises several interpretive issues on who constitutes a mandatory detainee. In *Demore v. Kim*, the Supreme Court upheld mandatory detention for pre-removal order detainees for the “brief period necessary” to complete removal proceedings.⁶⁴ Two circuit courts of appeal have found that pre-removal order detention would be constitutionally impermissible if it exceeded the time reasonably needed to complete a removal proceeding.⁶⁵ In addition, it is an open question whether a noncitizen with a bona fide claim *not to be* removable should be subject to mandatory detention.⁶⁶ A third issue is whether ICE must immediately arrest a noncitizen following his release from criminal custody in order to trigger the mandatory detention rules, or whether the “when released” requirement is met by an arrest that occurs some days or weeks after release.⁶⁷

We recommend that ICE information systems, particularly the ENFORCE database and case tracking system, capture the information necessary to allow the agency:

- **to distinguish between pre-removal order mandatory and nonmandatory detainees, including the exact crime that forms the basis of removability and detention;**⁶⁸
- **to determine whether mandatory, pre-removal order detainees meet any of the narrow grounds of release related to witness protection or cooperation in a criminal investigation;**
- **to decide whether a detainee represents a flight risk or a danger to the community;**
- **to know when a detainee was released from criminal custody, and when DHS arrested him;**
- **to determine whether a detainee has made a bona fide legal claim to remain or otherwise may not be removable.**

On the latter point, we recommend that ICE information systems record the relief from removal sought by the detainee, and legally relevant factors like the legal status

a controlled-substance violation, a firearms offense, treason, and national security-related crimes; (3) deportable for a conviction for a crime of moral turpitude for which the sentence was at least one year; or (4) inadmissible or deportable on broad terrorist grounds. See INA, § 236 (c)(1).

⁶³ INA § 236(c)(2).

⁶⁴ 538 U.S. 510, 513.

⁶⁵ *Tijani v. Willis*, 430 F. 3d 1241, 1242 (9th Cir. 2005); *Ly v. Hansen*, 351 F.3d 263, 270-72 (6th Cir. 2003).

⁶⁶ *Gonzalez v. O’Connell*, 355 F. 3d 1010, 1019-21 (7th Cir. 2004).

⁶⁷ BIA has held that mandatory detention is triggered even though ICE does not immediately take the alien into custody following his release from criminal custody. *Matter of Rojas*, 23 I & N Dec. 117, 127 (BIA 2001); *In re Kotliar*, 24 I & N Dec. 124, 125-26 (BIA 2007). However, many federal district courts have held that mandatory detention does not apply unless ICE immediately arrests an alien after his release. See *Waffi v. Loiselle*, 527 F. Supp. 2d 480, 488 (E.D. Va. 2007); *Quezada-Bucio v. Ridge*, 317 F. Supp. 2d 1221, 1224 (W.D. Wash. 2004).

⁶⁸ As stated, the crime forming the basis of removability and detention is not always the “most serious offense” listed in the ICE database.

of the detainee, his family ties, and his length of time in the United States.

We also recommend that ICE track all information related to the timing, outcome, and communication of its bond and parole decisions for post-removal order detainees.

Post-Removal Order Detention

DHS is statutorily required to remove an alien within 90 days following a final removal order.⁶⁹ The 90-day removal period begins to run on the latest of the following: (1) the date when the removal order becomes administratively final; (2) the date of a court's final order (if a federal court stays removal); or (3) the date an alien (who has already been ordered removed) is released from criminal custody.⁷⁰ The removal period can be extended if the immigrant refuses to cooperate in his own removal, for example by refusing to apply for travel documents.⁷¹

In light of these legal standards, we recommend that ICE information systems capture:

- **the key dates that trigger the “removal period;”**
- **whether the detainee has cooperated with ICE officials in attempting to effect his own removal; and**
- **what the detainee must do in order to cooperate.**

The INA provides that DHS “shall detain” the noncitizen during the removal period.⁷² After that period, a detainee can be released subject to conditions of supervision.⁷³ However, aliens ordered removed “may be” detained beyond the removal period if they are: (1) inadmissible on any grounds; (2) deportable because of a violation of their nonimmigrant visa status, or on criminal or national security grounds; or (3) deemed to be a danger to the community or a flight risk.⁷⁴

In light of these standards, we recommend that ICE information systems track:

- **the length of post-removal order detention;**
- **the grounds of inadmissibility and deportability;**
- **all decisions on dangerousness and flight risk, and the basis for those decisions;**
- **all decisions on continued custody and release, and the basis for those decisions; and**
- **the conditions placed on release.**

In *Zadvydas v. Davis*, the Supreme Court interpreted the statute governing detention post-

⁶⁹ INA § 241(a)(1)(A).

