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Protecting the Voiceless: Ensuring ICE's Compliance with Standards That Protect Immigration Detainees

Kelsey E. Papst
University of the Pacific, McGeorge School of Law

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I. INTRODUCTION

Immigration and Customs Enforcement (ICE) detained Victoria Arellano in May of 2007 after her second attempt to enter the country illegally.[1] Although she was a transgendered woman,[2] ICE held her in a male mass detention cell in a

* J.D. Candidate, University of the Pacific, McGeorge School of Law, 2009; B.S., Psychology, University of California, San Diego, June 2004. The author would like to extend a warm thank you to her parents Richard and Kathy Papst for spending their Christmas giving feedback on this Comment.

1. Darryl Fears, *3 Jailed Immigrants Die in a Month*, WASH. POST, Aug. 15, 2007, at A02.

2. Transgendered refers to one whose gender identity and expression do not coincide with the traditional gender norms associated with his or her sex at birth. Sydney Tarzwell, Note, *The Gender Lines are Marked with Razor Wire: Addressing State Prison Policies and Practices for the Management of Transgender Prisoners*, 38

prison in San Pedro, California.[3] During the two months she was detained, Arellano endured a painful battle to get medical care before succumbing to pneumonia and meningitis.[4] On July 20, 2007, Victoria Arellano died in custody of ICE;[5] she was twenty-three years old.[6]

Prior to her detainment, Arellano had been diagnosed with AIDS and was taking the antibiotic dapasone to protect her immune system from disease.[7] However, after a month and a half of detention, Arellano called her mother and said she had not been given her medication while in custody.[8] Arellano became very ill, complaining of nausea, headaches, back pain, and cramping.[9] Her fellow detainees cared for her to the best of their abilities. They soaked towels in water to help with the fever, placed a box next to her as she vomited blood, and assisted her to the bathroom when she was too weak to walk.[10] Many detainees requested help for Arellano from the guards, and dozens signed a petition to get her to a hospital.[11] Finally, a week before her death, Arrellano was taken to the infirmary and given amoxicillin, a drug not generally used to treat AIDS-related illnesses.[12]

However, Arellano could not keep the medications down as she continued to vomit blood.[13] After officials returned her to the detention cell, her fellow detainees staged a protest, urging ICE officials to provide care for the weak and ill Arellano.[14] After several more days of vomiting and diarrhea and after the detainees began chanting "hospital" to get the guards' attention, she was taken to a hospital, only to be returned once more to the detention facility within twenty-four hours.[15] After finally realizing her condition was critical, officials rushed

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COLUM. HUM. RTS. L. REV. 167, 167 n.1 (2006).

3. Michael K. Lavers, *Answers Sought in Pos Detainee's Death*, ADVOCATE.COM, Aug. 23, 2007, http://www.thetaskforce.org/TF_in_news/07_0909/stories/31_Answers_sought.pdf (on file with the *McGeorge Law Review*).

4. *See* Sandra Hernandez, *Denied Medication, AIDS Patient Dies in Custody*, DAILY J., Aug. 9, 2007, http://www.detentionwatchnetwork.org/node/334 (on file with the *McGeorge Law Review*) (noting that "[Arellano] was so sick that if you tried to move her she would scream" and that "Arellano's mother said . . . her son's body was wracked by meningitis and pneumonia").

5. Fears, *supra* note 1.

6. Hernandez, *supra* note 4.

7. *Id.*

8. PRI's The World, *Death in Detention* (BBC News radio broadcast Aug. 31, 2007) [hereinafter *Death in Detention*] (transcript on file with the *McGeorge Law Review*).

9. Hernandez, *supra* note 4.

10. *Id.*

11. *See Death in Detention*, *supra* note 8 (stating fifty-five detainees signed a petition); Letter to Julie L. Myers, Assistant Secretary, U.S. Immigration and Customs Enforcement (Sep. 11, 2007), http://www.aid sinfonyc.org/tag/activism/arellanoltr.html [hereinafter Open Letter] (on file with the *McGeorge Law Review*) (stating that seventy detainees signed a petition for Arellano to receive medical care).

12. Hernandez, *supra* note 4.

13. *Id.*

14. *Id.*

15. *Id.*

Arellano to another hospital where she died two days later shackled to her hospital bed.[16]

Reporters have had difficulty getting information from ICE regarding Arellano's death. Arellano's medical records have not been made public, and ICE officials were told not to comment on her death.[17] ICE has also refused to make its records on other detainee deaths public.[18] On June 26, 2007, the New York Times reported that ICE acknowledged sixty-two immigration detainees had died in custody since 2004, far above the previously known number of twenty during the same time period.[19] The Times stated that "No government body is charged with accounting for deaths in immigration detention. . . . Getting details about those who die in custody is a difficult undertaking left to family members, advocacy groups and lawyers."[20] Two months later, on August 15, 2007, the Washington Post published a story about three immigration detainees, including Arellano, who died in ICE custody within one month of each other, all from medical complications.[21]

ICE officials responded by noting that they spend over $98 million a year on detention for the tens of thousands of detainees held in custody.[22] But despite ICE's declared dedication to providing detainees a humane and safe detention environment, reports of mistreatment and below-standard medical care continue to be reported.[23] Unfortunately, Arellano's death is not a unique occurrence. Various reports have given accounts of inadequate medical care, dangerous overcrowding, unreported abuses by guards, and other substandard conditions showing that inadequate treatment is systemic throughout ICE facilities.[24]

ICE detention facilities are not run completely free of oversight. In 2000, the former Immigration and Naturalization Service (INS)[25] issued the Detention

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16. *Id.*; *Death in Detention*, *supra* note 8 ("Olga says she asked the guards if they could unchain her daughter, but she says they refused. Victoria Arellano died two days later.").

17. *See, e.g.*, *Death in Detention*, *supra* note 8; Hernandez, *supra* note 4.

18. Nina Bernstein, *New Scrutiny as Immigrants Die in Custody*, N.Y. TIMES, June 26, 2007, at A1.

19. *Id.*

20. *Id.*

21. Fears, *supra* note 1.

22. *See id.* (stating there are nearly 30,000 detainees currently in custody); *see also* Bernstein, *supra* note 18 (reporting that ICE holds 27,500 detainees in custody on any given day).

23. Fears, *supra* note 1; *see* Hernandez, *supra* note 4 (reporting on other medical related deaths and mistreatment of ICE detainees); *see also infra* Part IV (detailing both detention standards violations and allegations of overcrowding and inadequate health care).

24. *See generally* DEP'T OF HOMELAND SEC., OFFICE OF THE INSPECTOR GEN., TREATMENT OF IMMIGRATION DETAINEES HOUSED AT IMMIGRATION AND CUSTOMS ENFORCEMENT FACILITIES (OIG-07-01) (Dec. 2006) [hereinafter OIG REPORT] (discussing violations of ICE detention standards at five facilities); AM. CIV. LIBERTIES UNION, CONDITIONS OF CONFINEMENT IN IMMIGRANT DETENTION FACILITIES (2007), http://www.aclu.org/immigrants/detention/30261pub20070627.html [hereinafter ACLU REPORT] (on file with the *McGeorge Law Review*) (discussing numerous first-hand accounts of human rights violations and abuses of ICE detainees); *infra* Part IV.

25. See *infra* Part III.A for a discussion on the dissolution of the INS.

Operations Manual (DOM), which continues to govern ICE facilities today.[26] On September 12, 2008, ICE revised the DOM standards into new Performance-Based National Detention Standards (PBNDS) which will "take full effect in all ICE facilities . . . in January 2010."[27] Collectively, this Comment will refer to the DOM standards and the PBNDS standards as the National Detention Standards (NDS). The director of the Office of Detention and Removal Operations (DRO) stated that ICE's Office of Professional Responsibility conducts annual inspections of each facility to ensure compliance with these standards.[28] Recently, ICE temporarily shut down operations at one facility for preventative maintenance.[29]

Despite these inspections, it is evident that the detention standards are not working to protect immigration detainees from abuse while in ICE custody. One American Civil Liberties Union (ACLU) report stated that "[t]he current scheme of detention oversight does not prevent or cure human rights abuses within detention facilities or jails."[30] Some form of accountability needs to be put in place to compel ICE to maintain its national detention facilities in safe and humane conditions.[31]

This Comment argues that ICE facilities consistently fail to comply with the NDS. Accordingly, Congress should implement a system to ensure ICE's compliance with standards that protect immigration detainees. Part II lays out the constitutional rights of immigration detainees, as well as the statutory law governing immigration detention facilities. Part III explores ICE's background as an administrative agency, including some of the policies and standards that internally govern ICE's detention facilities. Part IV describes the current conditions of ICE facilities and explains how these conditions violate both the constitutional rights of immigration detainees and the NDS. Part V argues that the current standards are inadequate to protect detainees' rights, and suggests several ways Congress can hold ICE accountable for the poor conditions of its

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26. *See infra* Part III.B.1.

27. Press Release, U.S. Immigration and Customs Enforcement, ICE Announces New Performance-Based National Detention Standards for all ICE Detention Facilities (Sept. 12, 2008), http://www.ice.gov/pi/nr/0809/080912washington.htm [hereinafter PBNDS Press Release] (on file with the *McGeorge Law Review*).

28. *House Homeland Security Subcommittee Holds Hearing on Detention*, 84 INTERPRETER RELEASES 861, 862 (2007) [hereinafter *Hearing on Detention*] ("[Torres] stated that inspections are conducted annually of both DRO-operated facilities and contractor facilities, and that these are overseen by the Office of Professional Responsibility (OPR).").

29. Anna Gorman, *ICE Facility Closure Causes Angst: More than 400 Detainees at a Center on Terminal Island are Sent to Other Institutions, Upsetting Attorneys who were Notified Belatedly*, L.A. TIMES, Oct. 24, 2007, at B1.

