

# US Immigration Policy & Reform:

What does the evidence tell us?

Institute for the Study of International Migration

GEORGETOWN  
UNIVERSITY

## Detention and Removal: What Now and What Next?

Report on an experts' roundtable

Georgetown University, Washington D.C.



### ABOUT THE PROJECT

The Institute for the Study of International Migration, with the support of the MacArthur Foundation, is organizing a series of public presentations, as well as expert roundtables that address the multiple challenges of immigration reform. The aim of the project is to inform debate on immigration reform, with a focus on addressing the challenges of implementation

## **SUMMARY**

The Institute for the Study of International Migration convened a diverse group of experts for a roundtable held under Chatham House Rule where neither the identity nor the affiliation of any participant is revealed. The roundtable addressed the administrative, jurisdictional, legal and humanitarian challenges of US detention and removal policies.

Since the meeting took place in October 2014, President Obama issued a number of executive orders of relevance to detention and removal, including: strengthening of border security, revision of removal priorities, the replacement of the Secure Communities program with the Priority Enforcement program, personnel reform for ICE officers, expansion and extension of the Deferred Action for Childhood Arrivals (DACA) program, a new deferred action program for parents of US citizens and Lawful Permanent Residents (LPRs); and expansion of the provisional waiver program for spouses and children of LPRs. Many of the conclusions and recommendations in this report are relevant to the implementation of these executive orders. Other recommendations address additional steps that would improve the detention and removal system.

### **DETENTION**

Immigration and Customs Enforcement (ICE) detains a large population in removal proceedings, including adults and families with protection claims and those convicted of crimes. While there have been efforts to improve procedures, participants identified challenges and debated constructive recommendations, some of which are highlighted below.

- ICE's Risk Classification Assessment (RCA) is a valuable tool for assessing humanitarian equities and vulnerabilities. It could be used at different stages in detention and removal to evaluate an individual's changing circumstances. It should also be adapted where necessary and used by Customs and Border Protection (CBP) in determining who should be held for detention in the border zone.
- ICE has used an assortment of Alternatives to Detention (ATD), from centers with relatively lenient custody to electronic surveillance and community-based programs. These have shown success and are significantly less costly than detention.
- Where possible, families should be placed in ATDs. The treatment of those placed in detention requires heightened attention. There are concerns over the apparent 'no-bond/high-bond' policy for some family members.
- Between private contract facilities, ICE-owned facilities, and Intergovernmental Service Agreement Facilities (IGSA), the latter are arguably the least satisfactory. ICE-owned facilities are expensive, but may offer more accountability and better implementation of detention standards.

- As ICE strives to consolidate facilities, some facilities are placed in isolated areas hindering access to legal counsel or community and family support. Participants urged action to ensure access to quality legal services for all detainees.
- The implementation of internal standards by ICE is welcome. Standards tailored to different facilities, such as those holding migrants less than 72 hours, may lead to better protection outcomes.
- Detention may compound problems for migrants. Those who experience physical and psychological harm prior to arrival are particularly vulnerable. There should be more appropriate, personalized, and accessible orientation programs and materials offered in multiple languages.
- ICE has taken steps to break down bureaucratic barriers and improve accountability, establishing a detainee locator and dedicated call center. An independent monitoring body could help ensure effective implementation of standards.
- In FY 2014, an estimated 60,000 children entered the Office of Refugee Resettlement (ORR) custody, compared with nearly 25,000 in 2013. The system was ill-prepared to respond effectively to the surge in unaccompanied children, raising questions about the capacity of ORR to address future large increases in such movements.
- The extent to which the number of detainees has increased in recent years raises concerns over standards, and in particular, delays in implementing the Prison Rape Elimination Act (PREA). The creation of an independent monitoring body to conduct regular assessments of facilities could improve implementation and accountability.
- High and increasing levels of violence in Central America pose a risk to migrants returned home. Many participants argued for efforts to better integrate those returned home, while long-run solutions need to address the root causes of violence.

## **REMOVALS**

Since 2003, the DHS has removed about 3.7 million non-citizens, most of who were apprehended at or near the border. In FY13, ICE conducted 368,644 removals of which 98 percent met one or more of ICE's stated civil enforcement priorities. Still, President Obama is called "Deporter-in-Chief" by some advocates, while public sentiment views efforts to curb immigration as inadequate.

- Immigration courts are underfunded and facing heightened demand. According to the Transactional Records Access Clearinghouse (TRAC) on immigration, there are extensive backlogs and delays for over 350,000 pending cases. Participants called for increased funding for immigration judges and the immigration court system.
- There has been a significant increase in DHS administered removals and a widening gap between these and removal orders issued by immigration judges, generating

concern about due process safeguards. There is a need for greater scrutiny and oversight of administrative and other summary removals, or in alternatives to removal, reform or overhaul of some of these mechanisms.

