



ICE Officers Overwhelmingly Use Their Discretion to Detain LGBT Immigrants

By Sharita Gruberg October 26, 2016

On November 20, 2014, as part of President Barack Obama’s executive actions on immigration, U.S. Department of Homeland Security, or DHS, Secretary Jeh Johnson issued a memorandum that established priorities to guide all aspects of immigration enforcement regarding the apprehension, detention, and removal of unauthorized immigrants.¹ Those priorities have focused government resources on addressing threats to public safety, national security, and border security rather than on unauthorized immigrants who have been in the United States for years without committing serious crimes.

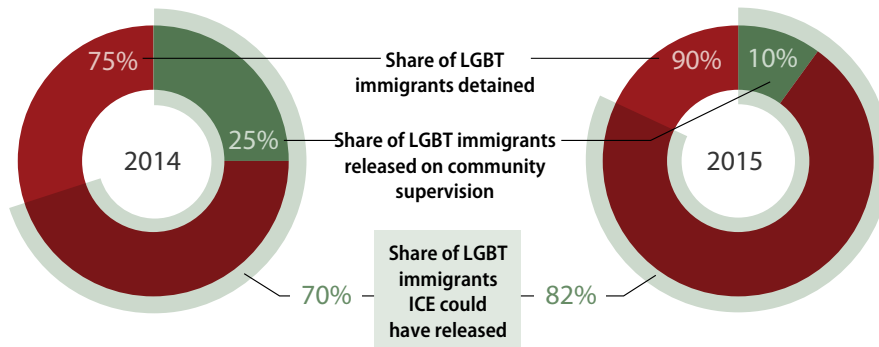
That memorandum, in addition to outlining enforcement priorities, clarified that certain categories of vulnerable people—unless subject to mandatory detention—should not be detained absent extraordinary circumstances.² Although the memo does not specifically mention lesbian, gay, bisexual, and transgender—or LGBT—immigrants, due to their extreme risk of abuse in detention, they are recognized as a “special vulnerability” category by the DHS.³ Data obtained recently by the Center for American Progress through a Freedom of Information Act request revealed that despite the priorities outlined in the memo, the DHS elected to detain a higher percentage of LGBT immigrants who were not subject to mandatory detention in fiscal year 2015 than the year before the memorandum was issued.⁴ These data indicate that Immigration and Customs Enforcement, or ICE, officers ignored Secretary Johnson’s enforcement priorities when making custody decisions for LGBT immigrants.

ICE—a DHS law enforcement agency charged with governing border control, customs, trade, and immigration—uses an automated tool called a Risk Classification Assessment, or RCA, to determine whether individuals under its jurisdiction should be detained or released.⁵ RCAs, which are used as part of the intake process at immigration detention facilities, take into account the DHS’s enforcement priorities—such as those outlined in Secretary Johnson’s November 2014 memo—as well as an individual’s special vulnerabilities. According to a 2013 presentation by ICE on RCAs, the tool

FIGURE 1

ICE officers increasingly elect to detain more LGBT immigrants despite reforms

Among all individuals in ICE custody who expressed fear in detention based on LGBT status



Source: Author's calculations from documents on file with author. Documents were accessed through an April 5, 2016, and October 8, 2014, Freedom of Information Act request to U.S. Immigration and Customs Enforcement.

will never recommend detention for individuals who are determined to have a special vulnerability and who are not subject to mandatory detention—that is to say, required by statute to be in DHS custody.⁶ According to the DHS memo, individuals who fall in the special vulnerability category should be released under community supervision until their hearing.⁷ Moreover, according to the presentation, ICE supervisors are required to justify any decision to detain individuals determined to have a special vulnerability.⁸

However, a 2015 report from the DHS Office of Inspector General found that in 2012 and 2013, the RCA tool frequently failed to make a recommendation regarding whether an individual ought to be detained or released, and when it did, ICE officers frequently overrode the recommendations.⁹

