



Ending ICE's Mass Detention System

In the summer of 2019, a historic high of 85,000 adults and children languished in some form of immigration detention on an average day.¹ The government's detention network includes holding facilities run by Customs and Border Protection (CBP); warehouse-sized shelters for unaccompanied children run by the Office of Refugee Resettlement; and hundreds of jails and prisons run by private prison companies or counties under contract with Immigration and Customs Enforcement (ICE) or operated by ICE directly. While these agencies have different cultures, practices, and responsibilities, they all use detention as a means to deter, control, and punish people who have come to the United States in pursuit of safety or a better life.

This brief focuses on ICE detention. Of all the agencies involved in confining immigrants, ICE holds people the longest — for months or even years — and is responsible for the lion's share of immigration detention; its average daily population exceeded 56,000 at its peak in 2019 and it detained more than 500,000 adults and children over the course of the fiscal year.² Under the Trump administration, a record high 81 percent of the ICE detention population is jailed in facilities run by private prison companies.³

It has not always been this way. The 1996 Antiterrorism and Effective Death Penalty Act (AEDPA) and the 1996 Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) had the combined effect of dramatically increasing immigration detention, from an average daily population of 8,500 in 1996 to double that in just two years. AEDPA required the mandatory detention of non-citizens convicted of a wide range of offenses, including minor drug offenses. IIRIRA further expanded the list of offenses for which mandatory detention was required.⁴

Despite preliminary efforts by the Obama administration to reform standards of detention, no shift from this punitive model ever took place. Immigration detention centers remained a cornerstone of the immigration system, and new conditions standards did little, if anything, to curtail human rights abuses. In the summer of 2014, the Obama administration explicitly declared that it would use detention to deter Central American families from attempting to seek asylum in the United States.

¹ See "Detention Statistics: Currently Detained Population by Arresting Agency as of 09/14/2019," U.S. Immigration and Customs Enforcement, <https://tinyurl.com/yxzn6llc> (describing an average daily population range of 54,253 to 55,241 from June to August 2019); Senate Committee on Homeland Security and Government Affairs, Hearing on Unprecedented Migration at the U.S. Southern Border, July 30, 2019 (noting that CBP held 19,699 individuals with a capacity of 4,000 in June 2019) (transcript on file with ACLU); House Committee on Appropriations, Subcommittee on Labor and Health and Human Services, Hearing on Oversight of the Unaccompanied Migrant Children Program, July 24, 2019 (describing "about 10,000 children in our care") (transcript on file with ACLU).

² See "Detention Statistics: Currently Detained Population by Arresting Agency as of 09/14/2019," U.S. Immigration and Customs Enforcement, <https://tinyurl.com/yxzn6llc>.

³ See Eunice Hyunhye Cho, Tara Tidwell Cullen, and Clara Long, *Justice Free Zones: U.S. Immigration Detention Under the Trump Administration*. New York: ACLU, Human Rights Watch, and National Immigrant Justice Center, 2020. <https://www.aclu.org/report/justice-free-zones-us-immigration-detention-under-trump-administration>

⁴ See "ACLU History: Due Process: Freedom from Unconstitutional Detention," ACLU, <https://www.aclu.org/other/aclu-history-due-process-freedom-unconstitutional-detention>.

The Trump administration, like its predecessors,⁵ sought to increase its authority and capacity to detain individuals in order to deter them from coming to the country in the first place. Yet the theory that immigration detention will deter migration has no evidentiary basis, as applied in the United States⁶ or anywhere else in the world.⁷ It also conflicts with core Supreme Court precedents holding that due process forbids deterrence as a basis for civil detention in other contexts.⁸ In keeping with the due process clause, immigration detention should be based only on “characteristics inherent in the alien himself or in the category of aliens being detained — that is, the Court countenanced detention of an alien or category of aliens on the basis of those aliens’ risk of flight or danger to the community.”⁹ Years of documentation by Congress, oversight agencies, physicians, journalists, advocates, and whistleblowers have established that ICE detention is a system rife with abuse, medical neglect, and dangerous conditions.

