

## **I. STATEMENT OF PETITION**

The National Immigration Project of the National Lawyers Guild (“National Immigration Project”), American Immigration Lawyers Association, American Immigration Law Foundation Legal Action Center, Casa de Proyecto Libertad, Catholic Legal Immigration Network, Inc., Families for Freedom, National Immigrant Justice Center, and eighty-four individual immigration detainees hereby petition the Department of Homeland Security (“DHS”) to initiate a rulemaking proceeding pursuant to the Administrative Procedures Act, 5 U.S.C. § 553, to promulgate regulations governing detention standards for immigration detainees. The Secretary of Homeland Security has ultimate authority over the administration of all immigration-related laws, including the care and treatment of immigration detainees, pursuant to the Immigration and Nationality Act, 8 U.S.C. §§ 1103(a)(1), (3); *see also id.* § 1103(a)(11).<sup>1</sup>

## **II. STATEMENT OF INTEREST**

The National Immigration Project of the National Lawyers Guild, a legal support group specializing in defending the rights of immigrants facing deportation and incarceration. Through the Keeping Hope Alive (KHA) program, the National Immigration Project provides legal support to immigration detainees, including monitoring human rights abuses at detention facilities, working to improve facility conditions, and providing legal resources to detainees and the general public. The Keeping Hope Alive program for immigration detainees provides legal representation to detainees facing deportation as well as legal assistance with class action lawsuits on behalf of abused detainees.<sup>2</sup> Through this work, the National Immigration Project has observed grave problems with detention conditions that point to the need for regulations. These problems include physical and sexual abuse of detainees, inadequate medical care, lack of access to legal materials, needless difficulty in communicating with counsel, violations of religious freedom, and serious problems with phone access, often a detainee’s only window of communication with the outside world.

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<sup>1</sup> Section 1103(a)(11)(A) authorizes the Attorney General to use appropriated funds for “necessary clothing, medical care, necessary guard hire, and the housing, care, and security of persons detained by the Service pursuant to Federal law” in agreements with states or localities. *See also id.* § 1103(a)(11)(B) (authorizing Attorney General to enter into agreements with states or localities for “necessary construction, physical renovation, acquisition of equipment, supplies or materials required to establish acceptable conditions of confinement and detention services” in states or localities providing bed space for immigrant detainees.) To the extent that § 1103(a)(11) relates to the detention of immigrants, the function has been transferred from DOJ to DHS. *See* 6 U.S.C. § 251(2), (establishing that reference to “the Attorney General” is now read as “the Secretary of Homeland Security”); *see also id.* § 557 (“With respect to any function transferred by or under this chapter . . . reference in any other Federal law to . . . any officer . . . the functions of which are so transferred shall be deemed to refer to the Secretary [of Homeland Security]”). Petitioners recognize that in 2000, Congress appropriated funds to establish the Office of Federal Detention Trustee (OFDT) to assist in coordinating some matters related to federal detainees. Congress has not transferred any authority from DHS to OFDT to regulate conditions of confinement for immigration detainees. Therefore, this petition is directed to DHS.

<sup>2</sup> National Immigration Project 2004 Annual Report.

The American Immigration Lawyers Association (AILA) is a national, voluntary bar association of over 10,000 attorneys, practicing and teaching in the field of immigration law. AILA was established to promote justice, advocate for fair and reasonable immigration law and policy, advance the quality of immigration and nationality law and practice, and enhance the professional development of its members. AILA is deeply concerned about conditions of immigration detention and has long advocated for reasonable and enforceable detention standards.

The American Immigration Law Foundation (AILF) is a non-profit organization founded in 1987 to increase public understanding of immigration law and policy, to promote public service and professional excellence in the immigration law field, and to advance fundamental fairness, due process, and basic constitutional and human rights in immigration law and administration. The AILF Legal Action Center conducts national impact litigation; writes amicus curiae briefs; produces practice advisories on a wide variety of topics; conducts the Litigation Institute and other legal educational programs; and mentors, coordinates and provides technical support for lawyers litigating due process and fairness issues in family, removal and business cases nationwide.

Casa de Proyecto Libertad, of Harlingen, Texas was founded in 1981 to provide legal defense and advocacy to Central American immigrants seeking asylum in the United States. Proyecto Libertad has evolved from a Central American project into a community based organization that assists immigrant families living in the Rio Grande Valley. The mission of Casa de Proyecto Libertad is to promote and defend the human rights of immigrant families in the Rio Grande Valley through legal defense and community organizing. Proyecto Libertad believes that all persons -- Proyecto Libertad clients, constituents, members of the public, and Proyecto Libertad employees -- have the right to be respected, live with dignity, and enjoy well-being.

The Catholic Legal Immigration Network, Inc. (“CLINIC”), a subsidiary of the United States Conference of Catholic Bishops (USCCB), is the nation's largest charitable legal agency for immigrants. CLINIC supports a national network of 161 charitable immigration programs. These programs, in turn, offer low-cost and pro bono legal services out of 261 offices nationwide. CLINIC directly represents immigrant detainees in several sites. It also co-founded the Detention Watch Network, a national network of agencies that serve immigrants in DHS custody. Based on its extensive experience with the DHS detention system, CLINIC has long advocated for the promulgation of a federal regulation that would govern the conditions and treatment of immigrant detainees.

Founded in September 2002, Families for Freedom (“FFF”) is a multi-ethnic defense network for immigrant families facing deportation, and an organizing support center for targeted communities. A New York-area network of support, education and action, FFF members are primarily low-income people of color, current and former detainees, loved ones of people being deported and individuals at-risk of deportation based on immigration status. FFF provides direct support to detainees and their families, conducts outreach in the most affected communities and raises public awareness about the deportation system and the erosion of immigrants’ civil rights. FFF regularly

corresponds with immigrant detainees and documents detention conditions to members of Congress, the Department of Homeland Security, consulates and embassies, and the media.

The National Immigrant Justice Center (“NIJC”) specializes in the legal representation of noncitizens held in government detention, including immigrants, asylum seekers, victims of domestic and gender-based violence, and unaccompanied children. In addition to providing legal services, NIJC regularly offers legal orientation “Know Your Rights” presentations to detained immigrants to ensure that they are aware of the reasons for their detention and of their basic rights. Drawing upon the thousands of cases handled by our staff and pro bono attorneys, NIJC works to remedy injustice through litigation and public education.

