

ending mandatory detention

Each year, U.S. Immigration and Customs Enforcement (ICE) detains over 100,000 immigrants,¹ including people who have lived in the U.S. for decades, parents of U.S. citizens² and individuals who come to the country seeking safety.³ ICE subjects people in detention to dangerous conditions and substandard medical care.⁴ Detention facilities are often located in rural, hard to reach areas, inaccessible to families and legal counsel.⁵ The unprecedented scale of immigration detention has been driven in large part by private prison companies that capture the lion's share of the over one billion dollars spent every year to lock up immigrants.⁶

Immigration detention is thus immoral and inhumane; it causes psychological trauma and physical injury, breaks families apart, and shatters immigrants' chances to win relief—all while enriching private coffers. And immigration detention is not necessary—studies consistently show that immigrants show up for their hearings close to 100% of the time when provided support, counsel and reliable information about hearing schedules.⁷

Generally, an individual fighting their deportation in immigration court may be released if it is determined that they are not a flight risk or a danger to the community.⁸ However, section 236(c) of the Immigration and Nationality Act requires that several sweeping categories of immigrants be kept in custody even if they

can affirmatively demonstrate that they pose no flight risk or danger.⁹ On any given day, ICE categorizes approximately two-thirds of those detained as being subject to mandatory detention.¹⁰ ICE uses the mandatory detention provision to justify the prolonged detention of people facing removal on nearly any of the crime-based grounds of removability,¹¹ including minor crimes like marijuana possession and shoplifting offenses involving diapers and food.¹²

There is no other area of American law where people can be locked up for prolonged periods without any individualized determination of the necessity of such detention. Indeed, in the criminal legal system, there is a presumption favoring pretrial release.¹³ No matter the seriousness of the charge, individuals detained for criminal proceedings are entitled to individualized bond hearings.¹⁴

Immigration proceedings are civil, just like proceedings in housing or tax court. **But what differentiates immigration from other civil proceedings is that immigrants are locked up in jails and prisons that are indistinguishable from the harms of criminal incarceration.** And although the criminal legal system is rife with its own injustices, those in mandatory immigration detention do not even get the basic procedural protections available in the criminal context.¹⁵

a racial justice issue

Section 236(c) is a byproduct of immigration detention’s historical roots in racism and anti-Blackness.

The mass immigration incarceration system grew out of enforcement episodes in the 1980s and 1990s targeting immigrants from Haiti and Cuba.¹⁶ During the 1990s, the combination of the increase in mass incarceration of Black and Brown communities in American prisons as part of the “War on Drugs” was tinder to the fire of the expansive immigration detention system today.¹⁷ Section 236(c) was enacted in 1996 as part of the Illegal Immigration Reform and Immigrant Responsibility Act (“IIRIRA”), which was the immigration version of the discredited 1994 Crime Bill, and which imported the racism and defects of the criminal legal system into the immigration arena.¹⁸

While political leaders from both parties have now recognized the failure of the “tough on crime” policies of that era—President Biden has since called his support for the 1994 Crime Bill a “big mistake”¹⁹—many have been slow to recognize the ways

those same policies persist in the immigration arena. Such is the case with mandatory detention, which continues to disproportionately impact Black and Brown immigrants.²⁰

- Although Black immigrants comprise only 5.4% of the unauthorized population in the U.S., they represent 10.6% of all immigrants in removal proceedings.²¹
- Half of all Black immigrants detained pending their removal proceedings have criminal grounds of removability, overwhelmingly based on minor offenses such as marijuana possession or shoplifting.²² Thus, the racial disparities in our criminal legal system are a primary driver of the mandatory detention of Black immigrants.

Detention under section 236(c) is incompatible with the Biden-Harris administration’s commitment to move toward a “fair, safe, and orderly” immigration system.²³ Notably, while ICE’s interim enforcement priorities miss the mark in various ways,²⁴ they represent a step forward in that they are much narrower than the categories outlined in section 236(c).²⁵ It defies logic that the Biden-Harris administration would continue to impose detention without a chance for release on individuals it does not consider a priority for enforcement in the first place.

the harms

Regressive results for public safety.