In response to the inspector general's report, ICE maintained that it made changes to its RCA process based on an analysis of RCA recommendations and actual field office custody decisions, which was cross-referenced with data on crime categories and flight risk factors.¹⁰ ICE began implementing its improved RCA tool in January 2014. Unfortunately, even after ICE's improvements to the RCA tool and Secretary Johnson's November 2014 priorities memo, the rate of LGBT immigrant detention has continued to climb. CAP's analysis of 78 self-identified LGBT individuals in ICE custody in FY 2015 shows that LGBT immigrants were more likely to be detained by ICE in the year following the new enforcement priorities than the year that preceded them. LGBT immigrants were detained with startling regularity regardless of legal requirements, vulnerability to abuse, or even the absence of flight risk or risk to public safety.

When LGBT immigrants were eligible for release because of their vulnerability and were not subject to mandatory detention, ICE detained them 88 percent of the time. This is a rate even higher than the 68 percent detention rate for release-eligible LGBT immigrants before the priorities memo in FY 2014.¹¹ Considering recent reports that ICE is detaining immigrants at a rate that is financially unsustainable in light of its budget, it is difficult to comprehend why ICE would unnecessarily waste scarce bed space detaining LGBT immigrants—not to mention putting these individuals at significant risk of sexual abuse.¹²

ICE increased its detention of vulnerable LGBT immigrants contrary to DHS enforcement priorities

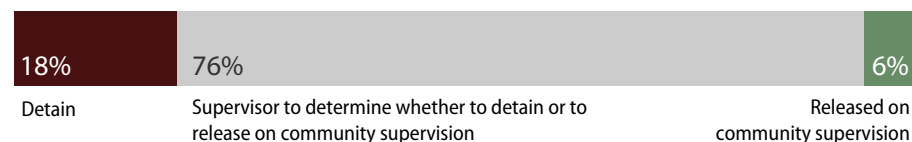
In FY 2015, despite improvements made by ICE in 2014, the RCA tool provided no custody recommendation in 76 percent of cases involving a self-identified LGBT person who was not subject to mandatory detention. In FY 2014, such a situation occurred 64 percent of the time for LGBT individuals and only 15.7 percent of the time for the general population.¹³ In the absence of such a recommendation, the decision to detain or release is left entirely to the discretion of an ICE officer, guided only by departmental policies, including the November 2014 priorities memo.¹⁴ Not only were more decisions left up to ICE officers in FY 2015, but ICE officers were also more inclined to choose detention in these circumstances than in the previous year. In FY 2015, ICE officers detained LGBT immigrants who they had the option to release 88 percent of the time—despite the fact that these immigrants had a special vulnerability—compared with a 68 percent detention rate in FY 2014.¹⁵ Only 4 out of 53 people detained were given the option of posting a bond to secure release, but the lowest bond was set at \$6,000 and the highest at \$15,000. In all four cases, the amount was likely too high for LGBT immigrants to pay.¹⁶

Even when the RCA recommended release, ICE often overrode the recommendation, in what appears to be a clear abuse of authority based totally on officer bias. ICE officers overrode 60 percent of RCA recommendations for the release of LGBT individuals, electing to detain them despite these individuals being determined to be low public safety risks and low flight risks at intake. There are no publicly available data for how frequently ICE overrode RCA recommendations for the general population in FY 2015, but in FY 2014, ICE overrode RCA release recommendations for the general population only 16 percent of the time.¹⁷

FIGURE 2

ICE detained 90 percent of LGBT immigrants even though its automated system only recommended detention for 18 percent

RCA detention recommendation



ICE's actual detention decision



Source: Author's calculations from documents on file with author. Documents were accessed through an April 5, 2016, Freedom of Information Act request to U.S. Immigration and Customs Enforcement.

