



From Jailers to Case Managers

Redesigning the U.S. Immigration Detention System
to Be Effective and Fair

Randy Capps
Doris Meissner

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Migration Policy Institute

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Contents

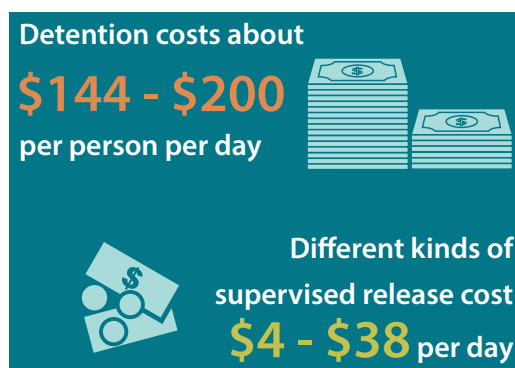
Executive Summary	1
1 Introduction	4
2 An Overview of Immigration Detention in the United States	5
A. Detention Conditions	5
B. Fluctuations in the Number and Characteristics of Detained Immigrants	7
C. Detention Costs	9
3 Aligning Custody Methods with Policy Goals	10
4 Rethinking the Immigration Custody System	12
A. New Priorities for Custody Determinations	12
B. Designing Custody Tools Based on Risk, Need, and Vulnerability	13
C. Change Management: Requirements and Challenges	18
5 Conclusion	21
About the Authors	23
Acknowledgments	24

Executive Summary

The United States operates a sprawling immigration detention system of about 150 facilities that has long been controversial for its prisonlike conditions and health risks—risks that have come into sharper focus during the COVID-19 pandemic.¹ By July 2021, more than 20,000 detainees had contracted the virus, and at least nine had died. Yet statutorily, immigration detention is a function of civil, not criminal, law. Its aim is not to punish but to ensure migrants appear for their immigration appointments and court dates and leave the United States in a timely fashion if they are ordered removed.

Policies put in place since the onset of the pandemic in 2020 and the start of the Biden administration in early 2021 have greatly reduced the number of immigrants held in detention. This includes both public-health restrictions on entries at U.S. borders that led to fewer border-crossers being detained and narrower priorities for U.S. Immigration and Customs Enforcement (ICE) enforcement in the country's interior. At the end of July 2021, there were about 27,000 individuals in immigration detention, compared with an average of 50,000 in fiscal year (FY) 2019. This substantial reduction in ICE detention makes this an opportune moment to rethink the role and nature of custody in the U.S. immigration enforcement system, as the new administration has pledged to do.

In addition to many harms that have been documented about immigration detention conditions, detention accounts for about \$2.8 billion out of ICE's total budget of \$8.4 billion. Official estimates break this down to about \$144 per detainee per day, though unofficial estimates run as high as \$200 per day. By comparison, other forms of custody such as electronic monitoring, supervision, and case management cost between \$4 and \$38 per day, depending on the nature of the supervision provided.



Prioritizing expensive detention over more economical custody alternatives—a practice that contributed to significant growth in the detained population in the years leading up to the pandemic—has distorted the broader immigration enforcement system. Because detention is comparatively expensive and a deprivation of personal freedom, the immigration courts prioritize resolving the cases of migrants who are detained over those who are not. This has left a growing and increasingly poorly supervised nondetained population of more than 3 million people who must wait years to have their immigration cases completed. This, in turn, deprives those with compelling claims for asylum and other forms of relief from having their cases heard and being able to move forward with their lives if relief is granted. It also invites misuse of the system and—if removal is ultimately ordered—makes returning migrants to their origin countries more difficult because they have established roots in the United States during the lengthy wait.

¹ This report, originally published in August 2021, has been revised to more accurately characterize detention bed minimums, which were removed from congressional appropriations law beginning in fiscal year 2017.

This report explores replacing the longstanding system of detention for most immigrant adults apprehended in the U.S. interior and at least initially for many of those who arrive at the border without authorization and seek asylum, with a system that makes release with supervision and case management (i.e., monitoring, check-ins, legal advice, and other support services) the prevailing method for exercising immigration custody

whenever possible. A redesigned system would also need to attend to the situation of apprehended families with children, as by court order they cannot be detained for lengthy periods. It does not address the custody system for unaccompanied children, whose cases are governed by separate statutes and requirements managed by the Office of Refugee Resettlement (ORR) in the U.S. Department of Health and Human Services.

The report recommends that ICE shift its focus to methods of custody management that are less expensive, more humane, and better suited to the characteristics of most immigrants for whom it is responsible.

The report recommends that ICE shift its focus to methods of custody management that are less expensive, more humane, and better suited to the characteristics of most immigrants for whom it is responsible, while better ensuring compliance with the requirements and procedures of the removal process. In such a system, detention would be used sparingly for the relatively small share of apprehended migrants who pose true public safety threats, consistent with congressional mandates requiring detention of those convicted of certain crimes.

A reimagined immigration custody system would:

- ▶ **Detain individuals who pose public safety risks.** Those who have been convicted of serious, non-immigration crimes would continue to be held in secure detention facilities. Because their numbers are relatively small (in June 2021, fewer than 5,000 had any U.S. criminal conviction, however minor), ICE would be able to consolidate the system into fewer facilities, better monitor detention conditions, and reduce the use of private prison contractors, which housed about 81 percent of the detained population in 2020.
- ▶ **Use the least restrictive feasible custody options.** Others in ICE custody—both migrants apprehended at the border and those arrested in the U.S. interior—should be released and placed in supervision programs based on an assessment of risks and needs conducted by specially designated and trained personnel. Such programs and practices are better suited to protecting the rights and well-being of migrants, particularly those seeking asylum and those with vulnerabilities that could make detention particularly harmful (such as immigrants who are pregnant, elderly, disabled, LGBTQ, or who have medical or mental health conditions). Less restrictive settings would also substantially lower costs and public-health risks.
- ▶ **Provide legal counsel, case management, and social services.** Legal representation is key to helping people understand their rights and responsibilities in immigration and removal proceedings and thereby ensuring they attend court hearings and other appointments. A review of data for 2007

through 2012 showed that only 7 percent of those with attorneys were ordered removed *in absentia* because they missed an immigration court hearing, compared with 68 percent of those who were not represented. Case management and access to community services also promote compliance. When operated by community- or faith-based organizations, these services help build immigrants' trust in the fairness of the process and thereby gain their cooperation in complying with it. For example, more than 90 percent of participants in ICE's pilot Family Case Management Program attended their immigration court hearings.

- **Design nondetention custody options to ensure that immigrants appear in immigration court and comply with the removal process.** Asylum and removal processes are lengthy and complex, with steps and requirements that can be difficult to understand and meet. Understanding immigration procedures and getting assistance to navigate the process promote compliance with them. More limited data have been collected on whether these programs are also effective in ensuring migrants leave the United States when so ordered. This would need to be closely monitored and assessed.

Shifting immigration custody away from its current focus on detention would require fundamental changes in the mission, culture, and enforcement practices of the Department of Homeland Security (DHS) and its component immigration agencies. Implementation would require developing new policies; redirecting resources; running pilot supervised release programs and evaluating their effectiveness before scaling them up; and training and equipping ICE and DHS staff to implement screenings, case management, and linkages to legal representation and other services.

Nor can such reforms of the immigration custody system be achieved by ICE alone. Redesigning custody practices would ultimately require congressional action, given statutory mandates to detain migrants convicted of a broad range of crimes, including nonviolent offenses, as well as almost all migrants detained by the Border Patrol. Reforms must also ensure that the U.S. asylum system delivers timely and fair decisions, thereby limiting the time asylum seekers with strong protection claims spend in custody and curtailing incentives to misuse the system to remain in the country while cases make their way through a lengthy backlog. Finally, Border Patrol and ICE screening procedures must be able to identify risks and vulnerabilities as migrants are taken into custody.

Shifting immigration custody away from its current focus on detention would require fundamental changes in the mission, culture, and enforcement practices of the Department of Homeland Security.

While some argue that detaining migrants acts as a deterrent for would-be unauthorized migration, true deterrence rests on timely, fair adjudication of claims for asylum and other forms of relief, combined with assured removal of individuals found not to have valid claims. This can only be achieved when the U.S. immigration system's border and interior enforcement, custody, supervision, and asylum adjudication measures are working together.