- Many migrants who are removed have genuine and credible fears of returning to their home country. But credible fear grant rates have decreased amid concerns over the proficiency of interviews, particularly at the border. One way to improve the quality of interviews is to increase funding for asylum officers and deploy them to targeted locations. Some participants urged that those who pass the credible fear standard have their full asylum hearing before asylum officers.
- Many migrants on the non-detained docket encounter lawyers with inadequate experience, while others in mandatory detention lack access to legal counsel. Some participants recommended a legally mandated right to counsel.
- Some participants argued local law enforcement actors should not be tasked with immigration enforcement; others argued that the Secure Communities program is an effective tool in the interior. All agreed on a need to clarify priorities and procedures among ICE and local law enforcement actors, and the need to address mistrust of law enforcement among the non-citizen population.
- Given the volume of removals, and their associated individual and national costs, alternatives through defensive action or affirmative action should be given serious consideration.
- Participants called for greater interventions to stem the root causes of flight and efforts to ensure that those who are returned are able to successfully reintegrate, in part as a way to reduce possible re-migration and criminal activity in countries of origin.

## THE STATE OF PLAY IN DETENTION

The United States maintains the largest immigrant detention system in the world.<sup>1</sup> Of two authorized primary federal agencies within the U.S. Department of Homeland Security (DHS), Immigration and Customs Enforcement (ICE) oversees the larger detention apparatus in the interior. In part due to funding allocations determined by Congress, most notably the “detention bed mandate” first included in the 2010 Department of Homeland Security Appropriations Act, the practice of detention has grown. Whereas in the late 1990s there were some 10,000 beds, in Fiscal Year (FY) 2014 this number has risen to 34,000 beds.<sup>2</sup> ICE detains a diverse immigrant population, including adults and families with protection claims and persons convicted of crimes. The agency also oversees alternatives to detention (ATD) programs (discussed further below).

ICE inspects and regularly uses 202 facilities across the country, of which 37 are privately run and 165 are publicly owned and operated. The majority of these facilities are used to hold detainees for more than 72 hours. Detainees are housed in a variety of facilities ranging from ICE-owned facilities, to state and county jails contracted as Intergovernmental Service Agreement Facilities (IGSA), and private contracted facilities. Bed space for women, who make up around 14 percent of ICE detainees, is available in 100 facilities, but over half of the female population is detained in just 7 facilities.

ICE has at its disposal 1,200 beds in family detention centers. Of the approximately 70,000 family members who have been apprehended and placed in immigration proceedings, some 3,000 individuals have been detained. Given recent increases in numbers of family arrivals, the agency is looking to add a further 2,400 beds in family detention facilities.

According to ICE statistics, in FY 2014:

- More than 400,000 immigrants from 104 countries spent time in detention with 40 percent from Mexico, 51 percent from Central America, and 2 percent from Caribbean States.

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<sup>1</sup> Robyn Sampson and Grant Mitchell, 2013. “Global Trends in Immigration Detention and Alternatives to Detention: Practical Political and Symbolic Rationales,” *Journal on Migration and Human Security*, Volume 1 (3): 97—121.

<sup>2</sup> National Immigration Justice Center, 2014. “Immigration Detention Bed Quota Timeline,” March, [http://immigrantjustice.org/sites/immigrantjustice.org/files/Immigration\\_Detention\\_Bed\\_Quota\\_Timeline\\_2014\\_03.pdf](http://immigrantjustice.org/sites/immigrantjustice.org/files/Immigration_Detention_Bed_Quota_Timeline_2014_03.pdf)

- On average, immigrants were detained for 29.7 days, although the time period varied considerably. On average 25 percent of the detained population was released within 1 day, 50 percent within 1 week, 75 percent within 34 days, and 95 percent within 4 months.
- As of September, there were some 31,000 immigrant detainees housed in 180 facilities across the country with 79 percent of this population subject to mandatory detention. Of this 79 percent, 55 percent had a criminal conviction.

U.S. Customs and Border Protection is the other agency within DHS with authority to detain immigrants. It operates at and between legal ports of entry.<sup>3</sup> CBP responsibilities include referral of apprehended migrants for credible fear screenings and the operation of temporary detention facilities. Participants raised concerns about conditions in CBP holding facilities as well as deficiencies in operational standards and oversight. Concerns relating to CBP operations have been magnified during CBP's recent role in handling the "surge" of unaccompanied alien children (UAC) this past summer.

The Office for Refugee Resettlement (ORR) within the Department of Health and Human Services is responsible for the care and custody of unaccompanied minors. The ORR's role, responsibilities and operations are discussed further below.

## **Reforms to Detention**

In response to ongoing challenges and calls for improved conditions, ICE has introduced an assortment of noteworthy policy changes which include:

- A reduction in the total number of immigration detention facilities from approximately 350 to 202, as well as a decrease in the number of private contract facilities while still maintaining access to the statutorily mandated number of detention beds. In conjunction with the reduction in the number of detention facilities, DHS Secretary Jeh Johnson proposed in March 2014 to interpret the detention bed mandate as a requirement to "keep available," rather than "fill," 34,000 beds.
- Issuance of new standards in protecting vulnerable populations and improving conditions in detention through the 2011 Protection Based National Detention Standards (PBNDS). Implemented in 2012, the standards emphasize improved quality of care; enhanced rights; access to legal services and religious

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<sup>3</sup> As representatives from CBP were unable to attend the meeting, there are only limited references here to CBP operations.

opportunities; sexual assault prevention; and improved reporting and response to complaints. In late 2014, the PBNDS is being enforced in several dedicated facilities housing approximately 56 percent of ICE detainees, with plans for ongoing roll-out and review.

