

Center for American Progress



Dignity Denied

LGBT Immigrants in U.S. Immigration Detention

By Sharita Gruberg November 2013

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Introduction

As Congress debates immigration reform, a common refrain from congressional Republicans is the call for increased border security and increased resources for enforcement of immigration laws. While it is in the interest of national sovereignty and security to track those who come into and leave the United States, we cannot permit enforcement of immigration laws to trample immigrants' basic human rights. We must ensure that immigration enforcement is conducted in a humane manner that respects human dignity. Unfortunately, the current immigration enforcement system falls short of this goal, particularly in regard to the treatment of lesbian, gay, bisexual, and transgender, or LGBT, immigrants.

While the Department of Homeland Security, or DHS, does not keep data on the sexual orientation or gender identity of people in its custody, reports of treatment of LGBT detainees obtained through Freedom of Information Act, or FOIA, requests and through complaints filed by immigrant rights groups reveal that much like in the general prison population—where LGBT inmates are 15 times more likely to be sexually assaulted than the general population²—LGBT immigrants in immigration detention facilities face an increased risk of abuse in detention. The U.N. Special Rapporteur on torture and other cruel, inhuman or

Americans for Immigrant Justice provided a graphic example of how LGBT immigrants are mistreated. Advocates from this organization described incidents of transgender immigrants who were detained at the Krome Service Processing Center in Miami, Florida, and kept in administrative segregation—more commonly known as solitary confinement—for periods of up to six months at a time. The purported rationale for placing LGBT immigrants in solitary confinement is to protect them from the general detainee population. LGBT immigrants in immigration detention facilities are at increased risk of verbal abuse, sexual assault, and physical assault. In the case of Krome,

female transgender detainees are housed with the male population. Rather than providing a safe environment for immigrants who are particularly vulnerable to abuse—such as transgender people—Krome opts to place LGBT immigrants in administrative segregation. In addition to being held in isolation for 23 hours per day, LGBT immigrants in solitary confinement at Krome are further mistreated: They are released into a caged section within the facility's outdoor recreational area for one hour per day, frequently at the same time as the general population, while guards encourage other immigrants to verbally harass the caged immigrants.¹

degrading treatment or punishment went as far as finding the treatment of LGBT immigrants in U.S. detention facilities in violation of the Convention Against Torture after it received information on gay and transgender individuals who had been subjected to solitary confinement, torture, and ill-treatment—including sexual assault—while detained in U.S. immigration facilities.³

This report will examine the mistreatment LGBT immigrants face in immigration detention; the steps that Immigration and Customs Enforcement, or ICE, has taken in an attempt to address these issues; the impact that legislation pending before Congress would have on immigration enforcement; and recommendations for how to ensure enforcement of immigration laws is conducted in a manner that is effective and humane.

Abuse in immigration detention

Each day, a congressional mandate requires ICE to hold 34,000 immigrants who may be subject to removal for violations of administrative immigration law in more than 250 detention facilities nationwide, including county and private jails.⁴ Prior to 1996, immigrants in removal proceedings were not detained unless they were found to be a flight risk or pose a threat to national security.⁵ At that time, Congress passed the Antiterrorism and Effective Death Penalty Act of 1996 and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996.⁶ These laws greatly expanded the scope of who is subject to mandatory detention during removal proceedings without a hearing before an immigration judge to determine whether they should be detained. In 1996, the Immigration and Naturalization Service, or INS, held 8,500 immigrants in detention facilities. This number nearly doubled after the 1996 laws passed, as nearly 16,000 detainees were held in confinement in 1998.⁷ Today, DHS holds more than twice as many immigrants in detention each day as INS did during the entirety of 1998.⁸

