Abolish ICE? A Policy Perspective

Dear Representative ……….....…………… ,

You will find below an analysis and policy reform proposal for ICE, the executive agency responsible for the investigation, detention, and deportation of undocumented immigrants. The document overviews known issues with ICE policy and provides recommendations for their resolution, including legislative and legal actions.

We strongly believe that ICE is a negative force within U.S. government that causes irreparable harm to U.S. residents and those who wish to enter our country on legitimate grounds. Our final recommendation is that ICE undergo serious reform or be abolished entirely.

Sincerely,

…………..……….

Congressional Office of …………..……….

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**Executive Summary**

The call to “Abolish ICE”, the U.S. Immigrations and Customs Enforcement agency, has become a rallying cry for 21st century progressives. It signifies that one is ready to tear down the system, rather than incrementally improve it. Representatives like Bernie Sanders and Alexandria Ocasio-Cortez have embraced the policy, stating that ICE is an agency in rebellion, unaccountable to the wishes of the government or the American people. In many respects, this is true: **ICE’s Enforcement and Removal Operations (ERO) branch terrorizes peaceful, law abiding U.S. residents without improving our national security or contributing towards a just immigration system.** There is little evidence that its current policy of deporting immigrants without criminal records, many of whom have lived in the U.S. for over a decade, makes our country safer, and it certainly causes intergenerational harm to the families it effects. Furthermore, **ICE’s inhumane and long-term detention of undocumented immigrants, most of whom are seeking asylum, is cruel and unjust.** The agency holds tens of thousands of people in detention centers that fail to provide basic necessities and bar access to legal counsel. Congress must end both of these practices immediately, for the wellbeing of immigrant communities, and to claim some measure of salvation for our nation’s soul. Abolishing ICE would be one way to do so.

However, solely reforming or abolishing ICE would not end the most egregious of Trump’s immigration policies, such as family separation and housing kids in cages, which fall under the jurisdiction of other federal agencies, namely U.S. Customs and Immigration Services and U.S. Customs and Border Protection. **Any challenge to this administration’s immigration policies must involve USCIS and CBP**. Protecting long-term residents from deportation and ending indefinite detention of people seeking asylum are worthy goals, but they are only the first sentence in a larger conversation about comprehensive immigration reform. Unfortunately, such reform is not viable in the current political climate we therefore recommend that you **support constitutional and statutory challenges to Trump’s immigration policies.** Should immigration reform become viable, we believe that **2013’s bipartisan immigration reform bill could be the foundation** for a fair and effective national immigration policy.

**Structure and Purpose of ICE**

**I. History and Bureaucracy**

The U.S. Immigration and Customs Enforcement agency was created in 2003 when the executive branch joined a handful of loosely related agencies under the Department of Homeland Security in the aftermath of 9/11. Previously, ICE’s two main responsibilities, immigration enforcement and customs enforcement, were handled by the extinct U.S. Immigration and Naturalization Service agency and the U.S. Department of the Treasury respectively. These responsibilities are now divided between ICE’s two branches: Enforcement and Removal Operations (ERO) and Homeland Security Investigations (HSI). ERO is responsible for the immigration half of ICE’s name; it deals the identification, detention, and removal of undocumented immigrants. HSI is responsible for the customs half; it primarily investigates and transnational customs offenses, including child pornography and illegal opioid distribution. HSI, while significant as a function of ICE’s responsibility, is not part of the nation’s conception of ICE, and while we will recommend that ICE be abolished, we argue that an exception be made for the HSI, which could become a standalone agency or merge with an existing agency such as the DOJ’s Organized Crime Drug Enforcement Task Force or the Department of States’ Diplomatic Security Service.

