ACLU FOUNDATION AMERICAN CIVIL LIBERTIES UNION IMMIGRANTS' RIGHTS PROJECT

ISSUE BRIEF Prolonged Immigration Detention of Individuals Who are Challenging Removal*

On an average day, the U.S. Department of Homeland Security (DHS) detains roughly 33,400 non-citizens in federal detention facilities and local jails across the country, over a threefold increase in its detention population since just over a decade ago. The government's hugely expanded use of immigration detention has meant that thousands of immigrants are detained for prolonged periods of time—for months, if not years, and often in inhuman and cruel conditions—while the immigration courts and federal courts resolve their cases. Many individuals are imprisoned without ever receiving the most basic element of due process: a bond hearing to determine whether their detention is even necessary. Thus, these individuals are needlessly subjected to prolonged imprisonment even though they may have substantial challenges to removal from the United States and pose no significant danger to society or flight risk. Many are also forced to choose between being locked up indefinitely and giving up their immigration claims. Prolonged immigration detention is arbitrary and unfair, and imposes tremendous hardship on immigrants and their relatives, many of whom are U.S. citizens or otherwise residing lawfully within the United States.

The ACLU has long been at the forefront of efforts to challenge prolonged immigration detention. Recently, the ACLU, with the leadership of the Immigrants' Rights Project (IRP), has won a number of major cases imposing statutory and constitutional constraints on prolonged immigration detention.[1] The ACLU also engages in ongoing administrative and legislative advocacy in this area.

Why has prolonged immigration detention become a problem?

The problem of prolonged detention is due in part to the extraordinary expansion of immigration detention in general as U.S. Immigration and Customs Enforcement (ICE), a component of DHS, has ramped up its enforcement efforts and Congress has authorized more and more detention beds. In just over a decade, immigration detention has tripled. In 1996, immigration authorities had a daily detention capacity of less than 10,000.[2] Today, ICE holds on average roughly 33,400 individuals in its custody on any given day,[3] and this number is likely to increase even further in 2009. More than 311,000 men, women and children were detained by ICE in fiscal year 2007,[4] and ICE planned to detain over 440,000 in fiscal year 2009.[5]

Under the immigration laws, many immigrants are subject to *mandatory* detention during the pendency of their immigration cases. Mandatory detainees are held without any right to a bond hearing before an Immigration Judge (IJ) or other review over their custody. In 1996, Congress significantly expanded the categories of individuals who are subject to mandatory detention to include immigrants convicted of essentially any crimes, including non-violent misdemeanor convictions without any jail sentence.[6]

***Note:** This Issue Brief addresses the prolonged detention of non-citizens who are continuing to challenge their removal, either in administrative removal proceedings or in federal court. Many non-citizens who are no longer fighting their removal are also subject to prolonged and indefinite detention. Their detention raises a number of separate legal and policy issues which are addressed in a forthcoming Issue Brief on indefinite detention.

In *Demore v. Kim*, 538 U.S. 510 (2003), a case litigated by the ACLU, the Supreme Court upheld the constitutionality of mandatory detention. However, the Court only did so where the immigrant had conceded deportability and where detention lasted for the "*brief* period necessary for [completing] removal proceedings"—a period that typically "lasts roughly a month and a half in the vast majority of cases . . . and about five months in the minority of cases in which the alien chooses to appeal [to the Board of Immigration Appeals]."[7] Despite the limits set forth in *Demore*, ICE presently interprets the mandatory detention statute to require detention regardless of length. As a result, many immigrants whom the government subjects to mandatory detention often face prolonged periods of imprisonment while they fight their cases.

This problem has only worsened under the government's constructions of the statute that dramatically expand the reach of mandatory detention. The government currently applies the mandatory detention regime to individuals who have *bona fide* challenges to removal[8] and to individuals with decade-old offenses,[9] even though these individuals are most likely to be long-term residents of the United States, with strong community and family ties, records of rehabilitation, and other factors that can weigh against their deportation. The ACLU contends that these policies are in violation of the statute.