Despite the challenges, responding to current and likely future immigration realities both at U.S. borders and in the interior calls for rethinking the role and nature of the immigration custody system, steering it away from a punitive, detention-centered approach and toward more proportionate and cost-effective policies that still ensure compliance with immigration court and removal proceedings. Done right, a redesigned custody system would help those whose asylum and other claims are granted to integrate more readily into U.S. society, while assisting migrants who must leave with planning for their return and reintegration into their countries of origin.

BOX 1 About the Rethinking U.S. Immigration Policy Project

This report is part of a multiyear Migration Policy Institute (MPI) project, Rethinking U.S. Immigration Policy. At a time when U.S. immigration realities are changing rapidly, this initiative aims to generate a big-picture, evidence-driven vision of the role immigration can and should play in America's future. It will provide research, analysis, and policy ideas and proposals—both administrative and legislative—that reflect these new realities and needs for immigration to better align with U.S. national interests.

The research, analyses, and convenings conducted for MPI's Rethinking initiative address critical immigration issues, which include economic competitiveness, national security, and changing demographic trends, as well as issues of immigration enforcement and administering the nation's immigration system.

To learn more about the project and read the other studies generated by the Rethinking U.S. Immigration Policy initiative, see bit.ly/RethinkingImmigration.

1 Introduction

The United States operates a sprawling immigration detention system of about 150 facilities² that has long been controversial for its prisonlike conditions and health risks, which have come into sharper focus during the COVID-19 pandemic. Coronavirus outbreaks in Immigration and Customs Enforcement (ICE) facilities during 2020 led to a substantial reduction in the number of immigrants in ICE custody during the final months of the Trump administration, bringing the detained population to its lowest level since the late 1990s. Since taking office, the Biden administration has issued interior immigration enforcement priorities that have dramatically reduced ICE arrests in the U.S. interior, but a rapid rise in border encounters since the beginning of 2021 has again increased the detained population significantly. Against this backdrop, the Biden administration has promised to reform the immigration custody system operated by ICE, reducing the use of detention and developing case management and other forms of supervision and monitoring outside of controlled settings.³

This report explores and recommends replacing the longstanding system of detention for most immigrant adults arrested in the U.S. interior and at least initially for many of those who seek asylum at the border with a system that makes release with monitoring and case management the prevailing practice whenever

2 U.S. Immigration and Customs Enforcement (ICE), "Detention Management—Detention Statistics—FY 2021 ICE Statistics—Facilities FY 21 YTD" (dataset, ICE, Washington, DC, June 22, 2021).

3 Biden-Harris Campaign, "The Biden Plan for Securing Our Values as a Nation of Immigrants," updated 2020.

possible. A redesigned system would also need to attend to the situation of apprehended families with children, as by court order they cannot be detained for lengthy periods. The report does not address the custody system for unaccompanied children, whose cases are governed by separate statutes and requirements managed by the Office of Refugee Resettlement (ORR) in the U.S. Department of Health and Human Services.

Properly designed, a combination of case management and other forms of supervised release that include access to legal representation and services can ensure that individuals arrested in the interior and at the border comply with immigration proceedings and the removal process. By appearing for their immigration interviews and court hearings, immigrants are either granted relief that permits them to remain and live in the United States, allowed to depart the country voluntarily, or ordered to depart.

The relatively small share of immigrants who pose true public safety threats would still be detained, consistent with congressional mandates requiring detention of migrants convicted of certain crimes. But immigration custody of the large majority would be carried out through various supervision programs, thereby avoiding conditions that have proven harmful to health and well-being and mitigating the cost of large-scale detention and its distortions of the broader immigration enforcement system.

2 An Overview of Immigration Detention in the United States

Immigration detention is an administrative, not a criminal, procedure that aims to enforce the removal of immigrants who have committed a civil infraction, either by entering the United States without authorization or violating the terms of their visas.⁴ While Congress has mandated detention of removable noncitizens who have been convicted of certain criminal offenses (see Box 2), they are tried, and sentenced, if convicted, in federal, state, and local courts.⁵

Statutorily, the goals of immigration detention are to ensure that migrants appear for their immigration appointments and court dates and leave the United States in a timely fashion if they are ordered removed. The share of cases in which migrants have serious criminal convictions that call for detention to protect public safety is relatively small.

A. Detention Conditions

Despite the administrative purpose of immigration detention, reports by the federal government and others have highlighted its punitive and often inhumane nature. An official Department of Homeland Security (DHS) review of ICE detention standards in 2009 found that “all but a few of the facilities that ICE uses to

⁴ Livia Luan, “Profiting from Enforcement: The Role of Private Prisons in U.S. Immigration Detention,” *Migration Information Source*, May 2, 2018.

⁵ See “Immigration—General Penalty Provisions,” Title 8, *U.S. Code*, Sections 1321–30.

detain aliens were built as jails and prisons. Movement is largely restricted, and detainees spend most of their time in their housing units,”⁶ sometimes in solitary confinement.⁷

In addition, concerns about poor sanitary conditions and a lack of access to health care in ICE facilities were common even before the pandemic. In August 2019, detainees and civil-rights organizations filed a class-action lawsuit alleging deficient medical and mental health care in nearly 160 ICE facilities, citing unqualified and short-staffed health-care providers, delays or denials of treatment, improper use of solitary confinement for sick detainees, and inadequate accommodations for people with disabilities.⁸ The 2009 DHS review also concluded that ICE facilities would be poorly prepared for a disease outbreak.⁹

Despite the administrative purpose of immigration detention, reports by the federal government and others have highlighted its punitive and often inhumane nature.

This report proved prescient, as outbreaks of COVID-19 have been reported in more than 100 ICE facilities.¹⁰ Unofficial estimates from spring and summer of 2020 suggested that 20 percent of the detainee population may have been infected at that time.¹¹ In June 2020, these facilities had an average infection rate five times that of prisons and 20 times that of the overall U.S. population.¹² By June 2021, a year later, more than 20,000 migrants had tested positive for the virus in ICE facilities and at least nine had died.¹³ COVID-19 outbreaks in ICE facilities have also had ripple effects in surrounding communities. For example, outbreaks in two communities in south Texas were linked to cases in major detention facilities there.¹⁴

As of May 2021, vaccinations of ICE detainees severely lagged those of the general population—placing them further at risk for exposure to COVID-19. An estimated 20 percent of detainees had been given at least one shot,¹⁵ with 7 percent fully vaccinated. By contrast, about one-third of U.S. Bureau of Prison inmates¹⁶ and 36 percent of the total U.S. population¹⁷ were fully vaccinated.

6 Dora Schiro, *Immigration Detention Overview and Recommendations* (Washington, DC: Department of Homeland Security, 2009), 21.

7 Ellen Gallagher, “The Other Problem with ICE Detention: Solitary Confinement,” *Washington Post*, August 28, 2019; Spencer Woodman, Karrie Kehoe, Maryam Saleh, and Hannah Rappleye, “Thousands of Immigrants Suffer in US Solitary Confinement,” International Consortium of Investigative Journalists, May 21, 2019.

8 Andrea Castillo, “ICE Provides ‘Deplorable’ Healthcare to Detained Immigrants, Advocates Allege in Massive Lawsuit,” *Los Angeles Times*, August 29, 2019.

9 Schiro, *Immigration Detention Overview and Recommendations*, 25.

10 Noelle Smart, Adam Garcia, and Nina Siulc, “One Year Later, We Still Don’t Know How Many People in ICE Detention Have Been Exposed to COVID-19,” Think Justice Blog, Vera Institute of Justice, April 8, 2021.

11 Nina Siulc, “Vera’s New Prevalence Model Suggests COVID-19 Is Spreading through ICE Detention at Much Higher Rates than Publicized,” Think Justice Blog, Vera Institute of Justice, June 4, 2020.

12 Isabelle Niu and Emily Rhyne, “4 Takeaways from Our Investigation into ICE’s Mishandling of Covid-19,” *New York Times*, April 26, 2021.

13 ICE, “COVID-19 ICE Detainee Statistics by Facility,” updated July 21, 2021.

14 Niu and Rhyne, “4 Takeaways from Our Investigation into ICE’s Mishandling of Covid-19.”

15 Caroline Simon, “National Vaccination Effort Leaves ICE Detainees Behind,” Roll Call, May 14, 2021.

16 House Appropriations Committee, Subcommittee on Homeland Security, “U.S. Immigration and Customs Enforcement Resource Management and Operational Priorities” (hearing, May 13, 2021).