The COVID-19 pandemic has thrown the moral crisis of U.S. immigration detention into stark relief. This past year, the death toll in ICE custody reached levels not seen in 15 years, and the use of force, including pepper spray, physical force, and rubber bullets, has also increased.¹⁰

⁵ The Obama administration likewise sought to “send a message that ... if you come here, you should not expect to simply be released” through its detention policies. Julia Preston, “Detention Center Presented as Deterrent to Border Crossings,” *The New York Times*, Dec. 15, 2014, <https://www.nytimes.com/2014/12/16/us/homeland-security-chief-opens-largest-immigration-detention-center-in-us.html>. The use of immigration detention as a deterrent dates to at least the 1980s. See Emily Ryo, “Detention as Deterrence,” *Stanford Law Review Online*, Vol. 71 (March 2019), <https://review.law.stanford.edu/wp-content/uploads/sites/3/2019/03/71-Stan.-L.-Rev.-Ryo.pdf>.

⁶ “The data show that both family detention and family separation policies have not deterred families from coming to the United States in the past—and are unlikely to do so in the future.” Tom K. Wong, “Do Family Separation and Detention Deter Immigration?” Center for American Progress, July 24, 2018, <https://tinyurl.com/y3jg5dna>; Adam Cox and Ryan Goodman, “Detention of Migrant Families as ‘Deterrence’: Ethical Flaws and Empirical Doubts,” *Just Security*, June 22, 2018, <https://tinyurl.com/y8rhml0s>.

⁷ “[T]here is no evidence that detention has any deterrence effect on irregular migration.” “Detention Guidelines,” United Nations High Commissioner for Refugees, 2012. <https://tinyurl.com/y67d9px9>. “There is no empirical evidence to suggest that the threat of being detained deters irregular migration. Rather, existing evidence, and government and judicial statements suggest a policy of detention is neither effective nor reasonable in deterring refugees and irregular migrants.” Robyn Sampson and Vivienne Chew, *There Are Alternatives: A handbook for preventing unnecessary immigration detention*. Australia: International Detention Coalition, 2015. <https://idcoalition.org/wp-content/uploads/2015/10/There-Are-Alternatives-2015.pdf>.

⁸ See *Kansas v. Hendricks*, 521 U.S. 346, 372 (1997) (Kennedy, J., concurring) (“[W]hile incapacitation is a goal common to both the criminal and civil systems of confinement, retribution and general deterrence are reserved for the criminal system alone.”).

⁹ *RILR v. Johnson*, 80 F. Supp. 3d 164, 188-89 (D.D.C 2015).

¹⁰ Catherine Shoichet, “The Death Toll in ICE Custody is the Highest in 15 Years,” *CNN*, Sept. 30, 2020, <https://www.cnn.com/2020/09/30/us/ice-deaths-detention-2020/index.html>; Hamed Aleaziz, “There’s Been a Major Increase in the Use of Force Against Immigrants at ICE Detention Centers During the Pandemic,” *Buzzfeed News*, Aug. 5, 2020, <https://www.buzzfeednews.com/article/hamedaleaziz/use-of-force-immigrants-ice-pandemic>; Carmen Molina Acosta, “Psychological Torture: ICE Responds to COVID-19 with Solitary Confinement,” *The Intercept*, Aug. 24, 2020, <https://theintercept.com/2020/08/24/ice-detention-coronavirus-solitary-confinement/>; see also, Clara Long, Tara Tidwell Cullen, Thomas Rachko, and Rie Ohta, *Code Red: The Fatal Consequences of Dangerously Substandard Medical Care in Immigration Detention*. New York: ACLU, Human Rights Watch, and National Immigrant Justice Center, June 2018. <https://tinyurl.com/y9gey2zv>; Katherine Hawkins, “Medical Neglect at a Denver Jail,” *Project on Government Oversight*, May 21, 2019, <https://tinyurl.com/yym14vly>; Carl Takei, Mary Small, Carol Wu, and Jennifer Chan, *Fatal Neglect: How ICE Ignores Death in Detention*. New York: ACLU, Detention Watch Network, and National Immigrant Justice Center, February 2016. <https://tinyurl.com/y2l8g6mq>.

