

One year ago, on August 6, 2009, Immigration and Customs Enforcement (ICE) announced “major reforms” to its immigration detention system.<sup>1</sup> In the time since, ICE has made tangible progress under the guidance of its newly established Office for Detention Policy and Planning. For example, last month ICE introduced an online detainee locator system which allows family members and legal counsel to track the location of a relative or client. Although the ACLU has concerns about some of the system’s details,<sup>2</sup> we applaud ICE’s commitment to remedying the unwarranted lack of information on detainees’ whereabouts. The ACLU also supports the substance, if not the pace, of ICE wrestling with the central question behind true “detention reform” -- namely who must be detained in the first place? ICE’s implementation of the administration’s policy change favoring release of asylum seekers with a credible fear of persecution and ICE’s commitment in its recent civil enforcement priorities memo not to detain members of vulnerable groups where possible are positive steps in what needs to be an overall reduction of the ICE detainee population size.<sup>3</sup>

While ICE has improved some aspects of immigration detention, there is much more work to do before ICE can come close to implementing Assistant Secretary Morton’s goal of creating a civil detention system. Most notably, in making future projections of an ongoing vast detention system, ICE shows that it has not adequately considered how many immigrants *must* be detained in the first place -- at great monetary cost to the government and human cost to detainees and their families. Many detained individuals pose no flight risk or danger to public safety, and many eventually win their immigration cases.

On this first-year anniversary of ICE’s detention reform announcement, it is important to take stock of ICE’s progress and its shortcomings in meeting the promise of its intended reforms. The ACLU is particularly concerned about four critical detention areas – mental disability, health care, sexual assault, and mandatory and prolonged detention. In each of these areas it is impossible to credit ICE’s pledge from a year ago that “the steps Assistant Secretary Morton is taking . . . will address the vast majority of complaints about ICE’s immigration detention system.”<sup>4</sup> ICE has yet to institute due process and fairness as the bulwarks required for genuine detention reform.

## I. Detainees with Mental Disabilities

A comprehensive report issued in July 2010 by the ACLU and Human Rights Watch (“HRW”) concludes that “immigrants with mental disabilities are often unjustifiably detained for years on end, sometimes with no legal limits.”<sup>5</sup> In documenting cases of inadequate and inappropriate mental health treatment in ICE facilities, the ACLU/HRW report offers evidence of a recurring gap in ICE’s detention reforms: ICE, which transfers detainees with mental health needs to hospitals such as Columbia Regional Care Center (“CCRC”) in South Carolina, lacks

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<sup>1</sup> “ICE Announces Major Reforms to Immigration Detention System.” (Aug. 6, 2009), available at <http://www.ice.gov/pi/nr/0908/090806washington.htm>

<sup>2</sup> See [http://www.aclu.org/files/assets/Comments\\_to\\_ODLS.pdf](http://www.aclu.org/files/assets/Comments_to_ODLS.pdf)

<sup>3</sup> For the June 30, 2010 civil enforcement priorities memo, see [http://www.ice.gov/doclib/civil\\_enforcement\\_priorities.pdf](http://www.ice.gov/doclib/civil_enforcement_priorities.pdf)

<sup>4</sup> “Major Reforms,” *supra* note 1.

<sup>5</sup> *Deportation by Default* (July 2010), available at <http://www.hrw.org/en/reports/2010/07/26/deportation-default-0>

the control and accountability of clear, binding, and enforceable detention standards. Remarkably, no memorandum of understanding exists between ICE and CRCC.<sup>6</sup>

The ACLU/HRW report recommends “[d]eveloping robust protections and enhanced screening at the front end of detention,” as well as periodic review of detainees with mental disabilities, “to ensure that persons with mental disabilities are not lost in detention, or indefinitely detained during or after immigration proceedings.”<sup>7</sup> ACLU affiliates in Southern California and San Diego intervened in March 2010 to secure the release of two “lost” detainees with mental disabilities who had been forgotten by ICE for more than four years – without a single bond hearing – after their cases were closed because they were incompetent to understand proceedings. A brother expressed his thoughts on reuniting with one of the men: “This was such a long struggle that nobody should have to go through. We want to make sure he gets back his life and returns to school.”<sup>8</sup>

Other mentally disabled detainees are still languishing within the ICE removal system, as detailed in a pending class-action lawsuit filed in August 2010 by the ACLU and other groups. Ever Francisco Martinez-Rivas, a 31-year-old lawful permanent resident who came to the U.S. at the age of nine, has been diagnosed with schizophrenia so severe that he gets confused when given simple directions. Martinez-Rivas has been medically termed “a gravely disabled person,” yet ICE intends to deport him without providing counsel or having his mental state evaluated.<sup>9</sup> Detention frequently exacerbates mental illness or disability;<sup>10</sup> ICE’s actions are incompatible with due process and the values of a humane society.