Finally, lengthy delays in immigration courts, the Board of Immigration Appeals (BIA), and the federal courts, and the complex nature of immigration cases also cause many immigrants to languish in detention for months or even years while they wait for their cases to be decided. [10]

Who is subject to prolonged immigration detention?

DHS subjects three main categories of individuals to prolonged detention without bond hearings.

The first category consists of individuals, often long-time legal residents of the United States, whom the government claims are subject to mandatory detention because they are allegedly removable on certain criminal grounds. Some of the convictions at issue are very minor, such as shoplifting or turnstile jumping.[11] ICE takes the position that the mandatory detention statute includes individuals facing prolonged, rather than only brief, detention. The ACLU contends that this policy misapplies the statute. The mandatory detention statute does not require prolonged mandatory detention and, if it did, it would violate due process.

Gary Anderson, a lawful permanent resident (LPR) suffering from schizophrenia and mild mental retardation who has lived in the United States since he was a teenager, spent two years in mandatory detention while litigating his removal case. The government sought to deport Mr. Anderson based on two misdemeanor convictions for simple possession of a controlled substance in the seventh degree, for which he served a total of five days of imprisonment. Mr. Anderson's detention caused tremendous hardship to him and his family, which includes numerous U.S. citizens and lawful permanent residents, and in particular his mother, who is also mentally ill and relied on him for household help and emotional support. Ultimately, in light of the strong equities in his case, the IJ granted Mr. Anderson cancellation of removal—a permanent form of immigration relief. During his two years of detention, Mr. Anderson never received a bond hearing because the government argued that he was subject to mandatory detention. Mr. Anderson was represented by attorneys from the Legal Aid Society of New York and the Center for Constitutional Rights.

Luis Casas-Castrillon, a longtime LPR, spent seven years in immigration detention challenging the government's attempt to remove him. After fighting his case all the way to the Ninth Circuit, an IJ ultimately determined that he was not even deportable, terminated his proceedings, and restored him to lawful permanent residency. Though prior to his imprisonment Mr. Casas-Castrillon had a strong employment history, having worked in financial services and the Census Bureau, and strong ties to family and community in the United States, his lengthy incarceration has left his life in ruins. During his seven years of detention, Mr. Casas-Castrillon never received a bond hearing to determine if his detention was necessary. Instead, the only review he received was a single custody review that summarily deemed him a flight risk, misstated his criminal history, and erroneously asserted that he had received a personal interview regarding his detention. The government was finally ordered to provide him a bond hearing only after his *habeas* petition—filed with the assistance of Federal Defenders—was granted by the Ninth Circuit.

Second, DHS detains many individuals pending judicial review of their removal orders in the federal courts of appeals. Detention can span months and years while detainees wait for courts of appeals to work through backlogs and decide their cases. [12] Notwithstanding the merits of their cases, or how long their detention extends, ICE takes the position that these individuals are not entitled to any independent review of their detention by an IJ. Instead, all they receive are perfunctory and "rubber stamp" custody reviews by ICE itself that routinely deny release without any meaningful assessment of whether an individual's detention is even justified. These custody reviews lack basic due process minimums in that they are non-adversarial; conducted by ICE, which has an institutional investment in detention and removal, rather than a neutral decision-maker such as an IJ; and place the burden on the individual to justify release rather than on the government to justify continued detention. The ACLU contends that this policy is unlawful. Due process principles dictate that detention statutes cannot authorize prolonged detention without meaningful review.

The third category consists of individuals who are detained upon arrival to the United States, including asylum seekers who have established a "credible fear" of persecution, and lawful permanent residents (LPR's) with longstanding ties to the United States who are returning from brief trips abroad. DHS takes the position that, pursuant to current regulations, an IJ is precluded from reviewing ICE's decision to detain such individuals, no matter how long such detention lasts. [13] The ACLU contends that the statute does not authorize the prolonged detention of these individuals without adequate procedures and would violate due process if it did so.

