

## LexisNexis® Emerging Issues Analysis

Cheryl Little and Susana Barciela on  
U.S. Immigration Detention Reforms

2009 Emerging Issues 4739

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On October 6, 2009, U.S. Immigration and Customs Enforcement (“ICE”) announced much-anticipated reforms of the immigration detention system,<sup>1</sup> promising a “truly civil” detention system. This announcement followed an important ICE report by Dr. Dora Schriro, *Immigration Detention Overview and Recommendations*, which for the first time provided a comprehensive government analysis of the state of immigration detention in the United States.<sup>2</sup>

Yet ICE’s lofty reform goals remain aspirational. Other reports issued in 2009, including one by the Department of Homeland Security (“DHS”) Office of Inspector General in November, detail numerous problems in the system.<sup>3</sup> Many vulnerable aliens languish for months, sometimes years, in civil custody. Many are separated from their families, at times are subjected to abusive treatment, and lack access to adequate medical care and legal counsel. Often detainees are needlessly confined when there are better and cheaper alternatives to detention. Why detain aliens when they are neither dangerous nor likely to flee – at great cost to each individual, to the government, and to society?

Rosemarie is only one example. Detained for seven months at a county jail that contracts with ICE to hold immigration detainees, Rosemarie suffered daily vaginal bleeding and pelvic pain as a result of fibroid tumors in her uterus. Months before, Rosemarie had been set for surgery to treat this known condition, but was transferred to ICE cus-

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1. News Release, ICE, Secretary Napolitano and ICE Assistant Secretary Morton announce new immigration detention reform initiatives (Oct. 6, 2009), <http://www.ice.gov/pi/nr/0910/091006washington.htm> (last visited Dec. 15, 2009). A hearing on these proposals was held by the House Homeland Security Committee on December 10, 2009. Testimony is available at <http://homeland.house.gov/Hearings/index.asp?ID=228> (last visited Dec. 11, 2009).
  2. It is dated October 6, 2009, and available at [http://www.ice.gov/doclib/091005\\_ice\\_detention\\_report-final.pdf](http://www.ice.gov/doclib/091005_ice_detention_report-final.pdf).
  3. Office of Inspector General, U.S. Department of Homeland Security, *OIG-10-13, Immigration and Customs Enforcement Policies and Procedures Related to Detainee Transfers* (Nov. 2009), available at [http://www.dhs.gov/xoig/assets/mgmt/rpts/OIG\\_10-13\\_Nov09.pdf](http://www.dhs.gov/xoig/assets/mgmt/rpts/OIG_10-13_Nov09.pdf); see also, e.g., Office of Inspector General, U.S. Department of Homeland Security, *OIG-08-52, ICE Policies Related to Detainee Deaths and the Oversight of Immigration Detention Facilities* (June 2008); Human Rights Watch, *Detained and Dismissed: Women’s Struggles to Obtain Health Care in United States Immigration Detention* (2009), available at <http://www.hrw.org/en/reports/2009/03/16/detained-and-dismissed> (last visited Mar. 18, 2009); Karen Tumlin, Linton Joaquin, and Ranjana Natarajan, *National Immigration Law Center, ACLU of Southern California, and Holland & Knight, A Broken System: Confidential Reports Reveal Failures in U.S. Immigrant Detention Centers* (2009), available at <http://www.nilc.org/immlawpolicy/arrestdet/A-Broken-System-2009-07.pdf>.

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## LexisNexis® Emerging Issues Analysis

Cheryl Little and Susana Barciela on  
U.S. Immigration Detention Reforms

tody before the surgery could take place. While she was in ICE custody, ICE, the county jail, and its contracted healthcare provider trivialized Rosemarie's symptoms and failed to provide the necessary surgery.

After the Florida Immigrant Advocacy Center ("FIAC") filed suit, a federal judge ordered ICE and its contractors to provide treatment without further delay.<sup>4</sup> Rosemarie finally had the surgery on December 1, 2009, and is in recovery. ICE detainees should not have to go to federal court to get needed medical care.

FIAC advocates on behalf of detainees like Rosemarie, who despite being confined in "civil" immigration detention often suffer treatment that is far from civil. This article examines the history of U.S. immigration detention, ICE's detention reform proposals, and the prospects for those reforms.

**History of U.S. Immigration Detention in Brief.** Although the United States initially had no federal restrictions on immigration, in 1881 the U.S. Congress passed the Immigration Act in the wake of a sharp influx of newcomers. Ellis Island opened on January 2, 1892, and became the best-known detention center of its time, holding hopeful immigrants for a period of a few days to several weeks as they sought entry to the United States.

During World War I, national security concerns raised the specter of the "Red Scare," resulting in a backlash against recent immigrants. Thousands of immigrants were rounded up, detained, and deported. World War II brought fear of "enemy aliens": people from countries waging war against the United States. Immigration detention sites were transformed into internment camps for thousands of Japanese, Germans, and Italians whose only "crime" was being born in the wrong nation.