30. ACLU REPORT, *supra* note 24, at 15.

31. One commentator discusses recommendations for improving immigration detainee health care. *See generally* Lisa A. Cahan, Note, *Constitutional Protections of Aliens: A Call for Action to Provide Adequate Health Care for Immigration Detainees*, 3 J. HEALTH & BIOMEDICAL L. 343 (2007). This Comment has a broader focus than health care and will look more closely at the NDS and ways Congress can improve ICE detention facilities as a whole.

facilities. Finally, Part VI calls for readers to discuss these issues with their communities so that the general public gains awareness of the current state of immigration detention conditions.

II. IMMIGRATION DETAINEE RIGHTS

A. Constitutional Rights

For over a century, the Supreme Court has recognized that immigration detainees have constitutional rights.[32] Immigration detainees are civil, not criminal, detainees.[33] As civil detainees, they have the right to challenge the condition of their confinement under the Fifth Amendment Due Process Clause.[34] This right to challenge exists because the Fifth Amendment applies to all persons within the territorial jurisdiction of the United States.[35] As the Supreme Court has stated, "[a]liens, even aliens whose presence in this country is unlawful, have long been recognized as 'persons' guaranteed due process of law by the Fifth and Fourteenth Amendments."[36]

One commentator questioned the ability of immigration detainees to challenge the conditions of their confinement because of the discretion the Supreme Court has given the executive and legislative branches over immigration.[37] Indeed, Congress has plenary power over immigration law, which the Court has recognized since the late nineteenth century.[38] However, in *Zadvydas v. Davis*, the U.S. Supreme Court held that Congress' plenary power over immigration law "is subject to important constitutional limitations";[39] while Congress has the power to detain and remove undocumented immigrants, it must do so by "constitutionally permissible means."[40] Thus, while immigration

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32. Wong Wing v. United States, 163 U.S. 228, 238 (1896) ("Applying this reasoning to the Fifth and Sixth Amendments, it must be concluded that all persons within the territory of the United States are entitled to the protection guaranteed by those amendments, and that even aliens shall not be . . . deprived of life, liberty or property without due process of law.").

33. *See* Zadvydas v. Davis, 533 U.S. 678, 690 (2001) (clarifying that government detention of aliens is civil, not criminal).

34. Margaret H. Taylor, *Detained Aliens Challenging Conditions of Confinement and the Porous Border of the Plenary Power Doctrine*, 22 HASTINGS CONST. L.Q. 1087, 1090 (1995) (stating that immigration detainees "must challenge the conditions of their confinement under the Due Process Clause of the Fifth Amendment"); *see also* Bell v. Wolfish, 441 U.S. 520, 535 (1979) (indicating that the court will evaluate the constitutionality of conditions of civil pretrial detention under the Due Process Clause).

35. Plyler v. Doe, 457 U.S. 202, 212 (1982).

36. *Id.* at 210.

37. *See* Taylor, *supra* note 34, at 1127 ("The main obstacle to these claims is the so-called 'plenary power doctrine,' a century of precedent mandating extreme judicial deference to Congress and the executive branch in matters involving immigration.").

38. *See id.* at 1128-29 (exploring two early cases from the 1890's extending judicial deference to immigration legislation).

39. Zadvydas v. Davis, 533 U.S. 678, 695 (2001).

40. *See id.* (quoting INS v. Chadha, 462 U.S. 919, 941-42 (1983)). Here, the Court was careful to

detainees' procedural due process rights may be limited, especially given their civil detainee status,[41] they retain certain substantive due process rights which govern their confinement.[42]

The primary substantive protection given to civil detainees under the Due Process Clause is that the conditions and restrictions of a detention facility may not amount to punishment;[43] punishment is reserved only for those who have been tried and convicted.[44] But defining the standard of "punishment" set by the Supreme Court is difficult at best. In *Zadvydas*, the Court held that government detention violates the Due Process Clause unless the detainee is either given criminal procedural protections or is held under special, nonpunitive circumstances.[45] The Court went on to say, however, that civil detention of undocumented immigrants is assumed to be nonpunitive in purpose and effect.[46] While *Zadvydas* was important in circumscribing the plenary power of the legislative and executive branches over immigrant rights, it did not concern the actual facilities within which immigration detainees are held.[47] Indeed, no Supreme Court case and few federal cases have directly examined the constitutionality of the conditions of immigration detention facilities.[48] Thus, an examination of case law pertaining to civil detainees in other contexts is useful in delineating when a detention facility's conditions cross the line into punishment.

At a minimum, the Due Process Clause guarantees that civil detainees have the right to be free from unsafe conditions and bodily restraint.[49] Supreme Court dicta also supports the proposition that civil detainees have a right to basic human necessities, including adequate food, clothing, shelter, and medical care.[50] However, to determine whether a substantive due process right has been violated, these basic individual rights and liberty interests must be balanced against the

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separate Congress' ability to remove or admit aliens from the power to indefinitely detain them. *Id.*

41. *See* Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469, 515-16 (2007) (listing several constitutional rights that operate only in criminal proceedings, such as *Miranda* warnings or trial by jury, that are not given to immigration detainees).

42. *See Zadvydas*, 533 U.S. at 694 (clarifying that *Wong Wing* granted "substantive protections for aliens who had been ordered removed, not procedural protections for aliens whose removability was being determined"); Youngberg v. Romeo, 457 U.S. 307, 314-15 (1982) (holding that a civil detainee involuntarily committed retains substantive rights under the Due Process Clause).

43. Bell v. Wolfish, 441 U.S. 520, 535 (1979).

44. *Id.* at 536-37. Convicted prisoners have constitutional rights under the Eighth Amendment's prohibition against cruel and unusual punishment. Taylor, *supra* note 34, at 1090.

45. *Zadvydas*, 533 U.S. at 690. Such circumstances must have a special justification that outweighs the detainee's constitutional right to be free from physical restraint. *Id.*

46. *Id.*

47. *See generally id.* at 682 (regarding the indefinite detention of immigration detainees only).

48. *See* Taylor, *supra* note 34, at 1092 n.25 (listing the handful of federal court cases that have directly discussed conditions of confinement).

49. *See* Youngberg v. Romeo, 457 U.S. 307, 315-16 (1982) (establishing these two rights for civil detainees).

50. *Id.* at 315 (1982); DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 200 (1989).

government's legitimate interests in maintaining order and security within the facility[51] and ensuring a detainee's presence at trial.[52] Such governmental interests are "valid objective[s] that may justify imposition of conditions and restrictions of pretrial detention and dispel any inference that such restrictions are intended as punishment."[53] Indeed, the Supreme Court cautions the judicial branch to give much deference to the decisions of detention officials.[54] In *Youngberg v. Romeo*, the Court held that decisions made by officials managing civil detainee facilities "are entitled to a presumption of correctness."[55] Only where there is substantial evidence indicating that officials have overstepped constitutional boundaries should courts interfere.[56]

Some case law suggests that detainees are entitled to conditions better than those given criminal detainees or prisoners. *Youngberg* held that those who have been involuntarily committed—civil detainees—are entitled to better treatment and conditions of confinement than convicted criminals "whose conditions of confinement are designed to punish."[57] One Ninth Circuit case held that "when a [civil] detainee is confined in conditions identical to, similar to, or more restrictive than, those in which his criminal counterparts are held, we presume that the detainee is being subjected to 'punishment.'"[58]

In sum, immigration detainees have substantive due process rights protecting them from being held under punitive conditions and entitling them to certain basic necessities. Punitive conditions are those that substantially infringe upon a detainee's liberty interests outweighing any justifiable government interest. Such conditions may even be found when immigration detainees are held in similar facilities as prisoners. ICE facilities that meet this level of punishment violate the Fifth Amendment Due Process Clause.[59]

B. Statutes and Regulations Governing Detention

Sparse legislation touches upon the subject of immigration detention facilities. Currently, the Department of Homeland Security (DHS) holds immigration detainees pursuant to the Immigration and Nationality Act (INA).[60] Various INA sections grant the DHS[61] discretion to detain any inadmissible[62] or

51. *Youngberg*, 457 U.S. at 320.
52. Bell v. Wolfish, 441 U.S. 520, 540 (1979).
53. *Id.*
54. *Id.* at 540 n.23.
55. *Youngberg*, 457 U.S. at 324.
56. *Bell*, 441 U.S. at 540 n.23.
57. *Youngberg*, 457 U.S. at 321-22.
58. Jones v. Blanas, 393 F.3d 918, 932 (9th Cir. 2004).
59. *See infra* Part IV.B.
60. *See* 8 U.S.C. §§ 1226, 1231 (2000) (governing the detention of aliens).
61. Although the statutes state that the Attorney General is to detain undocumented immigrants, the Department of Homeland Security, and not the Attorney General, now oversees most immigration functions as

removable[63] alien or any person who has a pending decision on such status.[64] The only provision governing detention facilities themselves is located in section 1231(g), which states in part that the DHS "shall arrange for appropriate places of detention for aliens detained pending removal or a decision on removal."[65] Section 1231(h) expressly rejects the possibility of a private right of action under this statute, such as to challenge a facility as an inappropriate place of detention.[66] Given this minimal legislation, it appears Congress has kept a relatively hands-off approach to legislating detainment conditions inside the U.S.[67]

Two sections of the Code of Federal Regulations, promulgated by the former INS, govern immigration detention as well.[68] However, like the INA, these regulations do little to define how detention facilities are managed. Section 236.6 comes closest to regulating ICE facilities; this regulation keeps ICE facilities from releasing information and records regarding detainees to the public.[69] Neither the former INS nor ICE have promulgated other regulations governing the conditions at detainee facilities.

The scarcity of legislation touching on immigration detention facilities demonstrates two things: first, that Congress has not fully concerned itself with this aspect of immigration enforcement,[70] and second, that ICE is given broad

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explained in Part III.A below.

62. 8 U.S.C. § 1182 (2000) (governing the inadmissibility of aliens).

63. *Id.* § 1227 (governing the removability of aliens).

64. *Id.* § 1226(a).

65. *Id.* § 1231(g).