Saluja Thangaraja fled the brutal beatings and torture that she suffered in a prison camp during the Sri Lankan civil war only to endure more than four years of immigration detention. In 2004, the Ninth Circuit granted Ms. Thangaraja withholding of removal and found her eligible for asylum, concluding that the immigration judge and the BIA's previous rejection of her claims lacked a "reasonable basis in law and fact." Despite this reprimand, the government continued to doggedly pursue Ms. Thangaraja's removal, appealing the IJ's subsequent grant of asylum and detaining her throughout this process. Ms. Thangaraja finally gained her freedom in March 2006 only after the ACLU of Southern California filed a habeas petition for her release.

Victor Molina de la Villa, an LPR since 1980, was detained by ICE while returning from a brief trip to Colombia in 2002 on the basis of a single, decade-old conviction. Mr. Molina, a former serviceman in the U.S. Navy with a U.S. citizen wife and three children, had no other criminal history. Nonetheless, he was detained by ICE for two and a half years until he ultimately won release through a petition for *habeas corpus*. His imprisonment imposed tremendous hardship on his family, ultimately leading them to lose their home. Since winning his release three years ago, Mr. Molina has lived under minimal conditions of supervision with no violations.

Notably, only approximately 16 percent of immigration detainees are represented by counsel,[16] and the often remote location of their incarceration and the complexity of the immigration laws makes it difficult for them to pursue their cases.

Prolonged detention also has perverse policy effects. Individuals with the strongest challenges to removability or claims to immigration relief are the most likely to fight their cases and thus face the greatest risk of prolonged imprisonment. The prospect of continued detention coerces many of them to abandon their meritorious claims to stay in the United States.[15]

Ms. G-Z*, a nineteen-year-old woman from Colombia was abducted twice by members of the Revolutionary Armed Forces of Colombia (FARC)—a leftist guerilla insurgent group—as a result of her association with military officers and policemen. After a third kidnapping in 2006, the young woman fled to the United States in search of refuge. She arrived at Newark Liberty International airport, where she was arrested and detained in New Jersey. Though the IJ found her testimony credible, the judge concluded that she did not meet the definition of a refugee. ICE ignored her request for release on parole while her appeal was pending, despite a diagnosis for anxiety and depression that was aggravated by her detention. In January 2008—after 17 and a half months in detention—Ms. G-Z decided to accept deportation, "averr[ing] that despite the fact that her 'fear of persecution is as strong as ever [,]' the detention was . . . 'affecting me physically and destroying me mentally' and . . . served as a daily and unwelcome reminder of the indignity of detention at the hands of the FARC." After her deportation, the Third Circuit Court of Appeals found that she had a well-founded fear of future persecution.

How many people are subject to prolonged immigration detention?[⊥]

Unfortunately, we do not yet have comprehensive data on the number of individuals subjected to prolonged immigration detention while continuing to challenge their removal. While ICE reported an average detention stay of 37 days in 2007[16], this number is significantly skewed by the number of Mexican nationals subject to expedited removal—a fast-track procedure that allows immigration officers to issue removal orders with no hearing or review by an IJ—at the Southern border.[17] It has long been recognized that many immigrants are detained for months or even years as they go through proceedings that will determine whether or not they are eligible to remain in the United States.

A national "snapshot" of a single day of ICE detention obtained by the Associated Press provides some information on the scope of prolonged detention.[18] On the evening of January 25, 2009, at least 4,170 individuals, and possibly more, had been subject to detention for six months or longer, and 1,334 of those individuals had been subjected to detention for one year or longer. In extreme cases, some individuals had been detained as long as five, nine, or, in one case, 15 years.

Of these individuals, 2,362 persons were still fighting their removal cases before the immigration courts. Moreover, many of the 1,808 detainees identified as having final orders of removal were likely seeking review of those removal orders in federal court. (The ICE statistics do not indicate whether a removal order was stayed pending such federal court review.) ICE statistics for fiscal year 2006 also indicate that at least 1,559 asylum seekers were detained for more than 6 months.[19]

*Note: Name redacted in light of the risk of persecution that the individual faces in Columbia.
[⊥]See attached addendum for updated statistics.

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Where are individuals facing prolonged immigration detention?

The following chart provides a state-by-state breakdown showing the location of individuals subject to detention for six months or longer. Information about specific facilities, along with the database as a whole, is available upon request.