Immigrant detention undermines public safety by destabilizing communities and instilling a lack of trust in public institutions. Detention can cause financial, food, and housing insecurity for family members—including children—left behind.²⁶ And studies consistently show that immigrants are in fact correlated with lower crime rates in communities, *not* higher.²⁷

Double penalties. For those in detention with past criminal convictions, detention poses a second penalty solely because of their places of birth.²⁸

Undermines Fairness. Mandatory detention undermines people’s access to lawyers and the evidence they need to

defend themselves. Having a lawyer and being free from detention are the two most important variables affecting case outcomes. That is why detained and unrepresented immigrants win their deportation proceedings a paltry 4% of the time; however, when those same immigrants are free and represented, they prevail 48% of the time.²⁹

Detention kills. Deaths among detained immigrants in ICE custody have increased sevenfold since 2018; the rising death rate has been attributed to the spread of COVID-19, suicide rates, and substandard medical care.³⁰ The number of deaths in ICE custody for Fiscal Year (FY) 2020 tripled that of 2019, despite the detained population having dropped by a third.³¹

Robert

Now 54 years old, Robert came to the U.S. from Jamaica in the 1970s and lived in the community for years as a green card holder. In the early 1990s, he was sentenced to life in prison for a nonviolent drug offense. During the COVID-19 pandemic, Robert was granted compassionate release from incarceration because his underlying health conditions put him at great risk, and the judge believed that he was fully rehabilitated.

Robert joyfully anticipated reunification with his children and grandchildren but was instead immediately taken into ICE custody. He has three U.S. citizen children, including a New York City police officer. ICE has refused to release Robert for more than six months because of section 236(c); he remains in a county jail in Kentucky with his life in constant danger.

Maura

Maura is a 41-year-old trans woman who suffered relentless violence in her country of birth simply because of who she is.

One day, while living on the street without a home, Maura defended herself by throwing a rock in the direction of a man and his dogs who had approached to attack her. Maura served a criminal sentence for assault with a deadly weapon, and then was transferred to immigrant detention as she faced removal proceedings.

Maura has been in mandatory detention for almost two years in California, where she has suffered abuse and lacks adequate medical care. She does not fall under the Biden administration’s current enforcement priorities, yet continues to be detained under section 236(c).

what members of Congress can do

Empowering immigration judges to make individualized custody determinations by repealing section 236(c) and other mandatory custody provisions of the Immigration and Nationality Act, as contemplated by the Dignity for Detained Immigrants Act³² and New Way Forward Act,³³ is imperative.

Until such repeal is accomplished, Congress can mitigate many of the harms caused by section 236(c) by including language in the FY 2022 Department of Homeland Security Appropriations Act that prohibits ICE from inappropriately using section 236(c) to justify the prolonged detention of immigrants. Specifically, Congress should adopt language identical or similar to section 219 of the draft 2021 House bill that passed out of Committee last year, precluding prolonged immigration detention without an individualized release assessment for every person in ICE custody, including those described in section 236(c).³⁴