66. *Id.* § 1231(h) ("Nothing in this section shall be construed to create any substantive or procedural right or benefit that is legally enforceable by any party against the United States or its agencies or officers or any other person.").

67. However, there is one other statute that could prove helpful in protecting immigration detainees—the Detainee Treatment Act (DTA) of 2006. 42 U.S.C. §§ 2000dd-2000dd-1 (West 2007). The DTA states in part that "[n]o individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment." *Id.* § 2000dd(a).

While the DTA has never been applied to immigration detainees held by ICE, its possible advocates could file a lawsuit challenging the executive branch's failure to ensure conditions at detention facilities are humane. Although the legislative history is clear that the DTA was meant to protect detainees held by the Department of Defense (MICHAEL JOHN GARCIA, CONGRESSIONAL RESEARCH SERVICE, INTERROGATION OF DETAINEES: OVERVIEW OF THE MCCAIN AMENDMENT 1 (2006)), the plain language of the statute applies to all detainees. The DTA also provides that the President shall ensure compliance with the act, including "the establishment of administrative rules and procedures." 42 U.S.C. § 2000dd-0.

68. 8 C.F.R. § 241.4 (2007) governs the continued detention of aliens beyond the removal period; *id.* § 236.6 is discussed in the note below.

69. *Id.* § 236.6.

> No person, including any state or local government entity or any privately operated detention facility, that houses . . . any detainee on behalf of [ICE] . . . shall disclose or otherwise permit to be made public the name of, or other information relating to, such detainee. . . . Insofar as any documents or other records contain such information, such documents shall not be public records.

Id.

70. *But see infra* Part IV.D (discussing pending legislation introduced in 2008 that will impact ICE's detention operations).

power to establish its own detention operations with little guidance from the law. Legislation is probably the most direct way Congress can increase its oversight of ICE detention facilities and is discussed further in Part V.C below.

III. IMMIGRATION AND CUSTOMS ENFORCEMENT (ICE)

The above section defined the constitutional and statutory scope under which ICE must run its detention facilities. This section now turns to ICE's internal governance. Because there is sparse literature on ICE itself, Part III.A begins with a description of how ICE was formed. Part III.B then describes the various internal policies and standards that have shaped ICE's governance of its detention facilities over the past five years.

A. The Homeland Security Act of 2002: How ICE was Formed

The INS ceased to exist as of March 1, 2003, when the Department of Homeland Security (DHS) took over most of its functions.[71] The Homeland Security Act (HSA) of 2002 transferred most functions of the INS, including the detention and removal program, to the Under Secretary for Border and Transportation Security.[72] The DHS subsequently reorganized these functions into three bureaus: the Bureau of Customs and Border Protection, the U.S. Citizenship and Immigration Services (USCIS), and the Bureau of Immigration and Customs Enforcement (now ICE).[73]

The U.S. Code has since codified those sections of the HSA that relate to ICE.[74] These statutes are quite brief; for instance, the set of provisions governing ICE is over four times shorter than those governing its sister agency, the USCIS,[75] which oversees the adjudicative aspects of U.S. immigration.[76] None of these provisions provides guidance on how detainees are to be held. However, 6 U.S.C. § 253 created the Office of Professional Responsibility (OPR), which is to provide quality assessments of ICE operations.[77] The OPR is said to conduct annual reviews of ICE detention facilities, but reports from these reviews are unavailable for individual facilities.[78]

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71. *See* 6 U.S.C. § 291 (West 2007) (abolishing the INS); *id.* § 251 (transferring the immigration detention and removal program to a bureau of the DHS); Dep't of Homeland Sec. Notice, Name Change from the Bureau of Immigration and Customs Enforcement to U.S. Immigration and Customs Enforcement, 72 Fed. Reg. 20131 (Apr. 23, 2007) (noting that the transfer to the DHS went into effect March 1, 2003).

72. Homeland Security Act of 2002, Pub. L. No. 107-296, §§ 401-478, 116 Stat. 2177-212; 6 U.S.C. § 251; Dep't of Homeland Sec. Notice, 72 Fed. Reg. at 20131.

73. Dep't of Homeland Sec. Notice, 72 Fed. Reg. at 20131.

74. 6 U.S.C. §§ 251-256 (West 2007).

75. *Id.* §§ 271-279.

76. *See id.* § 271(b) (transferring all adjudications to the USCIS).

77. 6 U.S.C. § 253.

78. *See Hearing on Detention, supra* note 28, at 862. ICE recently began issuing semiannual reports on

B. ICE Detention Standards and Oversight

1. National Detention Standards (NDS)

On September 20, 2000, the former INS, along with the U.S. Attorney General, issued the Detention Operations Manual (DOM).[79] The INS, the Attorney General, and the American Bar Association (ABA) collaborated to develop the DOM, soliciting input from several immigrant advocacy groups.[80] The project attempted to standardize immigration detention facilities across the country.[81] One INS official stated that "[t]he standards are intended to provide a 'one size fits all' approach to detention, so that detainees experience the same treatment regardless of the type or location of the facility at which they are housed . . . ."[82] Currently, detainees are held at a variety of facilities, including eight ICE owned facilities, seven contract detention facilities, five Bureau of Prisons (BOP) facilities, and 350 state and local prisons and jails that work with ICE through Intergovernmental Service Agreements (IGSAs).[83] Around sixty-seven percent of detainees are held at some form of IGSA facility, while thirty percent are held at facilities ICE directly oversees.[84]

On September 12, 2008, ICE released an updated version of the DOM with new Performance-Based National Detention Standards (PBNDS).[85] The PBNDS are to be implemented over eighteen months and should be in full effect at each facility by January 2010.[86] In its press release on the PBNDS, ICE stated that the new standards are meant to bring its oversight process of detention facilities into

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facilities' overall compliance with the NDS. *See generally* U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, OFFICE OF DETENTION AND REMOVAL OPERATIONS, SEMIANNUAL REPORT ON COMPLIANCE WITH ICE NATIONAL DETENTION STANDARDS JANUARY—JUNE 2007 (2008) (on file with the *McGeorge Law Review*). However, the evaluation sheets for individual facilities remain unavailable to the public, preventing organizations from comparing ICE's ratings to each facility's actual compliance.

79. OIG REPORT, *supra* note 24, at 2.

80. *Id.*

81. *INS Hopes to Bring Uniformity to Detention Facilities' Processes with Release of Comprehensive Standards*, 77 INTERPRETER RELEASES 1637, 1637 (2000) [hereinafter *INS Hopes*].

82. *INS Discusses Implementation of Detention Standards, Upcoming Additions, at NGO Meeting*, 78 INTERPRETER RELEASES 995, 996 (2001) [hereinafter *INS Discusses*].

83. U.S. Immigration and Customs Enforcement, Detention Management Program, http://www.ice.gov/partners/dro/dmp.htm (last visited Oct. 12, 2008) [hereinafter Detention Management Program]. The current contracting process, including the terms of the contracts themselves, between ICE and the IGSAs is unknown, despite requests to make this process open. *See* ACLU REPORT, *supra* note 24, at 17.

84. *See* Leslie Berestein, *Lawsuits Raise Questions About Private Prisons: Immigration Agency, Contractors are Accused of Mistreating Detainees*, SAN DIEGO UNION-TRIBUNE, May 4, 2008, at A1 ("At the end of last year, 13 percent of ICE detainees were held in agency facilities. Seventeen percent were in private facilities that contract directly with ICE; 21 percent were in facilities contracted from local governments . . . . An additional 46 percent were in county jails . . . .").

85. PBNDS Press Release, *supra* note 27. The new PBNDS are available on the ICE Web site at http://www.ice.gov/partners/dro/PBNDS/index.htm.

86. PBNDS Press Release, *supra* note 27.

alignment with other detention accreditation bodies and industry standards.[87] Along with providing standards for detention facilities, the PBNDS also give a list of expected outcomes for each standard, and inspectors are to review facilities using specific outcome measures.[88]

Like the DOM, the PBNDS were written with input from outside agencies through the DHS-NGO Enforcement Working Group, a group of immigrants' rights organizations that submitted comments on ICE's draft standards for ICE to consider.[89] The PBNDS are forty-one standards that cover most aspects of detainee life including several new standards, such as Sexual Abuse and Assault Prevention and Intervention, Searches of Detainees, and Staff Training.[90]

The NDS are the guiding force behind ICE's Office of Detention and Removal Operations (DRO).[91] The DRO is responsible for overseeing the detention of all immigrants who are processed through ICE.[92] Because ICE is a federal agency, it is responsible for all detainees in its care, including those in IGSA and other contract facilities.[93] This means ICE, through the DRO, must ensure that treatment of its detainees does not amount to punishment, even when immigration detainees are held in criminal jails and prisons.

The DOM was a major step in immigrant advocacy, and the new PBNDS show that ICE is willing to work with immigration detainee advocates on improving detention governance.[94] But the standards are ineffective without enforcement. Numerous reports have stated that ICE consistently violates the NDS in many of its facilities.[95] While ICE states that it inspects each of its facilities annually to ensure compliance with the NDS,[96] inspection reports for

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87. *Id.*

88. *Id.*

89. *See ICE Releases New "Performance-Based" Detention Standards*, NAT'L IMMIGRANT JUSTICE CENTER, Sept. 12, 2008, http://www.immigrantjustice.org/news/detention/ice-releases-new-performance-based-detention-standards.html [hereinafter NIJC Article] (on file with the *McGeorge Law Review*).

90. PBNDS Press Release, *supra* note 27.

91. *See* Detention Management Program, *supra* note 83 (directing ICE facility employees and immigration detainees to the PBNDS for security and control procedures).

92. U.S. Immigration and Customs Enforcement, ICE Operations, http://www.ice.gov/about/operations.htm (last visited Oct. 28, 2007) ("DRO makes use of its resources and expertise to transport aliens, to manage them while in custody and waiting for their cases to be processed, and to remove unauthorized aliens from the United States when so ordered.").