Among those caught up in this mandatory detention are survivors of torture and asylum seekers—individuals whose past persecution makes them particularly vulnerable to the mental health strain brought on by conditions in detention. Numerous studies show that even in relatively well-run facilities, detention itself is a threat to the psychological health of detainees, exacerbating the severe psychological distress frequently found in survivors of torture and asylum seekers.⁹ Current law requires mandatory detention for all asylum seekers who enter the United States without proper documentation. Due to the complex nature of asylum cases, asylum seekers spend more time in immigration detention facilities than do other detainees. Whereas the average detainee length of stay is 30 days, the average stay for asylum seekers is 102.4 days.¹⁰ Since nearly 80 countries have laws criminalizing people who are LGBT, many LGBT asylum seekers in search of safety and security in the United States are instead locked away in our jail-like immigration detention facilities.¹¹

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In addition to the baseline trauma that people face when detained and deprived of their liberty, abuse of LGBT immigrants has been well documented by immigration advocates nationwide. Heartland Alliance's National Immigrant Justice Center, or NIJC, filed 17 complaints in 2011 with DHS's Office for Civil Rights and Civil Liberties, or CRCL, and Office of Inspector General, or OIG, in response to reports of abuse against LGBT immigrants in DHS custody.¹² NIJC's complaints documented mistreatment in immigration detention facilities nationwide, indicating the systemic nature of the mistreatment of LGBT immigrants in immigration detention facilities.¹³

The complaints include incidents of sexual assault, denial of adequate medical care, long-term solitary confinement, discrimination and abuse, and ineffective complaints and appeals processes.

One complaint describes the treatment of an individual called T, who was sexually assaulted by a guard while placed in administrative segregation in the Eloy Detention Center in Eloy, Arizona. She was granted Withholding of Removal, a form of relief similar to asylum, which prevents enforcing an order of removal in cases where it is more likely than not that the individual would face persecution if returned to his or her country of origin. Despite this, T was not released from ICE custody for another three months, during which time she was sexually assaulted a second time.¹⁴

In addition to the incidents of abuse described in NIJC's complaints, other complaints have documented LGBT detainees being called names such as "faggot" by guards and being told to "walk like a man, not a gay man" and "act male."¹⁵ Furthermore, detainees are frequently housed with detainees of a gender with which they do not identify.¹⁶ This means that female transgender detainees are detained with men.

Bamby Salcedo came to the United States to escape persecution in Mexico on account of her gender identity. After she made her asylum claim, she was placed in an immigration detention facility while she waited for her claim to be adjudicated. Despite her gender identity, Bamby was placed in a male housing facility, where she was forced to shower alongside approximately 10 men who would verbally harass her in the bathroom.¹⁷ Once, a male detainee assaulted her in the bathroom, fracturing her nose. After the attack, the detention facility moved Bamby into administrative segregation in an attempt to protect her from further abuse. As Bamby notes, "as transgender people, we are placed in that unit because of who we are."¹⁸

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CAP FOIA request reveals dangerous conditions for LGBT immigrants in detention

On September 4, 2013, the Center for American Progress submitted a FOIA request to the DHS OIG. The complaints unearthed by the request reveal the systemic nature of abuse against LGBT detainees in ICE facilities. The request sought records of complaints and/or investigations involving ICE made by LGBT detainees in ICE facilities from fiscal year 2008 to the present. The request turned up nearly 200 reports of abuse. Unfortunately, ICE does not keep records of the sexual orientation or gender identity of immigrants in its custody; therefore, the FOIA request only turned up incidents in which the summary of the allegation mentions the immigrant's sexual orientation or gender identity. Additionally, these are only instances of abuse that were reported to ICE by attorneys and detainees. Since immigrants in ICE custody often fear retaliation if they submit a complaint, formal reports of abuse are rare.¹⁹ Thus, these complaints likely illustrate only a fraction of the actual instances of abuse against LGBT immigrants that occur nationwide.