**II. Purpose of the ERO**

ICE’s ERO branch apprehends undocumented immigrants living in the nation’s interior and detains immigrants while they appeal their deportation orders in court. While the de jure policy of the ERO has always been the deportation and detention of all undocumented immigrants, the de facto policy of the branch has been the limited to the removal of recently arrived and undocumented immigrants with criminal statuses. This de facto policy changed after the election of president Trump, who increased ICE arrests by 42 percent in the first 8 months of his presidency[[1]](#endnote-1). Trump accomplished this by expanding the group of people that ICE is willing to deport to include people with minor criminal offenses and people who miss immigration court dates. This policy might seem reasonable on its face, but everyday occurrences become deportable offenses when you don’t have documentation. Under Trump, deportable offenses include driving without a valid license or presenting a fake social security card to an employer. Furthermore, racial profiling and overzealous policing can lead to the deportation of people who were simply in the wrong place at the wrong time. The deportation of immigrants for missing their court date is even less reasonable, because between 2016 and 2018 U.S. Citizenship and Immigration Services routinely issued immigration court summons without dates or times and failed to notify the accused once a date was set[[2]](#endnote-2). These facts paint a picture of an agency that is willing to deport undocumented immigrants for any infraction, no matter how small. In fact, this is the purpose of ICE under Trump: the systematic deportation of every undocumented immigrant living in the United States.

**The Problem**

**I. ICE doesn’t make us safer.**

As an agency within the Department of Homeland Security, ICE has a nominal responsibility to protect us. This narrative motivates much of ICE’s funding and is a rallying cry within the agency. However, its core function, the arrest and detention of people living in the Unites States without documentation, largely impacts peaceful and law-abiding long-term residents. Two-thirds of the eleven million undocumented immigrants living in the United States have been here for over a decade[[3]](#endnote-3). These are members of our communities who have built their lives on the mutual understanding that immigration offenses from long ago won’t make them targets for deportation. Clearly, deporting these residents won’t make us safer. Furthermore, the largest demographic of deportees, Central Americans, is a population that has never committed an act of terror on U.S. soil, something that cannot be said of native-born U.S. citizens[[4]](#endnote-4). The risk of other types of crime at the hands of undocumented immigrants is similarly low and it’s been shown that immigrants, including undocumented immigrants, are less likely to commit crimes than their native-born counterparts[[5]](#endnote-5). Trump likes to tout one-off cases of violent crime committed by immigrants, but these are aberrations from a clear nonviolent trend. From a national security perspective, the $7.9 billion dollars we spend on ICE annually is wasted. Instead of paying for security, we are paying to terrorize immigrant communities living peacefully within our borders.

**II. ICE facilities deny basic necessities and enrich private contractors**

Undocumented immigrants are right to fear deportation; not just because they will be forced to leave the country, but because of the detention that precedes it. ICE bids its detention centers out to private contractors, who are paid per head and not incentivized to care for the people they house. Detainees at the Elizabeth Contract Detention Facility in New Jersey have reported that they are not fed a sufficient amount of food and must supplement their diet with meals purchased from the detention center commissary at exorbitant rates, racking up profits for the private prison owners. Detention work programs only pay one to two dollars per day, so the detained must rely on their friends and family, who themselves may be struggling financially, to obtain basic necessities. Detainees at Elizabeth have also complained that the facility’s drinking water is not potable, that correctional officers prevent detainees from speaking with legal counsel and that medical treatment is denied in all but the most urgent cases[[6]](#endnote-6). This poor treatment is especially acute in the time of coronavirus. In late March 2020 multiple detainees reported that the Elizabeth facility had been without hand soap for three days and was not distributing masks or any other protective gear, despite the high risk of infection in dense communal living environments[[7]](#endnote-7). ICE detention centers are not supposed to be punitive. The detained have not been found guilty of any crime. Nevertheless, the Trump administration uses the poor quality of ICE facilities to encourage immigrants to forgo claims of staying in the United States and to dissuade future immigrants from entering the country.