The Internal Security Act of 1950 added suspected communists and fascists to the detainee population, disproportionately impacting immigrant communities. Then, in the notorious 1953 *Shaughnessy v. United States ex rel. Mezei* case,<sup>5</sup> the Supreme Court upheld the U.S. Attorney General's authority to detain people considered excludable. Though widely criticized, the decision has never been overturned.

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4. Rosemarie M. v. Morton, --- F. Supp. 2d ---, No. 2:09-cv-601-FtM-29DNF (M.D. Fla. Nov. 19, 2009).

5. 345 U.S. 206 (1953).

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*Cheryl Little and Susana Barciela on*  
**U.S. Immigration Detention Reforms**

In 1954, immigration policy reversed course. U.S. Attorney General Herbert Brownell Jr. announced that “in all but a few cases” aliens pending removal from the United States would no longer be detained. Only those deemed likely to flee or a danger to national security would be subject to detention.

For the next twenty-six years few aliens were detained. The U.S. Attorney General retained mass parole authority and created special programs to authorize the release of specific groups found in the United States, such as Cubans in the 1960s and Indochinese in the 1970s.

In the landmark Refugee Act of 1980, Congress limited the Attorney General’s parole authority. Yet other events – including the Mariel boatlift from Cuba, an influx of Haitians fleeing terror, and Central Americans seeking refuge from civil violence – brought unprecedented numbers of asylum seekers to our shores. The United States became a country of first resort for asylum seekers. In response, the U.S. government turned to detention as a deterrent.

In 1981 the congressional Select Commission on Immigration and Refugee Policy recommended enforcement, detention, and deportation efforts as deterrence measures. The Reagan administration embraced the concepts, as has every other administration to greater or lesser extents since.

In 1996, numbers of immigration detainees increased dramatically after the enactment of the Anti-Terrorism and Effective Death Penalty Act<sup>6</sup> and the Illegal Immigration Reform and Immigrant Responsibility Act.<sup>7</sup> These laws expanded the number of aliens – including those lawfully present – subject to mandatory detention and deportation.

The detention population surged again after the 2001 terrorist attacks stoked national security fears and anti-alien sentiment. When the DHS was created in 2003, it absorbed functions of the old Immigration and Naturalization Service (“INS”): ICE was charged with enforcing increasingly harsh immigration laws. U.S. Customs and Border Protection assumed former INS border-enforcement responsibilities. U.S. Citizenship and Immigration Services was to handle immigration applications, benefits, and naturalization.

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6. Pub. L. No. 104-132, 110 Stat. 1214 (1996).

7. Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, div. C, 110 Stat. 3009 (1996).

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## LexisNexis® Emerging Issues Analysis

Cheryl Little and Susana Barciela on  
U.S. Immigration Detention Reforms

Today, ICE detainees represent the fastest-growing segment of our nation's exploding jail population. Overall, immigration-detention capacity has more than quadrupled in the last fifteen years – from fewer than 7,500 beds in 1995 to the current 33,400 beds for fiscal year 2010.<sup>8</sup> These detainees are held in a patchwork system of more than 300 local jails, large for-profit prisons, and a few ICE-owned and -managed detention centers.<sup>9</sup>

An estimated 369,483 individuals were held in ICE custody in FY2009, more than twice the total in FY1999.<sup>10</sup> Comparatively, the average annual growth rate of prisoners held in federal or state prisons or in local jails was 2.4% from 2000 to 2007.<sup>11</sup> To handle the population surge, ICE increasingly relies on jails in remote locations to house its detainees. For many of these facilities, ICE detention is a cash cow with rates that exceed \$100 per day per detainee.<sup>12</sup>

**Immigration Detention is Far From Civil.** Immigration detainees are unlike both pre-trial inmates (incarcerated individuals pending disposition of criminal charges against them) and criminal inmates (individuals serving a criminal sentence after having been convicted of a crime). Immigration detainees are, by definition, neither charged with a criminal offense nor serving a criminal sentence. Their detention arises either from allegations that they have violated civil immigration laws or, once a final order of removal has been entered, from the government's efforts to physically remove them from the United States. Immigration detention is purely administrative and not "criminal" in nature. As such, it is not supposed to be punitive.<sup>13</sup>

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8. Dora Schriro, ICE, Immigration Detention Overview and Recommendations, at 2 (2009); National Immigration Forum. Legislative Update for November 4, 2009, available at <http://www.immigrationforum.org/policy/update-display/legislative-update-for-november-4-2009/>.
  9. Dora Schriro, ICE, Immigration Detention Overview and Recommendations, at 14 (2009). The majority of detention results from arrests in eight field office areas (San Antonio, Houston, Atlanta, Miami, Los Angeles, New Orleans, New York, and Phoenix). *Id.* at 6.
  10. TRAC Immigration, Huge Increase in Transfers of ICE Detainees, available at <http://trac.syr.edu/immigration/reports/220/> (last visited Dec. 16, 2009).
  11. Bureau of Justice Statistics, U.S. Department of Justice, Prison Statistics: Summary Findings, <http://www.ojp.usdoj.gov/bjs/prisons.htm> (last visited Dec. 16, 2009).
  12. Fact Sheet, ICE, ICE Detention Reform: Principles and Next Steps (Oct. 6, 2009), available at [http://www.ice.gov/doclib/10-06-09-fact-sheet\\_ice\\_detention\\_reform.pdf](http://www.ice.gov/doclib/10-06-09-fact-sheet_ice_detention_reform.pdf).
  13. *Zadvydas v. Davis*, 533 U.S. 678, 609 (2001).