The individual immigration detainees, each of whom is now or recently was confined in DHS custody at Oakdale Federal Detention Center, Oakdale, Louisiana; Corrections Corp. of America San Diego Correctional Facility, San Diego, California; Etowah County Jail, Gadsden, Alabama; or other facilities, are: Rafiu Abimbola, Flavio de Jusus Acosta, Roberto Aguilar, Antonio Aleman, Luis Aleman, Fidel Amaya, Victor Amaya, Adalberto Andrade, Martin Arego, Francisco Duran Armas, Josue Baeza, Joseph Bailey, Jose Baldazo, Valentin Barrita, Dimas Batista, Jose Bernabe, Emiliano Bernal, Andrew Burrell, Angel Carillo, Diego Cervantes, Enrique Cruz, Francisco A. Cruz, Gustavo Cruz, Joao DaSilva, Josue Diaz, Augusto Reynoso Domindo, Luis Estrada, Rafael Estrada, Daniel Fernandez, Rosalio Flores-Flores, Solomon Garcia Flores, John Fraser, David Freeman, Evarado Polo Garcia, Fernando Garcia, Francisco Garcia, Fredi Garcia, Jose Garcia, Jair Gomes, Alejandro Gutierrez, Oscar Gutierrez, Andrew Hango, Esteban Hernandez-Hernandez, Jose Ramirez Hernandez, Ruben Hernandez, Luis Islas, Kykhoun Kham, Wilson Romero Lara, Hilario Lopez, Alfredo Machado, Camal Marchabeyoglu, Carlos Martinez, Jaime Martinez, Miguel Perez Martinez, Israel Mateo, Josue Maye, Juan Maye, Pedro Maye, Augusto Moreira, Pastor Paredes, Alfredo Perez, Edwin Pineda, Guillermo Polo, Carlos Reyes, Jose Reyes, Richard Reyes, Jose Rivera, Claudio H. Rodriguez, Armando Acosta Rojas, Luis Rojo, Virgilio Romero, Domingo Rosa, Rafael Saavedra, Raul Sanchez, Jacobo Santiago, Carlos E. Lanza Sevilla, Carlos Soto, Boima Stevens, George Thompson, Ysyfy Touray, Baltazar Vasquez, Jorge Garcia Vazquez, Juan Vieya, and Kenyatta Wilkinson.

### **III. THE DEVELOPMENT OF DETENTION STANDARDS FOR IMMIGRATION DETAINEES**

Explosive growth in the numbers of non-citizens in immigration detention across the country has resulted in inconsistent conditions of confinement and repeated incidents of detainee abuse. Though federal immigration authorities adopted generalized detention standards in 1998 and 2000, these standards do not apply to all immigration detainees and are not fully enforceable even by those detainees to whom the standards do apply. In particular, observers report problems in local jails where a substantial proportion of the detained population is held. Earlier this month, an audit by DHS’s own Inspector General found widespread violations of detention standards concerning medical care,

environmental health and safety, detainee grievance procedures, access to legal materials, access to telephones, housing classifications, recreation, and other topics in five facilities audited.<sup>3</sup> This report also demonstrated that the agency's existing system for monitoring detention conditions is severely deficient. The lack of enforcement and ineffectiveness of the existing standards confirm the need for DHS to promulgate legally binding regulations to ensure the uniform and humane treatment of immigration detainees.

#### **A. Explosive Growth in the Detention of Immigrants**

The responsibility to detain non-citizens accused of immigration violations rests with the Office of Detention and Removal ("DRO"), a division of the Bureau of Immigration and Customs Enforcement ("ICE") within the Department of Homeland Security. ICE secures facilities and DRO carries out and monitors the detention process. ICE operates eight detention facilities, known as Service Processing Centers ("SPCs"), and contracts with seven additional facilities, known as Contract Detention Facilities ("CDFs").

In 1987, the predecessor to ICE, the Immigration Naturalization Service ("INS"), began contracting with local jails to house long-term detainees, after a riot occurred at a detention facility in Louisiana and detainees were dispersed to local jails.<sup>4</sup> The practice of contracting with local jails via Intergovernmental Service Agreements ("IGSAs") was further expanded in response to a dramatic rise in the immigrant detainee population. Between 1994 and 2001, the average daily population of immigrant detainees rose from 5,532 to 19,533.<sup>5</sup> In 2000, immigration detainees represented the fastest-growing segment of the United States' prison population.<sup>6</sup> Such a rapid increase put substantial pressure on INS-run detention centers. Even the CDFs, private facilities contracted by the INS to house detainees, could not absorb the rising numbers of detainees. INS concluded that dispersing detainees to local jails would be the best solution.

By 2000, approximately 225 local jails housed almost 60 percent of all INS detainees.<sup>7</sup> In 2005, Congress authorized a \$90 million dollar increase in ICE appropriations for detention beds.<sup>8</sup> Currently, IGSAs allow ICE to place in local and state facilities detainees set to be held 72 hours or longer. ICE compensates these local jails on a per diem basis. Much of the recorded detainee abuses occur in these local jails.

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<sup>3</sup> Department of Homeland Security, Office of Inspector General, *Treatment of Immigration Detainees Housed at Immigration and Customs Enforcement Facilities* (released Jan. 16, 2007) [hereafter DHS OIG Report], available at [http://www.dhs.gov/xoig/assets/mgmtrpts/OIG\\_07-01\\_Dec06.pdf](http://www.dhs.gov/xoig/assets/mgmtrpts/OIG_07-01_Dec06.pdf).

<sup>4</sup> Chris Hedges, "Policy to Protect Jailed Immigrants is adopted by U.S.," *The New York Times*, Jan. 2, 2001, A1.

<sup>5</sup> Mark Dow, *American Gulag 9* (Univ. of California Press 2004).

<sup>6</sup> Hedges, *supra* note 4 at A1.

<sup>7</sup> Hedges, *supra* note 4; Human Rights Watch, *Locked Away: Immigration Detainees in Jails in the United States* (Sept. 1998), available at <http://www.hrw.org/reports98/us-immig/> [hereafter Human Rights Watch, *Locked Away*].

<sup>8</sup> Congressional Research Service Report for Congress, *Homeland Security Department: FY 2006 Appropriations*, p. 26 (June 29, 2005), available at <http://www.fas.org/sgp/crs/homsec/RL32863.pdf>.