⁷⁰ INA § 241(a)(1)(B).

⁷¹ INA § 241(a)(1)(C).

⁷² INA § 241 (a)(2)

⁷³ INA § 241 (a)(3)

⁷⁴ INA § 241 (a)(6).

removal order to mean that detention could not continue past a period “reasonably necessary” to effect removal.⁷⁵ It found six months to be a presumptively reasonable period of time to remove a detainee.⁷⁶ After that point, the burden shifts to the government to rebut the presumption that there is “no significant likelihood of removal in the reasonably foreseeable future.”⁷⁷ The court construed the statute in this way under the doctrine of constitutional avoidance, in order to find it constitutional. In *Clark v. Martinez*,⁷⁸ the Supreme Court extended the *Zadvydas* holding to inadmissible aliens; i.e. those stopped at a port of entry or at the border who have not yet (in a legal fiction) entered the country.⁷⁸

In November 2001, the Justice Department issued regulations governing custody review procedures for long-term detainees who have been ordered removed.⁷⁹ Significant problems have been reported regarding the post-order custody review process, including:

- the inability of the ICE case tracking system “to automatically notify” ICE officials of when to provide custody reviews and of the results of the custody review decisions made over a period of time;⁸⁰
- the failure of DACS to provide timely information to detainees and to ICE on when custody reviews are due; to document whether an immigrant should be suspended from the custody review procedures due to a stay of removal or failure to cooperate in the removal process; to identify the cases most in need of rapid removal and intensive supervision upon release; and to track sufficient information on the willingness of nations to accept the return of their own nationals.⁸¹
- the failure of DHS to provide the initial custody determinations in many locations within the required 90-day removal period; to use consistent, uniform standards to make its custody decisions; to explain in writing its decisions to continue to detain and, in particular, what detainees need to do to “cooperate” in order to be considered for release; and to communicate successfully with consulates regarding travel documents.⁸²

It is not known whether the ENFORCE database and case tracking system has remedied the problems that plagued DACS.

⁷⁵ 533 U.S. 678, 699 (2001).

⁷⁶ 533 U.S. at 701.

⁷⁷ *Ibid.*

⁷⁸ 543 U.S. 371, 378 (2005).

⁷⁹ 8 CFR § 241.4, 8 C.F.R. § 241.14

⁸⁰ US Government Accountability Office, *Better Data and Controls Are Needed to Assure Consistency with the Supreme Court Decision on Long-Term Alien Detention*, GAO-04-434 (Washington, DC: US Government Accountability Office, 2004), 11, 15, <http://www.gao.gov/products/GAO-04-434>.

⁸¹ US Department of Homeland Security, Office of the Inspector General, *ICE’s Compliance with Detention Limits for Aliens with a Final Order of Removal from the United States*, OIG-07-28, (Washington, DC: US Department of Homeland Security, Office of the Inspector General, 2007), 22-24, 28-33, http://www.dhs.gov/xoig/assets/mgmt/rpts/OIG_07-28_Feb07.pdf.

⁸² Kathleen Glynn and Sarah Bronstein, *Systemic Problems Persist in U.S. Custody Reviews for ‘Indefinite Detainees’* (Washington, DC: Catholic Legal Immigration Network, Inc., 2005).

A legally distinct custody review process has governed parole decisions related to indefinitely detained Cubans who arrived in the United States in 1980 as part of the Mariel boatlift.⁸³

MPI's analysis reveals that 2,258 of the detainees in custody on January 25, 2009 had been held for at least 90 days following receipt of an administratively final removal order, and 992 had been held for at least six months post-removal order. The number of long-term Cuban detainees, however, has significantly diminished since the Supreme Court's decisions on indefinite detention. Of Cuban post-removal order detainees, five had been detained for 90 days or more, and three had been detained for six months or more.