Vulnerable immigrants have reported being subject to coercive medical procedures, including hysterectomies and other procedures that could damage reproductive capacity.¹¹ Lack of adequate medical and mental health care has resulted in serious harm to detained people, including loss of hearing and sight, amputations, and suicide.¹² COVID-19 has laid bare the ultimate costs of these systemic failures. ICE has failed to ensure safe conditions to prevent the spread of COVID-19, ignoring public health recommendations, refusing to test detained people, and knowingly transferring people from detention centers with confirmed COVID-19 outbreaks.¹³ Even in the face of an unprecedented pandemic, ICE has not provided humane, safe conditions for the people in its custody.

Yet even before COVID-19, it was clear that mass ICE detention was unnecessary. Most individuals in ICE detention are locked up pending removal proceedings, which means they have *not* been ordered deported and in fact very well may have the legal right to remain in the United States. Many languish in detention for months and years for no reason, only to win their cases. Even people who have won their cases sometimes continue to be detained pending appeals by the DHS, during proceedings that can last for years.

¹¹ Molly O'Toole, "19 Women Allege Medical Abuse in Georgia Immigration Detention," *Los Angeles Times*, Oct. 22, 2020, <https://www.latimes.com/politics/story/2020-10-22/women-allege-medical-abuse-georgia-immigration-detention>.

¹² See Eunice Hyunhye Cho, Tara Tidwell Cullen, and Clara Long, *Justice Free Zones: U.S. Immigration Detention Under the Trump Administration*. New York: ACLU, Human Rights Watch, and National Immigrant Justice Center, 2020. <https://www.aclu.org/report/justice-free-zones-us-immigration-detention-under-trump-administration>; Charles Bethea, "A Medical Emergency, and the Growing Crisis at Immigration Detention Centers," *The New Yorker*, Sept. 13, 2017, <https://www.newyorker.com/news/news-desk/a-medical-emergency-and-the-growing-crisis-at-immigration-detention-centers>; Eunice Hyunhye Cho and Paromita Shah, *Shadow Prisons: Immigration Detention in the South*. Alabama: Southern Poverty Law Center, 2017. <https://www.splcenter.org/20161121/shadow-prisons-immigrant-detention-south>; Amanda Darrach, "Q&A: Hamed Aleaziz on sparking an investigation into ICE's medical care," *Columbia Journalism Review*, Feb. 11, 2020, https://www.cjr.org/q_and_a/hamed-aleaziz-buzzfeed-ice.php; Noah Lanard, "ICE is Force-Feeding Hunger Strikers, In Violation of Medical Ethics," *Mother Jones*, Jan. 16, 2020, <https://www.motherjones.com/politics/2020/01/ice-is-force-feeding-hunger-strikers-in-violation-of-medical-ethics/> (quoting a professor of University of Southern California professor of clinical emergency medicine's affidavit that described ICE's treatment of a 70-day hunger striker as "the worst medical care I have seen in my ten years of practice"); Hamed Aleaziz, "Congress Has Launched an Investigation Into the Medical Care of Immigrant Detainees," *Buzzfeed News*, Dec. 23, 2019, <https://www.buzzfeednews.com/article/hamedaleaziz/congress-investigation-immigrant-detainees-medical-care>.