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## LexisNexis® Emerging Issues Analysis

Cheryl Little and Susana Barciela on  
U.S. Immigration Detention Reforms

For all practical purposes, however, this is too often a distinction without a difference. The vast majority of ICE detainees are kept in facilities built for criminal custody, ranging from pre-trial inmates to sentenced felons. As noted in Dr. Schriro's ICE report, "criminal" inmates and "civil" ICE detainees both are confined in "secure facilities with hardened perimeters in remote locations at considerable distances from counsel and/or their communities." Immigration detainees include women and children, families, victims of domestic violence, torture survivors, and asylum seekers.

Many vulnerable detainees are eligible for release, but ICE chooses not to exercise its discretion. For example, well over 48,000 asylum seekers were detained in the United States between 2003 and 2009. During the same period there was an increase of at least 62% in the use of jail-like detention for asylum seekers and other aliens.<sup>14</sup> As such, aliens in detention wear uniforms, are shackled and handcuffed, undergo invasive searches and inmate counts, and often are treated as criminal offenders by guards.

Further, ICE detention standards are based on a penal model: the American Correctional Association ("ACA") standards.<sup>15</sup> The ICE detention standards, which were first introduced by the legacy INS in 2000 based on the ACA correctional standards, were updated in 2008 with input from immigrant advocates. Standards exist for everything from medical care, detainee transfers, and transportation to access to attorneys, law libraries, recreation, telephones, and visitation.<sup>16</sup> They are now called Performance-Based National Detention Standards and are being phased in, although advocates continue to engage with ICE about ways to improve the standards to better reflect the civil nature of immigration detention.

However, no detention standard is enforceable by law. In fact, the majority of ICE's contracts with county jails that hold detainees do not include the detention standards. ICE instead has these local facilities evaluated each year on their compliance with the standards, and the FY2009 appropriations act requires ICE to discontinue use of any facility with less than satisfactory ratings for two consecutive years.<sup>17</sup>

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14. Human Rights First, U.S. Detention of Asylum Seekers: Seeking Protection, Finding Prison (Apr. 30, 2009), available at <http://www.humanrightsfirst.org/pdf/090429-RP-hrf-asylum-detention-report.pdf> (last visited Dec. 5, 2009).

15. Dora Schriro, ICE, Immigration Detention Overview and Recommendations, at 16 (2009).

16. ICE, Operations Manual ICE Performance Based National Detention Standards (PBNS), <http://www.ice.gov/partners/dro/PBNS/index.htm> (Oct. 7, 2009) (last visited Dec. 16, 2009).

17. Dora Schriro, ICE, Immigration Detention Overview and Recommendations, at 10 (2009).

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## LexisNexis® Emerging Issues Analysis

Cheryl Little and Susana Barciela on  
U.S. Immigration Detention Reforms

Yet even the jails whose contracts include standards often ignore them. FIAC also has seen local jails pass inspections with flying colors after flagrant violations have been documented there. For example, the Glades County Detention Center was found fully “compliant” with the ICE National Detention Standards in December 2008.<sup>18</sup> FIAC has nonetheless documented numerous standards violations at Glades over the years. Those violations include: improper use of force; restricting legal access to detainees by allowing no contact visits; routinely denying unrepresented detainees access to their own medical records; and denying and delaying needed medical care.<sup>19</sup>

**Conditions of Detention.** ICE detention is often a secret world outside of the public eye and subject to little scrutiny. Detainees routinely report the inappropriate use of force, deplorable living conditions, difficulty obtaining urgently needed medical care, and little to no recreation. They also face retaliation for demanding better treatment or complaining about the abuses committed against fellow detainees.

While in detention, immigration detainees have limited access to their loved ones: Almost all phone calls are required to be paid for through the jails’ in-house calling card systems, which routinely charge exorbitant prices, and visits with family are often non-contact (i.e. through glass or via video conferencing). Detainees also are victims of excessive transfers that can greatly interfere with their access to family and medical care.

