



# Why Alien Detention Is Necessary

## A rebuttal to anti-detention advocates

By Dan Cadman

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There is a full-court press going on to dismantle the detention system used to hold aliens for immigration proceedings and, ultimately, removal when it is ordered.

**The Dismantling Effort Has Many Fronts.** They include steps taken by the government itself; lawsuits by advocacy groups critical of detention; quasi-scholarly reports; and a concerted media campaign to sway public opinion.

From the beginning of the Obama administration the Department of Homeland Security (DHS) has been a prime mover in the effort, simply by failing to detain when it is most crucial — for instance with just-arrived border crossers, when it sends the loudest message about unwillingness to tolerate illegal intrusions. Even the valid public safety reason of keeping alien criminals off the streets and away from the communities they prey upon has gone by the wayside under this White House.<sup>1</sup>

Advocates also are pursuing legal means. There is a court case going on in California right now in which a judge is, for all intents and purposes, distilling into a decision whether it is ever possible to detain children in a manner consistent with humane principles.<sup>2</sup> Of course, as go the children, so go the caregivers, primarily women, but sometimes men or whole family units. If the children are released, then certainly their caregivers will be as well.

Such a decision would almost certainly portend a flood of aliens arriving with children,<sup>3</sup> using them as a sort of shield to ensure resettlement in lieu of what is even now only the vaguest threat of detention and removal;<sup>4</sup> quite possibly in some cases by stealing, “buying”, or “renting” vulnerable minors for that purpose. This is not far-fetched; fraudulent family claims happen with some regularity in the immigration system and the government does not routinely engage in DNA testing to ensure the legitimacy of familial relationships. A policy of releasing all caregivers with children in tow would almost certainly encourage the unscrupulous and the desperate.

The legal case has put the administration in a situation that is to a significant extent of its own making, because of the years of criticizing and minimizing detention in all its forms. (Remember Dora Schriro, special adviser for detention to Janet Napolitano, who worked to destabilize the system from within before moving to become New York City’s commissioner of correction, where she immediately initiated policies to impede immigration agents from interviewing incarcerated alien criminals<sup>5</sup>) DHS and Justice Department lawyers are now obliged, finally, to lay before the judge the reasons why detention is an important and fundamental part of any orderly immigration control system.

Advocates also have issued pseudo-academic “reports” on all of the reasons why detention should not be used. For example, the *Journal on Migration and Human Security* recently published a paper by the U.S. Conference of Catholic Bishops (USCCB) and the Center for Migration Studies titled “Unlocking Human Dignity: A Plan to Transform the U.S. Immigrant Detention System”.<sup>6</sup> USCCB, however, is far from impartial — it has long advocated broad-based amnesty and lobbied against both detention and meaningful border controls. The report refers to the wave of recent arrivals as “de facto refugees” and proceeds from this premise to assert that therefore detention is a violation of aliens’ rights and of international law. But there is no such thing as a “de facto” refugee or asylee. One either meets the legal definition or does not based on individualized persecution or a likelihood of persecu-

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tion. Poverty and general violence (the reasons often given for the recent waves of Central Americans illegally crossing our borders) don't qualify one for refugee status under either domestic or international law.

Advocates also have been vigorously courting public opinion, often to good effect. News articles; op-eds opposing alien detention such as one that recently appeared as a blog in the *Huffington Post* (which, curiously, was accompanied by a photo of terrorist detainees at Guantanamo Bay — one wonders how the irony has apparently escaped both editors and the readers);<sup>7</sup> Internet postings of every sort (often from advocacy groups, although this often is not immediately clear by form or format); and radio and television panels all over the nation. Anti-detention advocates are pressing hard to persuade the American people of the evils of alien detention. The modus used most often relies on anecdotal human interest stories that depict detention as inherently inhumane, but which make no effort to examine the part detention plays in the complex, larger immigration control system or the adverse impacts both to that system and to society when there is a broad-based failure or unwillingness to detain.

**The Arguments for Ending Alien Detention Vary.** Common themes include calling detention inhumane and expensive and claiming that immigration is a civil, not criminal, system with viable alternatives.

As mentioned, many advocates have suggested that detention of aliens “only” charged with violations of immigration law is, in and of itself, inhumane. What they stop short of saying, but clearly believe, is that in their eyes deportation itself is also inhumane. They would have an immigration system of benefits but no consequences for those who break the law. Such a system, though, is no immigration system at all, but simply a sophistry for perpetually open borders.