**III. Inhumane conditions are compounded by unnecessarily long stays**

ICE’s capacity to catch undocumented immigrants exceeded the Department of Justice’s ability to try them long ago, and therefore the detained must wait an exorbitant amount of time should they choose to argue against their deportation in court. In California, detainees wait an average of 421 days in ICE facilities before appearing before a judge[[8]](#endnote-8). This wait could be made more bearable if ICE granted parole to nonviolent and low flight risk detainees, as we do in the criminal justice system, but the Trump administration all but banned grants of parole in a 2017 executive order[[9]](#endnote-9). Some detention centers followed this order explicitly and others have set bail at such a high rate that all but the wealthiest detainees are forced to stay. The only immediate escape from detention is to agree to deportation without a trial, even though one may have a reasonable claim to stay in this country. This policy is a clear violation of the 5th amendment’s due process clause, which states that that no person, including noncitizens, “shall be… deprived of life, liberty, or property, without due process of the law”. Due process arguments have successfully led to the cessation of other immigration abuses: they were the foundation of the 2018 injunction against family separation issued by the US District Court for the Southern District of California[[10]](#endnote-10). It may be possible to stop ICE’s indefinite detention policy on similar grounds.

**IV. Relief rarely comes to those who wait**

Most appeals to stay deportation fail, in part because immigration offenses are not criminal offenses and the accused do not have the right to an attorney, which makes it extremely difficult for those with a legal claim to remain in the U.S., such as asylum or longtime lawful permanent resident status, to argue their case. They must fund their own defense or rely on pro bono legal aid, which is often limited because of the remote locations of most ICE facilities. Ostensibly, these facilities are built in remote locations to reduce costs, but their geography makes it harder for the detained to communicate with legal representation. ICE’s Stewart Detention Center, which completes over 42,000 removal cases a year, is located in Lumpkin, GA, a town that does not include a single practicing attorney and is a two to three hour drive away from Atlanta, the nearest city with available pro bono legal aid. Predictably, only 6 percent of detainees at this center acquire legal representation. Those who do manage to acquire it improve their chances of staying in the U.S. by 20 percent. For those without legal aid, fighting deportation is nearly impossible: 98 percent of detainees at Stewart without representation are deported[[11]](#endnote-11). This problem is not unique to Stewart Detention Center. Only 11 percent of detainees in remote facilities have legal representation, compared to 47 percent of detainees in urban facilities[[12]](#endnote-12). The inaccessibility of legal counsel, when coupled with the poor quality of ICE facilities, puts those fighting deportation in an unimaginable bind— they are forced to choose between sitting in deportation purgatory until they receive hearing where they will likely have no representation in front of a judge who will almost certainly deport them, or they can forfeit their claim to remain in the country and agree to immediate deportation. This is process is closer to trial by ordeal than it is trial by jury.

**V. Asylum seekers return to credible threats of violence**

Many of the people who elect to stay in detention do so because they have a credible fear of violence should they return home. This is especially true for Central American refugees: in 2015 Doctors Without Borders found over 43 percent of refugees from Honduras, Guatemala and El Salvador have lost a family member due to gang violence within the last two years, and over 50 percent of Salvadorans have been victims of blackmail or extortion[[13]](#endnote-13). Unfortunately, these alarming statistics do not necessarily qualify Central American refugees for asylum status. In order to claim asylum, a refugee must prove that they are a target for violence on the basis of their race, religion, nationality, membership in a social group, or political opinion. This is not the case for most Central American refugees, who are victims of wanton violence, not group based violence. Even when a refugee is potentially eligible for asylum it is increasingly hard for the them to claim it because the Trump administration has replaced professional USCIS asylum officers, who conducting credible fear interviews which determine eligibility, with CBP officers who have no specialized training in asylum status and routinely refuse to issue credible fear certification to people who warrant it[[14]](#endnote-14). Claims to asylum must always be taken seriously, and we cannot allow CBP to be both the asylum judge and jury.