Anger and frustration about detention conditions have also resulted in uprisings, episodic violence, and hunger strikes.<sup>9</sup>

## **B. Public Concern about Detention Conditions**

Several high-profile incidents about poor or abusive immigrant detention conditions arose in the 1990s. These included a 1995 uprising by INS detainees at the Elizabeth, New Jersey facility run by Esmore Inc. (now Correctional Services Corp., or “CSC”), which resulted in injuries, extensive damage to the detention center, media scrutiny of deplorable immigration detention conditions,<sup>10</sup> and costly civil litigation.<sup>11</sup> An INS investigation later reported that “detainees were subjected to harassment, verbal abuse, and other degrading actions”<sup>12</sup> and concluded that “some of the decisions made by Esmore had a serious negative impact upon relations between the INS and the general public since, in the public perception, INS is inextricably linked to the operations of the Elizabeth facility.”<sup>13</sup>

In a second example, alarming allegations about detention conditions at a detention facility in Florida prompted the Congressional Task Force on Immigration Reform in 1995 to send a fact-finding mission to the Krome SPC facility near Miami.<sup>14</sup> The facility managers allegedly endeavored to deceive the Congressional visitors about detention conditions at the facility with a Potemkin-inspired plan to reduce the detention population by 40% through temporary transfers, releases, and deportation. The ensuing scandal prompted an Inspector General audit of conditions in detention facilities.<sup>15</sup>

## **C. The 1998 Detention Standards**

In addition to public revelations about abuses and deplorable conditions in detention, concern was raised that the widespread dispersion of immigrant detainees across the country created difficulties in assuring uniform, just treatment of all detainees. In response to these problems, INS in 1998 issued twelve detention standards for INS Service Processing Centers and privately contracted for-profit facilities. These standards, however, did not apply to local jails. Later the same year, a senior INS official shed light

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<sup>9</sup> Human Rights Watch, *Locked Away*.

<sup>10</sup> John Sullivan, “Operator of Immigration Jails Has a History of Problems,” *New York Times*, June 20, 1995, p.A1.

<sup>11</sup> Three separate federal suits were filed. A partial settlement required a \$2.5 million payment to plaintiffs. *See Jama v. U.S.I.N.S.*, 343 F. Supp. 2d 348 (D.N.J. 2004). Esmore lost its federal contract to operate the Elizabeth facility. The detention center reopened in 1997 and is now operated by another private company, Corrections Corp. of America (“CCA”).

<sup>12</sup> U.S. INS, Headquarters Detention and Deportation Division, “The Elizabeth, New Jersey Contract Detention Facility Operated by ESMORE Inc.: Interim Report,” July 20, 1995.

<sup>13</sup> *Id.*

<sup>14</sup> *See* Miami INS Report – III. The Allegations Concerning Krome; available at <http://usdoj.gov/oig/special/9606/miafile4.htm>.

<sup>15</sup> *See* USDOJ/OIG Special Report - Alleged Deception of Congress: The Congressional Task Force on Immigration Reform’s Fact-Finding Visit to the Miami District of INS in June 1995 Executive Summary, available at <http://www.usdoj.gov/oig/special/9606/exec.htm>.

on INS's reasons for not applying standards to IGSA facilities, stating, "It's not in the INS's interest to force the jails to meet certain standards because we need the space."<sup>16</sup>

Without binding detention standards applied uniformly on behalf of all people in immigration detention, grave inconsistencies continued to exist among the various detention sites. In particular, failure to enforce standards for immigration detainees in local IGSA jails led to poorer conditions and more frequent abuse than in the federal-run SPCs and the CDFs. In the case of asylum seekers, for example, former INS Commissioner Doris Meissner acknowledged in a Senate hearing that documented cases of abuse had occurred exclusively in state and local facilities.<sup>17</sup> Detainees in local facilities across the country, including New Orleans, Chicago, and Los Angeles, filed a law suit alleging physical assaults, overcrowding, lack of working showers and toilets, and inadequate medical care.<sup>18</sup> In August 2000, around two dozen detainees from the Hudson County Correctional Center in Kearny, New Jersey, sent a letter to INS claiming they were held in cells where "human waste was clearly visible over the floors and toilets."<sup>19</sup> Hundreds of cases of abuse were documented by human rights groups, including Human Rights Watch, the Florida Immigrant Advocacy Center, the Women's Commission for Refugee Women and Children, the Catholic Legal Immigration Network and the ACLU Immigrants' Rights' Project.<sup>20</sup>

#### **D. The 2000 Detention Operations Manual**

To mitigate future abuses, the INS and Attorney General, with the help of the ABA, drafted and approved thirty-six detention standards, which were released in November 2000 as the Detention Operations Manual ("DOM").<sup>21</sup> The DOM standards apply to SPCs, CDFs, and IGSA facilities holding detainees for more than 72 hours.<sup>22</sup> The DOM merely serves as guidelines for IGSA facilities, however.<sup>23</sup>

With the release of the DOM, then-INS Commissioner Doris Meissner stated, "Our continued goal is to provide safe, secure and humane conditions of detention for all aliens in INS custody, and these new standards will help us achieve that."<sup>24</sup> However,

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<sup>16</sup> Human Rights Watch, *Locked Away*.

<sup>17</sup> *INS Reform and Oversight of Detention Facilities: Hearing before Senate Immigration Subcommittee*, 105<sup>th</sup> Cong. (1998) (statement of Doris Meissner, INS Commissioner).

<sup>18</sup> Hedges, *supra* note 4.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *INS News Release- INS to Adopt New Detention Standards*, (Nov. 13, 2000), available at <http://www.uscis.gov/text/publicaffairs/newsrels/detainee.htm>

<sup>22</sup> Since then, the American Bar Association's (ABA) Commission on Immigration has created a Detention Standards Implementation Initiative to urge facilities to consistently implement existing standards.

<sup>23</sup> "IGSA facilities may find such procedures useful as guidelines. IGSA's may adopt, adapt, or establish alternatives to, the procedures specified for SPCs/CDFs, provided they meet or exceed the objective represented by each standard." *Detention Operations Manual*, "INS Detention Standard: Hold Rooms in Detention Facilities," (2000). By contrast, IGSA facilities functioning primarily as criminal detention facilities must adhere to standards outlined in the Department of Justice ("DOJ") Justice Core Standards.

<sup>24</sup> *INS News Release- INS to Adopt New Detention Standards*, (Nov. 13, 2000), available at <http://www.uscis.gov/text/publicaffairs/newsrels/detainee.htm>

INS did not adopt the detention standards as regulations, making them difficult to enforce. Facilities that fail to adhere to the standards are rarely held accountable.