¹³ See, e.g. "Early Experiences with COVID-19 at ICE Detention Facilities," Department of Homeland Security Office of the Inspector General, June 18, 2020, <https://www.oig.dhs.gov/sites/default/files/assets/2020-06/OIG-20-42-Jun20.pdf>; Letter from Dr. Scott Allen and Dr. Josiah Rich to House Committee on Homeland Security, Mar. 19, 2020, <https://www.documentcloud.org/documents/6816336-032020-Letter-From-Drs-Allen-Rich-to-Congress-Re.html#document/p4/a557238>; Andrea Castillo, "ICE Deliberately Limited Testing at Bakersfield Immigration Facility with COVID-19 Outbreak," *Los Angeles Times*, Aug. 6, 2020, <https://www.latimes.com/california/story/2020-08-06/amid-coronavirus-outbreak-at-bakersfield-immigration-facility-emails-show-ice-deliberately-limited-testing>; Antonio Olivo and Nick Miroff, "ICE Flew Detainees to Virginia So the Planes Could Transport Agents to D.C. Protests. A Huge Coronavirus Outbreak Followed," *The Washington Post*, Sept. 11, 2020, https://www.washingtonpost.com/coronavirus/ice-air-farmville-protests-covid/2020/09/11/f70ebe1e-e861-11ea-bc79-834454439a44_story.html?arc404=true&_ddid=2-1599836400.

But the COVID-19 pandemic also shows that a different way is possible. ICE has reduced the average daily population by nearly 70 percent from its peak level under the Trump administration, in part due to COVID-19-related lawsuits. While ICE can — and must — continue to reduce detention even more, what this year’s massive reduction already shows is that the vast majority of detained immigrants can be released immediately. There is overwhelming consensus within the immigrants’ rights movement that now is the time for transformative change, not reforms at the margins.

Recommendations to the President

First 100 Days

1. The President’s budget request to Congress for Fiscal Year (FY) 2022 must reflect *at least* a 75 percent reduction in previous funding levels for ICE detention. A drastic reduction in funding for ICE custody operations must be reflected in any continuing FY2021 budget negotiations and all future budget requests. A portion of those funds can be invested in community-based, case management-centered alternative-to-detention programs run by non-profit organizations and supported by FEMA or another entity outside of ICE. These programs must be used as a true alternative to detention — that is, as a means of *reducing* detention levels, rather than increasing the supervision of people whom the agency would not otherwise have jailed. The remaining funds can be used to address more urgent needs during the pandemic and provide appointed counsel for indigent immigrants in removal proceedings.
2. The administration should immediately reduce the size of the ICE detention system by prioritizing certain facilities for closure and announce a plan to phase out detention.
 - a. *Close all three family detention facilities and restart the community-based Family Case Management Program.*

The new administration should immediately close ICE’s three family detention sites (Berks, Karnes and the South Texas Family Center known as Dilley). By ICE’s own account, during the pandemic more than 1,861 children were confined at these facilities for three months or longer with no efforts made to release them, in violation of the *Flores* settlement agreement.¹⁴ All detained families should be released on recognizance or parole, to case management programs as needed. COVID-19 has spread at these facilities due to ICE’s failure to take basic precautions, with hundreds of families exhibiting COVID-19 symptoms but failing to receive testing or adequate care.

Even once the pandemic has receded, family detention must end. Pediatricians and other medical experts cite overwhelming scientific evidence that even short-term jailing of children can cause long-term and permanent psychological damage, including developmental delays, anxiety, and suicidal ideation.¹⁵ These consequences are entirely avoidable. In many cases,

¹⁴ Memorandum of Points and Authorities in Support of Plaintiffs’ Ex Parte Application for Temporary Restraining Order and Order to Show Cause Re Preliminary Injunction at p. 20 (filed 26 Mar. 2020), *available at*: <https://www.law360.com/articles/1257622/attachments/0>.

¹⁵ Rhitu Chatterjee, “Lengthy Detention of Migrant Children May Create Lasting Trauma, Say Researchers,” *NPR*, Aug. 23, 2019, <https://www.npr.org/sections/health-shots/2019/08/23/753757475/lengthy-detention-of-migrant-children-may-create-lasting-trauma-say-researchers>; Julie M. Linton, Marsha Griffin, and Alan J. Shapiro, *Detention of Immigrant Children*. Policy statement. American Academy of Pediatrics, April 2017.

families can simply be released from detention, and provided with adequate instructions and advisals.

