

CHAPTER 1
INTRODUCTION: IMMIGRATION DETENTION SYSTEM

This chapter includes:

§ 1.1	Introduction to Immigration Detention	1
§ 1.2	How Immigration Detention Affects a Case.....	5
§ 1.3	Purpose of This Manual	6
§ 1.4	Contents of This Manual	7

§ 1.1 Introduction to Immigration Detention

The detention of immigrants in the United States began in the 1890s at Ellis Island Immigration Station in New Jersey and has continued in different configurations, targeting different populations, through the present day.¹ Currently, immigration detention exists across the country under the U.S. Department of Homeland Security (DHS) policy of detaining noncitizens in federal or contracted jails during their removal proceedings. Most of these detention facilities are owned or operated by for-profit corporations. While the states of Texas, Louisiana, Arizona, Georgia, and California house the largest number of detained people today, almost all U.S. states and territories have at least a facility for immigration detention.²

Prior to 1996, immigration detention was limited in scope.³ But with the growth of the U.S. prison system in the 1980s and 1990s, contemporary immigration detention began to expand in turn.⁴ Indeed, the immigration detention system heavily tracks the troubling growth and trends of incarceration in the criminal system. In 1996, Congress enacted legislation that dramatically increased the use of immigration detention. The Antiterrorism and Effective Death Penalty Act (AEDPA) and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) expanded mandatory detention without bond to large categories of noncitizens.⁵ These laws also subjected any noncitizen, including lawful permanent residents, to detention and deportation.

After the attacks of September 11, 2001, the U.S. Immigration and Naturalization Service (INS) was divided into Immigration and Customs Enforcement (ICE), Customs and Border Protection (CBP), and U.S. Citizenship and Immigration Services (USCIS). These agencies moved from the Department of Justice (DOJ) to the newly created Department of Homeland Security. At that

¹ Freedom for Immigrants, *A Short History of Immigration Detention*, <https://www.freedomforimmigrants.org/detention-timeline>.

² Transactional Records Access Clearinghouse (TRAC), *Detention Facilities Average Daily Population*, <https://trac.syr.edu/immigration/detentionstats/facilities.html>.

³ See, e.g., Detention Watch Network, *Immigration Detention 101*, <https://www.detentionwatchnetwork.org/issues/detention-101>.

⁴ *Id.*

⁵ Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (Apr. 24, 1996); Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208, 110 Stat. 3009-546 (Sept. 30, 1996).

time, the U.S. immigration detention system held about 20,000 people per day.⁶ Since then, immigration detention in the United States has steadily increased, with the largest detained population occurring under the Trump administration.⁷ In August 2019, immigration detention facilities collectively held more than 56,000 people per day at times, with more than 200 facilities nationwide by 2020.⁸

When the COVID-19 pandemic reached the United States in early 2020, the Trump administration was forced to detain fewer people and release many from custody pursuant to court orders.⁹ By November 2020, roughly 16,000 noncitizens were detained per day, the fewest in more than two decades.¹⁰ Nonetheless, from April to August 2020, people in ICE detention were 13 times more likely to contract COVID-19 than the average U.S. resident.¹¹

Since taking office in early 2021, President Biden has signed several executive orders reversing many Trump administration policies, but not the use of private prisons for immigration detention or reducing the existence of prolonged detention in the immigration context. Instead, the rising number of detained people (up to approximately 36,300 as of August 2024¹²) and prioritization of private prison companies¹³ over migrant lives illustrate the Biden-Harris administration's backsliding on immigration detention issues:

Regardless of the administration, advocates have continued to work proactively to reduce immigrant detention in the United States, with the long-term goal to eventually abolish it.¹⁴

A. Detention profiteers

A handful of private for-profit prison corporations are deeply invested in immigration detention and spend considerable resources on advocacy to defend and expand ICE detention. As of January 2020, over 80 percent of people in ICE detention were held in facilities owned or

⁶ Congressional Research Service, *Immigration-Related Detention: Current Legislative Issues* (Jan. 12, 2012), <https://fas.org/irp/crs/RL32369.pdf>.

⁷ TRAC, *ICE Detainees*, (Part A. ICE Detainees by Date and Arresting Authority), https://trac.syr.edu/immigration/detentionstats/pop_agen_table.html.

⁸ Eunice Hyunhye Cho et al., *Justice-Free Zones: U.S. Immigration Detention Under the Trump Administration* (Apr. 2020), <https://www.aclu.org/report/justice-free-zones-us-immigration-detention-under-trump-administration>.