In 2003, six detainees at the Passaic County Jail staged a hunger strike to protest the substandard conditions at the jail. These detainees stated, “We are being held without adequate ventilation, in unclean and unhealthy quarters.”<sup>25</sup> Jail Warden Charles Meyers responded, “They’re treated professionally, but they’re in jail. This isn’t camp, and they’re not Boy Scouts.”<sup>26</sup>

Yet the substandard conditions at Passaic continued to attract media attention. In 2004, National Public Radio investigated the use of dogs at the Passaic County jail.<sup>27</sup> In the report, a detainee named Hemnauth Mohabir described how prison guards beat detainees and used dogs in order to threaten them, reminding all listeners of the images of Abu Ghraib prison in Iraq.<sup>28</sup> Most recently, Nina Bernstein of *The New York Times* has continued to report on the use of dogs in Passaic County jail.<sup>29</sup>

Detention problems have of course not been limited to New Jersey. The DHS Office of Inspector General (“OIG”) recently audited five detention facilities (Krome, Passaic, Hudson, CCA, and Berks), and identified numerous instances of non-compliance with the DOM.<sup>30</sup> In addition, in January 2006 the DHS Civil Rights and Civil Liberties Committee<sup>31</sup> requested that the OIG perform a detention audit focusing on five particularly important areas: telephone access, visitation rights, medical care, access to legal materials, and transfers.

### **E. The Next Step: Promulgation of Regulations**

Clearly, without meaningful enforcement, the DOM alone is insufficient to assure uniform and human treatment of detainees. Opportunities for redress when facilities fail to adhere to detention standards depend largely on detainees asserting themselves, perhaps with the assistance of a family member or legal advocate. ICE compliance with the DOM is lacking and many detention staff have no knowledge of the standards in the DOM. Furthermore, detainees cannot address grievances in writing to an ombudsman or ICE liaison.<sup>32</sup> Despite ICE’s monitoring of conditions, widespread reports of abuse

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<sup>25</sup> Elizabeth Llorente, “INS Detainees in Hunger Strike at Passaic Jail Protest Conditions of Captivity”, *The Record*, Jan. 16, 2003, at L10.

<sup>26</sup> *Id.*

<sup>27</sup> Daniel Zwerdling, “Immigrant Detainees Claim Brutal Treatment and Abuse by Guards and Dogs at the Passaic County Jail in New Jersey”, *All Things Considered*, November 17, 2004.

<sup>28</sup> DHS added Passaic to its audit after the NPR report. In 2005, the county sheriff forced federal auditors to leave the facilities, and although they later returned, the sheriff subsequently terminated the DHS contract.

<sup>29</sup> Nina Bernstein, “9/11 Detainees Describe Abuse Involving Dogs,” *The New York Times*, April 3, 2006.

<sup>30</sup> See DHS OIG Report, *supra* note 3.

<sup>31</sup> The DHS Civil Rights and Civil Liberties Committee is an informal working group of NGOs that meets regularly with the Inspector General and Office for Civil Rights and Civil Liberties.

<sup>32</sup> The Staff-Detainee Communication Standard provides for scheduled and unscheduled visits by ICE Office in Charge and department heads; however, that standard distinguishes those visits from the formal grievance procedure. The formal grievance procedure allows for written grievances and appeal up to the

persist. Detainees themselves identify the lack of access to attorneys and legal materials and conditions of confinement (healthcare, longevity of detainment, and various forms of abuse) as major concerns. Despite these criticisms, there still exists no meaningful recourse for change within the detention facilities. The creation of the DOM represented an important step forward in creating uniformity among facilities and acknowledging the necessity for safe and humane treatment of immigrant detainees, but experience has taught that the lack of proper enforcement mechanisms seriously undermines the effectiveness of the standards.

DHS is now a mature detention agency, with many years of experience housing thousands of immigration detainees, directly or in contract facilities. Like the U.S. Bureau of Prisons, DHS should promulgate regulations that are more formal and enforceable than the DOM, so as to assure uniformity in the treatment of immigration detainees and to guarantee that minimum standards for humane treatment are honored. The agency should be engaged in rulemaking under the Administrative Procedures Act, including publication of proposed regulations in the Federal Register, notice-and-comment, and promulgation of a final rule, in order to improve the overall management of immigration detention operations.

In short, DHS has the opportunity and authority to take the next crucial step toward establishing detention conditions that meet the agency's needs and preserve the general welfare of the detainee population. By codifying the DOM into regulations, DHS can serve the best interests of the agency and policy goals of the administration and provide uniformity in the treatment of detainees.

#### **IV. LEGAL AUTHORITY**

DHS possesses the full statutory authority necessary to regulate conditions of detention for its immigration detainees. *See* 8 U.S.C. § 1103(a)(1) (conferring on Secretary of DHS ultimate authority over administration of all immigration-related laws); *id.* § 1103(a)(11) (conferring authority over conditions of detention for those immigrants detained by the federal government but held in non-Federal institutions).<sup>33</sup> The scope of DHS's authority includes the ability to regulate detention conditions in contract facilities governed by IGSA's.<sup>34</sup> DHS should exercise this undisputed authority by promulgating detention regulations.

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Center's Officer in Charge (OIC). The OIC's decision is final; if the OIC wishes, he may chose to file it with the Assistant District Director for Detention and Removal.

<sup>33</sup> The reference in § 1103(a)(11) to "the Attorney General" now means "the Secretary of DHS." *See* 6 U.S.C. § 557; *id.* § 251(2); note 1, *supra*. The language of § 1103(a)(11), including terms such as "necessary clothing, medical care" and "acceptable conditions of confinement," acknowledge that there are minimum standards for how individuals must be detained and what resources should be available to them. The absence of regulations to define the level of services, such as detainee supplies and medical care, that are "necessary," or to explain and implement the statutory terms "acceptable conditions of confinement," creates potential for abuse and agency exposure to litigation liability for any failure to address inappropriate treatment.