- Implementation of a Segregation Directive to ensure that detainees are housed in segregation only when necessary. The Directive provides guidance and enables an interdisciplinary committee to monitor segregation that exceeds a 14-day period.
- Development of a Risk Classification Assessment (RCA) in 2013, which is used to evaluate whether or not detention is appropriate for an individual or potentially harmful in the case of vulnerable populations. If release is found to be appropriate according to the RCA, alternatives to detention may be considered. Since 2013, every individual entering ICE detention undergoes a screening during the initial booking process.
- Issuance of a Transfer Directive in January 2012, minimizing to the extent possible the number of detainees transferred outside areas of responsibility. This initiative is aimed at avoiding instances of detainees being moved away from immediate family and legal counsel and reducing operational costs.
- Establishment of a dedicated hotline for detainees in 2011 to access ICE headquarters when reporting complaints, in order to improve accountability and facilitate individualized change. The system has received thousands of calls to date, and has led to improvements in privacy for detainees in expressing their concerns.
- Finalization of regulations pursuant to the Prison Rape Elimination Act (PREA) to prevent, detect, and respond to sexual abuse and assault in DHS confinement facilities (i.e., detention facilities overseen by ICE and holding facilities used by ICE and CBP).
- Issuance of an Access Policy Directive in September 2011 that establishes procedures for NGOs to tour and visit detention facilities.
- Establishment of an online detainee locator in July 2010, to locate detainees in ICE custody, as well as those who have been released from ICE custody during the preceding 60 days.

## **Challenges and Recommendations on Detention**

Notwithstanding recognition for the efforts that have been undertaken to improve detention conditions and procedures, participants identified challenges and raised constructive recommendations. A number of participants, including those who had visited detention facilities, raised concerns over adverse psychological and physical consequences of detention, noting in particular the impacts on families and ramifications for unaccompanied minors (discussed further below).

***Risk Classification Assessment Tool.*** The RCA is a valuable tool for assessing the need for detention and identifying humanitarian equities and vulnerabilities. Some participants, however, questioned the subjectivity of such a tool in making risk assessments and vulnerability determinations. There was also much encouragement for ICE to re-run the RCA at different stages in the detention and removal process in order to most effectively evaluate an individual's changing circumstances.

***Family Bond Ineligibility.*** Families should preferably be placed in alternatives to detention, with heightened attention paid to those families who are placed in detention. Among the challenges are concerns over the apparent 'no-bond/high-bond' policy for family members from Central America in particular. At the same time there has been an increase in the number of families in detention centers.

***Types of Detention Facilities.*** There are strengths and weaknesses in each of the three types of detention facilities: private contract facilities, ICE-owned facilities, and Intergovernmental Service Agreement Facilities (IGSA). The IGSA's, however, present many challenges and are arguably the most unsatisfactory. Typically, IGSA's are state or county jails built to house incarcerated criminals, and thus may not provide appropriate bed space for immigrant detainees. Moreover, IGSA's are not legally bound to enforce internal detention standards issued by ICE, and, although they are required to conform to these procedures or adapt suitable alternatives, they are harder to monitor. While private contract facilities provide flexibility by offering custodial settings that cater to differential needs and levels of security, some participants expressed concern that they may preclude use of non-detention alternatives, particularly for families and low-risk migrants for whom ATD should be preferred. The ICE-owned facilities are expensive and take time to establish, but may offer more accountability in enforcing detention standards than private or IGSA facilities.

***Location of Detention Facilities.*** Amid efforts by ICE to consolidate facilities, participants also raised concerns with the increasing number of facilities located in isolated areas. Possible problems in rural detention facilities include little access to legal



counsel, as well as lesser community and family support. While cost is the primary reason to locate in remote locations, such as Artesia, authorities and the public in urban areas may also oppose detention facilities. Participants urged for more concrete action to ensure access to quality legal services for all detainees.

***Need for Tailored Standards.*** Participants welcomed the issuance and implementation of a series of internal standards by ICE, but, in contrast, pointed out that CBP lacks a similar set of detailed internal detention standards. Standards tailored to different types of facilities (e.g. those holding migrants less than 72 hours and those holding migrants more than 72 hours) may lead to better protection outcomes. Many participants also argued for legally enforceable standards rather than internal agency standards.

***Orientation Information.*** Detention may compound problems for migrants. Those who experience physical and psychological harm prior to arrival in the United States are particularly vulnerable. They may not be able to fully understand orientation information. A lack of knowledge about their right to claim relief under immigration law has particularly serious ramifications for those with protection needs. An inability to articulate a claim for relief is compounded more generally by the complexity of the process, the conditions of detention; and the need for more appropriate, personalized, and accessible orientation programs and materials in multiple languages.

***Oversight and Accountability.*** While acknowledging steps that have been taken to break down bureaucratic barriers and improve accountability, such as the establishment of the online detainee locator and dedicated call center, some participants called for better oversight at all levels of authority within the agency. Some participants who had visited facilities perceived a fear of retaliation by officials among staff and detainees over raising complaints, advocating for implementation of rights and benefits, or even for talking with visitors to detention facilities. They recommended the creation of an external monitoring body to conduct independent audits and to ensure that standards are upheld in the different types of facilities.