We recommend that ICE information systems should allow the agency to determine:

- **which detainees merit custody reviews and when;**
- **what custody and release decisions have been made in individual cases, the basis for those decisions, and when this information has been communicated to the detainee and to their legal counsel;**
- **which detainees present a special risk and why; and**
- **whether removal is “reasonably foreseeable” and any information that supports this judgment, including the track record of the detainee’s nation in providing travel documents.**

Lawful Permanent Residents and Persons with Claims to US Citizenship

While LPRs are in all of the above legal categories, it will be particularly important for ICE information systems to capture LPR status because:

- DHS can administratively remove (without an immigration judge hearing) unauthorized immigrants who have committed aggravated felonies;⁸⁴
- The standard for cancellation of removal, an equitable form of relief from removal, is more generous for LPRs than for nonLPRs;⁸⁵
- LPRs are less likely to be removable and, thus, arguably less likely to be subject to mandatory detention;⁸⁶
- The transfer of LPRs may be more disruptive of families, support systems, and legal counsel;
- LPRs typically represent less of a flight risk given their family and community ties.

For obvious reasons, it will also be important to record whether a detainee might have a claim to be a US citizen. Nongovernment organizations (NGOs) and the media regularly find US citizens in ICE custody.⁸⁷ Most have obtained citizenship derivatively through a

⁸³ 8 CFR. § 212.12.

⁸⁴ INA §238(b).

⁸⁵ INA §240A(a) and (b).

⁸⁶ *Matter of Joseph*, 22 I & N Dec. 799, 806 (BIA 1999).

⁸⁷ For example, see Tyche Hendricks, “U.S. citizens wrongly detained, deported by ICE,” *San Francisco Chronicle*, July 26, 2009, <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2009/07/27/MNGQ17C8GC.DTL>.

parent.⁸⁸ Many do not realize that they may, in fact, be citizens.

We recommend that ICE information systems record the legal status of every person in its custody, including LPRs and persons who may be US citizens. It should also record all information that may support or give rise to a claim to citizenship.

C. Alternatives to Detention

ICE faces an additional challenge in determining who should be eligible for an alternative-to-detention program. A large part of this determination turns on an assessment of whether the detainee, under the conditions of the alternative program, would represent a risk to the community. A risk-assessment process and tool would need to take into account the broad differences among ICE detainees, which include asylum seekers, survivors of torture, LPRs without criminal records, unauthorized immigrants, and noncitizens with multiple criminal convictions who present a risk to others.

The FY 2009 ICE budget includes \$63 million for alternatives to detention.⁸⁹ ICE's three alternative-to-detention programs might be better characterized as less restrictive *forms* of civil custody. If viewed as "soft" detention or constructive custody, these alternative programs could be opened to "mandatory" detainees.⁹⁰ If this were to occur, the potential savings to the government and benefits to the individuals would be immense.

ICE's Intensive Supervision Appearance Program (ISAP) includes electronic monitoring, curfews, in-person reporting, and unannounced home visits. As participants demonstrate compliance with the program, ICE eases and gradually eliminates some of these restrictions. Its Enhanced Supervision Reporting (ESR) program includes many of the same features, including electronic monitoring, home visits, in-person reporting, and other requirements.⁹¹ ICE also offers a stand-alone Electronic Monitoring (EM) program.

Alternative programs have been championed by ICE and others as providing a cost-effective, humane alternative to detention. However, ICE officials have recently acknowledged that the agency does not collect "complete and accurate information" that allows it to assess the effectiveness or cost of these programs, and "its previously released reports are sometimes incorrect."⁹² Based on partial and incomplete data, ICE estimates that its three alternative programs cost far less than hard detention and enjoy relatively high rates of success as measured by the percentage of participants who abscond. In particular, ICE

⁸⁸ Under the law, a child born outside the country automatically acquires US citizenship if: (1) at least one parent is a US citizen based on birth or naturalization; (2) the child is under age 18; and (3) the child is residing in the United States "in the legal and physical custody of the citizen parent pursuant to a lawful admission for permanent residence." INA § 320(a).