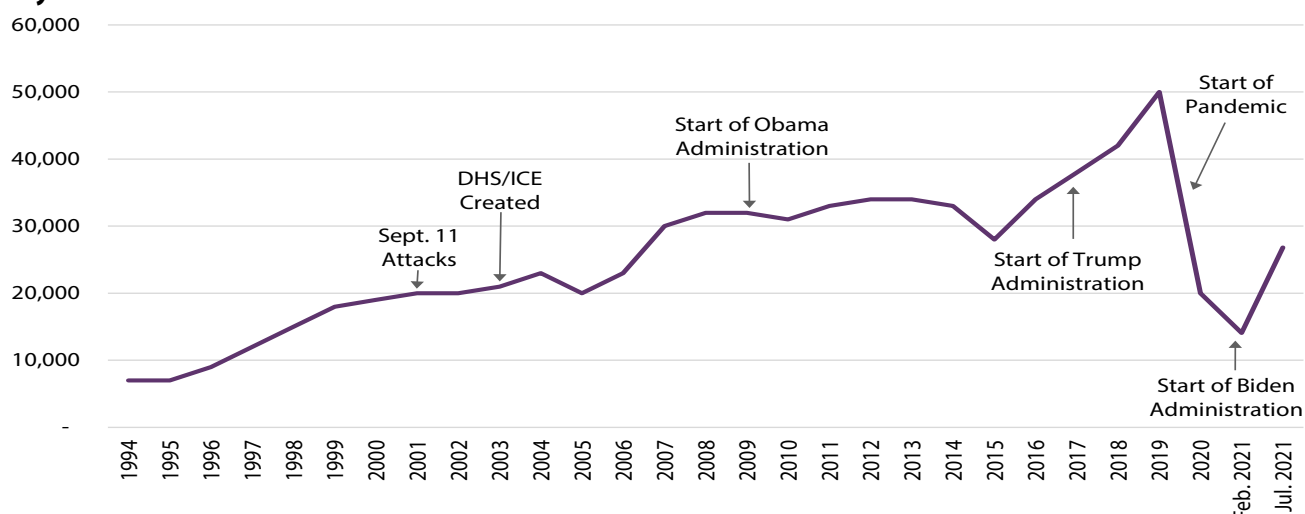
17 *New York Times*, “Coronavirus in the U.S.: Latest Map and Case Count,” updated May 15, 2021.

B. *Fluctuations in the Number and Characteristics of Detained Immigrants*

The average daily population in immigration detention fell to a two-decade low of about 14,000 during the first full month of the Biden administration in February 2021; this reflects a combination of increased releases from custody and lower ICE interior arrests during the pandemic,¹⁸ along with fewer border apprehensions due to the Trump administration's use of Title 42, a longstanding public-health statute, to expel almost all adults, children, and families arriving at the border without authorization to enter.¹⁹ The average daily population of detainees rose, however, to almost 27,000 at the end of July,²⁰ as more and more adults apprehended at the border were taken into custody (see Figure 1).²¹

FIGURE 1

Average Daily Population in U.S. Immigration Detention, FY 1994 through FY 2020, and February and July 2021



Sources: Data for FY 1994–2004 are from Alison Siskin, *Immigration-Related Detention: Current Legislative Issues* (Washington, DC: Congressional Research Service, 2004), 12. Data for FY 2005–15 are from Department of Homeland Security (DHS), “FY 2015 Budget Overview” (budget document, DHS, Washington, DC, n.d.), 24 in the section U.S. Immigration and Customs Enforcement (ICE) – Salaries and Expenses. Data for FY 2016–19 are from DHS, “U.S. Immigration and Customs Enforcement Budget Overview: Fiscal Year 2021 Congressional Justification” (budget document, DHS, Washington, DC, n.d.), 6. Data for February and July 2021 are from ICE, “Detention Management—Detention Statistics—FY 2021 ICE Statistics—Detention FY 21 YTD” (dataset, ICE, Washington, DC, 2021).

- 18 ICE detention book-ins based on interior arrests averaged slightly less than 11,000 per month during the six months preceding the pandemic (October 2020 through March 2021), and then fell to an average of slightly less than 6,000 per month from April 2021 through September 2021. See ICE, “Detention Management—Detention Statistics—FY 2020 ICE Statistics—Detention EOFY 20” (dataset, ICE, Washington, DC, accessed May 13, 2021).
- 19 These “Title 42” expulsions, authorized by the Centers for Disease Control and Prevention (CDC) under a 1944 statute, generally avoid sending migrants into ICE custody because they are rapidly returned to Mexico via land or to their countries of origin via air. See Doris Meissner and Michelle Mittelstadt, *At the Starting Gate: The Incoming Biden Administration’s Immigration Plans* (Washington, DC: Migration Policy Institute, 2020), 4. As a result of the expulsions, book-ins based on border encounters fell from an average of about 12,000 per month during October 2019 through March 2020 to an average of 2,000 from April 2020 through October 2020. See ICE, “Detention Management—Detention Statistics—FY 2020 ICE Statistics—Detention EOFY 20.”
- 20 ICE, “Detention Management—Detention Statistics—FY 2021 ICE Statistics—Detention FY 21 YTD” (dataset, ICE, Washington, DC, July 22, 2021).
- 21 Encounters at the U.S.-Mexico border—including Title 42 expulsions and apprehensions that brought individuals into custody in the United States—rose to two-decade highs during March and April 2021, with about half of those encountered being adults. See Camilo Montoya-Galvez, “Border Apprehensions Remained at a 20-Year High in April, but Arrivals of Children and Families Decreased,” CBS News, May 11, 2021.

Despite this recent rise, the average daily detainee population is still only about half of what it was in fiscal year (FY) 2019, when an average of 50,000 immigrants were in detention at a given time. Prior to FY 2019, the detention population had risen gradually since the 1990s, with some leveling off during the Obama administration before increasing sharply during the first three years of the Trump administration.

Until 2020, the detained population had generally been evenly split between immigrants arrested in the U.S. interior and those apprehended at the border, with about half of all detainees having had criminal convictions in the United States. The Biden administration has issued narrower priorities for ICE enforcement activities—interior arrests, detentions, and removals—than those enacted by the Trump administration, placing a focus on high-risk populations; this has resulted in a drop of more than half in book-ins from interior arrests.²² As a result, in May 2021, only 22 percent of detainees originated from interior arrests.

As the share of detainees apprehended in the interior of the country has fallen, so has the share of the detained population with criminal convictions. In July 2021, 17 percent of detainees had a criminal conviction, compared with 43 percent during FY 2020 (October 2019 through September 2020). The average number of detainees with convictions fell from 14,500 during FY 2020 to 4,400 in May 2021 as the new enforcement priorities excluded people with convictions for minor crimes such as drug possession and traffic offenses.²³ In July 2019, when the average daily detainee population was at its peak of 55,000, about 11 percent of detainees had been convicted of “Level 1” offenses (ICE’s most serious classification, which aligns somewhat but not entirely with the Biden administration’s interior enforcement priorities),²⁴ and the number of detainees convicted of such offenses was 6,000.²⁵

Congress has funded ICE for a certain number of beds in detention facilities—even when those beds go unfilled, as many have during most of the pandemic.²⁶ Prior to FY 2017, appropriations included requirements for a minimum number of beds, with ICE interpreting this as a mandate to keep the beds full. But the bed minimum has been excluded from appropriations for more recent years. In addition, Congress had mandated detention of discrete groups including those with convictions for certain crimes and most of those apprehended after crossing the U.S. border illegally (see Box 2).

22 The Trump administration had made all unauthorized immigrants subject to arrest, detention, and deportation, while the Biden administration’s priorities focus on those posing national security risks; entering the United States on or after November 1, 2020, either illegally or legally and since falling into unlawful status; or posing public safety threats with certain criminal convictions or gang involvement—with supervisory approval required for those falling outside these priorities. See Muzaffar Chishti and Jessica Bolter, “[Border Challenges Dominate, But Biden’s First 100 Days Mark Notable Under-the-Radar Immigration Accomplishments](#),” *Migration Information Source*, April 26, 2021. Book-ins based on interior arrests averaged about 6,000 per month from October 2020 through January 2021, versus about 2,300 from February 2021 through May 2021. See ICE, “Detention Management—Detention Statistics—FY 2021 ICE Statistics—Detention FY 21 YTD.”