93. *See INS Discusses*, *supra* note 82, at 997 (reporting that a representative of the former INS DRO emphasized "the INS is responsible for detainees regardless of where they are held").

94. *See* NIJC Article, *supra* note 89 ("NIJC appreciates the constructive exchange it has had with ICE on the performance-based standards over nearly a year's time. ICE has expressed a commitment to continuing discussion with the Working Group over the standards and considering further modifications.").

The ABA President at the time stated the standards were a "significant achievement" but that there were "several areas where we believe additional safeguards should be provided." *INS Hopes*, *supra* note 81, at 1637.

95. For a more extensive review of current ICE NDS violations, see *infra* Part IV.A; *see also* ACLU REPORT, *supra* note 24 (discussing numerous accounts by ICE detainees that would violate NDS standards).

96. *See Hearing on Detention*, *supra* note 28, at 862.

individual facilities are not made available to the public.[97] The ACLU believes that ICE does not follow through on every inspection.[98] Also, the DHS Office of the Inspector General (OIG) criticized ICE for giving passing ratings to five facilities that each violated several NDS standards.[99] These compliance problems are discussed further in Part V.B below.

2. *Length of Stay: The Catch-and-Return Policy*

Prior to the DHS, illegal immigrants were apprehended and then released on their own recognizance until their immigration hearings began.[100] This "catch-and-release" policy began informally in response to growing numbers of immigration detainees and a lack of bed space at detainment facilities.[101] One reporter stated that over eighty-five percent of immigrants failed to appear at their hearings.[102]

Under the DHS's Secure Border Initiative, issued in November 2005, the catch-and-release program was phased out and officially ended in August 2006.[103] The catch-and-release policy was replaced with the "catch-and-return" policy, which requires that ICE hold all illegal immigrants caught at the border in detention facilities until they are removed.[104] Before the new policy was implemented, around eighty percent of non-Mexican immigrants crossing the border without documents were conditionally released prior to their hearings.[105] In a little under a year, the release rate of those detainees dropped to zero.[106]

This new change in immigrant detention, along with other increased enforcement efforts, has substantially increased the number of detainees held in ICE custody since its inception.[107] Although ICE increased bed space to 27,500,[108]

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97. Such reports are not made available on the ICE website, http://www.ice.gov/, nor have any other DRO inspection reports been found in researching this paper. The ACLU argues that greater transparency is needed in the operations of ICE facilities, including "greater access to federal monitors, investigators, and auditors." ACLU REPORT, *supra* note 24, at 17-18.

98. *See* ACLU REPORT, *supra* note 24, at 16 ("NGOs have recently learned ICE fails to inspect each detention facility annually.").

99. OIG REPORT, *supra* note 24, at 36.

100. Michael Chertoff, Secretary U.S. Dep't of Homeland Sec., Statement before the U.S. Senate Judiciary Committee (Feb. 28, 2007), *available at* http://www.dhs.gov/xnews/testimony/testimony_1172853501273.shtm (on file with the *McGeorge Law Review*).

101. *Id.*

102. *See Noteworthy*, 84 INTERPRETER RELEASES 797, 798 (2007) ("[I]n 2005, two-thirds of the illegal aliens were released with notices to appear, and that more than 85% failed to appear.").

103. Chertoff, *supra* note 100.

104. *Id.*

105. *Id.*

106. *Id.*

107. *Detention and Removal: Immigration Detainee Medical Care: Hearing Before the Subcomm. on Immigration, Citizenship, Refugees, Border Security, and International Law of the H. Comm. on the Judiciary*, 110th Cong. 53 (2007) [hereinafter *Detention and Removal Hearings*] (statement of Zoe Lofgren, Chairperson, Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law) (transcript on

the number of ICE detainees on any given day exceeds 30,000.[109] Reports show that overcrowding has become a serious issue in some ICE facilities.[110]

Moreover, detainees are being kept in ICE facilities for longer periods of time because of the catch-and-return policy. In *Zadvydas*,[111] the Supreme Court held that after a noncitizen receives an order of removal, there is a presumptively reasonable constitutional limitation of six months on further detainment.[112] However, this does not limit the period of time detainees spend in ICE custody before a removal determination.[113] Due to both the catch-and-return policy and *Zadvydas*, detainees are being held for months at a time in ICE custody.[114] With the new catch-and-return policy and increased detainment periods, revised standards should be implemented to ensure appropriate long-term care.

3. Recent Headlines on ICE Operations

Between May 11 and May 14, 2008, the Washington Post published a four-part series of articles detailing its investigation into ICE detention operations.[115] These articles gave a broad overview of immigration detainee mistreatment,[116] as well as detailed stories of medical neglect,[117] gaps in mental health care,[118] and the

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file with the *McGeorge Law Review*). Chairperson Zoe Lofgren's opening remarks state that around 300,000 detainees were held by ICE in 2006, triple the amount from 2001 when less than 100,000 were detained. *Id.* at 1.

108. Chertoff, *supra* note 100.

109. *See* U.S. Immigration and Customs Enforcement, Detainee Health Care, http://www.ice.gov/pi/news/factsheets/detaineehealthcare.htm (last visited Oct. 12, 2008) (on file with the *McGeorge Law Review*) ("On any given day, ICE houses up to 33,000 immigration detainees . . . ."); Fears, *supra* note 1 (nearly 30,000 detainees).

110. [Proposed] Second Amended Complaint for Classwide Declaratory and Injunctive Relief at 10, Kiniti v. Myers, No. 3:05-cv-01013-DMS-PCL (S.D. Cal. Jan. 24, 2007), *available at* http://www.aclu.org/prison/conditions/28128lgl20070124.html; *see also* Joseph Summerill, *Is Federal Immigration Detention Space Adequate?: The Challenges Facing ICE's Custody and Detention Management Efforts*, 54-May FED. LAW. 38, 40-41 (2007) (discussing the OIG finding that there was a shortage of bed space as of 2006 and an increase in the number of illegal immigrants being detained).

111. Zadvydas v. Davis, 533 U.S. 678 (2001).

112. *Id.* at 701.

113. *Id.* at 682 (deciding the issue of whether the "post-removal-period statute authorizes the Attorney General to detain a removable alien *indefinitely* beyond the removal period").

114. *See, e.g., id.* at 684-86 (deciding the case based on the habeas corpus petitions of two INS inmates kept in custody for at least seven and one years, respectively); [Proposed] Second Amended Complaint for Classwide Declaratory and Injunctive Relief, *supra* note 110, at 10-14 (describing five detainees who had been in ICE custody from between four months and four years at the time of filing the complaint).

115. The full series entitled *Careless Detention: Medical Care in Immigrant Prisons* is available at http://www.washingtonpost.com/wp-srv/nation/specials/immigration/index.html.

116. Dana Priest & Amy Goldstein, *System of Neglect: As Tighter Immigration Policies Strain Federal Agencies, The Detainees in Their Care Often Pay a Heavy Cost*, WASH. POST, May 11, 2008, at A01.

117. Amy Goldstein & Dana Priest, *In Custody in Pain: Her Health Problems Worsening as She Fights Deportation, A U.S. Resident Struggles to get the Medical Care She Needs*, WASH. POST, May 12, 2008, at A01.

118. Dana Priest & Amy Goldstein, *Suicides Point to Gaps in Treatment: Errors in Psychiatric Diagnoses and Drugs Plague Strained Immigration System*, WASH. POST, May 13, 2008, at A01.

use of psychotropic drugs in the process of physically deporting immigration detainees.[119] The Post's investigation was based on thousands of official government documents, as well as interviews with government officials and immigration detainees and their families.[120]

In response to these articles, Julie Myers, Assistant Secretary for the DHS and head of ICE, sent a statement to the Washington Post.[121] Myers stated that while the number of detainees in ICE detention facilities has increased over thirty percent since 2004, the mortality rate has decreased significantly each year.[122] Further, Myers stated that ICE has increased its oversight and accountability measures, including creating an independent body to inspect detention facilities.[123] Finally, Myers stated that ICE is improving operations at the Division of Immigration Health Services (DIHS), including "selecting a new DIHS director [and] streamlining the hiring process to address staff shortages . . . ."[124] These steps may very well impact ICE operations in a positive way, and this Comment applauds ICE for its increased efforts at accountability. However, while hopeful, this author is still skeptical that these measures will actually be implemented systemically. Continued oversight by outside bodies such as newspapers and congressional committees should still continue, probably for months or even years, to determine if ICE has really effected change in its detention facilities.[125]

IV. THE CURRENT STATE OF ICE DETENTION FACILITIES

There are dozens of stories of mistreatment at ICE detention facilities described in various newspaper articles, NGO reports, and even government reports. This Comment focuses on two sources, a DHS report and pending cases, to demonstrate how ICE facilities are failing both the NDS and constitutional requirements for treatment of detainees.

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119. Amy Goldstein & Dana Priest, *Some Detainees are Drugged for Deportation: Immigrants Sedated Without Medical Reason*, WASH. POST, May 14, 2008, at A01.

120. Priest & Goldstein, *supra* note 116.

121. Julie L. Myers, *Caring for Immigration Detainees*, WASH. POST, May 20, 2008, at A13; *see also* U.S. Immigration and Customs Enforcement, Public Information, Detainee Health Care: The Rest of the Story, http://www.ice.gov/pi/detention_health_care.htm (last visited May 28, 2008) (on file with the *McGeorge Law Review*); U.S. Immigration and Customs Enforcement, Public Information, Washington Post Detainee Health Care Series - Day 3, http://www.ice.gov/pi/wash_post_myth_fact3.htm (last visited May 28, 2008) (on file with the *McGeorge Law Review*) (describing possible errors and misstatements by the Post in its series).

122. Myers, *supra* note 121.

123. *Id.*

124. *Id.*

125. Congressional oversight of ICE is discussed in depth in Part V.C below.

A. The Office of Inspector General Report: NDS Violations

The DHS has its own Office of Inspector General (OIG) that is responsible for overseeing all DHS programs.[126] Between January 2004 and January 2006, the OIG audited five ICE detainment facilities to assess compliance with the NDS.[127] It is beyond the scope of this Comment to go over each NDS violation the OIG found, but the following is a summary of its findings.