⁹ Brennan Center, *Immigration Detention and Covid-19* (Mar. 27, 2020), <https://www.brennancenter.org/our-work/research-reports/immigration-detention-and-covid-19>.

¹⁰ TRAC, *ICE Detainees* (Part A. ICE Detainees by Date and Arresting Authority), https://trac.syr.edu/immigration/detentionstats/pop_agen_table.html.

¹¹ Tahirih Justice Center, *Institutional Injustice: The Impact of the COVID-19 Pandemic on Immigration Detention* (July 2021), <https://www.tahirih.org/pubs/institutional-injustice/>.

¹² TRAC, *ICE Detainees*, (Part A. ICE Detainees by Date and Arresting Authority), https://trac.syr.edu/immigration/detentionstats/pop_agen_table.html.

¹³ See, e.g., Jose Olivares, *The Appeal*, *Investigators Wanted to Close an Abusive ICE Facility. Biden's Administration Extended Its Contract* (Jul 2024), <https://theappeal.org/biden-admin-extended-contract-abusive-ice-detention-center/>.

¹⁴ Freedom for Immigrants, *Why Freedom for Immigrants believes in abolishing immigration detention*, <https://www.freedomforimmigrants.org/why-abolition>.

managed by private prison companies.¹⁵ The private prison industry has spent more than \$25 million lobbying lawmakers and federal agencies over the past ten years.¹⁶ CoreCivic and the GEO Group, the two largest companies, receive more than half of the ICE detention contracts that go to the private prison industry, and over recent years ICE contracts have amounted to 25 percent of revenues for both CoreCivic and the GEO Group.¹⁷

Private prison corporations and ICE look for cash-strapped counties and rural regions to pitch new contracts and new facilities, and they fight aggressively against state and local laws that seek to limit immigration detention. These companies also frequently repurpose state or federal criminal system prisons that have closed, for use in immigration detention.¹⁸ These same companies, particularly GEO, are also the same private actors securing federal contracts for ankle monitors, which many advocates refer to as electronic incarceration.

In January 2021, President Biden issued an executive order aiming to end the use of private prisons by the U.S. Department of Justice (i.e., the Bureau of Prisons).¹⁹ However, the order did not extend to DHS or immigration detention. Instead, the Biden administration elected to continue its legal challenge to California and New Jersey’s state law restricting the use of private prisons,²⁰ and to continue seeking new facility contracts with private prison companies.

Nevertheless, it is worthwhile to note that non-private, government-run facilities are also wrought with serious health and safety concerns and are also motivated by profits. For example, county jails which rent out bed space to ICE pursue these contracts to increase their incarceration budget.

From an abolitionist perspective, the goal is to move away from detention in *all* its forms.

B. Abolition

As the movement against mass incarceration has gained steam, decarceration efforts in the immigrant justice space have grown as well. Across the country, advocates have fought to close detention centers and free the people inside. The leadership and activism of people detained by

¹⁵ Jesse Franzblau, “National Immigrant Justice Center: Phase out of Private Prisons Must Extend to Immigration Detention System,” (Jan. 28, 2021), <https://immigrantjustice.org/staff/blog/phase-out-private-prisons-must-extend-immigration-detention-system>.

¹⁶ *Id.*

¹⁷ ACLU, NIJC, and HRW, *Justice-Free Zones: U.S. Immigration Detention Under the Trump Administration*, (Apr. 2020), https://immigrantjustice.org/sites/default/files/content-type/research-item/documents/2020-04/Justice-Free%20Zones_Immigrant_Detention_Report_ACLU-HRW-NIJC_April-2020.pdf.

¹⁸ ILRC and DWN, *Carceral Carousel*, (May 23, 2023), <https://www.ilrc.org/resources/carceral-carousel>.

¹⁹ Claire Hansen, “Biden’s Order Aiming to End Use of Private Prisons Excludes Immigrant Detention Facilities,” *US News and World Report*, Jan. 26, 2021, <https://www.usnews.com/news/national-news/articles/2021-01-26/bidens-order-aiming-to-end-use-of-private-prisons-excludes-immigrant-detention-facilities>.

²⁰ See *United States v. California*, No. 20-56304 (9th Cir. 2021) (striking down California’s “People not Profit,” law known as A.B. 32, codified at Cal. Pen. Code §§ 5003.1, 9500 et. seq.); *CoreCivic, Inc. v. Murphy*, No. 23-967 (D.N.J. Aug. 29, 2023) (Biden-Harris administration filed a statement of interest in this case against New Jersey’s private prison ban: N.J. Stat. § 30:4-8.15).

