

# Mandatory Detention



DETENTION  
WATCH NETWORK

## Fact Sheet

### What is mandatory detention?

Mandatory detention is the statutorily required practice of automatically imprisoning an individual without any consideration of their individual circumstances. Current U.S. immigration policies require that whole categories of non-citizens **must** be detained by Immigration and Customs Enforcement (ICE) while removal proceedings are pending against them without entitlement to a bond hearing or any other way to secure their release.

### There are two types of mandatory detention:

Section 235 of the Immigration and Nationality Act (INA) imposes mandatory detention on asylum seekers during credible fear and asylum proceedings<sup>[1]</sup> and requires the use of [expedited removal](#)<sup>[2]</sup>, under which people arriving in the country must be detained without bond while their cases are reviewed.

Section 236(c) of the INA also imposes mandatory detention on certain noncitizens who have had contact with the criminal legal system, regardless of the seriousness of the offense or the fact that they have already completed any sentence for the offense. Their family and community ties or the strength of their legal case also cannot be considered. Misdemeanor crimes including shoplifting or petty drug possession can trigger mandatory detention under this provision.

**ICE still retains full discretion to unilaterally decide to release people subject to mandatory detention, but it chooses not to in the majority of cases.**

[1] 8 U.S.C. § 1225(b)(1)(B).

[2] 8 U.S.C. § 1225(b)(2)(A).

## Timeline

### 1988 U.S. Law

Mandatory detention provision is enacted into U.S. law.

### 1996 AEDPA and IIRIRA

Congress passes AEDPA and IIRIRA, two laws which drastically expand the category of people subject to mandatory detention.

### 2001 September 11

In response to 9/11, Congress further expands the category of people subject to mandatory detention and starts ratcheting up race-based enforcement programs.

### 2011 New Guidelines

The Obama administration announces new prosecutorial discretion guidelines and relief for some immigrants. However, the new guidelines have no impact on immigrants subject to mandatory detention.

### 2017 Trump

President Trump issued an executive order expanding the use of expedited removal to its full statutory extent.





## Who is subject to mandatory detention?

Any non-citizen can end up being subject to mandatory detention, including legal permanent residents who have lived in the U.S. their entire lives, asylum seekers, torture survivors, single mothers, the sick and the elderly. Due to the stark racial disparities in the criminal legal system and the disproportionate targeting of Black and Brown people for arrest, incarceration, and deportation, mandatory detention [disproportionately impacts](#) Black and Brown immigrants. Due to this disproportionate impact, [half](#) of all Black immigrants detained pending removal proceedings are targeted for deportation by ICE on criminal grounds and thus likely to be subject to mandatory detention.

## How has mandatory detention expanded in the United States and who benefits?

The practice of mandatory detention has existed since 1988, but it was not until the passage of two laws in 1996, the [Antiterrorism and Effective Death Penalty Act](#) (AEDPA) and the [Illegal Immigration and Immigrant Responsibility Act](#) (IIRIRA), that the scope of mandatory detention grew dramatically. These 1996 laws labeled a wide range of crimes as “aggravated felonies” and expanded the classification of “crimes involving moral turpitude,” both of which trigger mandatory detention. IIRIRA also created [expedited removal](#), a process through which asylum seekers apprehended by immigration authorities are mandatorily detained until they pass their credible fear interview with an asylum officer. The government has also systematically refused to release asylum seekers even after their detention is no longer required by law. The expansion of mandatory immigration detention in the 1996 laws reflected the long history of racism, anti-Blackness, and criminalization of communities of color in the United States, including modern campaigns like the “War on Drugs” that started in the 1970s and the 1994 Crime Bill.

Private prison corporations and those invested in for-profit incarceration benefit the most from mandatory detention and its expansion. [Nearly 80%](#) of people detained each day in ICE custody are detained in private detention facilities run by big companies like CoreCivic and GEO Group, which each earn more than a billion dollars every year keeping people behind bars. These companies also spend several million dollars a year lobbying officials in state, local and federal government to support laws and policies that will increase the number of people subject to detention - like mandatory detention - and therefore the demand for their services.