Recent findings by Human Rights Watch and the Transactional Records Access Clearinghouse (TRAC) of Syracuse University show that ICE and INS transferred detainees a startling 1.4 million times from 1999 to 2008, and an astounding 53% of those transfers took place after 2006.<sup>20</sup> The majority of ICE detainees were transferred to another facility at least once while in custody, and one out of every four was subject to multiple transfers.<sup>21</sup>

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18. Memorandum from William J. Patrick, Reviewer-in-Charge, Creative Corrections, Beaumont, Texas, for James T. Hayes, Jr., Office of Detention and Removal Operations, ICE, Glades Detention Center, Female Annex Initial Detention Review.

19. FIAC letters to Glades County Detention: on legal visits (Mar. 27, 2009); on excessive use of force on detainees (Nov. 17, 2008). On medical conditions, see Florida Immigrant Advocacy Center, *Dying for Decent Care: Bad Medicine in Immigration Detention* (Feb 2009), available at <http://www.fiacfla.org/fiacpublications.php#167>.

20. Human Rights Watch, *Locked Up Far Away: The Transfer of Immigrants to Remote Detention Centers in the United States* (Dec. 2, 2009), available at <http://www.hrw.org/sites/default/files/reports/us1209webwcover.pdf>.

21. TRAC Immigration. *Huge Increase in Transfers of ICE Detainees*, <http://trac.syr.edu/immigration/reports/220/>.

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Cheryl Little and Susana Barciela on  
U.S. Immigration Detention Reforms

Transfers often devastate detainees' ability to assert their rights and to secure legal representation in their immigration cases. Detainees are moved so far from available counsel and witnesses that they lose any chance for representation, which greatly compromises the likelihood of succeeding in their cases. Attorneys and family members have spent weeks trying to locate detainees who have been transferred with no notice to their families or attorneys.

The Human Rights Watch report illustrates the terrible consequences for a Jamaican New Yorker who was transferred to Texas after being detained for three months in New York and New Jersey. In New York, his drug misdemeanors would not be considered "aggravated felonies" and he would have been eligible for cancellation of removal due to his strong family ties and twenty-two years of legal residency in the United States. Such relief from deportation was not available in Texas due to Fifth Circuit rulings. Thus, he was deported.

Alison Parker, Human Rights Watch Deputy U.S. Director and report author, noted:

"Immigrant detainees should not be treated like so many boxes of goods - shipped to the most convenient place for ICE to store them," he said, "We are especially concerned that the transferred detainees may find that their chances of successfully fighting deportation or gaining asylum from persecution have just evaporated."<sup>22</sup>

A recent report from the DHS Office of Inspector General confirmed the problems with transfers. It concluded:

Transfer determinations made by ICE officers at the detention facilities are not conducted according to a consistent process. This leads to errors, delays, and confusion for detainees, their families, and legal representatives. Communication and coordination with the ... immigration courts regarding detainee status can also be improved to eliminate confusion and delays.<sup>23</sup>

22. News release, Human Rights Watch, Remote Detainee Lockups Hinder Justice (Dec. 2, 2009), available at <http://www.hrw.org/en/news/2009/11/30/us-remote-detainee-lockups-hinder-justice>.

23. Memorandum from Richard L. Skinner, Inspector General, DHS, to John T. Morton, Assistant Secretary, US ICE, on Letter Report: Immigration and Customs Enforcement Policies and Procedures Related to Detainee Transfers, unnumbered page in Office of Inspector General, U.S. Department of Homeland Security, OIG-10-13, Immigration and Customs Enforcement Policies and Procedures Related to Detainee Transfers (Nov. 10, 2009), available at [http://www.dhs.gov/xoig/assets/mgmt/rpts/OIG\\_10-13\\_Nov09.pdf](http://www.dhs.gov/xoig/assets/mgmt/rpts/OIG_10-13_Nov09.pdf).

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Cheryl Little and Susana Barciela on  
U.S. Immigration Detention Reforms

Though detainees have a number of rights, including the constitutional guarantee of fair treatment and protection against cruel and unusual punishment, they often do not know those rights or find it impossible to assert them in confinement. The difficulty is compounded by the lack of legal representation. Unlike most pre-trial inmates facing criminal charges, immigration detainees have no right to a court-appointed lawyer despite the dire consequences of losing a case and the complex nature of the proceedings. Consequently, indigent detainees must rely entirely on pro bono attorneys. Ultimately, more than 80% of ICE detainees face deportation without an attorney,<sup>24</sup> which hurts their ability to make their cases in immigration proceedings.

Even where pro bono attorneys are available there are serious obstacles to legal access for detainees. Detention centers in Florida illustrate this national problem. At the Broward Transitional Center (“BTC”), attorneys often may not speak privately with clients because the only legal visitation room is in an open area shared by multiple attorneys visiting with clients. At Miami’s Krome detention center, Board of Immigration Appeals Accredited Representatives, who may represent detainees before the immigration court or ICE, are not afforded the same level of access as attorneys, contrary to the ICE detention standards. Also at Krome, attorneys are locked in a room with detainees with no alert system to signal when the interview is over or if there is an emergency.