The complaints obtained through this request include incidents of sexual assault by guards and fellow detainees, withholding of medical treatment, verbal and physical abuse by guards and fellow detainees, the use of solitary confinement based solely on the sexual orientation or gender identity of the immigrant, incidents of LGBT immigrants being humiliated by guards in front of other detainees, and inappropriate use of restraints in violation of ICE's Performance-Based National Detention Standards, or PBNDS.²⁰ The exact language of the verbal abuse, as well as the forms of physical abuse, was redacted in the FOIA results.

Taken together, the data from immigration advocates, attorney complaints, and the CAP FOIA request illustrate a number of issues faced by LGBT immigrants in immigration detention facilities, each reviewed below. We also offer an analysis of recent policy changes.

Sexual assault

In its 2009 report, The National Prison Rape Elimination Commission found that immigration detainees are especially vulnerable to sexual abuse because of the social isolation they face from being detained away from friends and family and because they may not speak the same language as other detainees or staff.²¹ Since immigration detainees are detained by DHS—the same agency that has the power

to deport them—guards in these facilities have a high degree of control over detainees, who may believe the guards are able to impact decisions concerning their deportation status.

After numerous complaints of abuse surfaced, a Department of Justice, or DOJ, investigation into Krome in 2000 found that nearly 10 percent of female detainees reported sexual misconduct by INS, the precursor to ICE, officers.²² Reports of sexual abuse at Krome continue to this day, including a 2011 incident in which an ICE officer abducted an immigrant during a transfer and raped her in his home.²³

A 2010 report by Human Rights Watch on sexual assault in immigration detention facilities concluded that “the problem cannot be dismissed as a series of isolated incidents” and “there are systemic failures at issue.”²⁴ In its work, NIJC found incidents of sexual assault against LGBT detainees by fellow detainees and by guards employed by detention facilities.²⁵ The American Civil Liberties Union, or ACLU, filed a lawsuit against ICE on October 19, 2011, after finding that nearly 200 incidents of sexual assault had occurred in its detention facilities since 2007.²⁶ An immigration attorney reported an incident to the ACLU of Arizona in 2009 of a client who was detained in the ICE facility in Florence, Arizona, while he awaited a decision in his asylum case. While in detention, another detainee raped the client in the bathroom. After the rape, the client was placed in isolation, where he relived his trauma. Whenever guards brought him out of isolation to meet with his attorney, he was shackled at his hands, feet, and waist.²⁷

Solitary confinement

In response to the sexual assault and harassment of LGBT immigrants in detention facilities, many facilities place LGBT immigrants in administrative segregation, or solitary confinement, in an attempt to protect them from the general population. The use of solitary confinement is commonly associated with a multitude of psychological effects, including hyper-sensitivity to external stimuli, hallucinations, panic attacks, obsessive thoughts, and paranoia.²⁸ The U.N. Special Rapporteur on torture concluded that solitary confinement becomes “prolonged” at 15 days, after which the psychological effects may become irreversible.²⁹

The misuse of solitary confinement for LGBT detainees has been well documented in reports by nongovernmental organizations and in a 2013 *New York Times* article that found that each day, nearly 300 individuals are kept in solitary

confinement in immigration detention facilities.³⁰ In a 2010 report, the Inter-American Commission on Human Rights stated that it was “deeply troubled by the use of confinement (‘administrative segregation’ or ‘disciplinary segregation’) in the case of vulnerable immigration detainees, including members of the LGBT community,” and reported that “using confinement to protect a threatened population amounts to a punitive measure.”³¹ NIJC found incidents of detainees being held in isolation for four months in a 9-by-13-foot cell simply because an individual presented “effeminately.”³² Solitary confinement is also used nationwide as a means of “protective custody” for LGBT detainees.³³ As mentioned above, the ACLU of Arizona found cases of LGBT detainees placed in solitary confinement in response to being sexually assaulted by fellow detainees.³⁴