**Issues with Abolish ICE**

**I. The argument that abolishing ICE will create “open borders” stems from a misunderstanding of our nation’s border protection bureaucracy**

ICE operates in the interiorof the United States, while U.S. Customs and Border Production operates on its frontier***.*** U.S. law defines frontier broadly: border patrol, a division of CBP, has a jurisdiction over any area within 100 miles of a land or sea border. This is an extremely broad area. It includes nearly 2 out of 3 Americans and all three of America’s largest cities[[15]](#endnote-15). Abolishing ICE will have little effect on the executive branch’s ability to effectively control who enters this country and to stop drug and human trafficking. It will stop the harmful and often illegal deportation of long-term U.S. resident who pose zero threat to the United States. If we agree that these deportations are wrong, then ICE becomes an unnecessary agency. Its two remaining purposes, the removal of noncitizen criminals and the temporary detention of those apprehended while crossing the border, could easily be handled by other organizations. Local law enforcement agencies have the ability to investigate and detain criminals, regardless of their immigration status, and this shift in responsibility would not create an unreasonable amount of new work as immigrants commit less crimes than the native-born population. Temporary detention responsibilities could easily be shifted to CBP because that agency already shares detention responsibilities with ICE and because the number of detentions would dramatically decrease were we to stop deporting longtime U.S. residents.

**II. Abolishing ICE would not address many of the current administration’s anti-immigrant policies**

Because ICE’s jurisdiction is limited to the interior, abolishing it would do little to stop some of the current administration’s most egregious offenses, including family separation and child detention in cages, policies administered by U.S. Customs and Border Protection. Past legal challenges have slowed these offenses, but they have not been stopped entirely. In 2018 the US District Court for the Southern District of California ordered an injunction against family separation; however, this order did not provide a sufficient enforcement mechanism. Between June 2018 and July 2019, CBP has separated over 900 children, including babies and toddlers, from their parents, arguing that the parent-child relationship was in doubt, or that a parent’s criminal record made them an unsuitable guardian[[16]](#endnote-16). While CBP is not barred from separating parents from children based on criminal record per se, the injunction specifies that criminal record status should be taken into account only if that record suggests the parent is genuinely unfit. CBP has not exercised this level of discretion. It has found the presence of a criminal record at all to be sufficient grounds for family separation, including minor offenses such as traffic violations, disorderly conduct, or misdemeanor property damage[[17]](#endnote-17). Sometimes these offenses occur years before the family is detained. Furthermore, per the injunction, CBP must provide the family with an justification for the separation so that the family can later challenge it, however the agency has failed to do so for both child-parent relationship and criminal history motivated separations. This blindsides families who are wrongfully separated, leaving them with no recourse to reunite with their loved ones while they argue against deportation.Clearly, abolishing ICE does not go far enough. If we want a kinder and fairer immigration system, we also reform CBP, and set our sights towards comprehensive immigration reform.

**Policy Recommendations**

**I. Stop deporting law-abiding residents**

This policy causes irreparable harm to immigrant communities and is fundamentally unjust. If someone does not need to be deported, they should not be deported. The harm of Trump’s expansion of the deportable population is insidious and far reaching. In the first six months of 2017, California Latinos reported fewer instances of spousal abuse across the state’s largest cities than they did during 2016. The decrease in reporting is shocking— 18 percent fewer reports in San Francisco, and 13 percent fewer in San Diego[[18]](#endnote-18). There is no reason to believe that this reduction in reporting was caused by a reduction in spousal abuse because reporting rates were unchanged across other demographics. More likely, victims of abuse, who may be American citizens, were afraid to call the police for because someone in their household is at risk for deportation. Instead of deportation, long term undocumented residents should be offered a path to citizenship and protection form ICE harassment. Such a policy will allow them to continue their lives in peace and not prevent their family members from consuming essential government services.