<sup>34</sup> *See Roman v. Ashcroft*, 340 F.3d 314, 320 (6<sup>th</sup> Cir. 2003) ("It is clear that the INS does not vest the power over detained aliens in the wardens of detention facilities because the INS relies on state and local governments to house federal INS detainees. Whatever daily control state and local governments have over

## **A. DHS Authority to Regulate Detention Conditions**

Immigration-related regulations identify and distinguish between categories of immigration detainees. Regulations regarding immigration detainees include 8 C.F.R. § 232 (“detention of aliens for physical and mental examinations”); *id.* § 235.3 (expedited removal for “inadmissible aliens”); *id.* § 236 (pre-final order detention); *id.* § 241 (post-final order detention). The regulation covering detention in non-ICE facilities, 8 C.F.R. § 235.3, sets generalized standards for detainees’ treatment. *Id.* § 235.3(e). It cites “four mandatory criteria” for immigration detainees including 24-hour supervision, conformance with safety and emergency codes, food service, and availability of emergency medical care.

## **B. Proposals to Codify Regulations**

DHS could issue detention regulations in any of several ways. Petitioners request that the agency undertake an informal rulemaking proceeding as set forth in 5 U.S.C. § 553, to: (a) promulgate the standards already listed in the DOM, as well as additional regulations to address gaps and deficiencies in the Manual; (b) make the regulations binding on all facilities housing immigration detainees; and (c) mandate that all IGSAAs include terms compelling adherence to the detention standards. In addition, several further alternatives are outlined below.

One way to regulate detention standards would be to incorporate detailed standards similar to those in the DOM into the DHS regulations themselves. DHS could establish a subsection of Title 8 of the Code of Federal Regulations that would contain all detention standards, and amend each section describing categories of detainees to refer to that section. In the alternative, DHS could expand the section outlining some standards, 8 C.F.R. § 235.3(e), to include the extensive discussion of standards in the manual, while making clear that the standards apply to detainees covered in other sections as well.

As noted above, many of the standards are widely viewed as adequate, with most problems stemming from lack of enforcement. Basing proposed regulations on the current Detention Manual could expedite the rulemaking process, as the Manual could serve as a reasonable blueprint for new regulations, supplemented by public comment regarding flaws revealed by experience with the current standards.

Alternatively, ICE could issue proposed rules with strengthened provisions covering areas such as health care and family visitation, to address current deficiencies in the Manual. This would represent an important commitment by ICE to the safety and welfare of detainees. Or, ICE might codify standards for immigration detainees without adding extensive new regulations by publishing regulations that simply reference the

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federal INS detainees, they have that control solely pursuant to the direction of the INS.”); *ACLU of New Jersey v. County of Hudson*, 799 A.2d 629, 654 (N.J. App. Div. 2002) (“while the State possesses sovereign authority over the operation of its jails, it may not operate them, in respect of INS detainees, in any way that derogates the federal government's exclusive and expressed interest in regulating aliens”).

Detention Manual and mandate that all facilities housing immigration detainees abide by its standards.<sup>35</sup>

It is critical that any rulemaking involving detention standards ensure that the standards are binding in all of the facilities housing detainees, in particular IGSA. To ensure that detainees receive the same treatment when housed pursuant to an IGSA as when confined in CDFs or SPCs, the regulations should mandate that all contracts for IGSA require adherence to standards outlined in the regulations and agree to submit to ICE's enforcement. This is especially important given that IGSA facilities also house criminal prisoners, who have less legal protection against mistreatment than do civil prisoners like ICE detainees (who have not been convicted of any crime and thus, unlike convicted criminals, cannot be punished).<sup>36</sup> There is therefore a greater danger that such prison facilities will broadly apply impermissibly punitive policies to ICE detainees in the absence of any directive forbidding them to do so. Without question, the authorization in 8 U.S.C. § 1103(a)(11) for DHS to enter into agreements to establish "acceptable conditions of confinement" in state or local facilities empower the agency to insist on such terms in its IGSA.

## **V. DHS SHOULD CODIFY ITS STANDARDS INTO REGULATIONS**

### **A. Regulations are needed to insure uniformity and consistency in detention conditions, an announced agency priority**

INS and DHS have long acknowledged the need for uniform detention conditions meeting acceptable minimum standards consistent with relevant statutes and the Constitution. The current detention standards were adopted in 2000 to ensure consistent treatment and care as the population of non-citizen detainees in various INS, private and local facilities across the country grew rapidly. At the time the standards were issued, then-INS commissioner Doris Meissner declared, "We are committed to ensuring that our detention standards are met by all facilities we use for detention, regardless of whether they are operated by INS, private contractors or state, local or federal government officials under Intergovernmental Service Agreements."<sup>37</sup> Three years later, ICE issued its Detention and Removal Strategic Plan for 2003-2012, entitled "Endgame." The second listed goal of the plan was to "provide safe, secure, and humane confinement of

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<sup>35</sup> Such a regulation could state, for example: "Any institution detaining individuals subject to 8 C.F.R. §§ 232, 235, 236, or 241 must adhere to all of the standards for facility resources and detainee treatment outlined in the ICE Detention Manual." See, e.g., 32 C.F.R. § 199.2 (2005) (requiring that partial hospitalization programs for mentally ill individuals be in "substantial compliance" with standards in Mental Health Manual of Joint Commission on Accreditation of Healthcare Organizations); 5 C.F.R. § 338.301 (1997) (civil service employees given competitive service agreements must meet requirement's in Office of Personnel Management's "Operating Manual: Qualification Standards for General Schedule Positions"); 29 C.F.R. § 221.100 (1999) (incorporating standards outlined in "HUD Handbooks").

<sup>36</sup> See *Bell v. Wolfish*, 441 U.S. 520, 535 (1979).

<sup>37</sup> "INS to Adopt New Detention Standards: Standards to Be Implemented at All Facilities Housing INS Detainees" Nov. 13, 2000, available at: <http://uscis.gov/text/publicaffairs/newsrels/detainee.htm>.

persons detained in accordance with immigration law.”<sup>38</sup> To effectuate that goal, ensuring compliance with the detention standards was emphasized.

Unfortunately, six years after the adoption of the standards and three years after ICE announced its strategic plan, detention facilities across the country continue to fail to fully comply with the standards. Conditions across different detention facilities vary greatly. Not only do many violations of the standards go unchecked and unaddressed, but for many facilities, no effective enforcement mechanism exists to respond to complaints about detention standard violations. The procedures and mechanisms to identify and correct violations of the detention standards are not working, and the root of this problem can be traced back to the non-binding nature of the standards.