At four of the five ICE facilities, managing officials were non-compliant with initial medical screening standards; eight of the 115 detainees surveyed stated they were not screened, and another fourteen detainees were missing any documentation as to whether they had been screened.[128] At three facilities, ICE officials failed to respond to 196 of 481 (41%) immigration detainee sick call requests within the timeframe requirements.[129]

At one facility, the water going to the female detainees' toilets, showers, and sinks was scalding hot; officials failed to fix the problem for six days.[130] At the same facility, the OIG received many complaints of undercooked chicken; after confirming these reports and receiving word that officials had taken corrective measures, the OIG received a complaint signed by fifty-seven detainees that undercooked chicken had made ten people sick.[131] The OIG found that the chicken had not been cooked properly.[132]

At four of the facilities, thirty-seven of seventy-two (51%) detainees were missing at least some records; ten other detainees did not even have files.[133] At the time of the audits, the OIG auditors listened to several reports of physical, sexual, or verbal abuse by correctional staff; however, there were no procedures for reporting such abuses.[134] ICE stated that it would modify the ICE Detainee Handbook to let detainees know how to report abuses.[135] However, the OIG noted that several of the correctional officers they talked to at IGSAs had no idea there even were separate policies or standards for ICE detainees.[136] Further, two facilities did not regularly issue such Detainee Handbooks.[137]

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126. Department of Homeland Security, Office of Inspector General, http://www.dhs.gov/xoig (last visited Oct. 28, 2007) (on file with the *McGeorge Law Review*).

127. OIG REPORT, *supra* note 24, at 38.

128. *Id.* at 3-4.

129. *Id.* at 4.

130. *Id.* at 8.

131. *Id.* at 10.

132. *Id.*

133. *Id.* at 13.

134. *Id.* at 28-30.

135. *Id.* at 33.

136. *Id.* at 31-32.

137. *Id.*

The OIG made thirteen broad recommendations to ICE to encourage compliance with its own standards.[138] ICE partially or fully concurred with nine of these recommendations, but refused to consider the rest; one recommendation was subsequently dropped by the OIG.[139] To be fair, the OIG report shows that there is some internal oversight within the DHS over ICE. However, the OIG has not followed up with this audit, and it is uncertain to what extent ICE has corrected these violations.[140]

B. *Pending Cases: Constitutional Violations*

1. *Overcrowding*

On January 24, 2007, the ACLU filed a class-action lawsuit against Julie Myers, John Torres (Director of the DRO), and other state and local officials working at or with the San Diego Correctional Facility (SDCF).[141] The complaint charged defendants with violating detainees' right to have adequate bedding, livable space, and to be free from severely overcrowded conditions.[142] The complaint focused on the "triple-celling" of detainees in cells meant for two detainees.[143] It further alleged that many detainees had slept on the floor on a plastic "boat" next to the toilet, sometimes for months.[144]

Similar treatment has already been found to violate a civil detainee's due process rights. In *Thompson v. City of Los Angeles*,[145] the court held that, where a detainee was not provided with a bed or mattress during his stay in jail due to overcrowding, the detainee had stated a due process claim.[146] Thompson also listed many other federal cases where the denial of a bed, even where the detainee is given a floor mattress, is unconstitutional.[147]

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138. *See id.* at 44-52.

139. *Id.* at 1.

140. A complete list of the DHS OIG Management Reports can be found at http://www.dhs.gov/xoig/rpts/mgmt/editorial_0334.shtm. There is one OIG report from June 2008 that looks into ICE oversight regarding its detainee death policies specifically. *See generally* DEP'T OF HOMELAND SEC., OFFICE OF THE INSPECTOR GEN., ICE POLICIES RELATED TO DETAINEE DEATHS AND THE OVERSIGHT OF IMMIGRATION DETENTION FACILITIES (OIG-08-52) (June 2008) (detailing ICE's response to two detainee deaths during 2006). This report states that the ICE policies and standards in place are comparable to other detention standards, but that oversight problems still exist in ensuring facilities comply with them. *Id.* at 4. For instance, while the Office of Federal Detention Trustee, which inspects some of the same sites with which ICE contracts, gave one facility its lowest rating in 2006, ICE gave that same facility an acceptable rating in 2006. *Id.* at 3, 12-13.

141. [Proposed] Second Amended Complaint for Classwide Declaratory and Injunctive Relief, supra note 110, at 1, 3, 8-9.

142. *Id.* at 8.

143. *Id.* at 10.

144. *Id.* at 14-15.

145. Thompson v. City of L.A., 885 F.2d 1439 (9th Cir. 1989).

146. *Id.* at 1448.

147. *Id.*

On June 4, 2008, the parties settled the matter without deciding the merits.[148]

2. Health Care

On June 13, 2007, the ACLU filed another complaint against many of the same defendants for severe medical care violations.[149] On-site medical care at ICE facilities is provided by the U.S. Public Health Services (USPHS) which must get approval from the DIHS in Washington before providing non-emergency care.[150] The complaint alleges that, because immigration detention is perceived as short-term, medical personnel often delay or deny adequate treatment in the hope that detainees will leave the facility before treatment becomes critical.[151]

DIHS oversees the health care of all immigration detainees.[152] DIHS policy focuses on emergency care only, and any non-emergency care is determined on a case-by-case basis.[153] Based in part on the OIG report, the complaint alleges failure to timely respond to sick call requests, failure to monitor chronic conditions (such as hypertension, diabetes, or asthma), failure to timely issue prescription refills, failure to timely refer patients for specialized care, and failure to provide dental care, vision care, or adequate mental health care.[154]

One detainee at SDCF, Martin Hernandez Banderas, suffered a foot injury that, due to his diabetes, became gangrenous.[155] Despite his complaints of foot odor, ICE held Banderas for over two months with his foot injury before he was rushed to a hospital; he is now at risk of losing his leg.[156] The second ACLU complaint lists dozens of other stories of inadequate health care.[157]

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148. *See generally* Settlement Agreement, Kiniti v. Myers (S.D. Cal. June 4, 2008), http://www.aclu.org/immigrants/detention/35530lgl20080604.html.

149. Complaint for Injunctive and Declaratory Relief: Class Action at 4-9, Woods v. Myers (S.D. Cal. June 13, 2007), *available at* http://www.aclu.org/immigrants/detention/30101lgl20070613.html.

150. *Id.* at 1.

151. *Id.* at 11-12. ICE regards its detainee population as "highly transient." Detention Management Program, *supra* note 83. While it is true that detainees are held only temporarily, most criminal prisoners are also held only temporarily and yet have extensive regulations governing their confinement. See, for example, 28 C.F.R. chapter V for a lengthy set of regulations governing the U.S. Bureau of Prisons. While this author could not find any concrete numbers on the average length of stay of a detainee, there are many accounts of detainees being held for years at detention facilities. *See supra* note 114.

152. *Detention and Removal Hearings*, *supra* note 107, at 7 (statement of Gary E. Mead, Assistant Director for Management, Office of DRO) (transcript on file with the *McGeorge Law Review*).

153. DIHS Medical Dental Detainee Covered Services Package, 1, www.inshealth.org/ManagedCare/Combined%20Benefit%20Package%202005.doc (last visited Oct. 12, 2008) [hereinafter DIHS CSP] (stating that the DIHS CSP "primarily provides health care services for emergency care" and "[r]equests for pre-existing, non-life threatening conditions, will be reviewed on a case by case basis").

154. Complaint for Injunctive and Declaratory Relief: Class Action, *supra* note 149, at 15-39.

155. *Id.* at 19.

156. *Id.* at 19-20.

157. *See generally id.* (giving around forty different stories of inadequate medical attention alleged by over a dozen detainees).

Other related cases have since followed. One particularly distressing case of substandard health care is the story of Francisco Castaneda, also held at SDCF.[158] Castaneda was held in ICE detention for over ten months.[159] Over the course of his detainment he suffered from many painful, bloody lesions on his penis.[160] He was allowed to see a doctor, and eventually a urologist, who immediately recommended surgery and a biopsy.[161] However, DIHS refused to authorize the surgery, stating that it was elective and that he could get the surgery after he was deported.[162] When the ACLU finally got Castaneda medical attention after months of petitioning for care, it was too late—he had developed advanced penile cancer; his penis was surgically removed, and he later died.[163]

Before his death, at a congressional hearing on ICE medical care, Castaneda stated:

> I had to be here today because I am not the only one who didn't get the medical care I needed. It was routine for detainees to have to wait weeks or months to get even basic care. Who knows how many tragic endings can be avoided if ICE will only remember that, regardless of why a person is in detention and regardless of where they will end up, they are still human and deserve basic, humane medical care.[164]

Castaneda v. United States addressed whether a *Bivens*[165] action could be brought against DIHS and USPHS agents under the Eighth Amendment (the Fifth Amendment claim went unadressed by the Defendants, and thus was not addressed by the court).[166] Justice Pregerson found that not only had Castaneda stated an Eighth Amendment claim for unconstitutionally-inadequate medical care, but that, if true, the evidence would prove one of the most "egregious Eighth Amendment violations the Court has ever encountered" and "beyond cruel and unusual."[167]

As for the ACLU case on health care under the Fifth Amendment, even if the court finds that ICE's treatment does not merit *cruel and unusual punishment*,

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158. Castaneda v. United States, 538 F. Supp. 2d 1279 (C.D. Cal. 2008); *see also Detention and Removal: Immigration Detainee Medical Care: Hearing Before the Subcomm. on Immigration, Citizenship, Refugees, Border Security, and International Law of the H. Comm. on the Judiciary*, 110th Cong. 53, at 17 (2007) (statement of Francisco Castaneda, former detainee) (transcript on file with the *McGeorge Law Review*).

159. *Castaneda*, 538 F. Supp. 2d at 1285.