Inadequate medical care

The inadequacy of medical care in immigration detention facilities has been well documented as a systemic problem throughout ICE detention facilities.³⁵ LGBT and HIV-positive detainees are at particular risk of lacking access to proper treatment. In 2007, Victoria Arellano, an HIV-positive female transgender migrant, died in the men’s mass detention cell of an ICE detention facility because authorities at the facility refused to give her medical attention and her medication.³⁶ NIJC also found that HIV-positive individuals detained by ICE were harassed and mistreated and encountered serious problems accessing HIV medication.³⁷

Another frequent medical issue faced by LGBT immigrants in ICE custody is the denial of hormone treatment to detained transgender individuals, a denial which many U.S. Circuit Courts have found to be in violation of the Eighth Amendment’s requirement that the incarcerated receive “adequate medical care.”³⁸ The 2011 PBNDS medical care standard provides for continued access to hormone therapy for transgender detainees who were already receiving hormone therapy prior to being taken into ICE custody; however, these standards are not mandatory.³⁹ Even at the dedicated LGBT protective-custody unit in the Santa Ana City Jail in Santa Ana, California, there have been instances of transgender asylum seekers whose medical records took from 35 to 45 days to arrive at the jail, delaying their access to hormone therapy for one to four months, treatment that the American Medical Association and American Psychological Association have affirmed is medically necessary.⁴⁰

ICE's attempts to address the needs of LGBT detainees

ICE has taken numerous steps to respond to the reports of abuse and mistreatment of LGBT immigrants in detention facilities; unfortunately, its efforts have proven to be inadequate to meet the particular needs of LGBT immigrants. This section details ICE's responses to date.

2011 Performance-Based National Detention Standards and ICE detention reform initiative

National Detention Standards were created in 2000 to govern the treatment of immigrants in detention facilities.⁴¹ These standards mostly mirror the American Correctional Association standards for pretrial felons and include guidance on permissible use of force, shackling, medical care, access to legal materials, provision of clothing and bedding, religious practices, and other areas of detention administration and detainee rights. An internal review of ICE detention practices conducted in 2009 found that the penal model the ICE standards were modeled on was inappropriate for the immigration detention population and that it imposed more restrictions than were necessary to effectively operate ICE facilities.⁴² Beginning in 2008, ICE enacted Performance-Based National Detention Standards to govern its detention facilities, and the 2009 review contributed to changes made in the 2011 PBNDS. The detention standards, however, are voluntary guidelines without the force of law behind them.⁴³ Since the standards are not mandatory, detention facilities are not required to adhere to them, and there is no judicial oversight to ensure adherence. This lack of accountability is troubling, as a 2009 assessment found that 50 percent of immigration detainees are housed in facilities that are not subject to detention standards.⁴⁴ Today, ICE monitors compliance with detention standards in 52 facilities, which house 84 percent of immigrants in ICE custody.⁴⁵

In 2011, ICE released PBNDS that included for the first time important safeguards for LGBT immigrants.⁴⁶ These protections include recognizing transgender detainees as a vulnerable population, conducting strip searches of transgender detainees in private, basing housing decisions for transgender detainees on the detainee's gender self-identification rather than solely on physical anatomy, and allowing transgender detainees who received hormone therapy before detention to have continued access.

ICE sexual abuse and assault prevention and intervention directive

In 2012, ICE created policies and procedures to address sexual assault in immigration detention facilities, including a mandatory training for staff on ICE's zero-tolerance policy for sexual abuse and assault, as well as on "communicating effectively and professionally with lesbian, gay, bisexual, and transgender individuals."⁴⁷ The guidance also requires an annual review and report of incidents of sexual assault of individuals in ICE custody; it does not, however, require data to be gathered on the sexual orientation or gender identity of victims, reducing its effectiveness.