⁸⁹ Consolidated Security, Disaster Assistance, and Continuing Appropriations Act, 2009, Committee Print of the Committee on Appropriations, US House of Representatives, H.R. 2638, P.L. 110-329 (Washington, DC: Government Printing Office, 2008), 637, http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_house_committee_prints&docid=f:44807p5.pdf.

⁹⁰ See, e.g., *Yong v. INA*, 208 F. 3d 1116, 1118 (9th Cir. 2000) (release to a halfway house held to be a form of civil custody).

⁹¹ *Ibid.*

⁹² Letter from Dr. Schriro to Donald Kerwin, July 2, 2009.

reports that 87 percent of ISAP participants, 96 percent of ESR participants, and 93 percent of EM participants appear for their removal hearings. Direct program costs, not including ICE staff time, are estimated to be \$14.42 per day (ISAP), \$8.52 per day (ESR), and between 30 cents and \$5 per day (EM).⁹³ ICE plans to develop a more viable database by the beginning of FY 2010 and will subsequently produce a comprehensive cost study on standard detention and alternative program costs.⁹⁴

ICE contracts for detention bed space present a challenge in assessing and, more broadly, in realizing cost savings from alternative programs. Under these contracts, ICE typically agrees to pay for a set number of beds per night at a fixed rate. If ICE transfers a detainee to an alternative program, but does not fill the vacated bed with another detainee, it will continue to incur at least marginal expenses for the detention bed. One short-term alternative would be to create more flexible contracts, but this would lead to higher per-bed rates. In the long term, as part of the systemic reform of its detention system, ICE has announced that it “will no longer rely primarily on excess capacity in penal institutions” and “will design facilities located and operated for immigration detention purposes.”⁹⁵

We recommend that ICE create a reliable risk assessment tool that can guide its decisions on eligibility for alternative-to-detention programs, as well as its release determinations and placement of detainees within its system. We also recommend that ICE significantly expand its use of alternative programs for detainees who do not present a risk to others and that it assess whether its current programs, perhaps with some modifications, could more appropriately be viewed as alternative “forms” of detention and, as such, be made available to “mandatory” detainees.

We recommend that ICE comprehensively review its contracts for detention space, with the goal of maximizing the cost savings realized by expanding alternative-to-detention programs. We support ICE’s plans to develop a more viable database by the beginning of FY 2010 and to produce a comprehensive study on the costs of detention and alternative programs.

D. National Standards

In September 2000, the US Immigration and Naturalization Service (the predecessor to ICE and its sister immigration agencies within DHS) issued 36 national detention standards which cover security, the exercise of religion, medical care, visitation, telephone access, legal access, and transfers.⁹⁶ Developed in conjunction with the American Bar Association, the standards respond to the unique needs of immigrants in civil custody.⁹⁷ In January 2010, ICE will implement “performance-based” standards that set forth the outcomes that the

⁹³ Ibid.

⁹⁴ Ibid.

⁹⁵ US Immigration and Customs Enforcement, “2009 Immigration Detention Reforms” (fact sheet, August 6, 2009), http://www.ice.gov/pi/news/factsheets/2009_immigration_detention_reforms.htm.

⁹⁶ DHS subsequently added two more standards, bringing the total to 38.

⁹⁷ Additional correctional standards govern the different facilities in which ICE houses those in its custody.

national standards are intended to realize. It will also add standards related to media interviews and tours, detainee searches, sexual abuse, and staff training.⁹⁸

In late July 2009, the Obama administration affirmed longstanding ICE policy by refusing to codify the detention standards in a federal regulation.⁹⁹ The decision came just before ICE's announcement of previously unreported detainee deaths and just after the release of a report that documented widespread violations of its standards.¹⁰⁰ The report was based on an exhaustive review of previously confidential reports and portions of reports by the American Bar Association, the United Nations High Commissioner for Refugees, and ICE.

Both the report and the ICE announcement on unreported deaths raise the issue of whether the agency's information systems (particularly ENFORCE) contain sufficient data that allow ICE to comply with its existing detention standards or with new standards that may be developed as part of the transformation of its detention system.