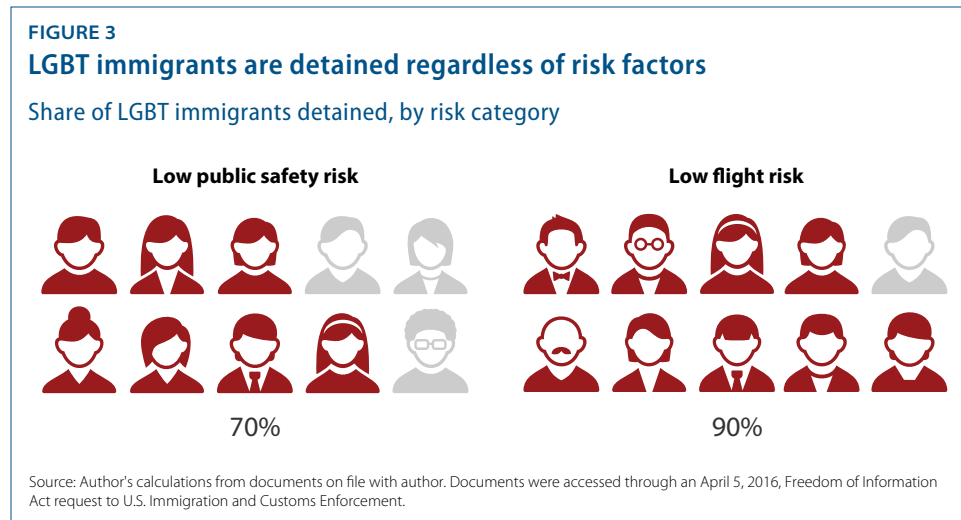
In the year prior to the DHS announcing its intent to focus detention resources on threats to national security, public safety, and border security, ICE decided to detain 75 percent of LGBT immigrants. The DHS understands that this population faces extremely high risks of sexual and physical abuse in detention. Rather than improving enforcement and ensuring that detention is only used in extraordinary circumstances for this population, however, ICE decided to detain 90 percent of LGBT immigrants in the year after Secretary Johnson's memo, even though the RCA tool only recommended detention for 18 percent of LGBT immigrants.¹⁸

ICE detains LGBT immigrants regardless of vulnerability, flight risk, or public safety risk

In light of the DHS's enforcement priorities, the expectation is that LGBT individuals who are not high public safety or flight risks and who are not subject to mandatory detention be released. However, there was relatively little difference between release rates for individuals deemed low and medium public safety risks when compared with the release rate of LGBT people determined to be high public safety risks. Only 30 percent of LGBT people found to be low public safety risks were released.¹⁹ There was almost no difference in release rates for individuals deemed medium and high public safety risks, at 9.1 percent and 7.7 percent, respectively.²⁰

Moreover, factoring in flight risk did not change the relative similarity of detention rates among individuals considered to be low, medium, and high public safety risks. Only 6 percent of individuals who were a medium public safety risk and low flight risk were released.²¹ This is nearly indistinguishable from the 8.7 percent of people who were

medium or high public safety risks and medium or high flight risks who were released.²² Even after the DHS issued its 2014 enforcement priorities, ICE overwhelmingly chose to detain low, medium, and high public-safety-risk individuals. The few LGBT individuals who did get released were released irrespective of risk.



Over the past few years, numerous incidents of physical violence and sexual abuse against LGBT immigrants in detention have been reported.²³ ICE has worked to address these issues by segregating transgender individuals in special pods; although, even with this precaution, abuse persists.²⁴ ICE recognizes that LGBT immigrants are vulnerable in detention, and as a result, the agency claims that LGBT individuals are recommended for release unless their detention is required by law.²⁵ Unfortunately, even when immigrants expressed fear of detention because of their sexual orientation or gender identity and were not subject to mandatory detention, ICE officers chose to detain them 88 percent of the time.

Conclusion

These data show that when ICE officers have discretion over custody decisions, they use that authority to detain LGBT people. In order to ensure the safety of LGBT immigrants, it is critical that ICE headquarters meaningfully curtails or eliminates the discretion that its officers have over custody decisions for LGBT people. Rather than establishing new pods to segregate transgender immigrants, the DHS should improve the oversight of ICE officers to ensure that existing policies are being followed and that LGBT immigrants are not unnecessarily and unfairly singled out for detention.²⁶

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Endnotes

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