Occasionally, additional interventions and supports may be necessary. One example of these is the Family Case Management Program (FCMP), which the Trump administration ended in 2017, around the same time it was first considering the family separation policy.¹⁶ The FCMP, carried out by community-based organizations, connected families with a case manager and legal support and achieved a 99 percent success rate, as reported by ICE.¹⁷

- b. *Close facilities with the most egregious records of rights abuses, including those with high death rates, those that are in remote locations, and those with COVID-19 outbreaks.*

The new administration must immediately close facilities with egregious, documented records of abuse and neglect, including sites with COVID-19 outbreaks. These facilities include both private detention centers and county jails.¹⁸ The new administration should immediately prioritize closure of the 41 ICE facilities opened by the Trump administration, which added over 20,000 new beds, mostly in rural areas with limited or no resources for legal assistance.¹⁹ Conditions at these facilities are egregious; in fact, a number are facilities whose contracts the Obama administration had terminated due in part to poor conditions of confinement.²⁰ The administration should also prioritize immediate closure of facilities with contracts that do not adhere to the 2011 Performance-Based National Detention Standards or comply with the DOJ and DHS Prison Rape Elimination Act (PREA) rules.

- c. *Announce the administration will terminate all private and contract detention centers by the end of 2021, and immediately suspend new detention contracts, extensions of contracts, and expansion of detention.*

A new administration should immediately announce its intent to end contracts with all private prison companies and county jails by the end of the year.²¹

<https://pediatrics.aappublications.org/content/pediatrics/139/5/e20170483.full.pdf>; Devin Miller, “Pediatricians speak out: Detention is not the answer to family separation,” *AAP News*, July 24, 2018, <https://www.aappublications.org/news/2018/07/24/washington072418>.

¹⁶ Aria Bendix, “ICE Shuts Down Program for Asylum-Seekers,” *The Atlantic*, June 9, 2017, <https://www.theatlantic.com/news/archive/2017/06/ice-shuts-down-program-for-asylum-seekers/529887/>; Daniella Diaz, “Kelly: DHS is considering separating undocumented children from their parents at the border,” *CNN*, March 7, 2017, <https://www.cnn.com/2017/03/06/politics/john-kelly-separating-children-from-parents-immigration-border/index.html>.

¹⁷ Audrey Singer, *Immigration: Alternatives to Detention (ATD) Programs*, Congressional Research Service, July 8, 2019, <https://fas.org/sgp/crs/homsec/R45804.pdf>.

¹⁸ See, e.g., Khushbu Sha, “Etowah: the ICE detention center with the goal to make your life miserable,” *The Guardian*, Dec. 2, 2018, <https://www.theguardian.com/us-news/2018/dec/02/etowah-the-ice-detention-center-with-the-goal-to-make-your-life-miserable>.

¹⁹ See Eunice Hyunhye Cho, Tara Tidwell Cullen, and Clara Long, *Justice Free Zones: U.S. Immigration Detention Under the Trump Administration*. New York: ACLU, Human Rights Watch, and National Immigrant Justice Center, 2020. <https://www.aclu.org/report/justice-free-zones-us-immigration-detention-under-trump-administration>.

²⁰ *Id.*

²¹ Notably, there are avenues for the administration to terminate contracts early, even without termination clauses in the contracts. See Kate M. Manuel, Erika K. Lunder, and Edward c. Liu, *Terminating Contracts for the Government’s Convenience: Answers to Frequently Asked Questions*, Congressional Research Service, February 3, 2015. <https://fas.org/sgp/crs/misc/R43055.pdf>.