In FY 2007, for example, ICE transferred 261,910 detainees.¹⁰¹ Transfers away from family, support systems, and legal counsel can disrupt the legal process and traumatize detainees. The national standards require ICE to notify detainees of imminent transfers, to inform the detainee's legal counsel of a transfer, and to ensure that official health records accompany transferred detainees. A 2008 OIG report found significant noncompliance with these standards.¹⁰² The standards also require detainees to receive medical screening within 24 hours of arriving at a detention facility and a medical examination within 14 days. An OIG review of five detention sites found 20 percent noncompliance with the 14-day physical examination requirement.¹⁰³

Additional standards cover access to legal materials, legal orientation presentations, and attorneys. Yet access to legal support, information, and counsel also remains a significant challenge.¹⁰⁴

We recommend that ICE information systems (particularly ENFORCE) capture information that would allow it to adhere to its national standards, including information on when and how the agency has complied with the standards. For standards related to detainee transfers, ICE should record information on the US residence of detainees, their family members, and legal counsel.

⁹⁸ US Immigration and Customs Enforcement, "Detention Management Program" (last modified, February 20, 2009), <http://www.ice.gov/partners/dro/dmp.htm>.

⁹⁹ Nina Bernstein, "U.S. Rejects Call for Immigration Detention Rules," *New York Times*, July 29, 2009.

¹⁰⁰ Karen Tumlin, Linton Joaquin, and Ranjana Natarajan, *A Broken System: Confidential Reports Reveal Failures in U.S. Immigrant Detention Centers* (Los Angeles, CA: National Immigration Law Center, 2009), <http://www.nilc.org/immlawpolicy/arrestdet/A-Broken-System-2009-07.pdf>.

¹⁰¹ US Department of Homeland Security, Office of Inspector General, *Immigration and Customs Enforcement's Tracking and Transfers of Detainees*, 7.

¹⁰² *Ibid.*, 6-8, 11.

¹⁰³ *Ibid.*, 9.

¹⁰⁴ Amnesty International, *Jailed Without Justice* (New York, NY: Amnesty International, 2009), 30-36, <http://www.amnestyusa.org/immigrant-rights/immigrant-detention-report/page.do?id=1641033>; Human Rights First, *U.S. Detention of Asylum Seekers: Seeking Protection, Finding Prison*, 55-59.

In light of the recent ICE announcement regarding previously uncounted detainee deaths, we recommend that ICE information system collect all information related to detainee medical needs, interventions, treatment, and causes of death.¹⁰⁵

Finally, we recommend that ICE initiate an exhaustive analysis of its information systems (including ENFORCE) which examines: (1) the way ENFORCE relates to other databases within DHS and other federal agencies; (2) the way in which ICE collects the information that populates ENFORCE; (3) the fields that ENFORCE contains; and (4) time-series data on all ICE detainees since ENFORCE went into effect.

V. Conclusion

This report has provided a snapshot analysis of persons in ICE custody on January 25, 2009. While limited in scope, MPI's analysis nevertheless points to significant trends in the ICE detention system. These include ICE's increased use of for-profit prisons and IGSA's, its detention of a mostly noncriminal population, and its long-term detention of significant numbers of both pre- and post-removal order detainees.

Many government and NGO reports have criticized ICE's failure to comply with its legal mandates and management imperatives. This analysis places these criticisms in a new light by asking whether ICE *can* fully comply with the law, effectively manage its sprawling detention system, and create a system better suited to civil detainees. It makes recommendations that would make it possible for ICE's information systems to:

- adhere to the legal standards governing detention and release;
- place the right persons at the right time in its custody review processes for post-removal order detainees;
- select the right detainees to participate in its "alternative" programs; and
- adhere to its national detention standards.

Carrying out the report's recommendations will require a broad analysis of all ICE information systems capabilities, especially ENFORCE. Such an analysis would lay the groundwork for building the kind of robust data and information-management capabilities that will be vital to the success of ICE's important and long-needed detention reform initiative and that will permit ICE to make humane, cost-effective, and legally sound decisions related to those in its custody.

¹⁰⁵ The President's FY 2010 budget request for ICE includes \$20.4 million "to begin the design and development of an electronic health records system, which will allow real-time reporting of detainees' medical information." US Immigration and Customs Enforcement, "Fiscal Year 2010 President's Budget Request" (May 7, 2009), <http://www.ice.gov/doclib/pi/news/factsheets/2010budgetfactsheet.doc>. It is not clear, however, whether the health records database will interface with ENFORCE.

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