



# “MANDATORY DETENTION” IN THE HEROES ACT

## AN UNNECESSARY EXCLUSION FOR DETAINED IMMIGRANTS FACING COVID-19

The HEROES Act tasks ICE with reviewing the immigration files of people in ICE detention to assess whether continued detention is necessary. Excluded from prioritized review are people detained pursuant to “mandatory detention,” which accounts for 71% of all people in detention, according to ICE.<sup>1</sup> This limited approach to reducing the detention population leaves out some 19,814 people from consideration.<sup>2</sup>

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For decades, immigration authorities have relied on “mandatory detention” to justify some of the most egregious due process and humanitarian violations that have occurred in the immigration system. This is in part why there are a number of bills such as the New Way Forward Act and the Dignity Not Detention Act that have been introduced in the House to end mandatory detention.

As detailed below, mandatory detention should not be used as a benchmark for preserving human life under this pandemic or beyond, given the history, scope, and devastating impact of this unjust label.

### **Mandatory detention means that many people never get a bond hearing.**

An immigration judge ordinarily assesses each individual’s case and determines whether or not release on bond is appropriate. People held under mandatory detention are denied this opportunity. Under mandatory detention, people are detained for months, or even years, with no review of whether their incarceration is justified.

In contrast to the immigration system, in the criminal system, every person held in pretrial detention has the right to a hearing on flight risk or in some cases, dangerousness, regardless of the nature of allegations against them.<sup>3</sup> Meanwhile, most people released from detention show up for immigration court. A reported 86% of people released on bond granted by an immigration judge attended their

<sup>1</sup> Tara Tidwell Cullen, *ICE Released Its Most Comprehensive Immigration Detention Data Yet. It’s Alarming.* (Mar. 13, 2018), <https://immigrantjustice.org/staff/blog/ice-released-its-most-comprehensive-immigration-detention-data-yet>

<sup>2</sup> As of May 9, 2020, ICE reported total 27,908 people in detention. See Detention Management, <https://www.ice.gov/detention-management#wcm-survey-target-id>.

<sup>3</sup> Even though people facing criminal charges have a right to this hearing, many people spend months or even years in pretrial detention due to cash bail and other obstacles.

court hearings during 2015,<sup>4</sup> and compliance with ICE-administered alternatives to detention programs are as high as 99%.<sup>5</sup> The underlying assumption behind mandatory detention is fundamentally flawed. Community-based case management has proven an effective alternative to make sure people are able to attend court.

### **Mandatory detention means detention with no end date, and without any determination of whether detention could be justified.**

At a basic level, mandatory detention is when someone is detained for the entire duration of their immigration case. Mandatory detention dates back to President Reagan’s drug war laws, the 1988 Anti-Drug Abuse Act. Mandatory detention was imposed in the same legislation that introduced the 100:1 crack to cocaine sentencing disparity. And the massive expansion of detention in our current era is a result of immigration laws passed in 1996, which greatly expanded the criminal system contacts that trigger deportation and made detention a mandatory minimum for almost all of them.

### **Many people in a diverse range of situations are subject to mandatory detention.**

People subject to mandatory detention include anyone who has not naturalized—such as green card holders, asylees, and refugees—if they have been convicted of a very broad range of offenses, from drug possession and shoplifting, to offenses carrying longer and more serious sentences. Individuals can end up in mandatory detention for convictions that are decades old. The Department of Homeland Security also mandatorily detains people arriving in the country without documentation, such as asylum seekers at the border.

Despite their overbreadth, these disqualifiers are final, sweeping thousands of people into indefinite detention who could instead be safely released and reunited with loved ones while attending to their court case. These stories, highlighted in recent Supreme Court case filings,<sup>6</sup> exemplify the diverse range of individuals who have been held pursuant to mandatory detention:

#### **Gulf War veteran Warren Hilarion Joseph came to the United States as a lawful permanent resident from Trinidad**

, enlisting in the U.S. Army when he was twenty-one. After his honorable discharge, Mr. Joseph fell upon hard times and was arrested for unlawfully purchasing a handgun for individuals to whom he owed money. He received probation, but found a good job with his family’s support. When he moved to his mother’s house and failed to inform his probation officer, however, Mr. Joseph was found guilty of violating probation. At the end of a six-month sentence, he was detained by ICE. Mr. Joseph was deeply pained to be separated from his U.S. citizen children and family members. His mother and sister travelled across state lines to see him, though the jail sometimes turned them away. Mr. Joseph was ultimately allowed to retain his lawful permanent resident status and eventually become a U.S. citizen. Despite his strong claims, he was forced to spend 3 ½ years separated from his loved ones in immigration detention in order to make his case.

4 Transactional Access Records Clearinghouse, What Happens When Individuals Are Released On Bond in Immigration Court Proceedings? (Sep. 14, 2016), <https://trac.syr.edu/immigration/reports/438/>.

5 American Immigration Lawyers Assn., et al., The Real Alternatives to Detention, <https://immigrantjustice.org/sites/default/files/content-type/research-item/documents/2018-06/The%20Real%20Alternatives%20to%20Detention%20FINAL%2006.17.pdf>.

6 Brief of Amici Curiae for Americans for Immigrant Justice, et al., *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018).

**Mr. Fernandez is a lawful permanent resident from Mexico** who was detained and placed into removal proceedings in 2015, several years after two convictions stemming from a robbery offense for which he had been arrested when he was a young man. By the time he was detained, Mr. Fernandez had changed his life, had a stable job, and was supporting his family. Mr. Fernandez was eligible for relief from removal through an approved “I-130” visa petition through his U.S. citizen wife. The process dragged on, however, for months. Detention separated him from his pregnant wife and two young U.S. citizen children. After he missed the birth of his son, Mr. Fernandez grew disheartened and depressed. When, seven months into his detention, Mr. Fernandez accepted a deportation order rather than remain detained, his wife ran from the courtroom in tears. Mr. Fernandez was deported in November 2015. His I-130 visa petition was approved one month later.

Their lived experience says it all. The horrible conditions, mistreatment, separation from family, and an extinguished light at the end of the tunnel coerce people to the brink of foregoing their legal claims. **That is true now more than ever, as people fear for their survival at detention centers that are among the largest coronavirus clusters in the country.**

In the past, DHS has argued that detention is necessary to facilitate deportation, but filling up deportation flights and sending people who have been exposed to or currently have coronavirus around the world will lead to disastrous consequences during this global health crisis.

Congress should ensure that the HEROES Act and any legislation on ICE custody review include all people in ICE detention custody. This is just a simple review of files - an initial step in securing release for more people from coronavirus hotspots at detention centers.<sup>7</sup> An exclusion at this stage serves no purpose other than to reinforce the misperception that mandatory detention is justified.

To end mandatory detention and dismantle the harmful immigration legal system, we must pass the New Way Forward Act, which repeals some of the harshest provisions of the 1996 laws.

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<sup>7</sup> ICE still maintains full discretion over whether to release someone after reviewing their file. On May 15, 2020, a federal judge found that ICE failed to comply with multiple aspects of a court order to identify high-risk detainees and move quickly toward custody determinations. See *Fraihat, et al. v. U.S. Imm. and Customs Enforcement, et al.*, No. 19-1546, slip op. at 6 (C.D. Cal May 15, 2020).