*ICE should respond with specificity to the ACLU/HRW report’s recommendations and greatly reduce the number of detained immigrants with mental disabilities.*

## II. Health Care for ICE Detainees

ICE’s outsourcing of detention responsibilities without proper accountability goes far beyond mental disabilities and is best characterized as a systemic failing. Whereas Assistant Secretary Morton testified this year to the Senate Homeland Security Governmental Affairs Committee that immigration detention is his leading example of a function for which federal contracting should be minimized, ICE’s reliance on state, local, and private detention facilities remains extensive. Many of these contract facilities are not yet covered by ICE’s 2010 Performance-Based National Detention Standards, which in any case will not be binding and enforceable. At least 113 detainees have died in ICE custody since October 2003 and while ICE has improved transparency regarding detainee deaths, serious questions remain about the agency’s oversight of disparate facilities lacking the uniformity and legal consistency that a

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<sup>6</sup> *Id.* at 76.

<sup>7</sup> *Id.* at 71.

<sup>8</sup> “Immigration Officials Announce Release of Detainees with Mental Disabilities Who Were Lost in Detention for Years.” (Mar. 31, 2010), available at <http://www.aclu-sc.org/releases/view/103017>

<sup>9</sup> For the class action complaint, see <http://www.aclu.org/files/assets/2010-8-2-GonzalezvHolder-AmendedComplaint.pdf>

<sup>10</sup> *See, e.g.*, Physicians for Human Rights and Bellevue/NYU Program for Survivors of Torture, *From Persecution to Prison: The Health Consequences of Detention for Asylum Seekers* (June 2003), available at <http://physiciansforhumanrights.org/library/documents/reports/report-perstoprison-2003.pdf>

proper supervisory regime would provide. For example, ICE announced on July 18, 2010 that Jose Nelson Reyes-Zelaya, a 28-year-old national of El Salvador, committed suicide two days after being detained by ICE at Orleans Parish Prison. Orleans Parish Prison was the subject of a scathing 2009 Department of Justice Civil Rights Division investigation that, inter alia, singled out deficient “procedures for suicide prevention.”<sup>11</sup> Pending the inquiry into Mr. Reyes-Zelaya’s death it is impossible to say whether the prison was at fault, but his suicide underscores that ICE has not yet established the unity of facility standards and supervision required for a national detention system.

*ICE should apply and enforce comprehensive, uniform national detention standards in all facilities housing immigrant detainees.*

### III. Sexual Abuse and Assault in ICE Detention

The May 2010 sexual abuse of women detainees by Corrections Corporation of America (CCA) staff at the T. Don Hutto Detention Center in Taylor, Texas, further illustrates an urgent need for improved ICE oversight. We are particularly troubled that this abuse took place at a facility ICE promotes as a model of its detention reforms, under the auspices of a newly installed ICE Detention Services Manager. Indeed, ICE lauds Hutto as being governed by a “person-centered philosophy [that] guides every interaction with the residents by understanding the often complex circumstances surrounding their detention. [Hutto] continues to fulfill the mission of ICE while at the same time recognizing and valuing the dignity of the individual.”<sup>12</sup> ICE’s failure to prevent the Hutto abuse demonstrates how the agency’s oversight regime is insufficient and how the ICE model of self-policing continues to fall short.

The Hutto violations are not isolated or unique but rather indicative of a long-standing failing throughout the ICE detention system. Prior incidents since 2007 have occurred at Hutto; Port Isabel, Texas; Pearsall, Texas; and in Florida.<sup>13</sup> Holding civil detainees in prison-like conditions exposes them to sexual harassment and assault. ICE’s response to the Hutto assaults was woefully inadequate: Despite finding CCA culpable because “ICE[-] mandated transport policies and procedures were not followed,” ICE acted only to put CCA on “probation,” a legally meaningless term that has no effect on CCA’s contracting. ICE’s response to the Hutto abuse lacked transparency and ICE was uncooperative with the ACLU and other non-governmental organizations in tracking down all possible Hutto victims. Moreover, ICE resisted committing to preventive action such as providing current detainees “know your rights” information about sexual assault and abuse.

ICE’s treatment of individual sexual assault victims has also been deficient. At the CCA-Eloy Detention Center, for example, the ACLU of Arizona learned of a transgender woman who

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<sup>11</sup> Laura Maggi, “Orleans Parish Prison Conditions Unconstitutional, Justice Department Finds.” *Times-Picayune* (Sept. 22, 2009).

<sup>12</sup> ICE, “T. Don Hutto Residential Center.” (Mar. 24, 2010), available at <http://www.ice.gov/pi/news/factsheets/huttofactsheet.htm>

<sup>13</sup> See Carol Lloyd, “Hanky-Panky or Sexual Assault?” *Salon.com* (May 31, 2007); “Ex-Fed Agent Pleads Guilty in Sex-Assault Case.” *Miami Herald* (Apr. 3, 2008); Brian Collister, “More Sex Assault Allegations at Immigrant Detention Center.” *WOAI.com* (Dec. 29, 2008); Mary Flood, “Ex-Prison Guard Admits to Fondling Immigrant Women.” *Houston Chronicle* (Sept. 24, 2009).

was sexually assaulted by a detention officer while in ICE custody. From the start of her detention, she suffered discrimination, harassment, and humiliation because of her gender identity. She was placed in “protective custody” throughout her eight months of detention and it was while in this custody classification that the sexual assault took place. The ACLU of Arizona has requested an investigation into her abuse and the conditions in which transgender immigrants are detained. While she has since been released, she still suffers from the emotional pain and humiliation she endured while at Eloy.