Codification of the standards into regulations would provide much-needed consistency and enforceability and allow ICE to achieve its goal of providing “safe, secure, and humane confinement of persons detained in accordance with immigration law.” Critically, promulgating regulations would make the detention standards binding upon all immigrant detention facilities, including the contract IGSA facilities, which would be bound through the doctrine of preemption. An example of this doctrine in action can be found in a recent lawsuit to compel a county jail to release the names of its immigration detainees, pursuant to a state “Jailkeeper’s Law.” An intermediate state court in New Jersey held that the federal immigration regulation barring release of immigrant detainees’ names preempted contrary state law.<sup>39</sup> This case demonstrates the strong benefits to DHS of promulgating detention regulations that will protect agency interests and policy choices, even in the face of contrary state laws. By contrast, the non-binding guidelines of the DOM do not preempt contrary state laws applicable to many contract facilities.

#### **B. The expanding detainee population, housed in the absence of uniform standards, risks exposing DHS to legal liability and adverse publicity**

The average daily population of immigrant detainees has risen to over 20,000, and the numbers are unlikely to diminish soon; to the contrary, immigration reform legislation may increase detention demands. The occasional disturbances in immigrant detention facilities, if not ameliorated with improvements in conditions and enhanced uniformity across facilities, will likely recur, with negative publicity and potential legal liability for the agency, and its contractors. Most at risk, of course, are the immigration

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<sup>38</sup> Endgame: Detention and Removal Strategic Plan 2003-2012, Bureau of Immigration and Customs Enforcement, Office of Detention and Removal (June 2003).

<sup>39</sup> *ACLU of New Jersey*, 799 A.2d at 647 (“where there is an operational conflict, a federal regulation will pre-empt state law if its promulgation was within the scope of the agency’s delegated authority and in compliance with the procedural provisions of the APA”). Because the federal government has “exclusive authority over matters involving...immigration,” courts “have recognized that judicial deference to the executive branch...is especially appropriate in the immigration context,” *Id.* at 648, to the extent the Executive Branch’s regulations does not interfere with other Constitutional protections. See, e.g., *Turner v. Safley*, 482 U.S. 78 (1987) (holding that inmates have a constitutionally protected right to marry); *Zablocki v. Redhail*, 434 U.S. 374 (1978).

detainees themselves crammed into detention facilities without the protection of legally enforceable standards.

As the examples from Section III *supra* indicate, inadequate oversight over immigration detention has led to inhumane treatment, detainee unrest, public outcry and litigation. Promulgation of uniform, binding regulations can reduce the likelihood of all these negative outcomes, including the potential liability of DHS and agency officials in the event of future detainee uprisings. DHS has already taken the first step by promulgating the detention standards. The next step in the development of DHS as a detention agency is to transform the standards into more comprehensive, detailed, and enforceable regulations.

### **C. DHS can better monitor and assure quality control in all of its facilities through the promulgation of standards**

The private contractors and local detention facilities seeking lucrative contracts from DHS may resist the imposition of what they will perceive as additional costs associated with complying with any new standards. Under the current, non-binding regulations, providers of contract facilities have no incentive to improve their standard of care to the level necessary to achieve the goals outlined above. Instead, their bargaining power derives from ICE's increasing demand for bed-space and its inability to rectify supply problems in the near term. Pressure to achieve procurement goals while containing costs provides ICE with a dangerous incentive to accept the lowest-bid contract or provider. These pressures have increased as a result of the rapid increase in detention needs of the Office of the Federal Detention Trustee (OFDT) and the outsourcing to private jails.

Binding regulations, especially ones which clearly delineate the differing requirements of non-punitive and punitive detention, will provide ICE with the ability effectively to negotiate with these suppliers, whether directly or through the OFDT.<sup>40</sup> Contracts with third-party providers are subject to the requirements of the Federal Acquisition Regulation System, which provides for "equitable adjustment for nonconforming services."<sup>41</sup> If the standards to which these third-party contractors are held are legally binding, ICE will then be able effectively to threaten either exclusion from contract competition or significant reduction of contract value for non-performance. While legally binding standards for detention conditions may reduce the expected profit margin of these third-party providers, the lucrative nature of ICE contracts and the incentive to maintain eligibility for future contracts should ensure ICE an adequate supply of detention facilities more mindful of conformity to the detention standards.

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<sup>40</sup> The Office of the Federal Detention Trustee was established to exercise all power and functions authorized by law relating to the detention of federal prisoners and aliens awaiting adjudication and/or removal from the United States. "Provided, That the Trustee shall be responsible for construction of detention facilities or for housing related to such detention; the management of funds appropriated to the Department for the exercise of any detention functions; and the direction of the United States Marshals Service and Immigration and Naturalization Service with respect to the exercise of detention policy setting and operations for the Department." Pub. L. 106-553, § 166, 114 Stat. 2762 (2000)

<sup>41</sup> 48 C.F.R. § 46.407(f).

**D. Regulations are needed so DHS can preserve the health and welfare of detainees, prevent cruel and improper treatment, and reduce liability for violating the constitutional rights of detainees**

Non-citizens have well-established substantive due process rights under the Fifth and Fourteenth Amendments which protect them from punitive detention conditions without due process of law.<sup>42</sup> This constitutional protection extends to non-citizens not yet legally admitted to the U.S. but who are nevertheless held in U.S. immigration detention.<sup>43</sup>

Not only does the Constitution impose a duty on government officials for ensuring the safety and well-being of all detainees during government detention,<sup>44</sup> more importantly, the Constitution prohibits mistreatment amounting to punishment of any government detainee who has not had an adjudication of criminal guilt in accordance with due process of law.<sup>45</sup> This means that any person detained by the government who has not been adjudged guilty of a crime and who is not detained to serve a criminal sentence may not be subjected to punitive conditions. Generally speaking, this prohibition includes civil detainees, pre-trial criminal detainees, and those detainees who have been convicted of a crime and who, upon finishing their criminal sentence, continue to be held under *civil* law in *civil* detention.<sup>46</sup> As persons held under the civil immigration laws, DHS detainees are included in these groups.

The Constitution prohibits punitive conditions for DHS and other civil detainees because they have not been adjudicated guilty of any crime and are not being held for criminal purposes. This constitutional mandate is not only prohibitive but also prescriptive, because the standard for constitutionally acceptable detention standards is higher for those, such as DHS detainees, whose detention serves no punitive purpose. As

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<sup>42</sup> *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) (“The fourteenth amendment to the constitution is not confined to the protection of citizens.”); *Wong Wing v. U.S.*, 163 U.S. at 235; *Mathews v. Diaz*, 426 U.S. 67, 77 (1976) (holding even one whose presence is unlawful is entitled to constitutional protections under the 5<sup>th</sup> and 14<sup>th</sup> amendments).