**II. Make detentions quick and humane**

# For those who are apprehended crossing our border illegally, detention should be humane and as short as necessary. Low flight risk individuals, such as children and the elderly, should not be detained. Other individuals should be allowed to post bail or be monitored. No individual should be detained for longer than six months, as required by Title 8 of the U.S. Code. All current ICE and USCIS detainees should be subject to these changes immediately. Furthermore, paroled detainees should be allowed to work so that they can support themselves financially and fund their legal case to remain in the United States. Should any immigrant be detained while their flight risk status is being determined, they should be housed in facilities that provide adequate food and shelter and offer a standard of living in accordance with international guidelines for civil detention which may be higher than U.S. penal detention standards. The best way to accomplish this last goal would be to outlaw the use of private contracted detention centers and hold public detention center accountable to reasonable quality standards with independent monitoring.

**III. Expand asylum class to include refugees and provide legal aid**

# Claims of asylum should be taken seriously, and Title 8 of the U.S. Code should be amended to allow anyone who faces a credible threat of violence in their home country to claim asylum. This would include the largest demographic of new undocumented immigrants— Central Americans seeking relief from violence in their home countries. Furthermore, we should legally mandate that asylum intake interviews be conducted by professionally trained staff, and not handled by any organization responsible for a refugees’ deportation. We should also provide legal resources to refuges from this region so that they are aware of asylum law and have the opportunity to claim asylum status if applicable. While appointing an attorney to every refugee may not be feasible, USCIS could develop more affordable legal aid resources staffed by paralegals or other non-lawyer immigration law advocates. This change would be transformational— detained immigrants with counsel are eleven times more likely to seek relief such as asylum than immigrants without counsel[[19]](#endnote-19). This implies that many immigrants who may be eligible for asylum status simply do not claim it because they are either not aware that it exists, or they do not know they are potentially eligible for it.

# IV. Support legal challenges to indefinite detention

Long term immigration reform, and even small improvements to the quality of ICE detention centers, may not be politically feasible in the near future. Ultimately, the larger policy issue of improving our immigration process will not be resolved by abolishing ICE. It will take comprehensive immigration reform. There was been political appetite for such reform in the past— in 2013 the senate passed such legislation, but it failed to win support in the House when then speaker John Boehner barred discussion of the bill on the House floor. Since 2013, the republican party has further radicalized through its embrace of Donald Trump and nativism and it is unlikely we will pass immigration reform acceptable to Democrats anytime soon. Therefore, we recommend that you support immediate legal action to combat ICE’s policy of indefinite detention. While the Supreme Court has been loath to overrule U.S. code concerning asylum in the past, the reasons for their refusal to do so have stemmed from technicalities in the cases brought before them, and not from the content of existing constitutional or immigration law. In 2018 the Supreme Court overruled the U.S. Court of Appeals for the Ninth Circuit’s ruling in Jennings v. Rodriguez, which held that Title 8 of the U.S. implied a right to biannual bond hearings for all ICE detainees. While the Supreme Court felt that the code does not contain such a right, they did not rule that indefinite detention is permissible under the 5th amendment, and they did not rule that Title 8 does not allow for other remedies to indefinite detention. The code in question states that “an alien… whose removal is unlikely in the reasonably foreseeable future, may be detained for… [a] period of up to six months only if the release of the alien will threaten the national security of the United States or the safety of the community or any person”[[20]](#endnote-20). The executive branch has justified detentions exceeding six months by claiming that nearly every alien is a national security threat, but this claim is clearly too broad and could be narrowed by the courts. Because there is existing textual support for the illegality of indefinite detention, legal challenges based on the text of Title 8 of the U.S. Code or on the 5th amendment’s due process clause may find more success with the current Supreme Court than Jennings v. Rodriguez did. If such a challenge is unsuccessful, we recommend that Congress update the text of Title 8 such that the executive branch is unable to wrongfully detain asylum seekers based on a fraudulent national security claim.

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    [↑](#endnote-ref-20)