23 During FY 2020, 78 percent of those with criminal convictions were arrested in the U.S. interior; in July 2021, interior arrests accounted for 87 percent of this population. See ICE, “Detention Management—Detention Statistics—FY 2020 ICE Statistics—Detention EOFY 20”; ICE, “Detention Management—Detention Statistics—FY 2021 ICE Statistics—Detention FY 21 YTD.”

24 Between October 2016 and April 2019, the most common Level 1 offenses were assault, burglary, and drug trafficking; Level 2 offenses were most commonly larceny, illegal re-entry at the U.S. border, and weapons offenses; and Level 3 offenses were most often driving under the influence, illegal border entry, and other traffic violations. More recent data on the severity of offenses for detainees with convictions are not available. See Transactional Records Access Clearinghouse (TRAC) Immigration, “[ICE Detains Fewer Immigrants with Serious Criminal Convictions under Trump Administration](#),” updated December 6, 2019.

25 TRAC Immigration, “[Decline in ICE Detainees with Criminal Records Could Shape Agency’s Response to COVID-19 Pandemic](#),” updated April 3, 2020.

26 House Appropriations Committee, Subcommittee on Homeland Security, “U.S. Immigration and Customs Enforcement Resource Management and Operational Priorities.”

BOX 2**Congressional Mandates for Immigration Detention**

While the United States has a history of immigration detention dating back to at least the late 1800s, requiring the detention of certain groups of noncitizens is much more recent. In 1988, Congress for the first time mandated the detention of any noncitizen, including lawful permanent residents (LPRs), who had committed an aggravated felony—a category that at the time included a narrow set of primarily violent and drug-related crimes. Congress expanded the categories of aggravated felonies used to determine who is subject to mandatory detention in laws enacted in 1990 and 1996.

The 1996 *Illegal Immigration Reform and Immigrant Responsibility Act* (IIRIRA) reinforced the mandatory detention of lawfully admitted noncitizens (such as LPRs) convicted of aggravated felonies. It also expanded the detention mandate to include most noncitizens who crossed the border illegally or appeared at a port of entry without proper documentation to be admitted, as well as those with significant criminal histories for 90 days following a final removal order. The USA PATRIOT Act, enacted in 2001 following the September 11 attacks, mandated the detention of suspected terrorists.

In the early years of the Trump administration, as in past administrations, federal authorities generally released asylum seekers while their protection claims were heard by the immigration courts and pending their removal hearings, if their claims were denied. In 2019, however, Attorney General William Barr interpreted the statute to mean that asylum seekers must be detained unless they meet narrow health and safety requirements for parole. Pending litigation in the federal courts has enjoined this new interpretation, and detention of asylum seekers is not currently mandatory.

Sources: For a thorough review of congressional mandates for immigration detention, see Hillel R. Smith, *Immigration Detention: A Legal Overview* (Washington, DC: Congressional Research Service, 2019). See also Livia Luan, “Profiting from Enforcement: The Role of Private Prisons in U.S. Immigration Detention,” *Migration Information Source*, May 2, 2018; *Anti-Drug Abuse Act of 1988*, Public Law 100–690, *U.S. Statutes at Large* 102 (1988): 4181; *Immigration Act of 1990*, Public Law 101–649, *U.S. Statutes at Large* 104 (1990): 4978; *Antiterrorism and Effective Death Penalty Act of 1996*, Public Law 104–132, *U.S. Statutes at Large* 110 (1996): 1214; *Illegal Immigration Reform and Immigrant Responsibility Act of 1996*, Public Law 104–208, *U.S. Statutes at Large* 110 (1996): 3009; *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act) Act of 2001*, Public Law 107–56, *U.S. Statutes at Large* 115 (2001): 279; *Padilla v. U.S. Immigration and Customs Enforcement*, 387 F. Supp. 3d 1219, 1232 (Western District of Washington, 2019), appeal docketed, No. 19-35565 (9th Circuit, July 5, 2019).

C. Detention Costs

Immigration detention is costly compared to other custody options. Comprising \$2.8 billion out of ICE’s total budget of \$8.4 billion in FY 2021, ICE detention costs officially average \$144 per migrant per day.²⁷ Unofficial estimates have run as high as \$200 per day, with some arguing that ICE’s official estimates exclude ICE staffing and administrative costs related to detention.²⁸

ICE also relies on alternatives to detention (ATDs), which are considerably less costly than detention. An FY 2013 U.S. Government Accountability Office review found the cost of ATDs to be between \$10 and

27 Department of Homeland Security (DHS), ICE, “U.S. Immigration and Customs Enforcement Budget Overview: Fiscal Year 2022 Congressional Justification” (budget document, DHS, Washington, DC), accessed June 3, 2021, 5, 10.

28 One unofficial estimate of \$208 is based on dividing the FY 2018 custody operations budget of \$3.078 billion by 365 days to yield a total daily spending estimate of \$8.43 million, and then dividing that figure by 40,520 beds. See Laurence Benenson, *The Math of Immigration Detention, 2018 Update: Costs Continue to Multiply* (Washington, DC: National Immigration Forum, 2018).

\$11 per participant per day—about 7 percent of the cost of detention at that time.²⁹ ICE's most recent budget estimate for its Intensive Supervision Appearance Program III (ISAP III), an ATD program that involves a combination of electronic monitoring, in-person visits, and case management operated by an ICE contractor, was \$4.43 per day—about 4 percent of the daily cost of holding an adult in detention.³⁰ ICE's pilot Family Case Management Program (FCMP) that monitored and served asylum-seeking families apprehended at the border in 2016–17 cost on average \$38 per family per day, or 16 percent of the daily cost for family detention.³¹

Spending on detention diverts resources from other immigration custody functions and has other harmful consequences for the U.S. immigration enforcement system. Because detention is comparatively expensive and a deprivation of personal freedom, the immigration courts prioritize the removal cases of immigrants who are detained over those who are not. Thus, immigrants who have been released or are in ATD programs must wait much longer for their asylum or other deportation relief claims to be adjudicated than those who are detained. ICE's monitoring of its nondetained caseload has deteriorated as a result, as the number of immigrants in detention has increased.

3 Aligning Custody Methods with Policy Goals

Prioritizing expensive detention over more economical alternatives has distorted the broader immigration enforcement system, leaving a growing and increasingly poorly supervised nondetained population waiting for years to have their immigration cases completed. This, in turn, invites misuse of the system and—if removal is ultimately ordered—makes returning migrants to their origin countries far more difficult because they have established roots in the United States during the lengthy wait.

Among detained cases, the average time to completion in the second quarter of FY 2021 was 43 days,³² and 90 percent were completed within six months.³³ However, the wait time for all removal cases (those involving both detained and nondetained migrants) is considerably longer and had been growing even before the pandemic.

In May 2021, for example, the time to completion of all removal cases in the immigration courts averaged 946 days, or more than two and a half years.³⁴ These long wait times have been driven by the large and growing nondetained caseload, which includes claims for asylum and various other forms of relief from deportation.

Prioritizing expensive detention over more economical alternatives has distorted the broader immigration enforcement system.

29 U.S. General Accountability Office (GAO), *Alternatives to Detention: Improved Data Collection and Analyses Needed to Better Assess Program Effectiveness* (Washington, DC: GAO, 2014), 20.

30 DHS, "U.S. Immigration and Customs Enforcement Budget Overview: Fiscal Year 2021 Congressional Justification" (budget document, DHS, Washington, DC, n.d.), 171.

31 Audrey Singer, *Immigration: Alternatives to Detention (ATD) Programs* (Washington, DC: Congressional Research Service, 2019), 13.

32 U.S. Department of Justice, Executive Office for Immigration Review, "Median Completion Times for Detained Cases" (adjudication statistics, April 19, 2021).

33 U.S. Department of Justice, Executive Office for Immigration Review, "Percentage of DHS-Detained Cases Completed within Six Months" (adjudication statistics, April 19, 2021).

34 TRAC Immigration, "Immigration Court Backlog Tool: Pending Cases and Length of Wait by Nationality, State, Court, and Hearing Location," updated May 2021.