## **Alternatives to Detention**

Despite the positive reforms that have taken place, participants emphasized that detention should not be the principal way to ensure compliance with immigration law. Rather, the aim should be to release as many as can be, while ensuring that those who are apprehended show up for their removal hearings and comply with orders of removal. Only those who pose a risk to their own safety or the safety of others, or who are likely to abscond if they are not detained, should be placed in detention. Participants emphasized that detention should not be used as a deterrence measure to prevent unauthorized migration.

Since 2002, ICE has used an assortment of ATD programs, ranging from physical detention centers with relatively lenient custody restrictions and electronic surveillance, to community based programs designed to monitor immigrants who do not pose a security threat, a danger to themselves or a flight risk. Programs discussed at the meeting include:

- Those that integrate a case management approach, such as the community support program implemented by the Lutheran Immigration and Refugee Service (LIRS) and the United States Conference of Catholic Bishops (USCCB). While this pilot could be regarded as successful, due to limited funding only a small number had benefited by the time of the meeting in October 2014.
- Private contractors have run two programs since 2006 with increasing success. A technology-only program, costing about \$5 daily uses cell phone self-reporting or GPS monitoring. A full-service program combining technology with case management costs about \$7 daily. Studies find that the combination of case management and technology has proved more successful than the technology-only programs.

While intensive ATD service programs are costly and may not yet scale up for a national roll out, their cost is still significantly less than the cost of detention. An evaluation of the merits of ATDs versus detention for targeted populations, nevertheless, requires comprehensive data and evidence on compliance rates, e.g., attendance at hearings and orders of removal. An assessment of release policies found that in 2006 just 20 percent of individuals released under their own recognizance would appear for removal proceedings. But in the most recent privately implemented ATD in 2013, almost all appeared for their initial court hearing and 80 percent for the final hearing. Ways to improve compliance include orientation programs and access to counsel, as those with an immigration attorney are more likely to appear for hearings. Similarly, more sophisticated needs assessments might determine the extent to which individuals eligible for ATD or release require more-or-less intensive case management.

Throughout the discussion of ATD, questions were raised as to why they do not play a more prominent role as a mechanism for executing the objectives of the detention system, particularly when many of those placed in detention do not represent a national security, self-harm, or flight risk. As long as ATD result in compliance and improved conditions, their reduced cost, compared with detention, should favor their use. A combination of technology and various levels of case management tailored to individual needs could be more widely implemented across the country. A philosophical underpinning of the

discussion was the question: Why are ATD, particularly the most restrictive forms, not considered alternative *forms of* detention as opposed to alternatives *to* detention?

## **Unaccompanied Alien Children (UAC)**

Unaccompanied children are encountered by CBP at the borders and ICE in the interior of the country. Depending on where the children are from, both agencies transfer UACs to the ORR to determine the best placement for the children. The challenge of humane treatment of UAC from Mexico, Honduras, Guatemala, and El Salvador begins with their initial encounter, but then centers largely around their care and placement by ORR, or their removal to countries of origin.

The Homeland Security Act of 2002, the Trafficking Victims Protection Reauthorization Act of 2008, and the *Flores Settlement Agreement* of 1997 primarily guide the policy and treatment of minors. UAC from non-contiguous countries—primarily Honduras, Guatemala, and El Salvador—may be detained for a maximum of 72 hours before transfer to ORR. Those from contiguous countries, most pertinently Mexico, are to be screened within 48 hours of apprehension for protection needs and relief. Those with potential claims for relief are transferred to ORR custody. Others may be returned to their countries of origin upon voluntary agreement without further penalty.

According to ORR statistics:

- In FY14, an estimated 60,000 children entered ORR custodial facilities, compared with 25,000 in FY13 and only 400 during FY04, the first year of the agency's responsibilities.
- During the summer months of 2014, some 500 children entered custody each day, prompting the agency to increase the number of beds in its facilities by 3,000 in 15 states across 100 different sites.
- There has been an increase in the number of girls entering the United States, including pregnant and teenage mothers. In FY12, the percentage of males in the UAC population was 77 percent, compared with 73 percent in FY13 and 67 percent in mid-FY14.
- The percentage of children under the age of 14 has increased, from 17 percent in FY12 to almost 25 percent in mid-FY14.

- Roughly 70 percent of unaccompanied minors are housed in sheltered care facilities; 20 percent are in transitional foster care facilities until reunification with a family member; 10 percent, for whom reunification is not an option, are in long-term foster care facilities; 6 percent, considered to be a high risk of flight, are in staff secure facilities; 2 percent are housed in juvenile detention facilities with review every 30 days; and the remaining 2 percent are placed in residential treatment facilities to address mental health disorders before release/return.

As part of custodial responsibilities, there are medical and mental health assessments, screens for trafficking or fear of persecution, provides religious and recreational services, facilitates access to legal services, and seeks release and reunification with family members. ORR's coordination of release and reunification of UAC to family members or other sponsors has undergone significant change over the years. Some 91 percent of children are released to family members or other sponsors and fewer children are returning home to their home countries.

Participants acknowledged that overall conditions in custodial facilities have improved under ORR. They commended the introduction of ORR trainings on LGBT issues, as well as child abuse and neglect. Given the recent increase in beds and the rapid expansion of detention space to keep pace with the rise in UAC from Central America, however, many participants expressed concern over conditions in custodial facilities. There is a lack of comprehensive standards that incorporate the best interest of the child principle. Institutional delays have prevented the complete implementation of the PREA, despite a Congressional mandate in 2013 to implement regulations. Recommendations for improving conditions include: the immediate implementation of PREA; the formulation and application of more extensive standards; the creation of an independent monitoring body; and improved access for child advocates visiting facilities.

