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Policy Brief: Increase in Indefinite ICE Detention Without Foreseeable Removal Dates During COVID-19 Pandemic

Every year, U.S. Immigration and Customs Enforcement (ICE) deports tens of thousands of noncitizens who have final orders of removal. These removals require the cooperation of foreign governments in receiving deportation flights, providing travel documents or other verification of citizenship for the deported person, and in some cases issuing visas to ICE escorts.¹ In some cases, foreign governments are unwilling or unable to cooperate with ICE in accepting the return of individuals with final orders of removal, and the person cannot be deported. There are limitations on ICE's authority to indefinitely detain people when they are unable to be deported. ICE has consistently failed to comply with these limitations, violating due process and endangering public health as well as the health and well-being of the person who is still detained. The agency's noncompliance has only increased since March 2020, when deportations to certain countries became difficult or impossible due to the COVID-19 pandemic.

The American Immigration Council and American Immigration Lawyers Association have identified 117 cases of people who, as of early December 2020, are being kept in detention beyond the legal limit at eleven facilities, primarily across the southern region of the United States. Given that legal service providers reported these cases anecdotally, and access to counsel has been further restricted in ICE custody during the COVID-19 pandemic, it is very likely that many other cases exist at these and other facilities.

Violations of Constitutionally Defined Rules on Detention

The Supreme Court has confirmed that the U.S. Constitution protects both citizens and noncitizens from indefinite detention.² The purpose of detention after a final order of removal is to facilitate the removal of the individual. If the government is unable to demonstrate that there is a significant likelihood that it can execute the removal in the reasonably foreseeable future, the individual should be released.

Federal statute and regulation also protect individuals from indefinite detention. If a person is not deported within the first 90 days following their final order of removal, ICE must conduct a Post-Order Custody Review (POCR) to determine if there is a significant likelihood that a person will be removed in the reasonably foreseeable future.³ If ICE determines that removal is not reasonably foreseeable, then the agency must release the person after 180 days on an order of supervision (OSUP). OSUPs allow the release of an individual with an order of removal on certain conditions, such as electronic monitoring (i.e., wearing a GPS ankle monitor), periodically reporting to an ICE officer in person or by telephone, and travel restrictions.⁴ Exceptions for special circumstances require the government to provide significant evidence of contagious disease, adverse foreign policy consequences, security concerns, or special danger.⁵ However, in many cases, ICE continues to detain the individual in violation of these requirements. The number of people detained in these circumstances has increased during the COVID-19 pandemic while some countries have stopped accepting deportation flights.

Post-Removal-Period Detention Before the COVID-19 Pandemic

Even before the pandemic, ICE routinely failed to follow limits on post-removal-period detention. A Department of Homeland Security (DHS) Office of the Inspector General (OIG) report from 2019 found that for cases in which a 90-day POCR was required, the review was untimely or not performed at all in 25 percent of cases.⁶ The report found that ICE had failed to document its use of exceptions from the release requirement and was failing to track cases to the extent necessary for minimizing detention times.⁷

The report also found that 23 percent of all individuals with final orders of removal in ICE custody on December 23, 2017, had been detained beyond 90 days.⁸ While 1,763 of those individuals fall under the pending appeal and failure to comply exceptions to the 90-day removal period, 1,290 did not. The report pointed to a variety of inefficiencies in data management and scheduling procedures that were increasing the number of people experiencing prolonged post-order detention.

Current Cases of Post-Order Prolonged Detention

In recent months, legal service providers and AILA practitioners around the country have reported that a significant proportion of people currently detained are being held post-order of removal beyond the 90 days allowed with no foreseeable end to their detention. Approximately 80 percent of cases reported are those of Cubans, whose government did not accept deportation flights between March and December of 2020.⁹ As of late September, 1,805 Cubans were in ICE custody, forming approximately nine percent of the nationwide detained population.¹⁰ However, legal service providers have also reported cases of noncitizens from Bangladesh, Eritrea, Honduras, Sierra Leone, Venezuela, Vietnam, and Sri Lanka. In some cases, the countries are not accepting deportation flights because of the COVID-19 pandemic. Other countries did not have diplomatic relations with the United States before the pandemic and refused to repatriate their citizens.