A recent report by the Constitution Project, a bipartisan think tank, points out the pitfalls of a detention system that cannot ensure basic conditions or legal protections. Its sweeping recommendations for reforms in DHS policy and U.S. immigration law were formulated by a host of prominent attorneys and constitutional experts, including former DHS Under Secretary Asa Hutchinson. One recommendation is “an aspirational goal for government funded and appointed counsel for all indigent non-citizens in removal proceedings where voluntary *pro bono* services are not otherwise available.”<sup>25</sup> The report notes:

Although DHS has pledged to ensure safe, secure, and humane conditions for the detained, significant reforms are needed to achieve this goal.

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24. Scott Lewis & Paromita Shah, Detention Watch Network, National Immigration Project, and Rights Working Group, The Real Deal: Detaining America’s Immigrants: Is this the best solution?, <http://65.36.162.162/files/RealDealDetention.pdf> (last visited Dec. 15, 2009).
  25. The Constitution Project, Recommendations for Reforming our Immigration Detention System and Promoting Access to Counsel in Immigration Proceedings 8 (Dec. 2009), available at <http://www.constitutionproject.org/manage/file/359.pdf> (last visited Dec. 15, 2009).

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[Legal](#) [Academic](#) [Risk & Information Analytics](#) [Corporate & Professional](#) [Government](#)



## LexisNexis® Emerging Issues Analysis

Cheryl Little and Susana Barciela on  
U.S. Immigration Detention Reforms

Moreover, few of these immigration detainees have access to attorneys to help them navigate the U.S. immigration system and ensure that they secure the protections provided under our immigration laws. The important and legitimate role of immigration enforcement is undermined when we fail to provide these fundamental protections.<sup>26</sup>

FIAC has documented serious problems with healthcare in detention, where ICE detainees are routinely subjected to poor, and sometimes appalling, medical care. Major medical staffing shortages often compromise the quality of care. Treatment is often delayed, if not denied outright. At times, immigration detainees in remote areas of the country are treated even worse than regular inmates because of hostility toward the immigrant population. Many mentally ill inmates are treated improperly.

FIAC, for example, repeatedly has complained about the use of force on detainees who have mental-health issues at the Glades County Detention Center in Central Florida.<sup>27</sup> In one troubling incident, jail staff used a chemical spray on a detainee for punitive reasons, a clear violation of ICE National Detention Standards. In November 2007, a woman diagnosed with depression and on suicide watch was sprayed with mace in the face. Her offense: She had spread feces on the walls of her holding cell and would not clean it. The jail's incident report did not indicate that the woman posed a threat to their own safety, to other people, or to any property.<sup>28</sup>

Unfortunately, oversight of ICE detention conditions is sorely lacking.<sup>29</sup> Reform clearly is needed. ICE subjects many detainees to substandard and at times appalling conditions of confinement. ICE often sets bonds so high as to be prohibitive. Further, many cases worthy of humanitarian parole or deferred action are routinely denied. Thousands of detainees must therefore choose between remaining locked up in deplorable conditions

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26. *Id.* at 1.

27. Florida Immigrant Advocacy Center, *Dying for Decent Care: Bad Medicine in Immigration Detention* (Feb. 2009), available at <http://www.fiacfla.org/fiacpublications.php#167>.

28. *Id.* at 36-37.

29. See, e.g., Office of Inspector General, U.S. Department of Homeland Security, *OIG-08-52, ICE Policies Related to Detainee Deaths and the Oversight of Immigration Detention Facilities* (June 2008); Karen Tumlin, Linton Joaquin, and Ranjana Nataraajan, National Immigration Law Center, ACLU of Southern California, and Holland & Knight, *A Broken System: Confidential Reports Reveal Failures in U.S. Immigrant Detention Centers* (2009), available at <http://www.nilc.org/immlawpolicy/arrestdet/A-Broken-System-2009-07.pdf>.

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[Legal](#) [Academic](#) [Risk & Information Analytics](#) [Corporate & Professional](#) [Government](#)



## LexisNexis® Emerging Issues Analysis

Cheryl Little and Susana Barciela on  
U.S. Immigration Detention Reforms

while fighting worthy immigration cases, possibly for years, or simply giving up and returning to their homelands, where some may face persecution.

**ICE's Detention Reforms.** No doubt Secretary of Homeland Security Janet Napolitano intends to improve conditions in the nation's dysfunctional immigration jails. She ordered a review of ICE's detention system earlier this year.<sup>30</sup> She also hired Dr. Schriro, a corrections expert who visited advocates and detention centers to gather data, assess problems, and formulate solutions. Dr. Schriro's report aptly notes that ICE's expertise focuses on enforcement and removal rather than the design of detention facilities and community-based alternatives.<sup>31</sup> It lays out many of the detention reforms now proposed by ICE.