## Mandatory Detention by the Numbers

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**\$2.8 Billion**

Money Congress spent in Fiscal Year 2021 to lock up immigrants.



**190,000**

The approximate number of people detained in Fiscal Year 2021, a nearly 300% increase since the passage of AEDPA and IIRIRA in 1996.



**Over 66%**

Approximate percentage of immigrants detained under mandatory detention on a given day in Fiscal Year 2021. ICE expects this number to continue to rise.



**219 Deaths**

The number of people known to have died in ICE custody since 2003.





## How does mandatory detention affect individuals and communities?

Mandatory detention leads to the long-term incarceration of people with pending immigration cases. Although ICE retains discretion to release people held under mandatory detention, the statutory provisions allow ICE to claim its hands are tied by the law. Given ICE's unwillingness to release people, the increasingly backlogged and delayed immigration courts, and already lengthy and complicated legal processes involved, people often spend years behind bars while fighting their cases.

Immigrants subject to any period of ICE detention, including mandatory detention, suffer [notoriously inhumane](#) conditions. Beyond the psychological trauma of incarceration, human rights violations are rampant in ICE detention, including poor medical care, physical and verbal abuse, and punitive use of solitary confinement. People in ICE detention are isolated from their communities and often transferred to facilities far from where they were originally detained, making family visits and access to counsel nearly impossible. Ultimately, ICE detention facilitates deportation: people in mandatory detention often endure these conditions for longer periods of time and some even give up promising claims to stay in the U.S. because they can no longer bear being detained.

Mandatory detention takes parents away from their children, sows fear in neighborhoods across the country, and often has dire psychological and physical repercussions for people even if they are eventually released. Incarceration and family separation can also cause financial, food, housing, and employment insecurity for family members.

In the community, immigration enforcement and raids funnel people into immigration detention, and the increasing number of people subject to mandatory detention creates pressure to add more capacity to the system. As a result, local communities are incentivized to become prison towns, despite [studies](#) which show the long-term negative effects of prisons on local economies. The growth and entrenching of the immigration detention system destabilizes communities, undermines public safety, and erodes trust in government bodies.

### Backlogged Courts

- Complicated legal processes
- Years behind bars

### Inhumane Conditions

- Physical and verbal abuse
- Human rights violations
- Psychological trauma
- Solitary confinement
- Poor medical care

### Family Separation

- Employment insecurity
- Housing insecurity
- Food insecurity

### Prison Towns

- Erodes trust in government bodies
- Undermines public safety
- Destabilizes communities

## Why should we end mandatory detention?

All immigration detention is inhumane and abusive, and the United States must eliminate immigration detention altogether. **Ending mandatory detention would be a significant step toward this ultimate goal.**

Many people of color are mandatorily detained as a result of contact with the criminal justice system, further cementing the racism in the carceral system and strengthening the detention and surveillance of communities of color. Mandatory detention also imposes a cruel double punishment on individuals in detention because of past criminal convictions. They have completed their criminal sentences and are then detained by ICE simply because of where they were born. This additional punishment is often devastating and harsh because there is no definite release date from ICE detention.

In 2003, the Supreme Court upheld the constitutionality of mandatory detention while individuals are in deportation proceedings. However, there is a growing consensus in the courts that when mandatory detention results in incarceration for long periods of time, it is no longer constitutional. The Supreme Court will likely reconsider this issue at some point in the future. There is also a good argument that mandatory detention violates the international human rights law prohibition against arbitrary detention. This prohibition is codified in the International Covenant on Civil and Political Rights, which the United States has signed and ratified.

Mandatory detention impacts over 200,000 immigrants every year. In order to bring justice and fairness to the immigration system, mandatory detention must be repealed. Without the repeal, immigrants will never have a fair opportunity to pursue their right to live in the U.S. and stay with their families and communities.