160. *Id.* at 1284-85.

161. *Id.* at 1281-82.

162. *Id.* at 1282.

163. *Id.* at 1285.

164. *Detention and Removal Hearings*, *supra* note 107, at 18 (statement of Francisco Castaneda, former detainee) (transcript on file with the *McGeorge Law Review*).

165. Bivens v. Six Unknown Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971) (allowing victims of constitutional violations perpetrated by federal agents to recover damages against those agents).

166. *Castaneda*, 538 F. Supp. 2d at 1286 n.10.

167. *Id.* at 1295, 1298.

leaving detainees to suffer in pain for months at a time should weigh heavily in the due process balance required to find conditions that merit regular *punishment*.[168] As stated in *DeShaney v. Winnebago*:[169]

> when the State . . . so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs—*e.g.*, food, clothing, shelter, medical care, and reasonable safety—it transgresses the substantive limits on state action set by the . . . Due Process Clause.[170]

Castaneda's story, along with the stories of Arellano and others described in the second ACLU complaint, show that the medical care in ICE facilities is appalling, inhumane, and certainly punitive. Because of the extensive nature of delayed and inadequate medical attention, along with the allegations of overcrowding and unsafe conditions from the first complaint, the ACLU and *Castaneda* have made a good case that the conditions at SDCF fall well below the constitutionally minimum level of care.[171]

V. MOVING TOWARD ACCOUNTABILITY

A. The Trouble with the NDS

The new PBNDS take several significant steps towards alleviating some of the problems with the original DOM. For instance, the DOM's emphasis was on providing blanket standards that facilities were supposed to achieve, and IGSAs were allowed to adopt their own procedures to achieve those standards.[172] In contrast, the revised PBNDS have "Expected Practices" that IGSAs are required

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168. The Due Process Clause's prohibition of conditions that amount to punishment was explored *supra* Part II.A.

169. DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189 (1989).

170. *Id.* at 200.

171. However, ICE gave this facility a passing rate in its annual inspection three years ago and continues to use it today. *See* OIG REPORT, *supra* note 24, at 36 (stating that a final rating of acceptable was given to the San Diego detention facility for the 2004 annual review); Department of Homeland Security, Division of Immigration Health Services, DIHS Locations, http://www.inshealth.org/Facilities/OurLocations.shtm (last visited Oct. 28, 2007) (on file with the *McGeorge Law Review*) (reporting that DIHS provides services to the San Diego detention facility as of 2007).

172. *INS Hopes*, *supra* note 81, at 1638. Each DOM standard has a section on applicability, which states in part:

> Within the document additional implementing procedures are identified for SPCs and CDFs. . . . IGSA facilities may find such procedures useful as guidelines. IGSAs may adopt, adapt or establish alternatives to, the procedures specified for SPCs/CDFs, provided they meet or exceed the objective represented by each standard.

U.S. Immigration and Customs Enforcement, Detention Operations Manual, Access to Legal Material, http://www.ice.gov/partners/dro/opsmanual/legal.pdf (last visited Feb. 3, 2008) (on file with the *McGeorge Law Review*).

to follow by contract to achieve the "Expected Outcomes,"[173] although some of the Expected Practices are still only required at ICE-managed facilities.[174] Further, certain standards have been greatly improved. For instance, the Terminal Illness, Advance Directives, and Death standard was revised and now requires notification of detainee deaths to the OIG and to local and state officials, as well as an improved notification system for families.[175]

Still, there are several reasons why the NDS fail to fully protect immigration detainee rights. Primarily, certain provisions of the NDS fail to provide adequate protection for ICE detainees. For instance, the DIHS health care policy, which the PBNDS has incorporated,[176] requires that all non-emergency decisions regarding detainee treatment must be passed by the reviewing medical personnel in Washington, D.C. before being administered.[177] Although the NDS provide for twenty-four-hour emergency care when a detainee requires immediate medical detention, almost all medical care is classified as non-emergency.[178] Emergency care includes only those conditions that are threatening to life or limb.[179] Accidental or traumatic injuries and acute illnesses are thus reviewed by the

173. *See, e.g.*, U.S. Immigration and Customs Enforcement, Operations Manual, ICE Performance Based Nat'l Detention Standards, Emergency Plans, 1, 2, http://www.ice.gov/doclib/PBNDS/pdf/emergency_plans.pdf (last visited Oct. 12, 2008) (on file with the *McGeorge Law Review*) (giving a long list of Expected Practices for ICE facilities to follow to ensure compliance with the Expected Outcomes. The standard applies to all facilities that house DRO detainees except the Bureau of Prisons).

174. *See, e.g., id.* at 1, 2-24 ("Procedures in italics are specifically required for SPCs and CDFs. IGSAs may adopt, adapt, or establish alternatives to the italicized procedures, provided they meet or exceed the intent represented by those procedures."). Most of the Expected Practices section of this standard is italicized, but this varies for each standard.

175. *Compare* U.S. Immigration and Customs Enforcement, Detention Operations Manual, Terminal Illness, Advance Directives, and Death, 4 (on file with the *McGeorge Law Review*) (only giving procedures for notifying family, the DRO, and the detainee's consulate) *with* U.S. Immigration and Customs Enforcement, Operations Manual, ICE Performance Based Nat'l Detention Standards, Terminal Illness, Advance Directives, and Death, 6-7, http://www.ice.gov/doclib/PBNDS/pdf/terminal_illness_advance_directives_and_death.pdf (last visited Oct. 12, 2008) (on file with the *McGeorge Law Review*) (requiring ICE to inform the OIG and local and state officials where required, and stating that DRO Field Office Directors must have written procedures for communicating the news to next-of-kin).

176. *See* U.S. Immigration and Customs Enforcement, Operations Manual ICE Performance Based Nat'l Detention Standards, Medical Care, 1, http://www.ice.gov/doclib/PBNDS/pdf/medical_care.pdf (last visited Oct. 12, 2008) [hereinafter PBNDS Medical Care] (on file with the *McGeorge Law Review*) ("This Detention Standard ensures that detainees have access to . . . health care that [is] within the scope of services provided by the DIHS . . . .").

177. *See* DIHS CSP, *supra* note 153, at 1 ("All health care services for which a claim for payment is submitted to DIHS require authorization. Elective, non-emergent care requires prior authorization. DIHS must be notified of emergency care services within 24 business hours of occurrence."); *Detention and Removal Hearings*, *supra* note 107, at 57 (statement of Tom Jawetz, Immigration Detention Staff Attorney, ACLU National Prison Project) (transcript on file with the *McGeorge Law Review*) (stating that personnel must obtain prior authorization from DIHS in Washington, D.C. before performing diagnostic testing, specialty care, or surgery).

178. PBNDS Medical Care, *supra* note 176, at 2; *Detention and Removal Hearings*, *supra* note 107, at 8 (statement of Gary E. Mead, Assistant Director for Management, Office of DRO) (transcript on file with the *McGeorge Law Review*).

179. DIHS CSP, *supra* note 153, at 1.

DIHS on a case-by-case basis, and a detainee is not ensured treatment for such conditions.[180]

This emphasis on emergency care may have made sense while the catch-and-release program was in effect; however, under the catch-and-return program, detainees were held for much longer periods of time.[181] Arellano, Castaneda, and Banderas were all held for months as their medical conditions worsened to the point of requiring emergency care.[182] It is evident that if ICE is to detain undocumented immigrants for extended periods of time, its health care policy should be modified to allow for timely and appropriate medical care without regard to the urgency of the condition.

Medical care is not the only issue that needs to be addressed in the NDS. The ACLU and the New York Times have criticized ICE for a lack of accountability.[183] ICE developed a thorough Grievance System standard in the PBNDS, complete with an appeal process, which will hopefully help the accountability problem.[184] However, this system is still internal, and many of the procedures are not even required to be implemented at IGSA facilities.[185] Unlike the USCIS, there is no independent ombudsman to receive detainee complaints against ICE, or to generate reports to Congress about ways ICE can improve.[186] Such systems would help improve communication between immigration detainees, ICE, and Congress.

Further, the PBNDS have no standard governing the treatment of lesbian, gay, bisexual, or transgender detainees and the special health and safety issues they face.[187] This lack of consideration is evident from ICE's placement of Arellano, a transgendered woman, in a male mass detention facility.[188] While

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180. *Id.* Detainees can make "sick call" requests for non-emergent care, and medical personnel must be available at the facility at least once a week. *Detention and Removal Hearings*, *supra* note 107, at 7-8 (statement of Gary E. Mead, Assistant Director for Management, Office of DRO) (transcript on file with the *McGeorge Law Review*).

181. *See supra* Part III.B.2.

182. Hernandez, *supra* note 4; Castaneda v. United States, 538 F. Supp. 2d 1279, 1285 (C.D. Cal. 2008); Complaint for Injunctive and Declaratory Relief: Class Action, *supra* note 149, at 19-20.

183. *See* ACLU REPORT, *supra* note 24, at 16-17 (proposing internal and external mechanisms to help cure ineffective oversight); Bernstein, *supra* note 18 (stating that there is "secrecy and confusion" surrounding deaths in ICE custody).

184. U.S. Immigration and Customs Enforcement, Operations Manual, ICE Performance Based Nat'l Detention Standards, Grievance System, 3-7, http://www.ice.gov/doclib/PBNDS/pdf/grievance_system.pdf (last visited Oct. 12, 2008) (on file with the *McGeorge Law Review*).

185. *See id.* (stating that grievances and appeals can be filed with an IGSA's "Facility Administrator" or to an ICE facility's "Grievance Officer" or "Detainee Grievance Committee").

186. Compare this to the USCIS, which had an ombudsman created for it under the HSA. 6 U.S.C. § 272 (West 2007). An ombudsman acts as an intermediary between individuals and the government. For example, the USCIS ombudsman receives complaints from individuals going through immigration adjudication; it also makes annual reports to Congress and annual recommendations to the USCIS based on these complaints. *Id.*

187. *See* Open Letter, *supra* note 11 (calling for ICE to "[r]evise the DOM to address the particular needs of gay men, lesbians, bisexuals, and transgender men and women, including health and safety issues").