ICE chief John Morton also has reached out to immigration advocates and recognizes that the current detention system is fundamentally flawed. In announcing reform plans, Mr. Morton set a welcome goal of creating what he called a "truly civil detention system."<sup>32</sup> He has created ICE advisory groups on medical care and general detention conditions. Advocates from FIAC and the American Civil Liberties Union to Detention Watch Network and the Women's Refugee Commission will address critical issues with top ICE executives within those groups.

ICE's announced reforms include:

- *Increasing facility accountability* by centralizing oversight of detention contracts at ICE headquarters in Washington, D.C. ICE promises to double oversight staff at the detention centers where most detainees are held to intercede when necessary and to ensure appropriate grievance and disciplinary processes. It hopes to develop an "on-line locator service so that families and attorneys can locate detainees."
- *Using new risk assessment tools*, ICE will place immigrants in facilities "appropriate to the risk they present." For example, nonviolent detainees

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30. News Release, ICE, Secretary Napolitano Issues Immigration and Border Security Action Directive, (Jan. 30, 2009), [http://www.dhs.gov/ynews/releases/pr\\_1233353528835.shtm](http://www.dhs.gov/ynews/releases/pr_1233353528835.shtm).

31. Dora Schriro, ICE, Immigration Detention Overview and Recommendations, at 3 (2009).

32. Nina Bernstein, *Ideas for Immigrant Detention Include Converting Hotels and Building Models*, N.Y. Times, Oct. 6, 2009, at A14 and <http://www.nytimes.com/2009/10/06/us/politics/06detain.html>.

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## LexisNexis® Emerging Issues Analysis

Cheryl Little and Susana Barciela on  
U.S. Immigration Detention Reforms

“will not be jailed as if they represent a risk to society.” More alternatives to detention are promised.

- *Putting more attention on medical care.* ICE will develop a “medical classification system” that aims to improve awareness of detainees’ medical and mental-health conditions.<sup>33</sup>
- *Developing a new set of standards* that recognize the needs of special populations, such as women, families, the ill and infirm, and asylum seekers, and expand access to attorneys, legal materials, visitation, and religious practices.

Despite ICE’s goal to reform its detention system, changing facilities and penal culture will take time. Meanwhile, ICE should respond to the urgent need for fixes that can be quickly implemented.

Most important, ICE should exercise the considerable discretion it has to release non-violent detainees. Detaining asylum seekers and other vulnerable aliens should be the exception, not the norm.

Other detainees may also be released in programs that serve as alternatives to detention. These programs generally include a combination of reporting and electronic monitoring. Ankle bracelets are overly restrictive for some aliens who are unlikely to flee or cause harm. Erika Feller, the United Nations refugee agency’s Assistant High Commissioner for Protection, has encouraged ICE to provide asylum seekers with alternatives to detention, but to do so in ways that are less restrictive than previous ICE alternatives. “The objectives of many alternatives to detention systems are enforcement objectives,” she said recently. “UNHCR believes that humanitarian considerations should take on a higher profile.”<sup>34</sup>

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33. News Release, ICE, Secretary Napolitano and ICE Assistant Secretary Morton announce new immigration detention reform initiatives, (Oct. 6, 2009), <http://www.ice.gov/pi/nr/0910/091006washington.htm>.

34. *US initiative offers asylum-seekers an alternative to detention*, UNHCR News Stories (Nov. 25, 2009), <http://www.unhcr.org/4b0d643a6.html>.

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Cheryl Little and Susana Barciela on  
U.S. Immigration Detention Reforms

ICE itself notes that alternatives to detention cost substantially less: only \$14 a day per person versus detention costs that can top \$100 a day.<sup>35</sup> In fact, for FY 2010 each detainee will cost taxpayers an average of \$141 per day. Detaining asylum seekers who ultimately were granted relief cost an estimated \$12.7 million in 2007.<sup>36</sup>

In one case, Sarjina Emy spent twenty months in detention at the BTC while contesting her deportation. She was five when her parents brought her to the United States. In 2007, she was an honors student planning to go to college when she and her family were arrested by ICE agents at home. She was twenty when she withdrew her appeal and consented to deportation. The cost to taxpayers to detain a young woman who was no threat to the community: some \$85,000.<sup>37</sup>

The considerable savings from using alternatives could be redirected to address real national security threats. As former DHS Secretary Michael Chertoff pointed out:

Right now, I've got my Border Patrol agents and my immigration agents chasing maids and landscapers. I want them to focus on drug dealers and terrorists. It seems to me, if I can get the maids and landscapers into a regulated system and focus my law enforcement on the terrorists and the drug dealers, that's how I get a safe border.<sup>38</sup>

One immediate concern relates to who will oversee the reform process. Unfortunately, only weeks after Dr. Schriro submitted the detention report, she and one of her top lieutenants in ICE's Office of Detention Policy and Planning, Cree Zischke, resigned. Ms. Zischke had come to ICE with experience in corrections medical and mental-health care.<sup>39</sup> Both ICE executives were expected to play central roles in detention reforms. It's

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35. Fact Sheet, ICE, ICE Detention Reform: Principles and Next Steps (Oct. 6, 2009), [http://www.ice.gov/doclib/10-06-09-fact\\_sheet\\_ice\\_detention\\_reform.pdf](http://www.ice.gov/doclib/10-06-09-fact_sheet_ice_detention_reform.pdf).