*ICE should undertake a system-wide review of sexual abuse in its immigration detention facilities, with attention to the type and frequency of staff training and oversight, the accessibility and confidentiality of complaint procedures, and the track records of ICE detention contractors.*

#### IV. Mandatory and Prolonged Detention

We are disappointed that ICE has failed to adopt more reasonable and humane interpretations of the mandatory detention statute that are available to the agency. Compliance with mandatory detention requirements does not require the incarceration of individuals who have substantial challenges to removal on which they may prevail, or who finished serving their criminal sentences years ago and have since been leading productive lives.<sup>14</sup> Many of these individuals pose no danger or flight risk. While detention may be warranted in individual cases, these individuals are entitled to bond hearings to determine if their detention is necessary. Moreover, notwithstanding the increasing number of federal court decisions to the contrary, ICE is subjecting individuals to mandatory detention for prolonged periods of time far in excess of the 45-day to five-month period contemplated by the Supreme Court when it upheld mandatory detention seven years ago.<sup>15</sup> ICE should revisit its overbroad interpretations of the mandatory detention statute and adopt more reasonable policies which would be consistent with Congressional intent while avoiding the serious constitutional problems that its current policies are creating.

ICE’s prolonged detention practices deny detainees the most basic element of due process: bond hearings to determine if their detention is required. Thousands of detainees are forced to endure prolonged detention even though they have substantial challenges to removal and pose no danger or flight risk.<sup>16</sup> The prospect of continued detention, along with the fact that approximately 84 percent of all detainees lack legal counsel,<sup>17</sup> coerces many detainees to

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<sup>14</sup> See, e.g., *Quezada-Bucio v. Ridge*, 317 F. Supp. 2d 1221 (W.D. Wash. 2004) (holding that detention of a lawful permanent resident three and a half years after his release was unauthorized and noting that “petitioner has had no further criminal conduct”).

<sup>15</sup> See, e.g., *Tijani v. Willis*, 430 F. 3d 1241 (9th Cir. 2005) (construing 236(c) as only authorizing detention for “expeditious” removal proceedings in order to avoid the serious constitutional problem), *Ly v. Hansen*, 351 F.3d 263 (6th Cir. 2003) (construing 236(c) as only authorizing mandatory detention for the period of time reasonably needed to conclude proceedings promptly); *Alli v. Decker*, 644 F. Supp. 2d 535, 539 (M.D. Pa. 2009) (noting “the growing consensus . . . throughout the federal courts” that prolonged mandatory detention raises serious constitutional problems).

<sup>16</sup> See generally Anna Gorman, “350 immigrants held more than 6 months while fighting deportation, U.S. says.” Los Angeles Times (May 20, 2010) (referring to the number of prolonged detainees within the Central District of California alone).

<sup>17</sup> American Bar Association Commission on Immigration, *Reforming the Immigration System: Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases*. (2010), 5-8, available at <http://new.abanet.org/immigration/pages/default.aspx>

abandon meritorious claims to stay in the U.S. ICE should end its over-reliance on detention by expanding community-based alternatives to detention (“ATD”), which are far less costly than detention in prison-like settings – \$8.88 per person per day for ATD as compared to \$122.<sup>18</sup>

*ICE should adopt reasonable and humane interpretations of its detention requirements and implement policies to provide meaningful bond hearings to all eligible detainees.*

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The ACLU will continue to work closely with ICE in implementing its detention reform efforts. But adequate progress has not been made in the past year to address the larger concerns described here, which demand immediate action. The ACLU intends to hold ICE accountable for these shortcomings and expects ICE promptly to:

- reduce the number of incarcerated immigrants with mental disabilities and establish binding guidance to improve how ICE treats this vulnerable population
- apply and enforce comprehensive, uniform national detention standards in all facilities housing immigrant detainees
- undertake a system-wide review of sexual abuse in ICE immigration detention facilities
- reexamine ICE’s mandatory and prolonged detention policies to ensure the provision of bond hearings to all detainees except where expressly prohibited by Congress.

Every person ICE detains has the right to full and fair protection of the laws. The ACLU will keep working to ensure that ICE holds its ground on detention reforms underway, develops solutions to the recurring problems discussed above, and conforms its day-to-day practices to the agency’s stated goal of building a humane and civil detention system.

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<sup>18</sup> Statement of John Morton, “The Fiscal Year 2011 Budget for U.S. Immigration and Customs Enforcement.” U.S. House of Representatives Committee on Appropriations, Subcommittee on Homeland Security (Mar. 18, 2010); ICE, “Protecting the Homeland: ATD Nationwide Program Implementation Report.” (Feb. 1, 2010), 9.