ICE's directive is a welcome development, but a recent report by the Government Accountability Office, or GAO, found that ICE has not developed the controls necessary to ensure that field-office officials are in compliance with the guidance. The GAO examined 215 allegations of sexual abuse and assault in ICE detention facilities from October 2009 through March 2013. Its report found that 40 percent of sexual assault allegations were never reported to ICE headquarters and that not only do ICE field offices not comply with reporting requirements to headquarters, but immigration detainees also face barriers to reporting abuse. From 2010 to 2014, for example, 14 percent of calls placed to the DHS OIG hotline—one of the means for reporting abuse—from ICE detention facilities did not go through. Of the 215 investigations into allegations of sexual abuse and assault, only 7 percent were substantiated. In other words, investigators determined abuse had occurred in only 7 percent of cases. Frequently cited reasons for the low substantiation number are that the alleged victim chose not to cooperate with the investigation or that there was no evidence of the assault, and local law enforcement chose not to pursue the case.⁴⁸

In addition to these shortcomings in implementing ICE’s guidance on sexual assault, the particular vulnerability of LGBT immigrants to sexual violence in detention facilities—as described by the National Prison Rape Elimination Commission and graphically illustrated by advocates and attorneys working with this population—indicates that detention facilities are inherently unsafe spaces for LGBT immigrants.

Santa Ana City Jail protective-custody unit

In response to NIJC’s complaint on the deplorable treatment of LGBT immigrants in ICE detention facilities, ICE created a specialized facility to house LGBT immigrants at the Santa Ana City Jail.⁴⁹ The unit has 64 beds reserved for LGBT individuals to ensure that they are segregated from the rest of the jail’s population. ICE’s contract with the Santa Ana City Jail requires staff to undergo an eight-hour “specialized LGBT training.”⁵⁰ The staff underwent training conducted by NIJC in November 2012 and training conducted by professors at California State University, Fullerton, in July 2013.

Despite the training, however, visitor volunteers from the Community Initiatives for Visiting Immigrants in Confinement, or CIVIC, documented incidents of guards telling transgender, asylum-seeking women to “use their male voice” and “act male” and using male pronouns when speaking about them to others.⁵¹ The organization also found that transgender asylum seekers who were transferred to the facility did not have access to hormone therapy for one to four months, care that does not meet the PBNDS standard of providing treatment that follows accepted guidelines regarding medically necessary transition-related care.⁵² When Christina Fialho, CIVIC’s co-founder and executive director, went public with her findings in *The Huffington Post* in July 2013,⁵³ ICE responded by suspending CIVIC’s visitation program in three Southern California detention facilities.⁵⁴

ICE directive on solitary confinement

In September, the Department of Homeland Security released new rules on the use of solitary confinement that explicitly forbid placing immigrants in solitary confinement solely because of gender identity or sexual orientation.⁵⁵ This directive is a welcome step in the right direction; however, conversations with immigration attorneys have revealed that instead of automatically releas-

ing LGBT immigrants from solitary confinement, DHS only releases them upon their attorneys' requests. Approximately 84 percent of immigrants in detention facilities lack legal representation; therefore, while it is not yet clear how the new directive impacts unrepresented LGBT immigrants in solitary confinement, it is likely that there are considerable numbers of individuals who are not yet being released under the directive.⁵⁶ But with the directive having only gone into effect in September, facilities may still be becoming acquainted with the directive and may soon begin automatically releasing LGBT immigrants from solitary confinement without the intervention of an attorney.

ICE's directive falls short because it does not specify that solitary confinement should be used only for brief periods of time and in the least restrictive conditions possible. It also does not set specific limits for the total amount of time a vulnerable individual can be placed in solitary confinement.⁵⁷

While the directive does not solve every problem, it does require reporting about and oversight of the use of solitary confinement in immigration detention. Whereas the old rules required reporting only after an immigrant was placed in solitary confinement for more than a month, the new policy includes reporting requirements in which facilities must justify—in writing to DHS—why an immigrant is kept in solitary confinement for more than two weeks. This reporting requirement will allow ICE to monitor the use of solitary confinement in all of its detention facilities nationwide.⁵⁸