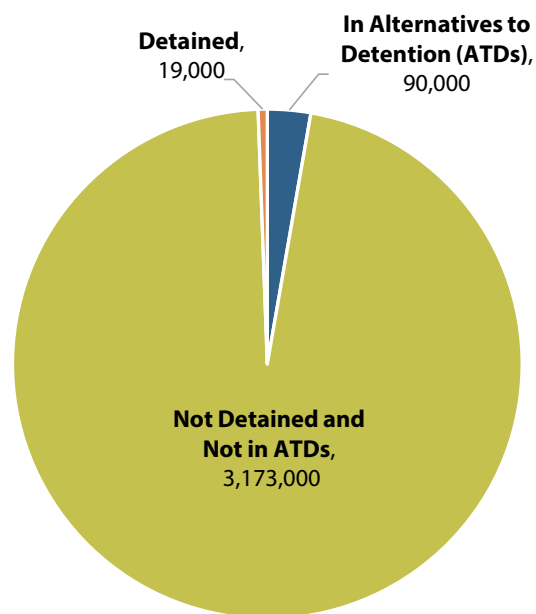
ICE has limited tools for tracking people who are not detained. Of its rapidly growing nondetained caseload, which exceeded 3.2 million in September 2020 (see Figure 2), ICE tracks but a small share—about 90,000 to 110,000 individuals—through its ATD programs. They rely on electronic monitoring and/or required telephone or in-person check-ins,³⁵ and immigrants are generally in these programs for an average of slightly more than two years.³⁶

Because many immigrants in the nondetained caseload—especially asylum seekers—wait considerably longer than detained migrants before their cases are completed, this leaves them untracked and in limbo, if they have approvable claims, or able to abscond from immigration hearings and avoid leaving the country, if they are ultimately ordered removed.³⁷

With the number of immigrants in detention currently below averages in recent pre-pandemic years, the Biden administration has broad flexibility to make changes that could more effectively align the architecture of the U.S. immigration custody system with its policy goals. Since taking office, the administration has started allowing individuals and their representatives to challenge whether their detention meets ICE's enforcement priorities.³⁸ It has also curtailed interior immigration enforcement and changed policies regarding the treatment of asylum-seeking families and children at the border. However, with the exception of closing two detention centers due to "mistreatment ... or substandard conditions of detention,"³⁹ it has not overhauled ICE's detention system or otherwise sought to redesign the country's approach to immigration custody.

The remainder of this report examines how the U.S. immigration custody system could be overhauled to employ tools other than detention—especially supervised release and case management—as its prevailing policy and practice to meet the goal of safe, fair, and effective immigration enforcement.

FIGURE 2
Individuals in ICE Custody, Detained and Nondetained Dockets, September 2020



Source: ICE, *U.S. Immigration and Customs Enforcement Fiscal Year 2020 Enforcement and Removal Operations Report* (Washington, DC: ICE, n.d.), 11.

35 In July 2021, there were about 108,000 individuals in ATD programs. See ICE, "Detention Management—Detention Statistics—FY 2021 ICE Statistics—ATD FY 21 YTD."

36 In July 2021, participants had spent an average of 761 days in ATD programs. See ICE, "Detention Management—Detention Statistics—FY 2021 ICE Statistics—ATD FY 21 YTD."

37 Singer, *Immigration: Alternatives to Detention (ATD) Programs*, 9–10.

38 ICE, "ICE Announces Case Review Process" (news release, March 4, 2021).

39 DHS, "ICE to Close Two Detention Centers" (news release, May 20, 2021).

4 Rethinking the Immigration Custody System

Before the pandemic, ICE chose detention as its preferred custody option for almost all immigrants arrested in the U.S. interior and many adults apprehended at the border, regardless of the risk level or vulnerabilities of individuals. Congressional mandates for detention (see Box 2) and, prior to FY 2017, appropriations for bed-space minimums have largely driven the preference for detention. But ICE has also frequently placed migrants in detention for reasons of deterrence rather than public safety or flight risk.

A. *New Priorities for Custody Determinations*

A more flexible custody system would provide different options for different groups of immigrants based on their public safety risk, flight risk, and vulnerabilities. An overhaul of the current system in pursuit of such a model should begin with five key principles. They align with key recommendations of DHS' 2009 review of the U.S. immigration detention system.⁴⁰

- 1 Protecting public safety by using secure settings when warranted.** A small share of migrants have serious criminal records in the United States or their origin countries that may make them public safety threats. For this group, detention in a secure setting is warranted.
- 2 Screening immigrants for risks and vulnerabilities and choosing custody options accordingly.** Screening and assessment of risks and needs should be conducted by specially designated and trained personnel for both migrants apprehended at the border and those arrested in the U.S. interior. The assessment should identify those who may present public safety risks as well as vulnerable populations such as families with young children and people who are pregnant, elderly, disabled, LGBTQ, or have serious medical or mental health conditions.⁴¹
- 3 Using the least restrictive feasible settings.** Given the high cost of detention, its negative impacts on immigrants, and distortions of the immigration enforcement system, nondetention custody options should be used whenever feasible, consistent with efficiency, fairness, flight risk, and deterrence considerations.
- 4 Designing nondetention custody options that ensure compliance.** Custody tools that do not involve detention should be built around measures proven to promote compliance, such as robust community supervision, intensive case management, and imposition of bonds.
- 5 Providing immigrants access to information, legal counsel, and services.** Asylum and removal proceedings are lengthy and complex, with steps and requirements that can be difficult to understand. It is critical that migrants know their rights and responsibilities within the system, particularly their right to legal counsel and their obligation to appear for interviews, hearings, check-ins, and removal appointments. Understanding immigration procedures and assistance with removal proceedings promotes compliance with them.

⁴⁰ Schiro, *Immigration Detention Overview and Recommendations*. These principles also reflect reforms recommended in similar inquiries in the European context. See Council of Europe, Steering Committee on Human Rights, *Alternatives to Immigration Detention: Fostering Effective Results* (Strasbourg: Council of Europe, 2019), 13.

⁴¹ Council of Europe, *Alternatives to Immigration Detention*, 14.

B. *Designing Custody Tools Based on Risk, Need, and Vulnerability*

The cornerstone of a rebalanced custody system should be supervised release and case management programs, with detention in secure facilities limited to the minority of cases for which it is truly justified. In January 2016, the Obama administration launched a pilot Family Case Management Program (FCMP) to provide a more humane alternative to detention for Central American families apprehended at the border. It provides a model for further testing and building out new approaches to custody of migrants in asylum proceedings as well as others subject to removal.

FCMP served about 2,000 family members in five metropolitan areas across the United States.⁴² It involved intensive case management and service referrals through a variety of for-profit and nonprofit community organizations that provided orientations to the U.S. legal and immigration systems, referrals to attorneys to assist with asylum applications and removal proceedings, and basic stabilization services such as medical, food, and educational assistance. Case managers and ICE officers met frequently, often monthly, with participating families.

The frequent contact of active case management, along with basic support services, helped build trust among the families, while orientations and access to legal counsel helped them understand their rights and responsibilities in the U.S. immigration enforcement system. Though short in duration (18 months), the FCMP reported 99-percent compliance rates for immigration court proceedings and ICE check-in appointments; just 4 percent of participants failed to appear for immigration court hearings.⁴³ FCMP was also considerably less expensive than detention in ICE's family residential centers, at \$38.47 versus \$237.60 per family per day.⁴⁴ The Trump administration ended the FCMP in early 2017. Thus, it was not possible to determine the participants' compliance rate with removal orders once their immigration court cases were completed.

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As FCMP did for families, two small programs that ICE piloted for vulnerable migrants without strong community ties achieved 97-percent rates of appearance in immigration courts: one was operated by Lutheran Immigration and Refugee Service in 2012–15, and the other by the U.S. Conference of Catholic Bishops in 2014–15.⁴⁵ The programs demonstrated the feasibility of ICE working with nongovernmental entities to enhance participant compliance. However, ICE did not extend them beyond their pilot periods.

⁴² Singer, *Immigration: Alternatives to Detention (ATD) Programs*, 10.

⁴³ Singer, *Immigration: Alternatives to Detention (ATD) Programs*, 13.

⁴⁴ Singer, *Immigration: Alternatives to Detention (ATD) Programs*, 10–13.

⁴⁵ U.S. Conference of Catholic Bishops, "[The Real Alternatives to Detention](#)," updated June 2019.