Privately run immigration detention sites have a well-documented record of sexual abuse, deaths in custody, and substandard medical care, and are not subject to the same transparency laws or liability as public facilities.²² That is why the DOJ directed the Bureau of Prisons to phase out the use of private prisons in 2016²³ (a policy reversed under Trump), and then-Vice President Biden pledged to “close private prisons and detention centers.”²⁴

DHS should also terminate all proposed, pending, and existing contracts with county jails, including Intergovernmental Service Agreements (IGSAs) and U.S. Marshals Service Intergovernmental Agreements with ICE riders. In 2016, the Homeland Security Advisory Council recommended that ICE “reduce reliance on detention in county jails,” noting that according to both immigrants’ rights advocates and current and former ICE officials, “county jails are, in general, the most problematic facilities for immigration detention.”²⁵ Solitary confinement, extreme neglect in medical care, and spoiled food are endemic in many of these detention sites.²⁶ ICE frequently excuses itself from responsibility for these conditions by citing a “firewall” between it and the local (sometimes private) operators. In general, the decentralization of the ICE detention system — through private prisons and contracts like IGSAs — allows the agency to avoid responsibility and accountability for poor and dangerous conditions facing people in its custody. ICE has also used IGSAs with state or local governments as a “middle man” to bring private prisons online without going through federal competitive bidding requirements.²⁷

3. In conjunction with the moratorium on removals, ICE should carry out a file review of every person in custody. It should eliminate cash bond, and immediately release individuals who

²² See Carl Takei, Michael Tan, and Joanne Lin, *Shutting Down the Profiteers*, New York: ACLU, September 2016. <https://www.aclu.org/report/shutting-down-profiteers-why-and-how-department-homeland-security-should-stop-using-private>; see e.g., Ryan Devereaux, “ICE Detainee Who Died of COVID-19 Suffered Horrifying Neglect,” *The Intercept*, May 24, 2020, <https://theintercept.com/2020/05/24/ice-detention-coronavirus-death/> (Otay Mesa, operated by CoreCivic, formerly Corrections Corporation of America); José Olivares, “ICE Records: Ill Migrant Continued Working in ICE Custody Until He Was Hospitalized. Three Weeks Later, He Died.” *The Takeaway*, podcast episode, June 10, 2019, <https://www.wnycstudios.org/podcasts/takeaway/segments/ice-records-ill-migrant-continued-working-ice-custody-died> (Stewart Detention Center, operated by CoreCivic).

²³ Memo from U.S. Department of Justice Office of the Deputy Attorney General to the acting director of the Bureau of Prisons, Aug. 18, 2016, <https://www.justice.gov/archives/opa/file/886311/download>.

²⁴ See “The Biden Plan for Strengthening America’s Commitment to Justice,” Biden-Harris campaign site, <https://joebiden.com/justice/#>. (“Biden will end the federal government’s use of private prisons, building off an Obama-Biden administration’s policy rescinded by the Trump Administration. And, he will make clear that the federal government should not use private facilities for any detention, including detention of undocumented immigrants.”)

²⁵ “Report of the Subcommittee on Privatized Immigration Detention Facilities,” Homeland Security Advisory Council, Dec. 1, 2016, <https://www.dhs.gov/sites/default/files/publications/DHS%20HSAC%20PIDF%20Final%20Report.pdf>.

²⁶ See *id.*; “Concerns about ICE Detainee Treatment at Detention Facilities,” DHS Office of Inspector General, Dec. 11, 2017, <https://www.oig.dhs.gov/sites/default/files/assets/2017-12/OIG-18-32-Dec17.pdf>; Tanvi Misra, “Where Cities Help Detain Immigrants,” *CityLab*, July 10, 2018, <https://www.citylab.com/equity/2018/07/where-cities-help-detain-immigrants-mapped/563531/>.

²⁷ DHS’ own inspector general has expressed concern with subcontracting to private companies via IGSAs. “Immigration and Customs Enforcement Did Not Follow Federal Procurement Guidelines When Contracting for Detention Purposes,” Department of Homeland Security Office of the Inspector General, February 21, 2018. <https://www.oig.dhs.gov/sites/default/files/assets/2018-02/OIG-18-53-Feb18.pdf>.

are detained solely because they cannot afford to pay bond. It should apply a presumption of release.