Cases have been reported at Eloy Detention Center (Eloy, AZ), La Palma Correctional Center (Eloy, AZ), Otero County Processing Center (Otero County, NM), Torrance County Detention Facility (Estancia, NM), Aurora Detention Center (Aurora, CO), South Texas ICE Processing Center (Pearsall, TX), Stewart Detention Center (Lumpkin, GA), Broward Transitional Center (Deerfield Beach, FL), Krome Detention Center (Miami-Dade County, FL), Glades County Detention Center (Moore Haven, FL), and Baker County Detention Center (Baker County, FL). For example, as of early December 2020, legal service providers and AILA practitioners report the following:

- At least 81 Cubans are being held past the 90-day mark in Stewart Detention Center, comprising at least eight percent of the detained population at that facility. Of these Cubans detained at Stewart, 59 are past the constitutionally significant 180-day mark.¹¹
- 37 people detained in Torrance County Detention Facility have a final order of removal. At least 19 of these individuals have been detained 180 days post-order. Between early September and early December of 2020, at least 26 individuals were detained at Torrance more than 90 days past their order of removal.
- At La Palma Detention Center, within only one of the three housing compounds, at least six Cubans have been detained over 90 days past their final order removal, at least three of them for over 180 days.

- At least seven people at the Aurora Detention Center have been detained over 180 days past their orders of removal, with several more approaching that date.
- Four individuals at Otero County Processing Center are confirmed to be detained 180 days past their order of removal, and at least ten will meet those criteria soon. It is likely that there are dozens of other individuals detained at Otero post-order who legal service providers have not been able to identify because of ICE's failure to provide legally required phone access.¹²

Legal service providers consistently report that instead of conducting individualized POCRs as required, ICE's justifications for continued detention beyond 90 and 180 days after the final order of removal include only boilerplate language. The justifications frequently cite danger to the community, flight risk, or an expectation to be able to execute the deportation in the foreseeable future without details or evidence specific to the individual. In some cases, ICE has stated the justification that the individual has not cooperated with obtaining travel documents when they have cooperated. In other cases, ICE has stated that they cannot release an individual until 180 days after their order of removal, in contradiction with the law. Legal service providers also report that ICE has failed to schedule some individuals for their 90-day POCR, and that some people have had to beg for ICE to conduct the legally mandated process.

The American Immigration Council and the American Immigration Lawyers Association have also identified a nationwide trend of ICE issuing blanket denials or simply not responding to requests for the release of noncitizens experiencing post-order prolonged detention, including under humanitarian parole and OSUP. Under *Fraihat v. ICE*, a federal judge ordered the agency to identify people with medical vulnerabilities and evaluate them for release.¹³ However, legal service providers report ICE's failure to release eligible members of the class, even when they do the work of identifying class members for the agency. Legal service providers report that *Fraihat* requests for people with severe psychiatric illness, diabetes, hypertension, and asthma have been denied.¹⁴

Many legal service providers have had to resort to seeking relief in federal court to secure the release of clients with medical vulnerabilities detained 180 days past their order of removal.¹⁵

Harms to the Individuals from Prolonged Detention

The physical and emotional harm of ICE detention has been consistently documented. An administrative complaint filed by the American Immigration Council in 2018 regarding conditions within ICE's Denver Contract Detention Facility details delays in calling 911, denial of treatment for serious medical conditions, and inadequate mental health care.¹⁶ The OIG has released multiple reports confirming deficient conditions in ICE detention centers.¹⁷ A nationwide class action lawsuit has challenged DHS' use of segregation as punishment and its failure to ensure noncitizens in ICE custody receive disability accommodations, medical care, and mental health care.¹⁸

From the beginning of the COVID-19 pandemic, ICE has failed to follow public health protocols to decrease the spread of COVID-19 in its facilities. For example, detained individuals across the country have consistently reported insufficient personal protective equipment, hygiene supplies, information, social distancing, isolation, testing, and treatment.¹⁹ As of December 21, 2020, 8,181 individuals have tested positive in ICE custody, at least eight of whom have died.²⁰ Federal judges have concluded there is the risk of serious harm to individuals in ICE custody during the pandemic.²¹

Public Health Risk of Detention for Detained Individuals and Surrounding Communities

Beyond putting the detained individual at risk, continuing to detain a person beyond the removal period increases the risk of COVID-19 spread in detention centers, putting other detained individuals, facility staff, and surrounding communities at greater risk of exposure.