endnotes

1. See Enforcement and Removal Operations, *U.S. Immigration and Customs Enforcement Fiscal Year 2019 Enforcement and Removal Operations Report*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT 1, 5 (2019), <https://www.ice.gov/sites/default/files/documents/Document/2019/eroReportFY2019.pdf>.
2. See *U.S. Citizen Children Impacted by Immigration Enforcement*, AM. IMMIGR. COUNCIL (Nov. 2019), <https://www.americanimmigrationcouncil.org/research/us-citizen-children-impacted-immigration-enforcement>.
3. See *Asylum Seekers & Refugees*, Nat'l Immigr. Just. Ctr. (last updated Nov. 2020), <https://immigrantjustice.org/issues/asylum-seekers-refugees>.
4. See generally Clara Long & Grace Meng, *Systemic Indifference: Dangerous & Substandard Medical Care in U.S. Immigration Detention*, HUMAN RIGHTS WATCH (2017), https://static1.squarespace.com/static/5a33042eb078691c386e7bce/t/5a9da33f0d9297a1f84f60f2/1520280385430/HRW_Report.pdf; see also Committee on Homeland Security Majority Staff Report, *ICE Detention Facilities: Failing to Meet Basic Standards of Care*, U.S. HOUSE OF REPRESENTATIVES (Sept. 2020), <https://homeland.house.gov/imo/media/doc/Homeland%20ICE%20facility%20staff%20report.pdf>.
5. See *Facts About Mandatory Detention*, DET. WATCH NETWORK (last visited Mar. 2, 2021), <https://www.detentionwatchnetwork.org/sites/default/files/Mandatory%20Detention%20Fact%20Sheet.pdf>.
6. See *id.*
7. See Nina Siulich & Noelle Smart, *Evidence Shows That Most Immigrants Appear for Immigration Court Hearings*, VERA INST. 1 (Oct. 2020), <https://www.vera.org/downloads/publications/immigrant-court-appearance-fact-sheet.pdf>.
8. See 8 C.F.R. § 1236.1(c)(8) (granting ICE officers the authority to release individuals who are not subject to mandatory detention); see also 8 C.F.R. § 1003.19 (granting immigration judges authority to review custody and bond determinations made by the Department of Homeland Security).
9. See Immigration and Nationality Act (“INA”) § 236(c) (8 U.S.C. § 1226(c)).
10. See *ICE Detention Statistics FY 2021*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT (last visited Mar. 4, 2021), <https://www.ice.gov/doclib/detention/FY21-detentionstats.xlsx?rev=02242021> (reporting the total ICE Average Daily Population (ADP) of individuals in ICE detention as 16,454 and the ADP for individuals being mandatorily detained as 10,915).
11. Under INA § 236(c)(1), a noncitizen is subject to mandatory detention if: (A) they are inadmissible under INA § 212(a)(2) based on the commission of enumerated crimes, including a crime involving moral turpitude (“CIMT”), any two or more criminal offenses resulting in a conviction for which the total term of imprisonment is at least five years, a controlled substance violation, a human trafficking offense, or a money laundering offense; (B) they are removable under INA § 237(a)(2) based on the commission of enumerated crimes, including of two or more CIMTs not arising out of a single scheme of criminal misconduct, an aggravated felony, a controlled substance offense (except for a single offense involving possession of thirty grams or less of marijuana), a firearm offense, or espionage-related crimes; (C) they are removable under INA § 237(a)(2)(A)(i) based on the conviction of a CIMT committed within five years of admission, for which the noncitizen was sentenced to at least one year of imprisonment; or (D) they are inadmissible or removable for engaging in terrorist activity, being a representative or member of a terrorist organization, being associated with a terrorist organization, or espousing or inciting terrorist activity.
12. See Sirine Shebaya & Robert Koulisch, *Detained Without Process: The Excessive Use of Mandatory Detention Against Maryland's Immigrants*, Am. Civil Liberties Union (Aug. 4, 2016), <https://www.aclu-md.org/en/publications/detained-without-process-excessive-use-mandatory-detention-against-marylands-immigrants>.
13. See *Frequently Asked Questions About Pretrial Release Decision Making*, AM. BAR ASSOC. CRIM. JUST. SECTION (last visited Feb. 24, 2021), https://www.ncsc.org/_data/assets/pdf_file/0015/1572/faq_pretrial_justice-1.ashx.pdf.
14. See Charles Doyle, *Bail: An Overview of Federal Criminal Law*, CONG. RESEARCH SERV. (July 2017) 1, 6-12, <https://fas.org/sgp/crs/misc/R40221.pdf> (providing an overview of federal criminal law pretrial release procedures).
15. The Supreme Court has twice upheld the constitutionality of mandatory detention, rejecting the argument that detention during removal proceedings violates due process. See *Denmore v. Kim*, 538 U.S. 510 (2002); *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018). However, in *Denmore*, while the Court did determine that mandatory detention during removal proceedings did not violate due process, it did so by explicitly relying on statistics provided by the Government which indicated individuals subjected to mandatory detention spent much less time in detention than they did. Following the Court’s decision, the Office of the Solicitor General submitted a letter to the Court, noting that the government submissions made in *Denmore* were based on erroneous Executive Office of Immigration Review statistics. Originally, it was reported that the immigration-judge stage of the proceeding in cases where there was an appeal took an average of 113 and a median of 89 days, and that the total time between the filing of charges with Immigration Court and the Board of Immigration Appeals’ completion in appealed cases was 233 days on average (median of 221 days). The corrected statistics were significantly higher: it took an average and median of 382 and 272 days for the total case completion time where there was an appeal. See Office of Solicitor General, *Re: Denmore v. Kim*, S. Ct. No. 01-1491, U.S. DEP’T OF JUST. (Aug. 26, 2016), *available at* <https://trac.syr.edu/immigration/reports/580/include/01-1491%20-%20Denmore%20Letter%20-%20Signed%20Complete.pdf>.
16. See Ana Raquel Minian, Opinion, *America Didn't Always Lock Up Immigrants*, N.Y. TIMES (Dec. 1, 2018), <https://www.nytimes.com/2018/12/01/opinion/sunday/border-detention-tear-gas-migrants.html>; see also A. Naomi Paik, *US Turned Away Thousands of Haitian*