36. National Immigration Forum, Backgrounder: The Math of Immigration Detention (July 7, 2009), available at <http://www.immigrationforum.org/images/uploads/MathofImmigrationDetention.pdf> (last visited Dec. 15, 2009).

37. *Id.*

38. *Immigration breakthrough could pave way for citizenship*, CNN.com, May 17, 2007, <http://www.cnn.com/2007/POLITICS/05/17/senate.immigration/index.html>.

39. *Second immigration official leaves new federal office*, The Investigative Report: Notice to Appear, <http://centerforinvestigativereporting.org/blogpost/20091023secondimmigrationofficialleavesnewfederaloffice> (Oct. 23, 2009)

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Cheryl Little and Susana Barciela on  
U.S. Immigration Detention Reforms

yet unclear how the reforms will unfold without key staff members who recommended fixes and could oversee their implementation at detention sites.

Additionally, ICE reports that it has already begun consolidating “special populations,” such as women and asylum seekers, in certain detention centers.<sup>40</sup> ICE’s intent is to better monitor and develop programs for the special needs of these populations. As of mid-September, ICE stated that newly arriving asylum seekers would be sent to BTC in Florida, which holds only noncriminals.

Women detainees from three South Texas facilities are being consolidated at the Hutto facility, also in Texas, where ICE used to detain families with children.<sup>41</sup> Sending women to a nearby facility that provides improved services and medical care appears a good move.

However, asylum seekers who have established a credible fear of persecution and are eligible for parole should be released from detention entirely. There is no reasonable basis for ICE to detain them while their cases are being adjudicated. Detaining these individuals, who in many cases have been subjected to persecution and isolation, causes unnecessary psychological harm.<sup>42</sup>

It also inevitably sends many vulnerable detainees far from family members, doctors, and potential witnesses who could be crucial to their cases. This compromises their ability to present meritorious cases by making it more difficult, if not impossible, to track down evidence crucial to establish their eligibility for protection. If congregated at remote facilities, their access to medical and mental-health care may also be more limited.

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40. Fact Sheet, ICE, ICE Detention Reform: Principles and Next Steps (Oct. 6, 2009), <http://www.ice.gov/doclib/10-06-09-fact-sheet-ice-detention-reform.pdf>.

41. *Id.* FIAC routinely provides pro bono know-your-rights presentations and represents detainees at BTC.

42. Transfer of Asylum Seekers to the Broward Transitional Center, FIAC letter to John Morton, DHS Assistant Secretary, ICE (Dec. 2, 2009). As this piece was about to be posted, ICE announced welcome improvements in this area. News Release, ICE, ICE Issues new procedures for asylum seekers as part of ongoing detention reform initiatives (Dec. 16, 2009), <http://www.ice.gov/pi/nr/0912/091216washington.htm> (“The revised guidelines . . . , effective Jan. 4, 2010, will permit parole from detention . . . of aliens arriving at U.S. ports of entry who establish their identities, pose neither a flight risk nor a danger to the community, have a credible fear of persecution or torture, and have no additional factors that weigh against their release. The new guidelines also mandate that all such arriving aliens should automatically be considered for parole -- a significant change from prior guidance that required aliens to request parole in writing.”). We will carefully monitor how this policy is implemented to see how much actually improves.

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## LexisNexis® Emerging Issues Analysis

Cheryl Little and Susana Barciela on  
U.S. Immigration Detention Reforms

Concentrating women, severely ill, or other vulnerable detainees in any *one* detention facility is also likely to overwhelm an area's capacity to provide high-quality legal and other specialized services. This will certainly hurt indigent detainees, due to the limited pool of pro bono legal providers. Without an attorney, a vulnerable detainee faces an uphill battle. For example, asylum seekers with attorneys are three times more likely to win their cases than those without counsel.<sup>43</sup>

Time will tell how effectively ICE balances the need for vulnerable detainees to stay close to family and counsel and the efficiencies gained by concentrating special populations in few and possibly remote detention locations. Meanwhile, ICE should avoid concentrating vulnerable detainees in facilities where egregious abuses have been reported.

It is not surprising that ICE Assistant Secretary Morton is dedicating a stakeholders group to detainee medical care. Detainees are routinely accused of faking illnesses, have painful symptoms ignored, and are shackled when taken to a hospital or medical appointments. They often are denied their own medical records. ICE routinely bars attorneys from accompanying detainee clients to medical appointments. ICE repeatedly turned FIAC away at medical visits for Rosemarie, whose case was mentioned earlier. We were able to accompany her only after a federal judge ordered ICE to allow her attorney to be present.<sup>44</sup>

In August, ICE revealed it had overlooked ten detainee deaths in the last six years and failed to include them in an official list of such fatalities in a March 2009 report to Congress.<sup>45</sup> ICE's apparent inability to keep accurate track of deaths in custody is one more concern about its ability to provide decent healthcare, especially since there's such a need to do so quickly.