ICE has further allowed the spread of COVID-19 between facilities by continuing to transfer individuals in its custody between facilities without proper testing, quarantine, and personal protective equipment. ICE Air Operations, the air transportation arm of ICE, has flown over 1,543 domestic transfer flights since the beginning of the pandemic.²²

The detention of noncitizens in crowded and unsanitary conditions puts the surrounding communities in danger. Unnecessary, prolonged detention increases the risk of detention center outbreaks that could spread into the community through facility staff. Detained individuals, especially those with medical vulnerabilities, could also contract severe cases of COVID-19 due to their high-risk exposure in detention, taking up hospital beds desperately needed by the community. A report by Detention Watch Network found that as of December 2020, 245,000 COVID-19 cases nationwide could be attributed to ICE's failure to release people from detention.²³ The report attributes these cases to ICE negligence, including staff bringing the virus from the outside community into the facility, inadequate provision of personal protective equipment, frequent transfers of detained individuals within facilities, and failure to isolate individuals with COVID-19 symptoms.²⁴

Otero County Processing Center and El Paso Service Processing Center in the El Paso, Texas, metropolitan area are particularly concerning. El Paso has experienced severe COVID-19 outbreaks that have overwhelmed the city's medical system. The city has had to open a field hospital at its convention center and transfer patients to other cities across Texas.²⁵ As of early December 2020, El Paso had only 13 of its 400 Intensive Care Unit beds available.²⁶ Between the beginning of the pandemic and December 17, 2020, 305 individuals detained at El Paso Service Processing Center and 185 at the nearby Otero Country Detention Center have tested positive for COVID-19. In early December, El Paso Service Processing Center had the largest current COVID-19 outbreak of any ICE facility in the nation, with 47 confirmed cases.²⁷ The Detention Watch Network study attributes 1,257 of El Paso's COVID-19 cases, or nearly ten percent of the city's total, to community spread from the El Paso Service Processing Center.²⁸

Public Health Risk of Deportations during COVID

Deporting people with final orders of removal as soon as they are accepted by their home country could have serious public health consequences. Since March, ICE has failed to take adequate precautions to prevent the international spread of COVID-19. As of early December 2020, ICE Air has flown over 665 deportation flights to over twenty different destinations since the beginning of the pandemic.²⁹ At least 11 governments have confirmed that individuals deported to their country from the United States were infected with the virus, including at least 331 Guatemalans.³⁰

Recommendations

Given the high public health risk of deportation and detention during the COVID-19 pandemic, ICE should pause deportations for the time being. Even if countries currently not accepting deportations begin to do

so, the deportations will present a serious international public health risk for the remainder of the COVID-19 pandemic.

Pandemic aside, ICE needs to improve its POCR process in order to comply with the U.S. Constitution, federal law, and regulations. ICE should release individuals who are still detained 90 days past their final orders of removal under OSUP, providing community-based case management support to those who need it.³¹ For as long as deportations are not occurring due to the COVID-19 pandemic, these releases will be necessary for an increased number of people. During the pandemic, the detention of an individual who could be released causes unnecessary health risk to detained individuals, facility staff, and surrounding communities. Furthermore, if deportations are paused, the individuals should not be detained since they cannot be deported in the foreseeable future.

During and after the pandemic, whenever ICE does continue to detain an individual past 90 days, the agency should provide individualized justification for its decision with evidence, and document that evidence in its POCR. In cases where ICE claims to be able to deport the person in the foreseeable future, the agency should also include clear evidence to support its claim, especially for nationals of countries like Cuba whose governments do not accept deportations for a long period of time. When an individual has been detained for 180 days, ICE must meet the higher standard that requires showing significant evidence of contagious disease, adverse foreign policy consequences, security concerns, or special danger.

Finally, ICE should improve case tracking to ensure that 90- and 180-day POCRs are timely, as recommended by the DHS OIG in 2007.³² It should also follow another recommendation from the same OIG report and implement an automated system that informs detained individuals of the status of their POCR.³³ Additionally, ICE should implement an administrative complaint process for cases where they failed to provide an adequate or timely POCR. Currently, the only recourse for detained individuals is to seek relief in federal court. Most detained individuals are unable to secure representation for this course of action, and even if they do secure representation the process is slow and expensive for both the detained individual and the government. A more accessible and efficient process would better protect due process for all.

Endnotes

¹ Department of Homeland Security Office of the Inspector General, ICE Faces Barriers in Timely Repatriation of Detained Aliens OIG-19-28, March 11, 2019, <https://www.oig.dhs.gov/reports/2019/ice-faces-barriers-timely-repatriation-detained-aliens/oig-19-28-mar19>.

² *Zadvydas v. Davis*, 533 U.S. 678, 701 (2001)

³ 8 U.S.C. § 1231(a)(1); Department of Homeland Security Office of the Inspector General, ICE's Compliance With Detention Limits for Aliens With a Final Order of Removal From the United States, OIG-07-28, February 2007, https://www.oig.dhs.gov/sites/default/files/assets/Mgmt/OIG_07-28_Feb07.pdf; 8 CFR § 241.4.

⁴ American Immigration Council, "Seeking Release from Immigration Detention," September 13, 2019, <https://www.americanimmigrationcouncil.org/research/release-immigration-detention>; 8 U.S.C. § 1231(a)(3).