ICE should conduct a file review of every person in custody. At the outset of this file review, ICE should issue a guidance eliminating the use of cash bond as a condition of release or as an alternative to detention.²⁸ ICE should then immediately release people who are detained only because their bond has been set at an amount they cannot afford.

Moreover, the file review should be based on these principles:

- ICE should release the individual unless it finds by clear and convincing evidence that the person is a danger or flight risk;²⁹
- An individual's prior conviction or a pending criminal charge alone are not a sufficient basis for detention;
- Flight risk can almost always be mitigated by case management services and, in extreme cases, intensive supervision such as electronic monitoring; and
- ICE should release individuals defined by the Centers for Disease Control and Prevention (CDC) as having heightened vulnerability to COVID-19, absent exceptional circumstances.³⁰
- Individuals who have been granted relief by an IJ, including orders of withholding or deferral of removal, should be released on recognizance during any appeals by DHS to the BIA.
- Individuals detained on the basis of their final order of removal (under 8 U.S.C. § 1231) should be released on supervision if they have not been removed within the 90-day period after entry of the final order (i.e. the statutorily defined "removal period"), unless that period has been extended under the statute.

ICE should begin with reviews and releases of: those defined by the CDC as having heightened vulnerability to COVID-19; primary caregivers and especially vulnerable populations, as defined at section 7 of H.R. 5383, the Dignity for Detained Immigrants Act; and those subject to prolonged detention, defined as longer than 60 days. Even individuals still subject to mandatory custody should be eligible for the file review process.³¹

The DHS Secretary should create an independent review system for all ICE decisions to continue detention through the file review. That review should be conducted by an agency independent of ICE, and this agency should have authority to overturn ICE's negative decisions.

²⁸ DOJ should also direct IJs to end the practice of conditioning release on bond.

²⁹ See *Dubon Miranda v. Barr*, 2020 WL 2794488, (D. Md. May 29, 2020) (collecting cases of rulings of federal district courts in the First, Second, Fourth, Ninth, and Tenth Circuits supporting this position), <https://casetext.com/case/miranda-v-barr-1>. The attorney general should issue a new precedent decision adopting this position, reversing previous guidance in *Matter of Guerra*, 24 I. & N. Dec. 37 (BIA 2006), and related cases, and the DHS and DOJ should issue regulations implementing the same principles.

³⁰ "People with Certain Medical Conditions," Centers for Disease Control and Prevention, Dec. 1, 2020, <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html>

³¹ Even where the immigration statutes otherwise appear to require confinement, ICE maintains some discretion to release such individuals for urgent humanitarian reasons. Therefore, individuals who are vulnerable, as defined above, should be eligible for release under the file review notwithstanding the statutory basis for their confinement.

4. The administration must immediately address inhumane conditions in detention.

The existing, sprawling ICE infrastructure will not be transformed overnight. Immigrants will continue to be detained as these recommendations are implemented. Therefore, it is absolutely critical that the administration take action on day one to stem the abuses in ICE jails. The ACLU and partners have issued detailed recommendations to this effect, including in a recent report, *Justice-Free Zones: U.S. Immigration Detention under the Trump Administration*.³² A new administration must immediately:

- Ban the use of solitary confinement (whether for administrative, protective, or disciplinary reasons) and the use of force-feeding;
- Fully implement PREA requirements in immigration detention facilities nationwide;
- Ensure access to counsel and legal materials for all immigrants in detention, and ensure access to free telephone calls to counsel and immediate family and access to quality legal materials and information in a variety of languages;
- Require access for nonprofit organizations and media — including access to segregated housing units — for the purposes of monitoring, public reporting, providing legal education, and visitation;
- Ensure access to timely, quality medical care and mental health services; reasonable accommodations and services for people with disabilities; and adequate food, water, hygiene supplies, sanitary conditions, and environmental safety; and
- Ensure transparency, including public release of all information pertaining to detention contracts and significant incidents in detention, such as deaths, hunger strikes, suicide attempts, and use of force, and immediate, meaningful inspections of all facilities that continue to detain people.