188. Lavers, *supra* note 3.

Arellano was fortunate to have her fellow detainees care for her, many transgendered individuals are subject to harassment and physical and sexual attacks while incarcerated, arguably amounting to punishment.[189]

The allegations stated in the first ACLU case on overcrowding also need to be addressed. There are no standards governing overcrowding, beds and mattresses, or minimum livable space. Such provisions are needed to ensure detainees are not kept in unconstitutional conditions.[190]

Lastly, the standard governing transfers of immigration detainees not only allows ICE to transfer a detainee for any reason, it requires officers to do so without providing detainees, their attorneys or their families with advanced notice.[191] When ICE transferred 400 detainees from the Los Angeles area to other facilities in 2007, many attorneys were notified late, and many were concerned about potential lapses in medical care.[192]

Individually, each of these standards, or lack thereof, supports the argument that the current NDS cannot protect a detainee's constitutional rights. When the standards are taken as a whole, however, it is evident that the current standards are not enough to ensure immigration detainees receive care that is above the level of punishment. Additionally, the NDS are based on standards developed for the Bureau of Prisons and the American Correctional Association.[193] These standards were created for punitive conditions of convicted inmates, not for civil detainees. If civil detainees are entitled to better conditions than those given prisoners, then the standards governing them should reflect this.[194] The current standards need to be revised to ensure that they protect all immigration detainees' constitutional rights to basic safety and care while in custody.

B. Enforcing the NDS

Revising the NDS is only the first step to ensuring that immigration detainees' rights are protected. As the OIG report shows, many ICE facilities are failing to implement the standards.[195] The following are some of the reasons why enforcement of the NDS is lacking.

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189. *See generally* Tarzwell, *supra* note 2 (arguing for improved conditions for transgender individuals in state prisons given the special risks they face of harassment, assault, and inappropriate medical care).

190. *See supra* Part IV.B.1.

191. *See* U.S. Immigration and Customs Enforcement, Operations Manual, ICE Performance Based Nat'l Detention Standards, Transfer of Detainees, 2-3, http://www.ice.gov/doclib/PBNDS/pdf/transfer_of_detainees.pdf (last visited Oct. 12, 2008) (on file with the *McGeorge Law Review*) (providing that attorneys shall not be notified of transfers until the detainee has arrived at the new location, detainees shall not be notified until immediately prior to leaving the facility, and the detainee or attorney has the responsibility of notifying family members of the transfer).

192. Gorman, *supra* note 29.

193. *INS Hopes*, *supra* note 81, at 1637.

194. *See supra* notes 57-58 and accompanying text.

195. *See supra* Part IV.A.

First, ICE itself does not run a majority of the facilities holding immigration detainees. Most ICE facilities are run by state and county officials.[196] While the PBNDS govern some of the practices at IGSAs, many standards allow these facilities to follow their own procedures to achieve the Expected Outcomes.[197]

There are inherent problems in allowing local facilities so much discretion in managing immigration detainees. IGSAs work under contract.[198] Potentially, ICE could contract with a facility that is failing even the Eighth Amendment standard of care. No policy prevents ICE from keeping detainees at these facilities.[199] Also, in placing immigration detainees in facilities meant for correctional purposes, the officers working at those facilities sometimes treat them as though they are criminals.[200]

Second, the DRO states that it conducts annual reviews of each ICE facility to ensure compliance with the NDS.[201] However, these reviews are not made public, and the OIG has criticized the DRO for giving passing ratings to facilities that are seriously violating the standards.[202] Some NGOs believe ICE does not actually inspect each facility annually.[203]

Third, the standards in the PBNDS are not mandatory or binding on ICE in a way that makes them judicially enforceable.[204] While ICE may issue these standards to the officials running its facilities, ICE faces few repercussions if a facility fails to comply with the standards.[205] Unlike regulations, which are binding on administrative agencies, these standards are only meant to govern the management of ICE facilities and were intended to give flexibility to officials.[206]

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196. *See* Detention Management Program, *supra* note 83 (stating that there are over 350 IGSA facilities compared with 30 federally run facilities).

197. *See supra* notes 173-74 and accompanying text.

198. Hence the title Intergovernmental Service *Agreement.*

199. *See* ACLU REPORT, *supra* note 24, at 17 ("The current process for ICE to contract with a county jail or prison is unknown.").

200. *See, e.g.*, Allen S. Keller, Congressional Briefing on Medical Treatment at Immigration Detention Centers 1, July 9, 2007, *available at* http://www.aclu.org/pdfs/immigrants/allen_keller_congressionalbriefing_07_2007.pdf (on file with the *McGeorge Law Review*) (describing a study that confirmed that detainees were sometimes kept with the general criminal population and subject to segregation); OIG REPORT, *supra* note 24, at 30-35 (describing how correctional officers at two facilities were unaware of separate standards for immigration detainees, and some were trained to treat inmates and detainees the same).

201. *Hearing on Detention*, *supra* note 28, at 862.

202. OIG REPORT, *supra* note 24, at 33.

203. ACLU REPORT, *supra* note 24, at 2 ("The detention standards are not binding under United States law or regulations, making them practically unenforceable.").

204. *Id.*; *see also* Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 529-36 (2003) (discussing the enforceability of administrative standards).

205. While immigration detainees may not be able to enforce the NDS against ICE, the OIG report and congressional committee hearings from last year demonstrate how the standards can be effective in holding ICE accountable.

206. ACLU REPORT, *supra* note 24, at 2 ("The detention standards are not binding under United States law or regulations, making them practically unenforceable."); *INS Hopes*, *supra* note 81, at 1637 ("The new standards . . . include 'flexibility' to allow IGSAs to use alternate means of meeting the standards . . . .").

While ICE should give IGSAs flexibility, immigration detainees have no way to enforce standards against ICE itself.

Given the comments by some correctional officers about their lack of awareness of such standards,[207] it seems that ICE is not strongly committed to enforcing its standards. Various detention facilities may need flexibility to account for varying numbers of detainees, for separating inmates from detainees, or for other issues that only arise in certain localities. But nationwide, the problems in ICE detention facilities are abysmal and do not seem to be improving.[208] Since the NDS have proven ineffective in ensuring that ICE oversee its own facilities, ICE needs outside intervention to enforce such standards and improve detainment conditions.

C. *Congressional Oversight*

The problems with the NDS could be discussed at length, but the bigger issue is that ICE violates these standards without repercussion. Accountability is necessary to ensure ICE maintains its facilities at an acceptable level of care. One form of accountability is internal, within the administrative agency itself. However, as has been discussed at length in this Comment, ICE's internal checks have failed to protect detainees' rights. Similarly, while the executive branch's OIG has brought to light the violations occurring throughout ICE facilities, its reports are rare and do not ensure actual change in ICE operations.

Externally, the judiciary could act as a check on ICE. However, the first ACLU case took eighteen months to reach a resolution,[209] and judges will be reluctant to grant an injunction in an area where so much deference has been given to the legislative and executive branches.[210] At this point, it seems the best way to ensure ICE fulfills its obligation to protect immigration detainees' constitutional rights during detention is for Congress to intervene.

Congressional hearings are one way Congress keeps administrative agencies accountable.[211] Currently, there is a subcommittee dedicated to immigration issues that oversees ICE.[212]

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207. OIG REPORT, *supra* note 24, at 31-32.

208. *See generally, e.g.*, HUMAN RIGHTS WATCH, CHRONIC INDIFFERENCE: HIV/AIDS SERVICES FOR IMMIGRANTS DETAINED BY THE UNITED STATES (2007), http://hrw.org/reports/2007/us1207/us1207web.pdf (on file with the *McGeorge Law Review*) (extensively illustrating how ICE persistently fails to provide adequate care for detainees with HIV/AIDS). This report was issued in December of 2007 and states that ICE frequently fails to administer medications consistently, a violation of the NDS medical care standard. *Id.* at 19; PBNDS Medical Care, *supra* note 176, at 18.

209. *See supra* notes 141, 148 and accompanying text.

210. *See supra* notes 37-38, 54-56 and accompanying text.

211. *See* J.R. DeShazo & Jody Freeman, *The Congressional Competition to Control Delegated Power*, 81 TEX. L. REV. 1443, 1456 (2003) (explaining that the two primary mechanisms by which Congress controls administrative agencies is through *ex ante* limits in statutory language and *ex post* oversight by congressional committees).

212. The Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law,

Research indicates that congressional oversight in the form of committees has a very powerful influence over administrative agency decision-making—perhaps even more so than statutory requirements.[213] Professors DeShazo and Freeman posit that agencies are quite responsive to Congress, and accountability deficits may result more from incongruous viewpoints within Congress than resistance on the part of the agency.[214] If this is the case, members within the House Committee should be willing to communicate with each other to find common ground on the extent and form of intervention needed in ICE detention facilities.

On October 4, 2007, the House Committee on the Judiciary Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law held a hearing on medical care and treatment of immigration detainees.[215] At this hearing, the ACLU, along with a doctor from the New York University School of Medicine, the Executive Director of the Florida Immigrant Advocacy Center, and several detainees and detainee family members testified about the deplorable conditions of ICE health care.[216] They urged Congress to intervene and codify health care legislation, or at least make the current ICE standards binding and enforceable.[217] Other immigration advocates have called for the same action:

> Promulgating enforceable regulations is a critical first step . . . . Regulations, unlike non-binding standards, would ensure uniformity and consistency in detention conditions, enabling ICE to better monitor and assure quality control in the range of facilities it uses and negotiate more effectively with private prison suppliers who do not perform in accordance with the contract.[218]

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which has jurisdiction over all immigration and naturalization related issues, has a website located at http://judiciary.house.gov/about/subimmigration.html.