In light of the recent surge in UAC and the attendant need to free up space, ORR has focused on reducing the average amount of time spent in ORR custody from 70-75 days to 30-35 days. Participants commended the reduction of time spent in ORR custody, but expressed concerns over the rigor with which family members and other sponsors are screened for suitability after release. Notwithstanding the complexities associated with ongoing monitoring of family members or other sponsors, the majority of whom are undocumented, some participants believe more comprehensive post-release services are necessary. It may be advisable to introduce individual case management for children in post-release situations, potentially by community-based care providers with training, and established trust with the undocumented population.

## **Other Challenges with Unaccompanied Children**

Overall, there is a pressing need to better manage pressures that drive migration in the region. Without such action, participants acknowledged that UAC would continue to risk their lives to enter the United States. UAC in the United States should be held in the least restrictive setting possible; and steps should be taken to mitigate both the physical and psychological consequences of time spent in detention. In many ways, the current model upon which facilities are based is still relatively penal in nature, which may compound the stresses of child detainees.

***Customs and Border Enforcement Facilities.*** The CBP has seen increased involvement with UACs arriving at the border. Recent media reports have highlighted inadequate conditions in CBP facilities, particularly since their facilities tend to lack comprehensive standards specific to the protection of children. Participants called for heightened accountability and oversight to ensure adequate treatment of children detained by CBP before they are transferred to ORR custody.

***Children with Protection Concerns.*** The President has announced his intention to process children in-country as refugees in Central America. At the same time, of the overall 70,000 refugee slots allocated for FY15, 4,000 will be designated for refugees originating from Latin America and the Caribbean. A further 2,000 slots are not allocated to any particular region, but the U.S. Department of States has authorization to accept a total of 2,000 individuals from Cuba, Eastern Europe and the Baltics, Iraq, Honduras, Guatemala and El Salvador. While encouraging, some participants argued that the numbers for in-country processing in particular are inadequate to meet the need and they encouraged PRM to consider extending processing to other vulnerable individuals in emergency situations with family members residing in the United States.

***Addressing Root Causes and Improving Management.*** There are high and increasing levels of violence in Honduras, El Salvador, Guatemala, and Mexico. Many participants argued for appropriate and adequate reintegration for those returned from the United States to their homes, emphasizing that otherwise those individuals may be harmed on return and/or attempt re-entry into the United States. Addressing the causes of violence is the best long-run solution. The Department of State's Bureaus for Western Hemisphere Affairs (WHA) and Population, Refugees and Migration (PRM), in coordination with the US Agency for International Development (USAID), are focusing on the challenges of prosperity, security and governance. They operate within the parameters of the Central American Regional Security Initiative (CARSI) which is funding training of both child welfare and migration officers in Central America. Training includes how to screen and identify individuals with protection concerns, including those at risk of trafficking or

smuggling. Among other programs, CARSI also provides training for law enforcement officers at the local level to improve policing mechanisms; and to foster greater connectivity and trust within communities.

## **THE STATE OF PLAY IN MIGRANT REMOVALS**

Since its inception in 2003, DHS has removed about 3.7 million non-citizens from the United States. Some key statistics were discussed from a recent report on formal removals, published by the Migration Policy Institute.<sup>4</sup>

- Interior removals of non-criminals fell sharply under the Obama administration, from 77,000 in FY 2009 to 17,000 in FY 2013.
  - In FY 2003-2013, 91 percent of all removals were from Mexico or Central America (El Salvador, Guatemala, and Honduras), whereas about 73 percent of all unauthorized migrants are from these countries.
  - Men constitute 91 percent of all removals, although they account for 53 percent of the overall unauthorized population.
- Interior removals of criminals have increased; they made up 80 percent of interior removals by FY11-FY13.
  - In FY 2003-2013 there were 1.5 million criminal removals. Immigration crimes accounted for 18 percent; FBI Part 1 crimes for 15 percent (homicide, aggravated assault and burglary); FBI Part 2 crimes 14 percent (violent offenses); and FBI Part 2 crimes another 14 percent (nonviolent offenses).
- In FY 2003-2013, 95 percent of removals fell into one or more of DHS enforcement priority categories, which are long-standing and broadly defined.
  - There would have been about 191,000 fewer deportations over this period had DHS exercised discretion and not removed those not falling into the enforcement priorities.

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<sup>4</sup> Marc Rosenblum and Kristin McCabe, 2014. "Deportation and Discretion: Reviewing the Record and Options for Change," Migration Policy Institute, <http://www.migrationpolicy.org/research/deportation-and-discretion-reviewing-record-and-options-change>

According to ICE statistics on removals for FY13:

- ICE conducted a total of 368,644 removals of which 98 percent met one or more of ICE's stated civil immigration enforcement priorities.
- About 59 percent of all removals (216,810) had been previously convicted of a crime; 110,115 individuals with criminal convictions were removed from the interior, compared with 106,695 apprehended at the border.
- 84 percent of those 151,834 removals who had no criminal conviction were apprehended at the border while attempting unlawful entry; 95 percent met one of ICE's immigration enforcement priorities.
- About 95 percent of individuals apprehended at the border were apprehended by Border Patrol agents and then processed, detained and removed. The CBP apprehended the rest at legal ports of entry.