⁵ *Ibid.*

⁶ Department of Homeland Security Office of the Inspector General, ICE's Compliance With Detention Limits for Aliens With a Final Order of Removal From the United States, OIG-07-28, February 2007, https://www.oig.dhs.gov/sites/default/files/assets/Mgmt/OIG_07-28_Feb07.pdf.

⁷ Ibid.

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⁹ There have been reports that the Cuban government accepted one deportation flight of 16 people in December 2020, but it has yet to publicly announce whether this is a change in policy that will continue into 2021; *Affidavit of Scott G. Ladwig, Patrick Gayle, et al. v. Michael W. Meade*, Case No. 1:20-CV-21553-MGC, ECF no. 465-1, ¶ 7 (December 10, 2020, S.D. Florida 2020); “Estados Unidos deporta a unos 16 cubanos a la Isla,” *Diario de Cuba*, 20 Diciembre 2020, https://diariodecuba.com/cuba/1609340482_27661.html.

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¹¹ Monique O. Mardan, “An asylum seeker is freed, then rearrested, as ICE makes Cubans languish in detention,” *Miami Herald*, October 28, 2020, <https://www.miamiherald.com/news/local/immigration/article246727026.html>.

¹² American Immigration Council, “Stopping Government Interference to Attorney Phone Access in Immigration Detention Centers: *Carranza et al. v. U.S. Immigration and Customs Enforcement et al.*,” https://www.americanimmigrationcouncil.org/litigation/stopping-government-interference-attorney-phone-access-immigration-detention-centers?qt-litigation_tab=5.

¹³ *Fraihat v. U.S. Immigration and Customs Enforcement*, https://creelaw.org/wp-content/uploads/2019/08/E-filedFraihat_v_ICE_Complaint_to_file_8_19.pdf.

¹⁴ In New Mexico, a man suffering from shortness of breath, allergic rhinitis, epistaxis, hematuria, regular sinus infections, stomach issues, a kidney cyst, intermittent headaches, and a history of digestive infections was denied release under *Fraihat*.

¹⁵ At Otay Mesa Detention Center, legal service providers went to federal court to ask for the release of clients with HIV and serious mental health conditions after ICE repeatedly denied requests for release.

¹⁶ American Immigration Council and AILA, “Failure to provide adequate medical and mental health care to individuals detained in the Denver Contract Detention Facility,” June 4, 2018, <https://www.americanimmigrationcouncil.org/advocacy/immigrants-inadequate-medical-careaurora>.

¹⁷ See, e.g., Department of Homeland Security Office of Inspector General, *Concerns about ICE Detainee Treatment and Care at Four Detention Facilities*, OIG-19-47, June 3, 2019, <https://www.oig.dhs.gov/sites/default/files/assets/2019-06/OIG-19-47-Jun19.pdf>.

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²⁰ U.S. Immigration and Customs Enforcement, COVID-19 ICE Statistics by Facility, last updated December 23, 2020, <https://www.ice.gov/coronavirus>, accessed December 21, 2020.

²¹ *Fraihat v. U.S. Immigration and Customs Enforcement*, https://creelaw.org/wp-content/uploads/2019/08/E-filedFraihat_v_ICE_Complaint_to_file_8_19.pdf; ACLU Northern California, *Zepeda Rivas v. Jennings*, <https://www.aclunc.org/our-work/legal-docket/zepeda-rivas-v-jennings-immigration-detention>.

²² Thomas Cartwright, “ICE Air Flights November and November 2020 Year-to-Date,” *Witness at the Border*, December 7, 2020, <https://www.witnessattheborder.org/posts/12620-2>.

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²⁵ “El Paso County judge says new ‘partial’ curfew doesn’t conflict with statewide coronavirus orders,” *The Texas Tribune*, November 24, 2020, <https://www.texastribune.org/2020/11/24/el-paso-coronavirus-curfew/>; “El Paso hospitals forced to send patients to other parts of the state,” *CBS News*, November 18, 2020, <https://www.cbsnews.com/video/el-paso-hospitals-forced-to-send-patients-to-other-parts-of-the-state/#x>.

²⁶ Lauren Leatherby, et al., “‘There’s No Place for Them to Go’: I.C.U. Beds Near Capacity Across U.S.,” *New York Times*, December 9, 2020, <https://www.nytimes.com/interactive/2020/12/09/us/covid-hospitals-icu-capacity.html>.

²⁷ U.S. Immigration and Customs Enforcement, “ICE Guidance on COVID-19,” <https://www.ice.gov/coronavirus>, accessed December 21, 2020.

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³³ *Ibid.*