<sup>43</sup> *Lynch v. Cannatella*, 810 F.2d 1363, 1373 (5<sup>th</sup> Cir. 1987). Due process protections apply even to some non-citizens held outside the U.S. *HCC v. Sale*, 823 F. Supp. 1028, 1041-42 (E.D.N.Y. 1993).

<sup>44</sup> *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189, 199-200 (1989) (“[W]hen the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being.”); *Colle v. Brazos County, Tex.*, 981 F.2d 237, 246 (5<sup>th</sup> Cir. 1993) (“A constitutional right to minimally adequate care and treatment [for pre-trial detainees] is not a novel proposition.”).

<sup>45</sup> *Bell v. Wolfish*, 441 U.S. 520, 535 (1979) (“In evaluating the constitutionality of conditions or restrictions of pretrial detention ..., we think that the proper inquiry is whether those conditions amount to punishment of the detainee. For under the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law.”).

<sup>46</sup> *Jones v. Blanas*, 393 F.3d 918 (9<sup>th</sup> Cir. 2004) (in case involving sexual predator, holding that civil conditions of confinement which were the same as or similar to those for criminal prisoners or even pre-trial detainees were presumptively punitive and unconstitutional).

the Supreme Court held in *Youngberg v. Romeo*,<sup>47</sup> civil detainee conditions must be superior to conditions of confinement for convicted criminal offenders.

Clearly then, prison conditions held to violate the Eighth Amendment prohibition on cruel and unusual punishment also violate civil detainees' due process rights.<sup>48</sup> Under the Eighth Amendment, courts have held unconstitutional the denial of adequate medical care, when there is "'deliberate indifference' to the 'serious' medical needs of prisoners,"<sup>49</sup> as well as the "use of force amount[ing]... to 'punishment' or 'the unnecessary and wanton infliction of pain.'"<sup>50</sup> While there is no right to "comfortable prisons," the Constitution also forbids overcrowding resulting in "serious" deprivations of amenities<sup>51</sup> and deliberate indifference by prison officials to their obligation to protect prisoners from violence (such as violent attacks by fellow inmates) and suicide.<sup>52</sup>

Under the Due Process Clause, detention conditions for all persons detained without adjudication of criminal guilt must exceed the requirements under the Eighth Amendment for prisoners. For individuals detained on criminal charges awaiting trial, this means they too may not be subjected to punitive conditions of detention. Thus courts have invalidated policies subjecting pre-trial detainees to the same conditions as convicted prisoners.<sup>53</sup> For example, the Fifth Circuit has held that pretrial detainees are owed greater access to medical care than prisoners<sup>54</sup> and several circuits have held that pretrial detainees may be owed greater access to counsel than convicted inmates.<sup>55</sup> The use of excessive force constituting punishment is also forbidden for detainees, as are long periods of isolation, gratuitous strip searches, and unnecessary shackling not required for the orderly running of the facility.<sup>56</sup> Furthermore, the denial of a mattress and a bunk has been widely held to be a valid due process claim regardless of overcrowded prison conditions.<sup>57</sup>

Importantly, at least one U.S. Court of Appeals has held that conditions of confinement for civil detainees must be superior to those of pre-trial criminal detainees,

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<sup>47</sup> 457 U.S. 307, 324 (1982) (holding that persons who have been involuntarily committed are entitled to more considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish).

<sup>48</sup> *City of Revere v. Mass. General Hosp.*, 463 U.S. 239, 244 (1983) ("In fact, the due process rights of a person in Kivlin's situation are at least as great as the Eighth Amendment protections available to a convicted prisoner").

<sup>49</sup> Howard B. Eisenberg, *Rethinking Prisoner Civil Rights Cases and the Provision of Counsel*, 17 S. Ill. U. L.J. 417, 429 (1993) (collecting cases).

<sup>50</sup> *Id.* at 432-43.

<sup>51</sup> *Id.* at 429.

<sup>52</sup> *Id.* at 430-1.

<sup>53</sup> Sarah Botz and Robert C. Scherer, *Substantive Rights Retained by Prisoners*, 84 Geo. L. J. 1465, 1498 (1996) (hereinafter Botz & Scherer, *Substantive Rights*).

<sup>54</sup> *Id.* at 1499 (citing *Hare v. City of Corinth*, 36 F.3d 412, 415 (5<sup>th</sup> Cir. 1994)).

<sup>55</sup> *Id.* (citing *Covino v. Vermont Dep't of Corrections*, 922 F.2d 128, 130 (2d Cir. 1991) (transfers to locations which impair access to counsel may violate Sixth Amendment); see also *Murphy v. Walker*, 51 F.3d 714, 718 (7<sup>th</sup> Cir. 1995) (Sixth Amendment applies if "revocation of phone privileges interferes with access to counsel").

<sup>56</sup> Botz & Scherer, *Substantive Rights*, at 1497, 1499.

<sup>57</sup> *Id.* at 1499.

in addition to those of convicted criminal offenders.<sup>58</sup> Under this analysis, when conditions for civil detainees are equally restrictive as those of pre-trial criminal detainees, then the conditions are presumptively punitive and unconstitutional.<sup>59</sup> Moreover, unlike criminal detainees and prisoners, civilly detained individuals need not prove “deliberate indifference” on the part of government officials to prevail on a Fourteenth Amendment claim regarding their conditions of confinement.<sup>60</sup>

Constitutionally, then, the rights of immigration detainees differ substantially from criminal pre-trial detainees and prisoners. Unfortunately, reports from attorneys indicate that detention officials, particularly wardens and sheriffs at IGSA contract facilities which also serve as local jails, do not distinguish between their DHS and other jailed populations. *See* Section III.D *supra*. This kind of attitude by jail authorities towards the civil immigration detainees under their care raises serious constitutional questions.

Given these concerns, it is critical that the proposed regulations reflect the difference between punitive and non-punitive conditions of detention to ensure that ICE detainees are treated properly and according to the relatively higher standard for civil detainees held for non-punitive reasons. In order to be constitutional, restrictions imposed upon detainees by the regulation must be “reasonably related to a legitimate, nonpunitive, and governmental purpose.”<sup>61</sup> Under the Due Process Clause, any policy justified by recourse to a punitive objective would be rejected as unconstitutional.<sup>62</sup>

The constitutional case law on detention conditions for civil detainees underscores the importance of enforcing the detention standards. The DOM standards, if properly enforced, would provide for constitutionally appropriate conditions of confinement. Too often, however, DHS detainees experience detention conditions that do not even meet fundamental Eighth Amendment standards for prisoners, let alone the higher Fifth and Fourteenth Amendment standards for civil detainees.