Increasing the size of the oversight staff at detention sites could help. But little will change for detainees unless contactors are penalized for violating standards and detention staff members who abuse detainees are consistently disciplined. To be effective,

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43. Jaya Ramji Nogales, Andrew Schoenholtz, and Phillip Schrag, *Refugee Roulette: Disparities in asylum adjudication*, 60 Stan. L. Rev. 295, 340 (2007) and <http://isim.georgetown.edu/Publications/AndyPubs/RefugeeRoulette.pdf>.

44. Rosemarie M. v. Morton, --- F. Supp. 2d ---, No. 2:09-cv-601-FtM-29DNF (M.D. Fla. Nov. 19, 2009).

45. Nina Bernstein, *Officials Say Detainee Fatalities Were Missed*, N.Y. Times, Aug. 18, 2009, at A10 and <http://www.nytimes.com/2009/08/18/us/18immig.html?scp=1&sq=Officials%20Say%20Detainee%20Fatalities%20Were%20Missed&st=cse>.

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## LexisNexis® Emerging Issues Analysis

Cheryl Little and Susana Barciela on  
U.S. Immigration Detention Reforms

detentions standards must reflect ICE's civil – not criminal – authority and be codified to be legally enforceable.

ICE also needs to install an effective grievance policy and enforce a ban on retaliation against detainees who complain of mistreatment. ICE headquarters must exercise decisive leadership to the field in this regard and clearly communicate reforms, expectations, and consequences through stronger communication and policy directives, as well as increased trainings for ICE field staff and detention-facility employees.

**Toward Truly Civil Detention.** The administration's commitment to dramatically change the detention system to a civil model is promising. However, the detention of aliens cannot be fundamentally changed without a serious examination of how ICE detainees come into custody. In this respect, the trends are deeply worrisome.

In 2008, Congress mandated that ICE's enforcement activities focus on the most dangerous criminal aliens. ICE rhetoric highlights a host of programs targeting the worst offenders. Yet the reality is quite different.<sup>46</sup>

ICE's two largest enforcement programs, which reeled in 60% of ICE detainees in FY2009, have been arresting increasingly fewer aliens with criminal histories. Thus, as the Schriro report notes, the majority of the detainees have no or minor convictions.<sup>47</sup>

Many such detainees unknowingly sign statements waiving all their legal rights and are summarily deported, even some who may be eligible for relief. Yet many of them have been in the United States for years, pay taxes, raise U.S.-citizen children, and contribute to their communities. These are the very people who would be able to earn legal status under the comprehensive immigration reform that President Obama rightly envisions.

In FY 2010 ICE is spending nearly \$6 billion, much of it to detain and deport tens of thousands of such aliens.<sup>48</sup> Those tax dollars would be better spent on alternatives to detention when, for a fraction of the cost per detainee, ICE can release needlessly de-

46. See, e.g., Margot Mendelson, Shayna Strom, and Michael Wishnie, Migration Policy Institute, Collateral Damage: An Examination of ICE'S Fugitive Operations Program (Feb. 2009), available at [http://www.migrationpolicy.org/pubs/NFOP\\_Feb09.pdf](http://www.migrationpolicy.org/pubs/NFOP_Feb09.pdf) (last visited Dec. 15, 2009) (reporting a high percentage of noncriminal, "collateral," arrestees).

47. Dora Schriro, ICE, Immigration Detention Overview and Recommendations, at 12 (2009).

48. Fact Sheet, ICE, ICE Fiscal Year 2010 Enacted Budget (Nov. 5, 2009), [http://www.ice.gov/pi/news/factsheets/index\\_office.htm](http://www.ice.gov/pi/news/factsheets/index_office.htm).

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[Legal](#) [Academic](#) [Risk & Information Analytics](#) [Corporate & Professional](#) [Government](#)



## LexisNexis® Emerging Issues Analysis

**Cheryl Little and Susana Barciela on  
U.S. Immigration Detention Reforms**

tained aliens with little risk that they will flee. Better yet, ICE should stop detaining such aliens in the first place. This is a more sensible way to manage, shrink, and reform ICE's dysfunctional detention system.

The Detention Operations Manual is available on Lexis.com in the Immigration administrative materials in [Immigration Law & Procedure - Agency Manuals](#).

For a more general discussion of detention, consult [8-108 Charles Gordon, Stanley Mailman & Stephen Yale-Loehr, Immigration Law and Procedure section 108.04](#).

The primary sources include [8 U.S.C. sections 1226, 1231, 1368](#); [8 C.F.R. sections 236.1, 241.3 -.5, and 1236.1](#).

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