In spite of the high levels of removals, there is considerable tension in the public's perception. While President Obama has earned the title of 'Deporter-in-Chief' among some advocates, there is parallel public sentiment that the administration's efforts to curb immigration are inadequate. Public attitudes about the scope of enforcement measures coincide with misperceptions about immigration in general. The Transatlantic Trends Immigration Survey, for example, found that US respondents thought that 35 percent of population was foreign born although the actual share was just 14 percent.<sup>5</sup>

## **Reform of Removal**

While acknowledging that reforms for a better functioning removal system has been difficult given the current political landscape, participants noted the following examples of incremental reform:

- While removals have increased under this administration, there has been a notable push to place efforts on removing individuals in high-priority areas of civil immigration enforcement.<sup>6</sup>

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<sup>5</sup> High estimates are also found for other sampled countries including Canada, France, Germany, Italy and Spain. See German Marshall Fund, 2010. "Transatlantic Trends: Immigration 2010," [http://trends.gmfus.org/files/archived/immigration/doc/TTI2010\\_English\\_Key.pdf](http://trends.gmfus.org/files/archived/immigration/doc/TTI2010_English_Key.pdf)

<sup>6</sup> Defined as national security, public safety and border security. See U.S. Immigration and Customs Service, 2011. "Memorandum on Civil Immigration Enforcement: Priorities for Apprehension, Detention and Removal of Aliens," March 20, <http://www.ice.gov/doclib/news/releases/2011/110302washingtondc.pdf>

- In March 2014, President Obama instructed Homeland Secretary Jeh Johnson to review deportation practices, working within the parameters of the law to find more humane ways to implement immigration enforcement.
- ICE, in coordination with the Department of State, has signed memorandum agreements with countries of origin. In August 2014, for example, ICE signed an agreement with the Honduran National Police to share immigration and criminal histories of Honduran nationals who are being removed from the United States.

Given the volume of removals and their associated individual and national costs, participants discussed and argued for alternative options other than removals when appropriate. Alternatives to removal fall in the broad categories of defensive action (stay of removal) or affirmative action (legalization). The high costs of adjudication and removal argues for discretion in using enforcement resources strategically to remove only those who pose a security threat.<sup>7</sup>

Participants acknowledged recent attempts to improve the implementation of prosecutorial discretion according to priorities for removal, but generally recognized that it was not as effective as it could be. As noted by one participant, most unauthorized immigrants who enter the United States do not enter the immigration enforcement system and thus do not directly benefit from prosecutorial discretion. Moreover, some participants argued that stays of removal only allow individuals to be resident without a legal status, prolonging individual insecurity and infringing on basic rights. Because there are few viable alternatives to removal, other than suspending or cancelling an order of removal, some participants argued that the goal should be to grant lawful status to certain populations. Questions remained, however, as to what individual criteria should take priority and how to ensure sustained success. A few participants argued for creating an alternative similar to the Deferred Action for Childhood Arrivals (DACA) program, but one that targets a larger segment of the undocumented population. Others expressed concern that such executive action could complicate future legislative solutions. One participant suggested updating the Registry Date to provide a path to legal status for individuals who have resided in the United State for many years. The current Registry Date, last updated in the 1986 Immigration Reform and Control Act, is January 1, 1972.

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<sup>7</sup> After this roundtable, President Obama announced on November 20th a series of executive actions with regard to immigration including deferring deportations for up to 5 million to stay and work legally. See Department of Homeland Security, 2014. "Fixing Our Broken Immigration System Through Executive Action: Key Facts," November 21, <http://www.dhs.gov/immigration-action>



## Removal Challenges

Participants observed that the United States is experiencing a number of challenges with the current system of removals. Salient challenges and recommendations were discussed, some of which are highlighted below.

***Underfunding of the Immigration Court System.*** Immigration courts remain chronically underfunded, particularly so in comparison to increased funding given to other enforcement activities. This has led to a court system that is unable to keep pace with heightened demand and extensive backlogs of over 350,000 pending cases as of September 2014, according to the Transactional Records Access Clearinghouse (TRAC) on immigration. There are lengthy delays in adjudication, particularly for those on the non-detained docket, as the detained docket is prioritized. Some unauthorized migrants may benefit from the delays and remain longer in the country than they should, but those with legitimate grounds for relief from removal, such as many asylum seekers, remain in limbo for unnecessarily long periods. Participants called for increased funding for immigration judges and the immigration court system in order to stabilize and reduce the growing backlog, promote processing of persons in both the detained and non-detained dockets, improve due process safeguards, and to facilitate more effective operation of the detention and removal system as a whole. There is a need for systemic reform to address flaws in the current immigration system. Even increased allocation of resources for immigration courts and other administrative interventions, given the size of the population and incoming stream of undocumented aliens, renders it impractical to expect all cases to appear before an immigration judge.

***Administrative Removals and Due Process Concerns.*** There has been a significant increase in DHS administered removals and a widening gap between these and removal orders issued by immigration judges. Given this state of affairs and the large volume of removals, some participants argued that the administration's emphasis on deterrence and focus on carrying out removals has compromised due process safeguards. Some also questioned the extent to which these mechanisms undermined access to relief for those with solid grounds to claim various forms of protection. Given the emphasis on enforcement, the corresponding shift towards CBP for implementing removals and the growth in CBP personnel at the border, most participants identified a need for greater scrutiny and oversight of administrative and other summary removals—or in the alternative, reform or overhaul of some of these mechanisms—and for greater accountability for those undertaking them.