In making the case to end the alien detention system, advocates also have noted that aliens held in detention are being charged with civil offenses of law, unlike individuals arrested for crimes. This is true, but exhibits a superficial logic that sidesteps some basic truths:

- First is the fact that many of these aliens were received into the immigration system after release from jails and prisons for criminal offenses, which often form the basis for the civil deportation charge. They are not therefore the innocents some critics of detention might wish us to believe.
- Second is the fact that although many other aliens in detention have not been charged with crimes, they *could have been* had the federal government chosen to do so. Illegally crossing the border once is a misdemeanor offense; multiple crossings become a felony. Reentering the United States illegally after removal is also a felony. However, open borders advocates also have argued strenuously for a decriminalization of immigration offenses and pushed the Obama administration to cease prosecuting such cases (which it has done to a significant extent — overall prosecutions are down 20 percent just since 2013),<sup>8</sup> even when the criminal charges are undertaken as part of a larger deterrent strategy.
- Third is the fact that the legal premise behind alien detention is precisely the same as it is for an individual charged and awaiting trial for a crime (whom anti-detention advocates, in their zeal to distinguish between kinds of detention, conveniently forget is entitled to the presumption of innocence). The premise is a simple one: *decisions about detention vs. release of any kind must be based on an analysis of the risk of flight and the risk to public safety posed by the individual.*

Considering the issue of public safety brings us back to the point that many of the aliens taken into detention and charged with civil deportation violations are, in fact, convicted criminals. In a shocking mockery of its obligation to conduct this public safety analysis in deciding on detention, the government has frequently released criminal aliens inappropriately. Many have reoffended, leaving new victims in their wake.<sup>9</sup>

The issue of flight risk also raises disturbing empirical evidence that directly contradicts advocates’ arguments that detention is unnecessary and should be abolished. Government figures show that there are now 904,000 alien fugitives at liberty on the streets of our country who have absconded from their immigration court hearings or failed to report for removal when ordered to do so by immigration judges.<sup>10</sup> If we accept the often-cited population figure of 11 million illegal aliens presently in the United States, this means that one in every 12 aliens unlawfully present has fled proceedings or removal. Such a stag-

gering number of scofflaws is a national disgrace and would not be tolerated in any other justice system. It shows a flagrant contempt for the immigration courts and the due process system established by law.

Even among minors, caregivers, and family units — for instance those who arrived in the recent surge and were released, most of whom one might consider low public safety and flight risks — the statistics paint a different picture. According to July 2014 testimony by the director of the Executive Office for Immigration Review (EOIR), the division of the Justice Department that oversees the immigration courts and their appellate tribunal, 46 percent were failing to show up for their court-ordered appearances.<sup>11</sup> As might be expected, this figure has risen and may rise further yet because many released aliens attend hearings up to the point at which they are ordered deported or directed to depart, after which they abscond rather than report for removal if they are not being held in detention.

**Many Advocate Ending Detention.** They include the authors of the previously mentioned USCCB report, who propose replacing detention with “alternative to detention” (ATD) programs such as supervised release. Supervised release can consist of processes ranging from probation-like contacts on a recurring basis with a designated agent or contractor up to monitoring via electronic bracelets and the like. They suggest that ATD is significantly cheaper per diem than running a national detention network.

Superficially, it is an attractive proposition to think that the government might be able to instill order in, and compliance with, the immigration due process system, and to minimize absconders and save money while doing so. Unfortunately there is a chasm between the reality and the proposal to replace detention with ATD:

- The government has neither the technical equipment nor the dedicated human resources to handle ATD on its own, and so it relies upon contractors — often the same firms that advocates criticize for being part of a “privatized” jail system. The start-up costs for such contracts run into the millions, often tens of millions, of dollars. (This also leaves one pondering why critics would be willing to accept contractor-administered ATD programs while they continue to unleash a torrent of outrage over both government and contractor-administered detention facilities.<sup>12</sup>)
- Although the per diem costs, when compared to daily detention rates, are in fact lower, this is a false financial analogy because aliens on supervised release are placed into a much more crowded court docket than those actually in detention, one with immigration court backlogs (445,000 cases as of April and growing daily<sup>13</sup>). It sometimes takes close to two years *just to initiate the removal proceeding*. Thus, any comparison of fiscal costs must be adjusted to recognize the reality that recipients of ATD will burn substantially more of those per diem dollars. For instance, the Government Accountability Office (GAO), in a report discussed below, found that between 2011 and 2013 the amount of time aliens spent on some form of ATD had risen by 80 percent — from 10 months to 18 months. In the mean time, aliens released on forms of ATD must either be supported through governmental programs — thereby straining federal, state, and local resources, including the educational and health systems — or be provided with work permits even though they are illegally in the country — thereby directly competing economically against persons here lawfully who are un- or under-employed. These latter issues, straining the social service networks of state and local governments and increasing job competition for citizens and legal aliens (especially those most vulnerable to unemployment and poverty in minority communities) are precisely the factors that led 26 states to file suit against the federal government to block the president’s executive immigration actions to begin with and should be factored in when considering the arguments put forward by groups that advocate wholly replacing detention with ATD programs, in addition to the other considerations of public safety and flight risk.
- Finally, there is the question of efficiency. Is ATD good at ensuring that aliens comply with the conditions of their release, show up in court, and depart the United States if ordered removed? Neither the GAO nor the Department of Homeland Security’s Office of Inspector General (DHS OIG) can give ATD a clean bill of health in that regard. Both have audited and reported on alternative to detention programs: GAO in November 2014<sup>14</sup> and DHS OIG in February 2015.<sup>15</sup> The reports are not encouraging. In addition to the findings related to rapidly escalating ATD costs mentioned previously, GAO also found that “ICE expanded the ATD program and changed program use, but has not monitored implementation of guidance to help ensure program cost effectiveness.” More tellingly, GAO states that “ICE does not have complete data to identify the specific reasons field officials decided to terminate aliens from the program.” In other words, the termination data is incapable of telling reviewing officials and program watchdogs whether aliens were terminated because they were shifted into another program — or whether they were terminated

because they have fled. This is a remarkable data omission. The DHS OIG report makes substantially the same statement: “ICE cannot definitively determine whether the Intensive Supervision Appearance Program has reduced the rate at which aliens, who were once in the program, but who are no longer participating, have absconded or been arrested for criminal acts.”

In sum, there is no empirical reason to believe that supervised release or other ATD methods truly bolster a system of immigration controls trying to cope with a huge backlog in immigration courts and a very large number of alien fugitives — both of which have risen exponentially because the administration declines to use legally authorized expedited means of removal in the first place, and make appropriate use of detention in the second.

In fact, there is no clearer evidence of the failure of ATD than in recent Executive Office of Immigration Review (EOIR) statistics on the aliens who were taken into custody during the rolling surge in Texas between July 18, 2014, and May 26, 2015.<sup>16</sup>

As shown in Table 1, which is an extract of the EOIR statistics, *84 percent of aliens who were placed on supervised release or some other form of ATD fled*, as compared with 29 percent of those who were detained. (For those wondering how a detained alien might abscond, it is because at some point after their hearing was commenced, the government chose to release them from detention.)

**Open Borders Advocates’ Circular Logic.** This includes their visceral dislike for detention, a reasoning that sometimes abandons facts in favor of emotive appeals: “Wait! Don’t prosecute, this should be treated as a civil offense. Wait! Don’t use expeditious deportation methods, give them a hearing before an immigration judge. Wait! Don’t detain them pending the hearing, these people aren’t criminals. Wait! These people are de facto refugees, let them stay.”

No one — and particularly not immigration officers who are closest to the situation in a very real sense — likes to see children in any form of confinement, however well-designed and planned it may be. The minors (at least those of tender age, although many arrivals are in their late teens, bordering on adulthood) are, in a tragic but real sense, collateral damage insofar as they are brought by a mother, a father, a sibling.

Perhaps the key distinction between immigration officers and those who argue against detention in any form is this: They see very clearly the consequence of not detaining.

The questions to ask advocates who say detention of aliens is unnecessary or inhumane and that those who have been arriving from Central America should be permitted to stay unfettered and at large, preferably with some kind of legal status, are these: Is your belief unconditional? Will you continue to hold to those beliefs if 100,000 individuals stage on our borders or begin to cross? How about 200,000? More?