Legal services are essential to the success of supervision programs. A review of six years of nondetained removal cases (2007–12) showed that only 7 percent of immigrants who had legal representation were ordered removed in absentia because they missed an immigration court hearing, compared with 68 percent of those who were not represented. In other words, 93 percent of those with representation showed up in court, versus 32 percent of those without it.⁴⁶

Experience with these and similar programs have demonstrated the following:

- ▶ Migrants who have not resided in the United States for an extended period may require support services to keep them in stable housing and in contact with authorities.
- ▶ Explaining the removal process and providing access to legal counsel build trust among immigrants that the process is fair, contributing to their cooperation and compliance.
- ▶ Effective case management ensures that immigrants receive their notices to appear at asylum or other immigration court hearings, and that they comply with other requirements to check in with immigration authorities and—if subject to a removal order—appear for their removal appointments.
- ▶ Immigrants should be advised of the likely timeframe for the various stages of the asylum and removal processes and be given adequate notice in a language they can understand.
- ▶ Migrants may agree to leave voluntarily if they are likely to be found removable—a more humane alternative to formal deportation that also reduces immigration court, ICE administration, and U.S. government transportation costs.⁴⁷
- ▶ Supervision and case management should continue throughout the removal process, including until the final court hearing and relief is granted or a final removal order is issued.
- ▶ Those to whom relief is granted should be given information about integration services in their adoptive communities, while those preparing for removal should be briefed about and put in touch with reintegration programs in the countries to which they are being returned.

Supervision programs built on these propositions should serve as the preferred treatment of the largest groups of immigrants in custody: (1) families with children apprehended at the U.S.-Mexico border (who comprised more than half of apprehensions in FY 2019); (2) adults apprehended at the border—both asylum seekers and other migrants; (3) adults arrested in the U.S. interior by ICE who do not have convictions for serious crimes; and (4) vulnerable populations.

A Redesigned Custody System

would use different kinds of supervised release for...



families and children apprehended at the border



adult asylum seekers and other immigrants apprehended at the border



most adults arrested within the United States



vulnerable populations

and reserve detention for immigrants with serious criminal convictions, as required by Congress

⁴⁶ Ingrid V. Eagly and Steven Shafer, “A National Study of Access to Counsel in Immigration Court,” *University of Pennsylvania Law Review* 164, no. 1 (2015): 1–91.

⁴⁷ For example, several Family Case Management Program (FCMP) participants who had been ordered removed and exhausted their appeal options were counseled to leave voluntarily and agreed to do so. See Singer, *Immigration: Alternatives to Detention (ATD) Programs*, 13.

Families Apprehended at the U.S.-Mexico Border

When determining whether apprehended migrants present a flight risk, a key factor is the extent of their ties to the United States. Because many families apprehended at the U.S.-Mexico border are recent arrivals and often lack a fixed address in the country, they would overall be considered at high or moderate risk of flight and noncompliance with immigration court and removal proceedings. Yet, many have ties in the United States. In the first six months of FY 2021, 82 percent of apprehended family members (75,000 out of 92,000) came from El Salvador, Guatemala, Honduras, or Mexico.⁴⁸ These countries have substantial immigrant populations in the United States. Thus, many Mexican and Central American asylum seekers already have family members or other close acquaintances residing in the United States.⁴⁹ When this is the case, Customs and Border Protection (CBP) or ICE could require and verify the address information of the U.S. residents to which the apprehended migrants have ties, treating them as sponsors who provide basic support.

Address registration and official documentation could help better track released asylum seekers than the current practice of releasing them with a notice to appear before an immigration judge—a document that is often poorly understood by immigrants and is not useful for identification purposes. Frequent, regular follow-ups would help ensure that they understand their responsibilities in immigration court proceedings, are able to access legal services to assist them with their case, appear for asylum or immigration court appointments, and prepare for removal if so ordered. Because families without extensive U.S. ties are likely to represent higher flight risks, they may require even more intensive supervision and case management.

Adults Apprehended at the U.S.-Mexico Border

Only about 3 percent of adults apprehended at the border in July 2021 (about 600 out of 22,200) had a conviction for any crime in the United States; the number with serious convictions that could merit detention on public safety grounds under a reimagined custody system is likely lower.⁵⁰ For those with family members or other connections in the United States, a combination of registration, in-person and telephone check-ins with authorities, and some form of electronic monitoring may be effective.⁵¹

Adults without strong U.S. ties could be best placed in case management programs modeled after the FCMP. Like families, these adults would require orientation to the U.S. immigration system and access to legal counsel and social services to build their trust alongside intensive supervision to ensure their compliance.

48 Customs and Border Protection (CBP), “U.S. Border Patrol Southwest Border Apprehensions by Sector—Southwest Border Family Unit Encounters by Country,” accessed Jun 1, 2021.

49 In a representative survey of immigrants over age 18 who arrived in the United States for the first time between 2007 and 2017 (1,859 respondents), 45 percent of Salvadorans, 44 percent of Guatemalans, and 31 percent of Hondurans said family reunification was one of their top two reasons for migrating. When they arrived in the United States, 47 percent went to the house of an immediate family member, and 27 percent went to the house of another family member. See Emmanuel Abuelafia, Giselle Del Carmen, and Marta Ruiz-Arranz, *Tras los Pasos del Migrante: Perspectivas y Experiencias de la Migración de El Salvador, Guatemala y Honduras en Estados Unidos* (Washington, DC: Inter-American Development Bank, 2019), 13–15.

50 See ICE, “Detention Management—Detention Statistics—FY 2021 ICE Statistics—Detention FY 21 YTD.”

51 Singer, *Immigration: Alternatives to Detention (ATD) Programs*, 8.

Adults Arrested in the U.S. Interior

Most adults arrested by ICE in the U.S. interior have lived in the country long term, and many have strong U.S. ties, such as U.S.-citizen or LPR spouses and children.⁵² As a result, they represent a lower flight risk than many migrants apprehended at the border.⁵³ They may, however, also need legal orientation and counsel to navigate the legal process. And because they have been in the United States much longer, immigrants arrested in the interior are more likely than those apprehended at the border to have U.S. criminal convictions, some of which may be for serious offenses that call for detention.

For those without serious convictions, ICE has at times employed ankle GPS monitors to track such individuals outside of detention. More often, the agency has granted them release on their own recognizance, with payment of an immigration bond or through humanitarian parole.⁵⁴ Release on bond has generally resulted in high compliance with immigration court appointments, though compliance has not been as high as for cases involving electronic monitoring or case management. According to immigration court records, 86 percent of those released on bond appeared for their final removal hearings in FY 2015, even though these hearings on average occurred three years after the bond hearings that resulted in the immigrants' release.⁵⁵

Vulnerable Populations

About 3 percent of ICE detainees are part of groups recognized as having particular vulnerabilities. As of July 2019, DHS had developed guidance for the identification, detention, care, and removal of six specific vulnerable populations: migrants who have mental disorders, those with disabilities, and those who are transgender, pregnant, parents of minors, or juveniles.⁵⁶

Juveniles (i.e., unaccompanied children) are referred to ORR custody, and limited numbers of parents of minors are held alongside their children in ICE's family residential centers. However, members of the other four vulnerable populations are detained in regular ICE facilities in significant numbers. ICE also detains large numbers of elderly migrants, whom DHS policies no longer define as vulnerable.⁵⁷

52 ICE, *Deportation of Aliens Claiming U.S.-Born Children: First Half, Calendar Year 2017* (Washington, DC: DHS, 2017).

53 For a discussion of how immigrants with long-term U.S. residence are determined to be low flight risks in ICE's risk assessment classification, see Mark Noferi and Robert Koulisch, "The Immigration Detention Risk Assessment," *Georgetown Law Review Journal* 24, no. 45 (2014).

54 During the Obama administration, ICE frequently used prosecutorial discretion to release individuals from custody on recognizance, bond, or parole. But in a 2017 executive order, President Trump ordered ICE to narrow its use of prosecutorial discretion, and the agency subsequently restricted the release of detainees. Those released on bond (usually after a bond hearing before an immigration judge) have been paying a median bond price of at least \$7,500 during almost every month since 2021—with the median in some months reaching \$9,000 or \$10,000. See Singer, *Immigration: Alternatives to Detention (ATD) Programs*, 4; Randy Capps et al., *Revolving Up the Deportation Machinery: Enforcement under Trump and the Pushback* (Washington, DC: Migration Policy Institute, 2018), 19–20; TRAC Immigration, "Immigration Court Bond Hearings and Related Case Decisions," updated April 2021.

55 TRAC Immigration, "What Happens When Individuals Are Released on Bond in Immigration Court Proceedings?" updated September 14, 2016.

56 GAO, *Immigration Enforcement: Arrests, Detentions, and Removals, and Issues Related to Selected Populations* (Washington, DC: GAO, 2019), 21.