***Conduct of Credible Fear (Asylum) Interviews.*** Participants expressed concern regarding the quality and circumstances under which referrals for credible fear interviews

were being carried out by CBP officials at the border. Questions were raised about the training provided to Border Patrol officers who encounter those who may have credible fear of return. Concerns were also expressed about recent changes in the standards for approving credible fear claims. In noting that the credible fear grant rates had decreased, some participants claimed that those in need of protection are not being effectively identified. Many of those removed who have genuine and credible fears of returning to their countries of origin may well experience dangers if returned precipitously. Others may inevitably re-make the journey back to the United States. At the same time, many asylum officers have been re-assigned to conduct credible fear interviews, leading to backlogs in regular asylum adjudications. One way to improve the quality of credible fear interviews, without risking the efficiency of the regular asylum system, is to increase funding for asylum officers and deploy them to targeted locations.

***Right to Access to Counsel.*** During the roundtable discussion concerns over the right to, and access to, competent and ethical counsel came up repeatedly. Some participants, speaking from experience, emphasized that many individuals on the non-detained docket encounter lawyers with inadequate experience or training, while others in mandatory detention, particularly those in expedited removal proceedings at the border, lack access to any legal counsel. Acknowledging that there had been some improvements on access to quality counsel at the state level, a number of participants argued that access to counsel remains problematic. They recommended a legally mandated right to counsel, noting a high correlation between legal representation and success at removal hearings. A number of participants pointed out that those in criminal proceedings have a Constitutional right to counsel, not shared by immigrants in civil removal proceedings, although removal is a form of punishment that may be very severe for some returned to dangerous situations in their home countries.

***Secure Communities and Removable Aliens.*** The Secure Communities program generates considerable debate over the program's utility and impact. Some participants argued that local law enforcement authorities designed to protect communities should not be tasked with immigration enforcement. There is a general perception among the undocumented that if they are arrested by local or state police, they may then be detained by ICE. This can increase distrust of police among the non-citizen population and deter community cooperation. Some argued that the program is too dependent on local police who are not adequately trained in immigration enforcement. Yet other participants argued that Secure Communities is a necessary and effective tool to implementing immigration enforcement in the interior. There was agreement over the need to clarify priorities and procedures among ICE and local law enforcement, as well as discussion over the

possibility of shifting Secure Communities to focus on immigrants who are criminals within the prison system.<sup>8</sup>

***Removal of Criminal Aliens and Reintegration.*** To a certain extent, participants attributed the proliferation of gang violence in Central American countries and the subsequent rise in UACs fleeing insecurity, to the removal of criminal aliens from the United States without due consideration and implementation of adequate safeguards to address such implications. Accordingly, participants called for greater interventions to address root causes of flight and also for more targeted efforts to ensure those who are removed or returned are able to reintegrate without turning to criminal activity.

## CONCLUSIONS AND RECOMMENDATIONS

In conclusion, participants viewed many recent reforms in detention and removal with favor, but offered constructive advice to improve the current state of play. These conclusions are as follows:

### DETENTION

- ICE's RCA is a valuable tool for assessing humanitarian equities and vulnerabilities. It could be used at different stages in detention and removal to evaluate an individual's changing circumstances. It should also be adapted where necessary and used by CBP.
- There should be a major expansion in the use of ATD, which range from centers with relatively lenient custody to electronic surveillance and community based programs. These have shown success, particularly when coupled with case management systems, and are significantly less costly than traditional detention.
- Families should be placed preferably in ATD, while the treatment of those placed in detention requires heightened attention. Detention should not be used as a deterrence measure, especially when applied to children.
- Use of IGSA facilities should be curtailed to the extent possible. Of the private contract facilities, ICE-owned facilities, and IGSA, the latter are arguably the least satisfactory. ICE-owned facilities are expensive, but may offer more accountability.

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<sup>8</sup> As part of his November 20<sup>th</sup> executive orders on immigration President Obama cancelled the Secure Communities program and replaced it with the Priority Enforcement Program to focus on felons.

- As ICE strives to consolidate facilities, some facilities are placed in isolated areas hindering access to legal counsel or community and family support. Participants urged action to ensure access to quality legal services for all detainees.
- The implementation of internal standards by ICE is welcome. In contrast CBP lacks internal detention standards and should develop them, as ICE did, in consultation with stakeholders.
- There should be more appropriate, personalized, and accessible orientation programs and materials, as well as services for migrants who experience physical and psychological harm prior to arrival.
- External monitoring of the impact of recent reforms, such as the detainee locator and dedicated call center, would be useful in calling attention to the strengths, weaknesses and need for further reform of these initiatives.
- Standards required under the PREA should be implemented by all agencies overseeing detention or custodial facilities without further delays
- The high and increasing levels of violence in Central America have led to mass detention of migrants from this region. Addressing the root causes of violence is the best long-run solution to this situation.