- Asylum-seekers and Detained Hundreds More in the 90s*, THE CONVERSATION (June 28, 2018), <https://theconversation.com/us-turned-away-thousands-of-haitian-asylum-seekers-and-detained-hundreds-more-in-the-90s-98611>.
17. See Madhuri Grewal, Opinion, *Biden can end the mass incarceration of immigrants*, WASH. POST (Dec. 11, 2020), <https://www.washingtonpost.com/opinions/2020/12/11/biden-end-ice-detention-migrants-mass-incarceration/>; see also Michelle Alexander, Opinion, *The Injustice of This Moment Is Not an 'Aberration'*, N.Y. TIMES (Jan. 17, 2020), <https://www.nytimes.com/2020/01/17/opinion/sunday/michelle-alexander-new-jim-crow.html>.
 18. See Patrisia Marcías-Rojas, *Immigration and the War on Crime: Law and Order Politics and the Illegal Immigration Reform and Immigrant Responsibility Act of 1966*, 6 J. MIGRATION AND HUMAN SECURITY (2018), <https://journals.sagepub.com/doi/pdf/10.1177/233150241800600101>.
 19. Elana Schor & Meg Kinnard, *Biden says he regrets 1990s crime bill, calls it a 'big mistake' at MLK Day event*, DELAWARE ONLINE (Jan. 21, 2019, 4:47 PM), <https://www.delawareonline.com/story/news/2019/01/21/biden-says-he-regrets-1990-s-crime-bill-calls-big-mistake-mlk-day-event/2639190002>.
 20. See Jeremy Raff, *The 'Double Punishment' for Black Undocumented Immigrants*, THE ATLANTIC (Dec. 20, 2017), <https://www.theatlantic.com/politics/archive/2017/12/the-double-punishment-for-black-immigrants/549425/>.
 21. See Juliana Morgan-Trostle & Kexin Zheng, *The State of Black Immigrants Part II: Black Immigrants in the Mass Criminalization System*, BLACK ALLIANCE FOR JUST IMMIGR. & NYU SCH. OF L. IMMIGR. RIGHTS CLINIC 1, 20 (last visited Feb. 28, 2021), <https://www.sccgov.org/sites/oir/Documents/sobi-deprt-blk-immigr-crim-sys.pdf>.
 22. See *id.* at 26.
 23. Briefing Room Statements & Releases, *President Biden Outlines Steps to Reform Our Immigration System by Keeping Families Together, Addressing the Root Causes of Irregular Migration, and Streamlining the Legal Immigration System*, THE WHITE HOUSE (Feb. 2, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/02/02/fact-sheet-president-biden-outlines-steps-to-reform-our-immigration-system-by-keeping-families-together-addressing-the-root-causes-of-irregular-migration-and-streamlining-the-legal-immigration-syst/>.
 24. See generally, *ICE's New Enforcement Memo Offers Incremental Change But Perpetuates a Framework that Hurts Communities*, NAT'L IMMIGR. JUST. CTR. (Feb. 19, 2021), <https://immigrantjustice.org/press-releases/ices-new-enforcement-memo-offers-incremental-change-perpetuates-framework-hurts> (noting how the memo continues to make the same mistakes of past administrations in framing groups of immigrants as threats by categorizing people according to a broad definition of "terrorism"; how the memo perpetuates harmful narratives by, for instance, conflating immigration status and prior criminal legal system involvement with public safety risk; and that the memo enables DHS to target asylum seekers who escaped gang conscription before fleeing to the U.S. and also Black and Brown communities who have been wrongfully labeled as gang members).