57 In 2017 and 2018, ICE rescinded its policies regarding arrest, detention, care, and removal of elderly immigrants, including an Obama administration policy to administratively close cases of individuals without criminal convictions who are age 70 or older for health and humanitarian reasons. As a result, total detentions of elderly individuals rose from 882 in 2015 to 1,159 in 2018. See GAO, *Immigration Enforcement: Arrests, Detentions, and Removals*, 32.

The case for releasing vulnerable individuals who do not represent a public safety risk is especially strong, given they may require substantial health care, social services, or other forms of support that are limited in detention settings. This is also the case because detention can be harmful to detainees' physical and mental health, and some groups—such as migrants who are transgender and those with disabilities—may need to be separated from the general population for their protection.

The case for releasing vulnerable individuals who do not represent a public safety risk is especially strong.

Detention in Secure Facilities

Although immigration detention is administrative, not criminal, the fact that Congress has mandated the detention of removable noncitizens convicted of certain criminal offenses (see Box 2) means that detention of this population will remain a feature of the U.S. immigration custody system. The number of migrants with Level 1 convictions (for violent or other serious crimes) in detention at any one time is relatively limited, peaking at 8,000 in October 2017. When the broader average daily detention population was at its highest in July 2019, at 56,000 detainees, the number with Level 1 convictions was 6,000 (11 percent of the total) and only 17,000 (30 percent) had criminal convictions for any offense, no matter how minor.⁵⁸ Since then, the number has fallen further: in July 2021, fewer than 5,000 detainees (17 percent) had convictions for any crime.⁵⁹ ICE has not conducted a systematic review to determine what share of these detainees had convictions matching the Biden administration's enforcement priorities warranting detention for public safety reasons.

Were ICE to house this population of immigrants with serious criminal convictions in a small number of facilities, it would make it easier to monitor these facilities and ensure that they meet standards for health, safety, and humane treatment.⁶⁰ ICE could also potentially reduce its use of private, for-profit facilities that housed about 81 percent of the detainee population in 2020—a practice that has become controversial among observers concerned about how the profit motive negatively influences detention conditions.⁶¹ The Biden administration has committed to ending contracts with private companies to house U.S. Bureau of Prison inmates, but it has not developed a similar policy to end such contracts for ICE detainees.⁶²

The number of migrants in ICE custody with serious criminal records is likely to be reasonably steady and predictably small, though it could be affected by changes to the agency's interior enforcement policies and by the characteristics of migrants crossing the U.S.-Mexico border. However, the fact that the number of detainees with Level 1 offenses fell between 2017 and 2019—a period of heightened ICE enforcement

⁵⁸ TRAC Immigration, "Decline in ICE Detainees with Criminal Records."

⁵⁹ ICE, "Detention Management—Detention Statistics—FY 2021 ICE Statistics—Detention FY 21 YTD." More recent data on the number of detainees with Level 1 convictions are not available.

⁶⁰ Schriro, *Immigration Detention Overview and Recommendations*.

⁶¹ Eunice Hyunhye Cho, Tara Tidwell Cullen, and Clara Long, *Justice-Free Zones: U.S. Immigration Detention under the Trump Administration* (Washington, DC: American Civil Liberties Union, Human Rights Watch, and National Immigrant Justice Center, 2020). See also Luan, "Profiting from Enforcement."

⁶² Denise Bell and Clara Long, "Roadmap for Urgent Change in Immigration Detention," *Newsweek*, May 13, 2021.

activity and rising border apprehensions—suggests that increased arrests do not translate directly to an increase in the population of detainees with serious convictions.⁶³ If the patterns seen in recent years continue, any future increase in border apprehensions is unlikely to result in a substantial rise in apprehensions of convicted criminals, because the vast majority of apprehensions will likely be of migrants crossing the border for the first time who have spent no time in the United States and are seeking asylum, including many families and children.

C. *Change Management: Requirements and Challenges*

Establishing effective supervised release policies and programs would require a significant overhaul of today's immigration custody system and of the activities and culture of ICE's Enforcement and Removal Operations (ERO). In the *U.S. Citizenship Act* fact sheet released on Inauguration Day 2021, the Biden administration proposed expanding the use of case management for families seeking asylum, building on the Obama administration pilot.⁶⁴ The sheer size of ICE's custody system makes it difficult to implement new supervision and case management programs across the board. Instead, they should be adopted through well-designed pilots that are carefully evaluated before going to scale. Thus, reorienting the custody work of ICE's mission must be a gradual, multiyear undertaking.

Existing Detention Facilities

Many ICE facilities, whether operated by federal, state, or local governments or by for-profit prison companies would need to be decommissioned or reconfigured for other uses. ICE's custody-management functions would change significantly, requiring fewer officers supervising detained migrants and more overseeing caseloads involving release with supervision and case management. To make this shift, additional training would be required for ICE officers engaged in case management or similar functions under more intensive case management programs.

Instead of large contracts with for-profit prison companies, multiple smaller contracts would be required with agencies qualified to provide case management, social services, medical and mental health assessments, and referrals for legal advice and representation. These elements are the keys to gaining the trust of immigrants as the basis for compliance with immigration laws and procedures.

A small number of for-profit companies and not-for-profit organizations provided case management in collaboration with ICE during the FCMP pilot. As the system expands and becomes more complex, with contractors taking on a greater range of responsibilities, the efficiency and effectiveness of contractors would need to be carefully monitored. A broad array of other nongovernmental and immigrant services organizations has extensive experience working with case management for refugees under ORR social services programs. They represent important potential partner organizations with the skills and commitment required for expanding supervised release strategies and capacity.

⁶³ TRAC Immigration, "Decline in ICE Detainees with Criminal Records."

⁶⁴ White House, "Fact Sheet: President Biden Sends Immigration Bill to Congress as Part of His Commitment to Modernize Our Immigration System" (news release, January 20, 2021).

Current Alternatives to Detention and Electronic Monitoring Programs

ICE's ATD programs may offer a starting point for reduced use of detention in favor of supervised release efforts. However, careful oversight and evaluations of ATD programs have not been carried out, and they have had serious shortcomings, which would need to be addressed before simply expanding current initiatives.

For example, in recent years, ICE has monitored up to 110,000 people at a time using its Intensive Supervision Appearance Programs (ISAP). In its various versions, ISAP has used a combination of electronic monitoring (ankle GPS bracelets, telephone reporting, and smartphones); scheduled face-to-face and telephone meetings; unannounced home visits; and court and meeting alerts to track migrants and ensure their compliance with immigration proceedings. At the end of July 2021, there were about 107,800 ISAP participants: 57,400 adults and 50,400 family members (adults and children) apprehended together.⁶⁵

There is mixed evidence for the effectiveness of ISAP and other ATD programs in ensuring compliance with the removal process. An evaluation of FY 2011–13 participants in a “full service” version of ISAP that included multiple tracking components found that they had a 99-percent appearance rate at court hearings, including a 95-percent rate for final removal hearings.⁶⁶ However, ICE data for a later period—FY 2020—show that 39 percent of migrants in ATD programs (of all kinds) absconded from court hearings. Moreover, on average, participants were in these programs between 14 and 18 months—far less than the time most spend in immigration court proceedings.⁶⁷ This would seem to run counter to the aim of these programs, which is to ensure compliance with the requirements of the full extent of removal proceedings.

Whether physical tracking devices remain the preferred form of electronic monitoring should be carefully considered. Such devices have been criticized as intrusive and harmful in both immigration and criminal justice contexts. Some GPS monitoring devices can record calls and conversations without the wearer's knowledge. And some ankle-bracelet models, particularly older ones, have caused cuts, bruises, and even electric shocks, and wearers can be stigmatized because of the highly visible devices. Using smartphone apps instead of tracking devices attached to migrants could potentially reduce physical discomfort and stigma, but privacy concerns have also been raised about them, generally related to the tracking of calls and social media.⁶⁸

An additional dimension that merits careful review is the resources and personnel needed to ensure that these programs meet their aims.

An additional dimension that merits careful review is the resources and personnel needed to ensure that these programs meet their aims. In a 2017 review, the DHS Office of Inspector General found that ICE deportation officers were, on average, each responsible for between 1,700 and 10,000 nondetained cases

65 ICE, “Detention Management—Detention Statistics—FY 2021 ICE Statistics—ATD FY 21 YTD.”

66 Singer, *Immigration: Alternatives to Detention (ATD) Programs*, 9.

67 ICE, *U.S. Immigration and Customs Enforcement Fiscal Year 2020 Enforcement and Removal Operations Report* (Washington, DC: ICE, n.d.), 12.