## **REMOVAL**

- The exercise of prosecutorial discretion should remain an important component of removal policies and practices.
- Immigration courts are underfunded and, with heightened demand, there are extensive backlogs and delays. Participants called for increased funding for immigration judges and the immigration court system.
- Decreasing shares of removals go through the immigration court, generating concern about due process safeguards. There is a need for greater scrutiny and oversight of administrative and other summary removals—or in the alternative, reform or overhaul of these mechanisms—and for greater accountability.
- The credible fear determination process needs to be monitored and assessed systematically to ensure migrants with legitimate reasons to fear return are not summarily deported to their home countries.
- Migrants should have access to effective legal counsel in removal proceedings.
- As Secure Communities remains a controversial program with strong support and opposition, efforts to clarify priorities and procedures are needed.

- Alternatives to removal for those with long duration of stay, equities such as family members, or fear of return should be considered. In the absence of legislative support for legalization, defensive measures such as stays of removal may well be the only way to address the needs of these individuals.
- Removal policies should aim to facilitate successful reintegration of returnees into their home countries.

**APPENDIX:**  
**ROUNDTABLE AGENDA AND LIST OF EXPERTS**



*Institute for the Study of International Migration,  
Georgetown University*

## **Detention and Removal: What Now and What Next?**

**October 6<sup>th</sup> & 7<sup>th</sup> 2014**  
Room C103  
School of Continuing Studies  
Georgetown University (Chinatown Campus)  
640 Massachusetts Avenue NW  
Washington D.C. 20001

Please note that the meeting will follow Chatham House Rules.

### **ROUNDTABLE AGENDA**

The number of migrants detained or removed from the United States has reached historic proportions creating administrative, jurisdictional, legal and humanitarian challenges. The migrants include those convicted of criminal offenses, as well as those who have violated U.S. immigration laws. Some of those in detention and removal proceedings are found in the interior while others are apprehended close to our borders. Many are adults, but the surge of families and unaccompanied minors apprehended at the border presents unique challenges. Events on the ground could, and almost certainly will, lead to policy changes between the time the invitations for this roundtable are sent out and the convening of academics, policymakers and practitioners from government and non-governmental institutions. In this context, we plan to debate solutions to both standing and new challenges, examining the capacity, conditions, and alternatives to detention and the efficiency and impacts of current removal policies.

### **MONDAY OCTOBER 6<sup>TH</sup>**

**8:30am – 9:00am Continental Breakfast**

**9:00am – 9:15am Introductions**

**9:15am – 10:45am State of Play: Detention**

What are the numbers and demographics of detainees, as well as, the distribution of facilities for various types of detention? What are the implications of recent developments for policy and practice? What is working, what is not working and what issues should be given priority?

**11:00am – 12:30pm Conditions in Detention**

What are the challenges for the detention of adults or families? How do these vary by type of facility (DHS, Bureau of Prisons, private, state and local jails)? What are the standards regarding

conditions in detention, how are they set, how are they monitored, what sanctions are applied if there are violations, and what remedies are in place? What can be done to improve these facilities and who is responsible?

**12:30pm – 1:30pm Working Lunch**

**1:30pm – 3:00pm Alternatives to Detention**

Given the financial and human costs of detention, what are alternatives to detention (ATD)? What are the costs and benefits of ATDs? Which migrant groups might benefit from ATDs? What lessons are there from other countries? Based on practice and research are there ATDs that warrant more investigation?

**3:15pm – 4:45pm Unaccompanied Children**

What challenges are there with the transfer from DHS detention to ORR custody? What are the forms of custody in secure facilities and release to family, group homes or foster care? How are decisions made? How is the best interest of the child integrated into these decisions? What are the conditions and issues encountered in different forms of custody?

**4:45 – 5:00pm Concluding Remarks**

**TUESDAY OCTOBER 7<sup>TH</sup>**

**8:30am – 9:00am Continental Breakfast**

**9:00am – 10:30am State of Play: Removals**

There have been some 4.5 million removals since 1996, increasing from about 70,000 in that year to 369,000 in 2013. Who is removed from the interior or the border? Are those who have violated criminal laws and others who are removed meeting the agency's civil immigration enforcement priorities? What issues arise with expedited deportations and other forms of removal? What is the capacity for adjudication within the Executive Officer for Immigration Review (EOIR) and the federal judiciary?

**10:45am – 12:15pm Strengths and Weaknesses of the Removal System**

While the current removal system appears to have expanded capacity, what can be done to prevent backlogs and delays while still ensuring due process? How have the Secure Communities program and the 287(g) provision impacted removals? Which changes would reduce backlogs in the immigration court and federal judiciary? What latitude should there be for prosecutorial discretion? What are the impacts of removals of unauthorized migrants on families and unaccompanied minors? What are the impacts on countries of origin, particularly in the context of the removal of those who committed criminal offenses?

**12:15pm – 1:15pm Working Lunch**

**1:15pm – 2:30pm Alternatives to Removal**

What are the implications of alternatives to removal such as deferred action, parole or expanded prosecutorial discretion among others? How have they been applied and for which migrant groups? What are the strengths/weaknesses and cost/benefits of each alternative? To whom should the alternatives apply and for what period of time?

**2:30pm – 3:00pm Wrap-Up**



## LIST OF PARTICIPANTS

1. Eleanor Acer Human Rights First
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3. Kevin Appleby United States Conference of Catholic Bishops
4. Michelle Brané Women's Refugee Commission
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