213. *See* DeShazo & Freeman, *supra* note 211, at 1516 ("Our results show that ongoing legislative oversight can have such a strong effect on agency decisionmaking that it effectively outweighs statutory criteria.").

214. *Id.* at 1517-18.

215. *See generally Detention and Removal: Immigration Detainee Medical Care: Hearing Before the Subcomm. on Immigration, Citizenship, Refugees, Border Security, and International Law of the H. Comm. on the Judiciary*, 110th Cong. 53 (2007) (transcript on file with the *McGeorge Law Review*).

216. *Id.* at 13-116.

217. *See id.* at 53 (statement of Tom Jawetz, Immigration Detention Staff Attorney, ACLU National Prison Project) (showing that the ACLU's fourth request is to codify improved and binding standards).

218. Andrea Black & Paromita Shah, *ICE's Deadly Care: Persistent Neglect and Lack of Accountability in Treatment of Detained Immigrants (NAM)*, NEW AMERICA MEDIA, Sept. 6, 2007, http://news.newamericamedia.org/news/view_article.html?article_id=434918b383a011fd5b649dc930718ddb; *see also* Nat'l Lawyers Guild, Nat'l Immigration Project, Petition to Issue Enforceable Immigration Detention Standards (2007), *available at* http://www.nationalimmigrationproject.org/ detention_petition_final.pdf (petitioning the DHS to initiate rulemaking under the Administrative Procedures Act); Cahan, *supra* note 31, at 355-58 (calling for a codification of improved ICE procedures).

As a concept, regulation might seem like the best solution to poor conditions at ICE facilities. However, both practical and federalism issues complicate this solution.

As previously noted, a majority of ICE facilities are IGSAs.[219] Each of these facilities operates a little differently from every other facility depending on state regulations, county codes, the number of detainees held, and myriad other factors. Attempting to enforce a lengthy set of regulations at so many facilities would be a difficult and unnecessary task. Such regulations would create a completely new list of rules with which local jail and prison officials would be forced to comply, overriding local codes and statutes and taking away officials' ability to run their facilities as they deem necessary (a point the Supreme Court cautions against).[220]

However, while regulating ICE detention facilities may be a step too far, there are still problems with a lack of oversight of IGSAs as discussed in Part V.B above. There are more practical solutions to monitoring ICE facilities which would still allow correctional officials the discretion they need to manage their facilities.

This Comment has several suggestions for ways Congress could effect change in ICE facilities. The first form of congressional intervention is, of course, legislation. Committee members could propose legislation that would allow for more effective oversight of ICE facilities to determine which facilities are consistently violating the standards. For instance, Congress should create an ombudsman similar to the one created to oversee the USCIS.[221] The ombudsman would hear grievances and communicate with ICE when a facility is not complying with the standards. It would also log complaints and give them to the House Committee upon request, as well as make recommendations for improvement. Creating this position would also give a voice to immigration detainees who feel as though they are not being heard. Such legislation should also require that information regularly be given out to all immigration detainees in their native language so that they are aware such a service exists.

Congress should also legislate to improve non-emergency health care for immigration detainees.[222] A revised medical standard would eliminate the requirement that medical personnel check with DIHS before administering care. The ACLU representative who testified before the House Committee made a similar request:

> This process [of obtaining prior authorization from the DIHS] results in both unreasonable delays in the provision of medical care, and

219. Detention Management Program, *supra* note 83.

220. *Supra* notes 54-56.

221. *See* 6 U.S.C. § 272 (West 2007) (detailing an independent ombudsman with several responsibilities, including making recommendations and working with USCIS officials).

222. See Part V.D *infra* for pending legislation on this issue.

> unjustifiable refusals to provide authorization. This statement is based not only on what we observe with our own clients, but also on the criticisms of jail officials whose hands are tied by the DIHS bureaucracy.[223]

As this statement suggests, the problem is not that detention officials do not want to provide health care to immigration detainees, but that ICE itself through the DIHS is keeping officials from providing needed care. Such legislation would eliminate this problem and actually allow for more freedom for IGSAs to administer health care while keeping ICE accountable.

The second form of congressional intervention this Comment recommends is overseeing the implementation of the PBNDS. Redrafting the DOM was a necessary step in rectifying the inadequacies of the NDS, and this author applauds ICE's commitment to working with NGOs on strengthening them.[224] However, as noted above, even the PBNDS fail to address many of the holes from the original DOM.[225] Primarily, Congress should continue holding hearings on ICE's detention operations, requesting actual documentation of each facility's annual compliance review. It should also review each of the new PBNDS to ensure they adequately protect immigration detainee rights, taking into account suggestions from non-governmental organizations as well.

Third, the House Committee should call for the contracting process between ICE and IGSAs to be made public. This would allow NGOs to determine if the contracts properly compel IGSAs to train their staff on the special needs of immigration detainees and to enforce ICE standards. Increasing oversight of how IGSA and ICE officials work together, as well as figuring out how IGSA officials understand their contracts with ICE, could go a long way to ascertaining specific problems in ICE's oversight of its detention facilities.

The above recommendations are not an exhaustive list of remedies, nor are they meant to be.[226] Each advocate for immigration detainee rights has his or her own views on what changes need to be made to improve the conditions at ICE facilities, and not all changes need congressional intervention. Hopefully, this Comment has brought to light the problems surrounding immigration detention, as well as encouraged problem solving among those who are concerned with the welfare of these detainees.

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223. *Detention and Removal Hearings*, *supra* note 107, at 57 (statement of Tom Jawetz, Immigration Detention Staff Attorney, ACLU National Prison Project) (transcript on file with the *McGeorge Law Review*).

224. *See supra* notes 89, 94 and accompanying text.

225. *See supra* Part V.A.

226. For instance, Cahan discusses ways to decrease the number of detainees in detention, including a return to a catch-and-release policy. Cahan, *supra* note 31, at 359-64. This Comment does not take a position on the catch-and-return policy, but does recognize that overcrowding is an issue that needs to be addressed.

D. Pending Legislation

After the hearing on ICE health care in October 2007, Representative Zoe Lofgren, Chairperson of the House Committee that oversees ICE,[227] proposed an amendment to a bill which, if passed, would require states to report all deaths of those in custody, including ICE detainees, to the Attorney General.[228] Part of this interest was spurred by Arellano's death and the circumstances surrounding it.[229]

In May 2008, Representative Lofgren introduced another bill that would require the DHS to establish specific procedures dealing with detainee medical care.[230] This bill would create procedures requiring ICE to, inter alia: inform detainees of medical and mental health care services,[231] ensure treatment decisions be "based solely on professional clinical judgments,"[232] consider medical and mental health concerns before transferring detainees,[233] create an administrative appeals process for denials of health care,[234] and report all deaths in immigration detention facilities to the OIG and the U.S. Department of Justice.[235] These procedures would be effective for all immigration detainees, regardless of the type of facility in which they are held.[236] Senator Robert Menendez introduced an identical bill shortly thereafter.[237]

If Congress passes this legislation, these requirements would go a long way to solve several of the issues raised by this Comment. However, medical care and accurate reporting of deaths are not the only problems facing immigration detention. Prolonged congressional oversight is needed to ensure implementation of these procedures, and this Comment recommends that Congress facilitate implementation of the PBNDS, create an ombudsman, and explore the contracting process between ICE and IGSAs. Regardless, these bills give hope

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227. U.S. House of Representatives, Committee on the Judiciary, Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law, http://judiciary.house.gov/about/subimmigration.html (last visited Oct. 11, 2008) (on file with the *McGeorge Law Review*).

228. *See* Death in Custody Reporting Act of 2008, H.R. 3971, 110th Cong. § 2 (2008) (giving the original text of the bill); Press Release, Am. Civ. Liberties Union, Amendment to Legislation will Require Government Transparency and Accountability Regarding Immigrant Deaths in Custody (Nov. 7, 2007) (on file with the *McGeorge Law Review*) ("[The] amendment . . . requires officials to report deaths of detainees in local and state custody . . . .").

229. *See Detention and Removal Hearings*, *supra* note 107 (statement of Zoe Lofgren, Chairperson, Subcomm. on Immigration, Citizenship, Refugees, Border Security, and International Law) (transcript on file with the *McGeorge Law Review*). Representative Lofgren described Arellano's death as one reason for calling the hearing. *Id.* at 1.

230. Detainee Basic Medical Care Act of 2008, H.R. 5950, 110th Cong. (2008).

231. *Id.* § 2(c)(1).

232. *Id.* § 2(c)(3).

233. *Id.* § 2(c)(5).

234. *Id.* § 2(e).

235. *Id.* § 2(g).

236. *See id.* § 2(a) ("The Secretary of Homeland Security shall establish procedures for . . . all immigration detainees in the custody of the Department of Homeland Security.").

237. Detainee Basic Medical Care Act of 2008, S. 3005, 110th Cong. (2008).

that Congress has finally started to increase its oversight of ICE and concern itself with immigration detention facilities.

VI. CONCLUSION

Representative Lofgren's actions indicate that the key to getting Congress to intervene is letting our Senators and Representatives know that the American people care about this issue. Undocumented immigrants are effectively voiceless in this country because they have no vote. "Immigration detention . . . is marked by a lack of adequate resources, public apathy toward conditions of confinement, and a 'voteless, politically unpopular, and socially threatening' population of detainees."[238] Without the media reports about the deaths that occurred in ICE custody this past year,[239] the House Committee may never have held a hearing on ICE health care, and Representative Lofgren may never have proposed such legislation.

Enforcing new standards and health care procedures, as well as increasing congressional oversight, would be big steps towards ensuring safe and humane conditions at ICE facilities. But the key to change will be increased pressure on Congress and ICE to take these steps. Those who are concerned about immigration detention should educate their communities about the conditions at ICE facilities. Only when the public becomes more concerned about how the U.S. treats these men and women will systemic change occur.

238. *See* Taylor, *supra* note 34, at 1127 (quoting Rhodes v. Chapman, 452 U.S. 337, 357-58 (1981)).

239. *See supra* Parts I & III.B.3.

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