State	Prolonged Detainees Without a Final Removal Order	Prolonged Detainees With a Final Removal Order
AL	52	82
AZ	419	173
CA	354	253
CO	17	11
FL	179	169
GA	50	33
HI	1	3
IA	2	1
IL	21	21
IN	5	2
KS	0	3
KY	5	8
LA	41	118
MA	91	84
ME	4	1
MD	10	23
MI	21	14
MN	6	13
MO	3	6
ND	0	5
NE	7	7
NH	0	5
NJ	130	99
NM	40	25
NV	7	12
NY	66	96
OH	17	14
OK	1	5
OR	1	0
PA	88	104
SC	10	13
TX	553	300
UT	7	5
VA	55	47
WA	94	51
WI	5	2
Total	2,362	1,808

Why is prolonged immigration detention unlawful?

Prolonged immigration detention deprives individuals of their liberty without a sufficient justification and adequate procedural safeguards. In *Zadvydas v. Davis*, 533 U.S. 678 (2001), the U.S. Supreme Court recognized that "[f]reedom from imprisonment—from Government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that [the Due Process] Clause protects." For this reason, the Court held that detention violates due process unless it is reasonably related to its purpose. Due process requires a sufficiently strong special justification for detention that outweighs its significant deprivation of liberty as well as "strong procedural protections." [20] As detention becomes prolonged, the deprivation of liberty becomes greater, requiring an even stronger justification and more rigorous procedural protections. [21] Yet the government subjects thousands of individuals to detention for prolonged periods of time without a sufficient justification or adequate procedural review.

The Immigration and Nationality Act does not expressly authorize prolonged detention without adequate procedures. Consequently, a number of courts in cases brought by the ACLU have construed the statute to require a bond hearing where detention has become unreasonably prolonged and thereby avoid the serious due process concerns that would otherwise be raised by prolonged detention without adequate review.[22]

Why is prolonged immigration detention bad public policy?

Prolonged immigration detention is also bad public policy for a number of reasons:

- **Unfair**: prolonged immigration detention is profoundly unfair. Prolonged detention forces many immigrants fighting the government's efforts to remove them to choose between being locked up indefinitely and giving up their meritorious immigration cases.

- **Perverse Effects**: prolonged detention has perverse effects in that individuals with the strongest challenges to removal are most likely to fight their cases and thus face the greatest risk of lengthy imprisonment.

- **Arbitrary and Unnecessary**: prolonged immigration detention is often unnecessary given that many detainees pose neither a flight risk nor a danger to the community and also have substantial challenges to their removal. The lack of sufficient procedures means that the government makes no adequate determination about whether detention is justified. Where individuals do pose a flight risk such that some supervision is necessary, alternatives to detention—such as curfews or electronic monitoring—are often more than sufficient to ensure appearance for removal proceedings.

- **Costly**: prolonged immigration detention places significant and unnecessary financial burdens on the government as the daily cost of detention amounts to approximately $141 per day. [23]

- **Hardship to Families**: prolonged immigration detention creates hardship for families, many of whose members are U.S. citizens or otherwise lawfully residing in the United States, and who are unnecessarily deprived of financial and emotional support by their loved ones' imprisonment.

What are possible government solutions?

Given the serious due process and public policy concerns raised by prolonged immigration detention, the government can and should implement several immediate reforms to significantly reduce the use of arbitrary and unnecessary imprisonment; bring cost-savings for the government; and alleviate the hardship that prolonged detention imposes on immigrants and their families:

- **Provide Adequate Review.** The government should take the minimal step of providing for independent and impartial review of all ICE detention decisions (e.g., bond hearings before an IJ) except where detention is clearly mandated by statute. Such review should be provided to all individuals detained for more than six months, the period of time deemed presumptively reasonable for effectuating removal, and in excess of the period of time typically necessary to conclude removal proceedings.

- **Increase Alternatives to Detention.** For those individuals who cannot be released on bond, either because their detention is mandated by statute or because they would otherwise pose too great a flight risk, the government should consider their release under other forms of custody such as curfews or electronic monitoring that are significantly less costly and create less hardship to their families.