Such large numbers are not impossible or unimaginable. According to scholars at the Mexico Institute of the Woodrow

**Table 1. Disposition of Surge Cases for Those Taken Into Custody July 18, 2014, to May 26, 2015**

	Unaccompa-nied Minors (Under 18)	Aliens with Children on ATD	Detained Aliens with Children
<b>Number Charged</b>	31,987	35,695	3,384
<b>Pct. Whose Proceedings Were Started</b>	81%	72%	92%
<b>Pct. Who Absconded</b>	51%	84%	29%
<b>Pct. Granted Relief (Asylum, etc.)</b>	0%	1%	21%
<b>Pct. Ordered Removed or Granted Voluntary Departure</b>	63%	95%	73%
<b>Pct. Closed by Trial Attorney’s Exercise of Prosecutorial Discretion or Ordered Terminated by Judge</b>	37%	3%	5%

**Source:** Executive Office of Immigration Review.

Wilson Center, which in April published a series of five essays in *Reflections on Mexico's Southern Border*, in 2014 Mexican authorities took into custody and detained 120,000 illegal migrants on their southern border with Guatemala.<sup>17</sup> (See, specifically, the comments of Ernesto Rodríguez Chávez on p. 11.)

As advocates remind us frequently, poverty and violence are endemic in many areas of Latin America. But what do they think will happen if sizable numbers of Hondurans, Guatemalans, or El Salvadorans believe they can come without fear of detention and be allowed to remain? The populations of El Salvador, Honduras, and Guatemala are, respectively, 6.13 million, 8.6 million, and 14.65 million. Cumulatively more than 29.37 million. How many of them can we realistically absorb without destroying our social service infrastructure?

If we as a society choose to tread this path, is there a philosophical reason to permit *only* nationals from those three countries to remain in the United States just because they have predominated recent waves of arrivals? Why should they be advantaged over, for instance, Nicaraguans who also suffer from poverty and violence? There are an additional 5.85 million people there.

And we haven't even discussed our southern neighbor yet: Mexico, which with regularity appears to be teetering on the edge of "failed state" status. It, too, suffers grinding poverty and violence. Narcotrafficking and murder are rampant;<sup>18</sup> its police and military forces are often indistinguishable from narcotraffickers, and in fact gave birth to the country's most violent gang cartel, the Zetas;<sup>19</sup> and mutilated bodies and mass graves are routinely found, but almost no one ever comes forward to say what they know out of fear.

Mexico has a population of more than 120 million. Will advocates persist in their beliefs out of philosophical consistency if disaster befalls Mexico and a million people or more trek northward? Those who answer "yes" are either liars, fools, or fabulously wealthy and indifferent to the increasingly difficult plight of America's common man; or they simply don't believe in borders or sovereignty — a position ironically easy to take while basking in the rights and privileges accorded by the laws and Constitution of the United States.

If the answer is an honest "no", then the question is how far this nation — the one we are a part of — should go, lest we send a green light to the poor and dispossessed of our southern neighbors, indeed to the poor and dispossessed of the world, to come *en masse*. What will it behoove them all if we try to give shelter to so many that we lose ourselves in the process and simply become another dysfunctional third-world nation struggling at all levels to cope?

Some advocates might claim to have no inherent difficulty with detention *per se*, but not for women and children. So let us ask these rhetorical questions:

- What should happen when these women and families fail to appear for their immigration hearings, as is occurring all too frequently? Are you then willing to accept the propriety of detention if/when they are found, so that the integrity of due process is maintained (that *is* important, isn't it?) — or is your anti-detention stance really just a mask for the end-game of letting everyone stay?
- More importantly, are you willing to see children routinely used as shields to protect adults from the adverse consequences of illegal migration, including detention? Because that *will* increasingly become the norm — we see it already. How many minors will die or be abused along the way? How many will be bartered to adults who aren't relatives, but will claim to be so that when they reach *el norte*, they can walk free?

**Teach a Man to Fish, Don't Just Give Him a Fish.** In the context of migration, that means not adopting the facile view that we can solve the problems of Latin America, or the third world generally, by opening our borders to all and sundry just because they have made the journey by foot, plane, train, or boat. We have seen the consequences of that in the Mariel boatlift; Europeans are watching it play out right now in the Mediterranean.

What it comes down to is this: If we as a country are not extremely careful in all that we say and do, a trickle will become a flood, will become a tidal wave of human beings scrambling to enter our lands as they abandon their own.

Arguing that all of Latin America (or any other region of the globe) should be permitted to migrate illegally to the United States is a foolish, progressive-liberal version of “noblesse oblige”; a kind of reverse colonialism that does nothing to solve the problems looming large in the lives of the populations of the region — festering inequality, disastrous economic policies, rampant crime, and rule by insulated kleptocracies.