Beyond the First 100 Days

1. *Reinterpret the mandatory detention statute.* With regard to individuals jailed under color of the mandatory custody authority at 8 U.S.C. § 1226(c) (which applies to persons subject to certain crime-based grounds of removability), the attorney general should issue a new precedent decision interpreting the statute to require custody only of an individual who “is deportable” or “is inadmissible” on the basis of the listed offenses. Individuals with a non-frivolous challenge to a removal order — either a threshold challenge to removability or a claim to immigration relief — should be exempted from section 1226(c). This decision would overturn *Matter of Joseph*, 22 I&N Dec. 799 (1999), and adopt the position of Judge Tashima in *Tijani v. Willis*, 430 F.3d 1241, 1246 (9th Cir. 2005) (Tashima, J., concurring). Under this approach, people who are statutorily eligible for relief that would bar entry of a removal order, such as asylum, cancellation of removal, or adjustment of status would not be subject to mandatory custody under section 1226(c).
2. *Issue a precedent opinion on constitutional due process in custody hearings.* The attorney general should issue a new precedent decision finding that the government, and not the immigrant, bears the burden of proof in custody redetermination hearings before an immigration judge (IJ) by clear and convincing evidence.³³

³² Eunice Hyunhye Cho, Tara Tidwell Cullen, and Clara Long, *Justice Free Zones: U.S. Immigration Detention Under the Trump Administration*. New York: ACLU, Human Rights Watch, and National Immigrant Justice Center, 2020. <https://www.aclu.org/report/justice-free-zones-us-immigration-detention-under-trump-administration>.

³³ See *Dubon Miranda v. Barr*, 2020 WL 2794488, (D. Md. May 29, 2020) (collecting cases of rulings of federal District Courts in the First, Second, Fourth, Ninth, and Tenth Circuits supporting this position), <https://casetext.com/case/miranda-v-barr-1>.

3. *Expand IJ custody hearings.* DOJ should issue guidance to IJs requiring custody review hearings for every person who remains in custody after ICE's first custody determination, and every 30 days subsequently if the person remains detained. DOJ should also issue new regulations where necessary requiring IJs to provide such review hearings over custody determinations made pursuant to 8 U.S.C. § 1182(d)(5) and § 1231.
4. *Amend the regulation on ICE custody determination:* DHS should amend 8 CFR 1236.1(c)(8) to impose a presumption of release requiring that DHS release the individual unless there is clear and convincing evidence they pose a danger or flight risk.
5. *Reimagine alternatives to detention.* ICE's existing Alternative to Detention (ATD) program, known as the Intensive Supervision Appearance Program (ISAP), is directly at odds with established best practices for alternative-to-detention programming. ISAP should be dismantled and replaced with a new system of case management developed and implemented in line with international best practices and recommendations from civil society. This new system of ATD programs should be non-profit operated and community-based; case-management centered; and committed to respecting the dignity and well-being of all participants and imposing the least restrictive obligations. ICE should permit immigrants to live in the safety of their homes and communities while navigating their court proceedings. Most immigrants have homes and communities ready to support them and are naturally incentivized to participate and comply with what is required of them by the immigration court system. For those who do need social services or case support, community-based alternatives offer a framework for migration processing that is 80 percent cheaper³⁴ than detention and proven to boast compliance rates of greater than 90 percent.³⁵

³⁴ Robyn Sampson and Vivienne Chew, *There Are Alternatives: A handbook for preventing unnecessary immigration detention*. Australia: International Detention Coalition, 2015. <https://idcoalition.org/wp-content/uploads/2015/10/There-Are-Alternatives-2015.pdf>

³⁵ Alice Edwards, *Back to Basics: The Right to Liberty and Security of Person and 'Alternatives to Detention' of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants*. Switzerland: UNHCR Division of International Protection, 2011. <https://www.unhcr.org/4dc949c49.pdf>