68 Albert Fox Cahn, “Ankle Monitors Can Hold Captives in Invisible Jails of Debt, Pain and Bugged Conversations,” NBC News, November 6, 2019; Colleen Long, Frank Bajak, and Will Weissert, “ICE Issuing More Immigrant Ankle Monitors. But Do They Work?” Associated Press, August 25, 2018; Kyle Barron and Cinthya Santos Briones, “No Alternative: Ankle Monitors Expand the Reach of Immigration Detention,” NACLA, January 6, 2015.

across the four ICE offices studied—a level it found to be unmanageable.⁶⁹ Such high caseloads, as well as the short duration of ATD programs compared to the length of immigration proceedings, suggest that these programs require more resources—another aspect of program design that should be informed by carefully analyzing the effectiveness of ATDs in ensuring compliance with the removal process.

Custody after Removal Orders Are Issued

More restrictive custody methods may be required for some groups of immigrants at certain stages when the flight risk is relatively high—such as when migrants without U.S. family ties first arrive and have yet to obtain a fixed address, or after a migrant is ordered removed by an immigration judge. When options for remaining in the United States have been exhausted, immigrants have more incentives to abscond.

While monitoring through ISAP and supervised release programs such as FCMP have shown high compliance rates with immigration court proceedings, they have not been well evaluated for compliance with removal orders. Evaluations should assess whether custody options short of detention are sufficient to ensure compliance after removal orders. Migrants with a high post-removal-order flight risk might warrant more intensive monitoring with, for instance, more frequent check-ins, use of GPS tracking devices, or even detention in some cases.

ICE Culture and the Broader Immigration Enforcement System

Historically, ICE and CBP have treated detention as the most reliable resource for ensuring removal and have utilized it to the extent that beds are available. Once migrants are in detention, the duration of their stay is rarely revisited. Moving to a custody system centered on supervised release and case management that utilizes detention sparingly would represent a profound shift in both the operations and the institutional culture of these agencies.

In making that shift, DHS should revisit its interpretation of the statutory requirement that certain migrants be “in the custody of” authorities. Many criminal justice correctional systems treat reporting centers, work release programs, and house arrest, for example, as meeting those systems’ custody requirements. Some experts have argued that, as a function of civil law, immigration custody should be able to be treated similarly in meeting established legal requirements.⁷⁰

Moving to a custody system centered on supervised release and case management that utilizes detention sparingly would represent a profound shift in both the operations and the institutional culture of these agencies.

69 By comparison, in the same four offices, detained caseloads ranged from 65 to 110 per officer. See DHS, *ICE Deportation Operations* (Washington, DC: DHS, 2017), 4.

70 Author discussion and email exchange with Dora Schriro, former Senior Advisor to the Secretary of Homeland Security; Director, ICE Office of Detention Policy and Planning; and Subject Matter Expert, DHS Advisory Committee on Family Residential Centers, December 2020.

Reform of the custody system also requires changes in key programs and processes that involve coordination among the Border Patrol, immigration courts, and U.S. Citizenship and Immigration Services (USCIS) asylum offices. If, as MPI has recommended elsewhere, the asylum system is restructured so that USCIS asylum officers adjudicate cases at both the credible fear and full interview stages (rather than referring credible fear cases with positive findings to the immigration courts),⁷¹ it is critical that asylum seekers have access to legal services and understand the system in order to comply with appearance requirements. An overhauled asylum system that can more fairly and efficiently decide claims would reduce incentives to misuse the system, whose lengthy backlogs enable extended stays in the United States. In turn, changes to the asylum system that result in backlog reductions would free up court resources to accelerate adjudication of nondetained cases in ICE supervised release programs.

Ultimately, reconfiguring the detention-related aspects of the custody system would be facilitated by legislation that reduces the scope of mandatory detention. Congress has mandated detention of migrants convicted of an overly broad list of crimes—including many that are not violent and do not constitute public safety threats warranting detention. The congressional mandate to detain many asylum seekers and others apprehended at the border with no U.S. criminal history should also be reviewed. Mandatory detention requirements distort the custody system by expanding the use of detention when less costly, more humane, and more proportionate forms of custody could be employed to ensure migrants appear for their immigration proceedings.

5 Conclusion

The United States operates an immigration detention system that has become increasingly expensive, punitive, and—particularly during the COVID-19 pandemic—dangerous to the health of migrants, detention center staff, and surrounding communities. At the same time, ICE currently lacks the resources to adequately supervise immigrants released from detention: It monitors a small fraction of those apprehended at the border and released into the United States, and for those it does monitor, its ATD programs generally do not last long enough to see migrants through to the completion of their case. Given the twin challenges of creating a more humane immigration custody system and ensuring compliance with immigration proceedings for people who are not detained, rethinking the custody system is an urgent priority.

The overhaul of immigration custody recommended in this report would use detention sparingly, limiting it to the relatively small number of migrants in custody who pose public safety risks. Thus, the vast majority would be under supervision through release on bond, community supervision, legal representation or services, and robust case management. A new, flexible custody system would have a range of options that are appropriate for different populations, depending on their public safety risk, flight risk, and vulnerabilities. Such programs also cost a fraction of current detention costs.

⁷¹ Doris Meissner, *Rethinking the U.S.-Mexico Border Immigration Enforcement System: A Policy Road Map* (Washington, DC: Migration Policy Institute, 2020); Doris Meissner, Faye Hipsman, and T. Alexander Aleinikoff, *The U.S. Asylum System in Crisis: Charting a Way Forward* (Washington, DC: Migration Policy Institute, 2018).

Placing a priority on release under supervision and case management where possible would reduce growing distortions in the U.S. immigration enforcement system. With substantial resources dedicated to detention facilities, the supervision of detained migrants, and the detained docket in immigration courts, the larger system of supervision, case management, and adjudication for nondetained migrants has been neglected. The result has been mushrooming court backlogs, unsustainable nondetained caseloads for ICE officers, and hundreds of thousands of immigrants falling through the cracks and becoming part of the unauthorized immigrant population.

Steering immigration custody away from detention and more fully developing supervised release options would require wholesale changes in the culture and enforcement practices of DHS immigration agencies and the immigration courts, as well as, ultimately, action by Congress to modify mandatory detention requirements. It would also necessitate thoughtful policy development—the gradual implementation of system changes through pilot programs; redirecting substantial resources to supervision, case management, and legal counsel; and thorough evaluation.

Custody policies and practices centered on supervision, case management, and legal services bring with them the promise of less costly, more humane treatment built on compliance with enforcement processes and requirements. Robust case management can achieve the removal of those migrants whose claims are rejected by assisting them in planning for return and reintegration into their origin countries, just as it can help prepare those whose asylum and other claims are approved to better integrate into U.S. society.

Custody policies and practices centered on supervision, case management, and legal services bring with them the promise of less costly, more humane treatment built on compliance.

About the Authors



RANDY CAPPS

Randy Capps, a demographer, is Director of Research for U.S. Programs at the Migration Policy Institute (MPI). His areas of expertise include immigration trends, the unauthorized population, immigrants in the U.S. labor force, the children of immigrants and their well-being, and immigrant health-care and public-benefits access and use. He also has examined the impact of the detention and deportation of immigrant parents on children.

Prior to joining MPI, Dr. Capps was a researcher in the Immigration Studies Program at the Urban Institute. He received his PhD in sociology and his master of public affairs degree from the University of Texas.



DORIS MEISSNER

Doris Meissner, former Commissioner of the U.S. Immigration and Naturalization Service (INS), is a Senior Fellow at MPI, where she directs the Institute's U.S. immigration policy work. Her responsibilities focus on the role of immigration in America's future and on administering the nation's immigration laws, systems, and government agencies. Her work and expertise also include immigration and politics, immigration enforcement, border control, cooperation with other countries, and immigration and national security.

From 1993 to 2000, she served in the Clinton administration as Commissioner of the INS. Her accomplishments included reforming the nation's asylum system; creating new strategies for managing U.S. borders; improving naturalization and other services for immigrants; shaping responses to migration and humanitarian emergencies; strengthening cooperation with Mexico, Canada, and other countries; and managing growth that doubled the agency's personnel and tripled its budget.

In 1986, Ms. Meissner joined the Carnegie Endowment for International Peace as a Senior Associate. There, she created the Endowment's Immigration Policy Project, which evolved into MPI in 2001.

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1275 K St NW, Suite 800, Washington, DC 20005
202-266-1940