If we are committed to social justice and aiding peoples to achieve more stable and prosperous lives, it must be in the context of their own countries and cultures. That is where any legitimate efforts must begin, not through misuse of our immigration system to try to welcome the world, while breaking ourselves in the process.

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## End Notes

<sup>1</sup> See, for example, Jessica Vaughan, [“Catch and Release: Interior immigration enforcement in 2013”](#), Center for Immigration Studies, March 2014.

<sup>2</sup> Francisco Ordoñez, [“The Beginning of the End’ for Obama’s Migrant Family Detention?”](#), McClatchy DC, April 28, 2015.

<sup>3</sup> Dan Cadman, “Straining the Border, Straining the System, Straining Credibility”, Center for Immigration Studies, April 15, 2014; Jessica Vaughan, [“Border Patrol: Illegal Surge Is Mostly Families, Not Unaccompanied Kids”](#), Center for Immigration Studies, July 24, 2014.

<sup>4</sup> Jessica Vaughan, [“Contrary to Administration Claims, Only a Tiny Fraction of ‘Surge’ Border-Jumpers Deported”](#), Center for Immigration Studies, December 24, 2014.

<sup>5</sup> David North, [“An Irony Within the Immigration Policy Debate”](#), Center for Immigration Studies, September 11, 2009; W.D. Reasoner, [“Which Way New York: Will Feds Tolerate Local Interference or Assert Their Authority?”](#), Center for Immigration Studies, October 2011; Phil Leggiere, [“DHS: Debating Detention Reform”](#), *Homeland Security Today*, December 14, 2009.

<sup>6</sup> Migration and Refugee Services/United States Conference of Catholic Bishops, Center for Migration Studies, [“Unlocking Human Dignity: A Plan to Transform the US Immigrant Detention System”](#), *Journal on Migration and Human Security*, undated.

<sup>7</sup> Roque Planas, [“Here’s the Case for Abolishing Immigrant Detention”](#), *The Huffington Post*, May 28, 2015.

<sup>8</sup> [“Criminal Immigration Convictions Drop 20 Percent”](#), Transactional Records Access Clearinghouse of Syracuse University, June 12, 2015.

<sup>9</sup> See, for instance, Jessica Vaughan and Bryan Griffith, [“A Town Near You? ICE Reveals Locations of Convicted Murderers It Freed”](#), Center for Immigration Studies, August 22, 2014; and [“1,000 ‘criminal aliens’ released by ICE committed new crimes, Grassley says”](#), Fox News, January 31, 2015.

<sup>10</sup> Jessica Vaughan, [“The Non-Deported: ICE Still Releasing Criminal Aliens at a Rapid Pace”](#), Center for Immigration Studies, May 28, 2015.

<sup>11</sup> “Hearing to Present the President’s Emergency Supplemental Request for Unaccompanied Children and Related Matters”, [testimony of Juan Osuna](#), director, Executive Office for Immigration Review, U.S. Department of Justice, before the Senate Appropriations Committee, July 10, 2014.

<sup>12</sup> See, for instance, [“The Math of Immigration Detention”](#), National Immigration Forum, August 22, 2013.

<sup>13</sup> Molly Hennessy-Fisk, [“Immigration court backlog grows past 450,000”](#), *The Washington Post*, May 16, 2015.

<sup>14</sup> [“Alternatives to Detention: Improved Data Collection and Analyses Needed to Better Assess Program Effectiveness”](#), GAO-15-26, U.S. Government Accountability Office, November 13, 2014.

<sup>15</sup> [“U.S. Immigration and Customs Enforcement’s Alternatives to Detention \(Revised\)”](#), OIG-15-22, U.S. Department of Homeland Security, Office of Inspector General, February 4, 2015.

<sup>16</sup> Executive Office of Immigration Review (EOIR) statistics obtained by CIS Director of Policy Studies Jessica Vaughan.

<sup>17</sup> Duncan Wood, Christopher Wilson, Eric L. Olson, Brenda Elisa Valdés Corona, and Ernesto Rodríguez Chávez, [“Reflections on Mexico’s Southern Border”](#), Washington, DC: Mexico Institute of the Woodrow Wilson Center with the Instituto Tecnológico Autónomo de México and Centro de Investigación y Docencia Económicas, April 1, 2015.

<sup>18</sup> [“Mexico gang shoot-out leaves dozens dead”](#), BBC News, May 23, 2015.

<sup>19</sup> [“The Origins of Los Zetas and its Founders”](#), Borderland Beat, April 15, 2012.