 25. See Tae D. Johnson, *Interim Guidance: Civil Immigration Enforcement and Removal Priorities*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT (Feb. 18, 2021), https://www.ice.gov/doclib/news/releases/2021/021821_civil-immigration-enforcement_interim-guidance.pdf. The guidance sets out three categories of people whom the Biden-Harris administration will consider priorities for detention: (1) people considered to pose a national security risk; (2) those considered a "border security" priority; and (3) individuals considered a "public safety risk." People falling into the third category are those who have a conviction defined under immigration law as an "aggravated felony," those convicted of an offense for which an element was active participation in a criminal street gang, and those who intentionally participated in an organized gang or transnational criminal organization and are over sixteen years old.
 26. See Jordyn Rozensky & Heidi Altman, *The Safety of Sanctuary Cities and the Immigrant Revitalization Perspective*, NAT'L IMMIGR. JUST. CTR. (Oct. 16, 2020), <https://immigrantjustice.org/staff/blog/safety-sanctuary-cities-and-immigrant-revitalization-perspective>; see also *Statement of the Effects of Deportation and Forced Separation on Immigrants, their Families, and Communities*, 62 AM. J. COMMUNITY PSYCHOL. (2018), <https://onlinelibrary.wiley.com/doi/epdf/10.1002/ajcp.12256>.
 27. See Rozensky & Altman, *supra* note 27; see also Christopher Lyons, María Vélez & Wayne Santoro, *Neighborhood Immigration, Violence, and City-Level Immigrant Political Opportunities*, AM. SOC. REV. (June 2013), <https://doi.org/10.1177/02F0003122413491964>.
 28. See Heidi Altman & Marta Ascherio, *Policy Brief | 5 Reasons to End Immigrant Detention*, NAT'L IMMIGR. JUST. CTR. (Sept. 2020), <https://immigrantjustice.org/research-items/policy-brief-5-reasons-end-immigrant-detention>.
 29. See Jennifer Stave, et. al., *Evaluation of the New York Immigrant Family Unity Project: Assessing the Impact of Legal Representation of Family and Community Unity*, VERA INST. 1, 6 (Nov. 2017), <https://www.vera.org/downloads/publications/new-york-immigrant-family-unity-project-evaluation.pdf>.
 30. See *Immigrant Detention and Covid-19*, BRENNAN CTR. FOR JUST. (last updated Feb. 26, 2021), <https://www.brennancenter.org/our-work/research-reports/immigration-detention-and-covid-19>.
 31. See *id.*
 32. Dignity for Detained Immigrants Act, S. 1243, 116th Cong., H.R. 2415, 116th Cong. (2019).
 33. New Way Forward Act, H.R. 536, 117th Cong. (2021).
 34. Section 219 of H.R. 7699, the draft Appropriations Act for the Department of Homeland Security that passed out of the House Appropriations Committee in July 2020, provided that all individuals should be released out of ICE custody after twenty days' time, notwithstanding section 236(c), unless the government can establish, after an individualized assessment, that the individual posed a public safety or flight risk. The period of time was five days for transgender individuals.