- **Apply Reasonable Interpretation of Federal Law.** Finally, the government should also abandon its overly broad interpretations of the mandatory detention statute and stop applying it against individuals with *bona fide* challenges to removal and individuals who were released from criminal custody for old offenses.

The ACLU is currently pursuing all these solutions through litigation and administrative and legislative advocacy.

For more information on prolonged detention and IRP's work in this area, please contact Judy Rabinovitz, IRP Deputy Director, at 212-549-2618 or jrabinovitz@aclu.org.

[1] *See, e.g.*, *Ly v. Hansen*, 351 F.3d 263 (6th Cir. 2003); *Tijani v. Willis*, 430 F.3d 1241 (9th Cir. 2005); *Nadarajah v. Gonzales*, 443 F.3d 1069 (9th Cir. 2006); *Casas-Castrillon v. Dep't of Homeland Security*, 535 F.3d 942 (9th Cir. 2008); *Wilks v. U.S. Dep't Homeland Security*, No. 07-2171, 2008 WL 4820654 (M.D. Pa. Nov. 3, 2008).

[2] Office of the Inspector General, U.S. Department of Justice, Audit Report 97-05 (1/97), Immigration and Naturalization Service Contracting for Detention Space, Jan. 1997, at 2.

[3] Testimony of the Honorable Janet Napolitano, Secretary, U.S. Deparment of Homeland Security, before the Senate Judiciary Committee, May 6, 2009.

[4] U.S. Government Accountability Office, Alien Detention Standards: Observations on the Adherence to ICE's Medical Standards in Detention Facilities, June 4, 2008, at 1.

[5] Testimony of James T. Hayes, Jr., Director, Office of Detention and Removal Operations, "Hearing on Health Services for Detainees in ICE Custody," before the House Appropriations Committee Subcommittee on Homeland Security, Mar. 3, 2009.

[6] *See* INA § 236(c); 8 U.S.C. § 1226(c).

[7] *Demore*, 538 U.S. at 513 (emphasis added).

[8] *See Matter of Joseph,* 22 I&N Dec. 660 (BIA 1999).

[9] *See Matter of Saysana,* 24 I&N Dec. 602 (BIA 2008); *Matter of Rojas*, 23 I&N Dec. 117 (BIA 2001).

[10] *See, e.g.*, Brad Heath, *Immigration courts face huge backlog*, USA TODAY, Mar. 29, 2009 (reporting, pursuant to review of immigration court dockets from 2003 to present, that "nearly 90,000 people accused of being in the United States illegally waited at least two years for a judge to decide whether they must leave" and that 14,000 "cases took more than five years to decide and a few that took more than a decade.").

[11] For example, in 2005, according to the Office of Immigration Statistics, 56% of criminal convictions forming the basis for deportations were non-violent drug or illegal reentry crimes; an additional 14.6% were non-specified but non-violent crimes. *See, e.g.*, Mary Dougherty, Denise Wilson, and Amy Wu, U.S. Department of Homeland Security, Office of Immigration Statistics, *Immigration Enforcement Actions: 2005*, Table 4, November 2006, at 5; *see also* Human Rights Watch, *Forced Apart: Families Separated and Immigrants Harmed by United States Deportation Policy* (July 16, 2007). In a more recent report analyzing enforcement data from 1997 to 2007, HRW found that some of the most common crimes for which people were deported were relatively minor offenses, such as marijuana and cocaine possession or traffic offenses. Among legal immigrants who were deported, 77 % had been convicted for such nonviolent crimes. Human Rights Watch, Forced Apart (By the Numbers): Non-Citizens Deported Mostly for Nonviolent Offenses (Apr. 15, 2009).

[12] *Casas-Castrillon v. Department of Homeland Security*, 535 F.3d 942 (9th Cir. 2008).

[13] *See* 8 C.F.R. § 1003.19(h)(2)(i)(B).