ICE and CBP, in organizing actions and hunger strikes and lawsuits, is pivotal to challenging the detention system.

For many years now, immigrant communities and advocates have fought to abolish the need for an immigration detention system. In July of 2018, these efforts accelerated as a fervor to abolish ICE erupted throughout the nation, when images of children in cages began to flood social media feeds and circulate through the 24/7 news cycle. Activists occupied public space outside ICE offices in cities such as Portland, San Francisco, Los Angeles, and New York to demand the immediate release of the children and their families, most of which were Central American refugees fleeing economic and political repression. Hundreds of thousands filled the streets demanding that these migrant families be reunited and released, and for the federal government to abolish ICE itself, which in its current evolution had been in operation for a little over 15 years at the time.

While legal measures to shrink or eliminate ICE itself have not yet resulted in concrete policy measures, organizing against ICE's detention centers has grown. As communities fight to close detention centers, they also fight for the release of all those detained inside, and for continuing legal and social support for those freed. These demands are frequently framed in the "divest/invest" framework, where advocates ask to divest government resources from detention, and instead invest in community-based social services such as housing and mental health services.

Advances in the fight for abolition are not possible without the leadership of incarcerated people who have organized themselves. It has been their courage and vision that ignites the outside organizing and advocacy. Organizers who are incarcerated must always play a leading role in guiding the strategy for both rapid-response actions and long-term fights.

As of 2021, several states have now passed laws banning immigration detention or private prisons. As mentioned earlier, the Biden administration shamefully sided with private prison companies in federal court and blocked AB 32 (2019) in California and AB 5207 (2021) in New Jersey.

- In 2017: California outlawed future detention contracts with ICE or extension or expansion of existing contracts, as well as contracts with private prisons companies for immigration detention, and in 2019, California enacted a law to close and prevent all private prison operations, including immigration detention.
- In 2019: Illinois banned private prisons, including civil detention.
- In 2021: Washington banned for-profit detention centers.
- In 2021: New Jersey banned new detention contracts with ICE.

Importantly, these laws and other national efforts to pass federal bills to scale back on detention, and efforts to defund DHS, all have the long-term goal of abolition. Abolition in this context means shifting away entirely from immigration detention in all its forms, regardless of whether the contract is private or government-run and including electronic incarceration. It means divesting from detention and instead freeing people so that they can fight their immigration cases from the safety of their communities, and for those who do not yet have a safe place like recently arrived asylum-seekers, investing in community-based programs instead of ankle monitors and

constant surveillance.²¹ The modern-day immigration detention system is an outgrowth of mass incarceration. An end to this unnecessary system is possible.

§ 1.2 How Immigration Detention Affects a Case

Few noncitizen populations are excluded from immigration detention, as ICE has authority and discretion to detain any immigrant charged with an immigration violation.²² Immigrants in detention include adults, children, undocumented immigrants, immigrants with lawful status, survivors of torture, asylum seekers, refugees, and other vulnerable groups. Most immigrants held in detention have no criminal record.²³ Those with past convictions endure a second punishment in immigration detention after completing their criminal sentences.

Once ICE detains someone, if the person is not subject to mandatory detention, ICE will determine a bond amount based on whether they perceive the person to be a “flight risk” (i.e., the likelihood of the person appearing for their removal hearings) or a “danger to the community” if they were released (sometimes referred to as “threat to public safety”).²⁴

If you are representing a client who is detained by ICE, your priority should be to get them released from detention through bond or other measures. Abuses in detention are common and confinement takes a psychological, and sometimes physical, toll on people.²⁵ The treatment of detained people is governed by a national set of Performance-Based National Detention Standards.²⁶ However, the standards are not binding and adherence to them may vary. Watchdog reports on immigration detention detail a litany of abuses, from inadequate health care, neglect, and physical and sexual abuse to inability to visit with family members, problems with phone access, and interference with access to counsel.²⁷

Aside from the psychological and financial impacts of detention on your client and their family, detention will also make the case much more difficult to litigate. It is harder to reach a detained client on short notice, difficult to get forms and applications signed, and the client is much less able to do important work on the case, such as gathering evidence or letters of support, because they are imprisoned. Also, the immigration court puts the cases of people in detention on a fast-track system. The person’s removal hearings and appeals will come up rapidly. This gives you less time to prepare, which can affect the outcome of the case.