Impact of increased enforcement in pending legislation on LGBT immigrants

Senate Border Security, Economic Opportunity, and Immigration Modernization Act of 2013, or S. 744

On June 27, the Senate passed the bipartisan Border Security, Economic Opportunity, and Immigration Modernization Act of 2013 by a vote of 68 to 32.⁵⁹ Although the bill calls for dramatic increases in immigration enforcement spending, including \$46.3 billion to double the number of Border Patrol agents and build 700 miles of fencing across the southern border, it couples these measures with important safeguards for immigrants—safeguards that are especially critical in light of the particular vulnerabilities faced by LGBT immigrants in our immigration system detailed above.

The centerpiece of the Senate bill is an earned path to citizenship that would benefit more than 267,000 undocumented LGBT adults currently living in daily fear of being detained and deported from the United States.⁶⁰ Currently, they live in fear of being separated from their families and communities and returned to countries that they no longer consider their homes, countries where they may even be in danger because of their sexual orientation or gender identity. This practice violates a basic cornerstone of international asylum and refugee law: nonrefoulement, or the prohibition against returning a person to any country where he or she would be at risk of persecution.⁶¹ The Senate bill also includes an expedited path to citizenship for DREAMers—undocumented immigrants who were brought to the United States as children. The United States is the only home many of them know. This provision will be particularly beneficial to LGBT undocumented immigrants, since they tend to be younger than the general undocumented immigrant population, with undocumented adult immigrants under age 30 being twice as likely to identify as LGBT as the broader population.⁶²

In addition to providing a path to earned citizenship, the bill would protect LGBT asylum seekers fleeing persecution by eliminating the one-year filing deadline. This deadline bars asylum seekers from applying for asylum one year after their arrival in the United States unless they can demonstrate changed or extraordinary circumstances. A study by NIJC, Human Rights First, and Penn State Law estimates that one in five asylum applicants fail to meet the deadline.⁶³ The Senate bill would remove an administrative barrier that has put countless LGBT asylum seekers at risk of being returned to countries where they are in danger of persecution on the basis of their sexual orientation or gender identity. Applications for asylum based on persecution on account of sexual orientation or gender identity are difficult cases to make, since, for example, LGBT asylum seekers frequently must hide their sexual orientation or gender identity in their home countries and thus may have difficulty meeting evidentiary requirements to win asylum.

The Senate bill provides for additional immigration judges, staff, and training programs to improve adjudication of these complex claims. Under current law, immigrants in removal proceedings do not have a right to counsel if they cannot afford to pay for an attorney. The Senate bill seeks to rectify this by requiring a lawyer to be appointed to represent unaccompanied minor children, immigrants with serious mental disabilities, and other particularly vulnerable individuals. It also expands and funds Legal Orientation Programs, which educate immigrants in deportation proceedings on their rights, immigration court, and the detention process.

In addition to procedural safeguards, the bill contains numerous safeguards to protect LGBT immigrants from the abuses they face in immigration detention, including increased oversight of detention facilities. It explicitly prohibits the use of solitary confinement solely because of an immigrant's sexual orientation or gender identity, codifying DHS's new directive on solitary confinement. Furthermore, it provides for the use of humane alternatives to detention so that vulnerable populations such as LGBT immigrants are placed in secure alternatives to detention pending a decision in their cases, rather than confined in jail-like facilities where they are at risk of torture and abuse.

House Border Security, Economic Opportunity, and Immigration Modernization Act, or H.R. 15

On October 2, House Minority Leader Nancy Pelosi (D-CA) and several other Democrats introduced a bill to reform U.S. immigration laws.⁶⁴ The bill includes all of the provisions detailed above from the Senate bill that would benefit LGBT

immigrants, such as a path to citizenship for undocumented immigrants and elimination of the one-year filing deadline, but it differs in one significant way. The House version of the bill does not include the Senate bill's border-surge provisions. In other words, it provides necessary safeguards for vulnerable immigrants without risking the exposure of more LGBT immigrants to our immigration enforcement and detention system.