[14] According to the federal Executive Office of Immigration Review, between October 1, 2006, and September 20, 2007, approximately 84 percent of detained respondents who completed immigration court proceedings were unrepresented. Nina Siulc, Zhifen Cheng, Arnold Son, and Olga Byrne, *Improving Efficiency and Promoting Justice in the Immigration System: Lessons from the Legal Orientation Program, Report Summary* (Vera Institute of Justice, May 2008).

[15] *See, e.g.*, *Gomez-Zuluaga v. AG of the United States*, 527 F.3d 330, 339 (3rd Cir. 2008).

[16] GAO, Alien Detention Standards, *supra* note 4.

[17] *See* INA § 235; 8 U.S.C. § 1225.

[18] *See* Roberts, Michelle, *AP Impact: Immigrants face detention, few rights*, Wash. Post. Mar. 13, 2009.

[19] Human Rights First, *U.S. Detention of Asylum Seekers: Seeking Protection, Finding Prison* (Apr. 2009), at 39.

[20] *Zadvydas*, 533 U.S. at 690-91.

[21] *See Kansas v. Hendricks*, 521 U.S. 346, 368 (1997).

[22] *See, e.g.*, *Tijani v. Willis*, 430 F.3d 1241, 1242 (9th Cir. 2005); *Casas-Castrillon v. Dep't of Homeland Security*, 535 F.3d 942, 950 (9th Cir. 2008); *Wilks v. U.S. Dep't Homeland Security*, No. 07-2171, 2008 WL 4820654, at *2 (M.D. Pa. Nov. 3, 2008); *Scarlett v. U.S. Dep't Homeland Security*, --- F.Supp.2d ---, 2009 WL 2025336 (W.D.N.Y. 2009); *Occelin v. ICE*, No. 09-00164, 2009 WL 1743742 (M.D. Pa. June 17, 2009).

[23] *See* Roberts, Michelle, *AP Impact: Immigrants face detention, few rights*, Wash. Post. Mar. 13, 2009.

[24] *See, e.g.*, ACLU of Massachusetts, *Detention and Deportation in the Age of ICE: Immigrants and Human Rights in Massachusetts* (Dec. 2008).

ACLU AMERICAN CIVIL LIBERTIES UNION FOUNDATION IMMIGRANTS' RIGHTS PROJECT

ISSUE BRIEF UPDATE: Prolonged Immigration Detention of Individuals Who are Challenging Removal

We recently obtained updated statistics on the scope of prolonged detention, as a result of a FOIA request we filed seeking data about individuals who had been detained for six months or more. ICE provided us with a detainee population report for November 1, 2010, indicating that on that date 4,303 individuals in ICE detention had been held for six months or more. Of those individuals, at least 2,743 were still in the process of fighting their cases; the remaining 1560 were detained pursuant to final orders that had not been stayed.[1] The procedural breakdown for those who still had pending cases is as follows:

- 1,976 had cases pending before an Immigration Judge,
- 534 had cases pending before the Board of Immigration Appeals (BIA)
- 233 had final orders that were judicially stayed (presumably pending federal court review)

The breakdown of the prolonged detainee population by circuit is as follows:

- 1st Circuit: 123 individuals
- 2nd Circuit: 336 individuals
- 3rd Circuit: 356 individuals
- 4th Circuit: 155 individuals
- 5th Circuit: 1,145 individuals
- 6th Circuit: 44 individuals
- 7th Circuit: 76 individuals
- 8th Circuit: 97 individuals
- 9th Circuit: 1,432 individuals
- 10th Circuit: 90 individuals
- 11th Circuit: 449 individuals

For a more detailed breakdown of these numbers, the complete spreadsheets obtained from ICE through FOIA are available on our website.

[1] Although most of these 1560 individuals were no longer challenging removal and were simply waiting for their removal orders to be effectuated, at least some of them were probably challenging their removal before the courts of appeals but their removal orders had not been judicially stayed. That is because in some circuits, such as the Second Circuit, the government has a "forbearance" policy of not effectuating removal orders of individuals who have petitioned for review and sought a stay of removal . These individuals would therefore appear as part of the 1560 individuals who were detained pursuant to final orders that were not judicially stayed, even though their removal orders are de facto stayed while they pursue relief from the court of appeals.