²¹ For more on alternatives to detention, see § 5.5.

²² 8 CFR § 236.1(b).

²³ TRAC, *Immigration Detention Quick Facts*, <https://trac.syr.edu/immigration/quickfacts/>.

²⁴ 8 CFR § 236.1(c)(3).

²⁵ See, e.g., American Oversight, *Conditions in Migrant Detention Centers*, <https://www.americanoversight.org/investigation/conditions-in-migrant-detention-centers>.

²⁶ The Performance-Based National Detention Standards, most recently revised in 2016, are available at U.S. Immigration and Customs Enforcement, “2011 Operations Manual ICE Performance-Based National Detention Standards,” <https://www.ice.gov/detention-standards/2011>. Note that different facilities may adhere to different versions of the detention standards. Advocates should refer to the contract of a given facility to see which version of the standards govern.

²⁷ For more information regarding conditions of confinement, see Detention Watch Network, *Detention Oversight*, <https://www.detentionwatchnetwork.org/issues/detention-oversight>.

If the bond amount set by ICE is too high for your client to pay, or if ICE did not provide a bond, the detained individual can request a “bond redetermination” hearing before an immigration judge.²⁸ During that hearing, the judge will make an independent decision on the flight risk and public safety questions and set a bond that could be lower, higher, or the same as the one initially set by ICE. By statute, the immigration judge must set a bond that is at least \$1,500.²⁹ But they can order the release of the detained individual on their “own recognizance” (release with no payment of bond) which is referred to in the statute as “conditional parole”.³⁰ The judge may also deny bond altogether if they determine that the risk of flight or danger to the community is too high. In the case of bond denial or a bond that is too high by the immigration judge, the detained person can appeal to the Board of Immigration Appeals (BIA).

If ICE denied bond because they determined your client was subject to mandatory detention, you can challenge this before an immigration judge and the BIA as well.³¹

If you can bond your client out of detention or advocate successfully for an alternative to detention for your client, your case strategy can change significantly. First, the case slows down tremendously, and the case is moved to the non-detained docket. You will now have an opportunity to build a case with your client and their family members and other supporters outside of the time and location constraints of detention. For example, it is now possible to have family meetings. Your client can also seek evidence to support their case, and they can start to build positive equities by obtaining employment or taking steps toward rehabilitation. The passage of time can help strengthen your client’s immigration case and might lead to new avenues of relief. Ultimately, your client will have more time to prepare and is more likely to have more people to support them when it is time to present their case before the court.

§ 1.3 Purpose of This Manual

This manual is designed to assist attorneys, DOJ-accredited representatives, paralegals, volunteers, and other staff supporting detained immigrants, including but not limited to those working as immigration advocates at nonprofit agencies and private law firms, whether on a regular or pro bono basis. We believe that practitioners with varying levels of experience representing or working in solidarity with detained noncitizens will find this manual useful.

Please note that this manual focuses on *adult* detention, although **Chapter 3** is dedicated to *youth* detention specifically, which reviews how youth may find themselves in detention and covers some of the detention and bond practices, procedures, and forms of relief applicable to detained juveniles in immigration proceedings.³²

Immigration detention poses special challenges in removal defense. We hope this resource will assist you in zealously advocating on behalf of detained immigrants and getting as many clients out of this system as possible.

²⁸ 8 CFR § 1003.19.

²⁹ INA § 236(a)(2)(A).

³⁰ INA § 236(a)(2)(B).

³¹ See *Matter of Joseph*, 22 I&N Dec. 799 (BIA 1999); see also *Zadvydas v. Davis*, 533 U.S. 678 (2001).

³² For more information on youth detention, see *Special Immigrant Juvenile Status and Other Immigration Options for Children & Youth* (ILRC 2021).

COVID-19 NOTE: In 2023, Biden and the Center for Disease Control ended the COVID-19 Public Health Emergency, even while COVID-19 continues to impact communities across the U.S., including people in detention. In turn, ICE’s policy regarding COVID-19 has shifted too. While COVID-19 may no longer be in the national spotlight, COVID-19 and other infectious diseases have a distinct, negative implications for detained immigrants. ICE detention centers have been hotbeds of infection.³³ To the extent that the COVID-19 is still affecting the detention and bond processes and procedures that we discuss in this manual, we will identify those issues in the chapters that follow. Because the spread of COVID-19 is ongoing and evolving, we urge practitioners to investigate agency practices, court closures, and timelines related to immigration detention and COVID-19 on a continuous basis.