SAFE Act, or H.R. 2278

The Strengthen and Fortify Enforcement, or SAFE, Act was introduced by Rep. Trey Gowdy (R-SC) on June 6.⁶⁵ If enacted, the SAFE Act would do nothing to resolve the legal status of 11 million undocumented immigrants but would significantly expand immigration enforcement⁶⁶ practices by making mere unlawful presence—such as undocumented status and overstaying a visa—criminal acts punishable with jail time, and it would greatly expand the detention of immigrants. It would also allow state and local governments to create their own draconian immigration enforcement provisions, allowing them to enact their own criminal penalties for violations of federal immigration laws, much like the provisions in Arizona's immigration law that were recently overturned by the Supreme Court.⁶⁷

The SAFE Act would exacerbate the dangers faced by LGBT immigrants in our immigration system by vastly widening the category of immigrants subject to mandatory detention, potentially subjecting even more LGBT immigrants to the unsafe conditions of immigration detention facilities. It would allow local law enforcement to arrest individuals on the suspicion that a person has committed an immigration violation, increasing the risk of racial profiling, and would require ICE to detain anyone a state or local government identifies as being inadmissible or deportable, removing DHS's discretion over whether to detain or release the individual.

This legislation is particularly dangerous for LGBT asylum seekers who missed the one-year filing deadline. If a judge finds that an asylum seeker missed the one-year filing deadline but determines the risk of persecution if deported is more likely than not, the judge can grant the asylum seeker Withholding of Removal, which prevents enforcement of a final order of removal. Under current law, immigrants who cannot be deported are eligible to file a writ of habeas corpus in federal

district court if they have been detained for more than six months. This is because the Supreme Court determined that six months is a reasonable period of time for the government to remove a deportable immigrant.⁶⁸ The SAFE Act would enable DHS to hold immigrants with no significant likelihood of removal, such as LGBT asylum seekers granted Withholding of Removal, indefinitely in jail-like immigration detention facilities.

Recommendations

As this report details, when LGBT immigrants are detained by ICE, they are particularly vulnerable to abuse and mistreatment. Both the Senate's immigration reform bill and the SAFE Act would greatly expand the number of LGBT immigrants that will likely be detained by ICE under expanded immigration enforcement efforts. ICE's efforts to protect this vulnerable population, while appreciated, have not adequately addressed the problem. The following are CAP's recommendations for how to protect LGBT immigrants.

Increase the use of alternatives to detention

There are a number of alternatives to detention, including monitoring through the use of electronic ankle bracelets or through supervised-release programs. At the request of INS, the precursor to DHS, the Vera Institute of Justice implemented a pilot project, the Appearance Assistance Program, to study appearance rates in removal hearings for individuals released into a form of supervised release.⁶⁹ Ninety-one percent of participants in the pilot project appeared for all of their required hearings. The high rate of appearance in removal hearings under the Appearance Assistance Program suggests that mandatory detention is not necessary to ensure that appearance at hearings, the objective of mandatory detention, is met.

In addition, alternatives to detention provide a wide range of benefits for the state as well as individuals. They are safer for LGBT immigrants, allowing them to be released from jail-like detention facilities where they face abuse and discrimination. They are also more cost effective than detention. The Vera project cost \$12 per immigrant per day, while the average cost of detaining an immigrant in an ICE facility is \$122 per day, totaling \$2 billion per year.⁷⁰ Release into alternatives to detention also allows immigrants greater access to resources to build their cases, a very important additional benefit for LGBT immigrants seeking asylum.⁷¹

Eliminate the bed mandate from congressional appropriations language

The number of people detained by ICE should be determined by necessity, not by an arbitrary quota set by Congress. The decision to detain an individual should be based on a case-by-case assessment that can be reviewed by an immigration judge. Eliminating the bed mandate would not eliminate immigration detention, nor would it eliminate mandatory detention provisions in current immigration law. Without the bed mandate, however, ICE would have the flexibility to shift resources to less costly alternatives to detention as needed.