§ 1.4 Contents of This Manual

This manual contains eight chapters and an appendix of referenced documents and sample materials. **Chapters 2 through 3** discuss how adults and youth end up in immigration detention, including the rights and recourse detained individuals have notwithstanding their condition of confinement. **Chapters 4 through 9** provide detailed information on the practices, procedures, and forms of relief available to detained noncitizens, as well as considerations and best practices for representing clients in detention and in custody determinations and custody redetermination hearings (i.e., “bond proceedings” or “bond hearings”).

Please refer to these chapters for substantive coverage of the following topics:

CHAPTER 1, INTRODUCTION: IMMIGRATION DETENTION SYSTEM, includes some historical and contemporary background on immigration detention in the United States, as well as information on the contents of this manual and how to use it.

CHAPTER 2, HOW ADULTS WIND UP IN IMMIGRATION DETENTION, explains how the various components of DHS may be involved in finding, apprehending, and detaining adults, as well as the role of local and state criminal legal systems in transferring people to ICE. It explains some of the rights and procedures involved when a person is initially arrested by federal immigration authorities.

CHAPTER 3, DETENTION OF CHILDREN AND YOUTH, describes how young people wind up in detention and the distinct settings, processes, and practices that apply to them, whether they are held in the custody of the Department of Health & Human Services’ Office of Refugee Resettlement (ORR) as unaccompanied minors, or in the custody of Department of Homeland Security.

CHAPTER 4, CUSTODY DETERMINATIONS BY DHS AND PROSECUTORIAL DISCRETION, covers initial custody determinations by DHS, including bond determinations upon apprehension, parole requests for clients categorized as “arriving,” and post-order custody review, alternatives to detention, and prosecutorial discretion opportunities.

³³ Gregory Hooks, Bob Libal, Detention Watch Network, *Hotbeds of Infection: How ICE Detention Contributed to the Spread of COVID-19 in the United States*, (Dec. 2020), https://www.detentionwatchnetwork.org/sites/default/files/reports/DWN_Hotbeds%20of%20Infection_2020_FOR%20WEB.pdf.

Immigrant Legal Resource Center
July 2024

CHAPTER 5, ELIGIBILITY FOR CUSTODY REDETERMINATION (BOND) HEARINGS BEFORE THE IMMIGRATION JUDGE, covers detained noncitizens' eligibility for bond hearings before an immigration judge under Immigration and Nationality Act (INA) § 236(a) and the possibility of conditional release, as well as mandatory detention under INA § 236(c) and how to challenge it under *Matter of Joseph*.³⁴ The chapter also addresses detention under INA § 241 for individuals with final orders of removal, and bond hearings and other strategies for immigrants who are detained for prolonged periods.

CHAPTER 6, CONSIDERATIONS FOR REPRESENTING CLIENTS IN DETENTION, discusses recommendations related to legal representation of clients in detention, including visitation and communication strategies, information gathering, and representation of clients with mental health conditions or disorders.

CHAPTER 7, REPRESENTING CLIENTS IN BOND PROCEEDINGS, discusses how to request a bond hearing; how to build, prove and present a client's case for release before an immigration judge; specific considerations for clients in the Ninth Circuit; how to post bond; and important post-release considerations.

CHAPTER 8, HOW TO CHALLENGE THE IMMIGRATION JUDGE'S BOND DECISION, explains different appellate avenues after the immigration judge's bond decision, including appealing custody determinations made by the immigration judge to the BIA, ameliorating the conditions of release under *Matter of Garcia-Garcia*,³⁵ and motions for a new bond hearing based on changed circumstances.

CHAPTER 9, HOW TO USE HABEAS, explains what detention issues could give rise to a habeas corpus petition. Describes the initial considerations and basic procedures as you gear up for habeas claim.

FOR FURTHER INFORMATION, SEE:

In addition to this manual, please visit the ILRC's Detention page at <https://www.ilrc.org/detention> for detention resources, practice advisories, reports, community materials, toolkits, webinars, and more.

³⁴ 22 I&N Dec. 799 (BIA 1999) (holding that a permanent resident is not properly included within a mandatory detention category if ICE is "substantially unlikely" to establish at the merits hearing that the charges would subject the person to mandatory detention).

³⁵ 25 I&N Dec. 93 (BIA 2009) (holding that immigration judges have authority to review and consider whether to modify the terms of release imposed on noncitizens by DHS).