Codify PBNDS and make them mandatory for all facilities that ICE uses to detain immigrants, with independent oversight of detention conditions

ICE's PBNDS include important safeguards and protections for LGBT immigrants, such as guaranteeing that transgender detainees have access to hormone therapy. Unfortunately, these standards are not currently mandatory for detention facilities, and immigrants have no recourse for violations of detention standards.

If a transgender individual must be detained, ICE's policy should be to place the individual in housing that is consistent with the individual's gender identity, not the anatomy or sex assigned at birth.

Require Legal Orientation Programs in all immigration detention facilities

Immigration law is an extremely complex area of law. Unfortunately, approximately 84 percent of immigrants in detention facilities are not represented by a lawyer and must navigate these laws by themselves. For immigrants facing deportation, particularly LGBT immigrants at risk of being sent back to countries where their lives are at risk, the stakes are incredibly high. This makes access to Legal Orientation Programs critical for protecting the basic rights of immigrants in removal proceedings. These programs provide basic information to immigrants about forms of relief from removal, how to represent themselves in immigration court, and how to get legal representation.

Require access to counsel for immigrants in removal proceedings

A study by immigration law professors found that access to counsel is the single-biggest determining factor in the outcome of an asylum case.⁷² Furthermore, immigrant advocates, the American Bar Association, and even some immigration judges argue that providing attorneys in removal hearings would lower costs, lessen backlogs, and provide critical due-process protections.⁷³ For LGBT asylum seekers trying to establish a difficult claim before an immigration judge, the assistance of an attorney can make all the difference in ensuring that they are not deported to a country where their lives are at risk.

Restore discretion to immigration judges

Historically, immigration judges could have considered a range of individual factors in determining whether it was in the best interests of the United States to allow an immigrant to remain in the country. Congress drastically limited judicial discretion in the 1990s by creating a category of violations called aggravated felonies.⁷⁴ Not all of these offenses are aggravated or felonies in the criminal law context. Today, immigration judges have no discretion in the decision to detain immigrants who committed aggravated felonies, nor the ability to grant them relief to remain in the United States, regardless of how compelling their individual circumstance is or how minor or old their convictions are. Restoring judicial discretion in immigration cases would allow judges to consider the individual circumstances and particular vulnerabilities of immigrants, including LGBT immigrants who would be placed in harm's way if deported from the United States.

Enforce Prison Rape Elimination Act standards in immigration detention facilities

The Prison Rape Elimination Act, despite the National Prison Rape Elimination Commission's recommendation that preventing sexual abuse in immigration detention facilities requires precautions beyond those required in prisons, does not govern immigration detention facilities.⁷⁵ ICE created a standard on sexual assault in detention facilities, but comments by a number of LGBT advocacy organizations show that DHS's standards are not as comprehensive as DOJ's and fall short of what is needed to protect LGBT immigrants in detention facilities.⁷⁶

Conclusion

From sexual assault to lack of access to proper medical care, LGBT immigrants are particularly vulnerable to abuse and mistreatment in immigration detention facilities on account of their sexual orientation or gender identity. While we support DHS's efforts to better care for the LGBT immigrants in its custody, its efforts have not succeeded in adequately meeting the particular needs of this demographic. As Congress debates reforms to our broken immigration system, it is critical that these reforms protect LGBT immigrants in DHS custody, promote due process, and preserve human dignity.

Author bio

Sharita Gruberg is a Policy Analyst for the LGBT Immigration Project at the Center for American Progress. She has extensive experience working in immigration advocacy, law, and policy, as well as experience providing direct service to immigration detainees, refugees, and asylum seekers.

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