The abuses and violations of the existing detention standards point to the need for codification of the standards, and constitutional concerns underscore this imperative. To avoid the continued occurrence of situations in which minimum constitutional protections are violated, codification of the existing detention standards is crucial. Codification will also help clarify the civil purposes of alien detention, demonstrate that unconstitutionally

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<sup>58</sup> *Jones v. Blanas*, 393 F.3d at 934 (“With respect to an individual confined awaiting adjudication under civil process, a presumption of punitive conditions arises where the individual is detained under conditions identical to, similar to, or more restrictive than those under which pretrial criminal detainees are held...”). Other circuits have analyzed due process protections for immigration detention by utilizing standards for those held in pre-trial detention. *See, e.g., Ortega v. Rowe*, 796 F.2d 765, 767 (5<sup>th</sup> Cir. 1986). (following line of cases regarding pre-trial detainees’ due process rights to analyze detention conditions claim by INS detainee).

<sup>59</sup> *Jones v. Blanas*, 393 F.3d at 934.

<sup>60</sup> *Id.*

<sup>61</sup> Botz & Scherer, *Substantive Rights*, at 1497.

<sup>62</sup> *Id.*

punitive detention conditions will not be tolerated, and confirm DHS's commitment to upholding detainees' constitutional rights by creating truly enforceable standards.

### **E. DHS Should Emulate the Bureau of Prisons' Promulgation of Binding Regulations**

DHS should follow the example of the U.S. Bureau of Prisons (BOP), which has nearly a century of experience in federal prison administration and which promulgated comprehensive, binding regulations for detention standards over thirty years ago. The Bureau of Prisons was established by Congress in 1930,<sup>63</sup> largely in response to overcrowding in prisons and also to enable federal administrators to effect policies necessary to "preserve the health of the prisoner...[and to] prevent cruel and improper treatment."<sup>64</sup> Congress was also responding to widespread public outcry against prison conditions generally.<sup>65</sup>

In the 1960s and 1970s, a marked increase in court decisions expanding judicial remedies for prisoners with prison condition claims prompted major changes in the Bureau of Prisons administration.<sup>66</sup> The increase in legal claims by prisoners tracked rising public awareness of prisoners' rights issues due to the internment of Japanese Americans during World War II.<sup>67</sup> Driven in part by a desire to reduce the number of prisoners' rights cases in the courts, in 1974 the director of the BOP issued a policy statement establishing an administrative review process for hearing prisoner complaints.<sup>68</sup> This change was not forced upon the Bureau by Congress or compelled by emerging jurisprudence; rather it was undertaken upon the Director's own initiative in anticipation of "the direction in which the courts were moving."<sup>69</sup>

ICE should emulate the BOP administrative review process for prisoner complaints about detention conditions.<sup>70</sup> As outlined in 28 C.F.R. §§ 542.10-542.19, the administrative review program provides for formal but non-judicial review of issues arising from confinement.<sup>71</sup> Generally, inmates are first required to bring issues to the attention of staff informally. In the absence of satisfactory redress inmates are permitted to file a standard form, "Request for Administrative Remedy," and to submit it to a

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<sup>63</sup> An Act To Reorganize the administration of Federal prisons; to authorize the Attorney General to contract for the care of United States prisoners; to establish Federal jails, and for other purposes, H.R. 7832, 71<sup>st</sup> Cong. (2<sup>nd</sup> Sess. 1930); 60 Am. Jur. 2d *Penal & Correctional Insts.* § 11 (2006).

<sup>64</sup> H.R. Rep. No. 71-106 (1930) (Comm. Rep.).

<sup>65</sup> *Federal Prisoners and Penitentiaries: Hearing Before the Comm. on the Judiciary*, 71<sup>st</sup> Cong. 23 (1929) (statement of Sanford Bates, Superintendent of Prisons, Department of Justice).

<sup>66</sup> See, e.g., *Bounds v. Smith*, 430 U.S. 817, 822 (1977); see generally Song Hill, *Casey v. Lewis: The Legal Burden is Raised; The Physical Barrier is Spared*, 25 Golden Gate U. L. Rev. 1, 4-8 (1995).

<sup>67</sup> H.R. Rep. No. 92-116 at 1435-36 (1971).

<sup>68</sup> Bruce Bernstein, *Federal Bureau of Prisons Administrative Grievance Procedure: An Effective Alternative to Prisoner Litigation?*, 13 Am. Crim. L. Rev. 779, 779 (1976).

<sup>69</sup> John W. Roberts, *View From the Top: The Bureau of Prisons' five Directors Discuss Problems and Ethics in Corrections*, 1 Fed. Prisons 4, 39-40 (1990).

<sup>70</sup> Bruce Bernstein, *Federal Bureau of Prisons Administrative Grievance Procedure: An Effective Alternative to Prisoner Litigation?*, 13 Am. Crim. L. Rev. 779, 779 (1976).

<sup>71</sup> 28 C.F.R. § 542.10(a).

designated staff member.<sup>72</sup> Inmates also may, in the case of sensitive issues, submit the request directly to the Regional Director.<sup>73</sup> In order to appeal unsatisfactory warden decisions, inmates have access to the Regional Director, and after that to the General Counsel, the final level of administrative appeal.<sup>74</sup>

In 1976, the Attorney General authorized the director of the Bureau of Prisons “to promulgate rules governing the control and management of Federal penal and correctional institutions and providing for the classification, government, discipline, treatment, care, rehabilitation, and reformation of inmates.”<sup>75</sup> Immediately following this explicit delegation of authority and according to the notice and comment procedures of the Administrative Procedure Act, the proposed Bureau of Prisons regulations were published in a series of seven sections, starting on May 23, 1977 and ending on Oct. 29, 1979.<sup>76</sup> The justification for this procedure was the desire to “afford interested persons additional notice of Bureau regulations and proposed regulations” through “a formal process for solicitation and consideration of comments” relating to policies then “contained [only] in Policy Statements and Operations Memoranda.”<sup>77</sup> Today, these regulations appear at 28 CFR § 500.1 - § 572.40.

We do not suggest that ICE regulations governing confinement of civil immigration detainees should be identical in substance to BOP regulations governing incarceration of criminal convicts and pretrial detainees; the needs and circumstances of immigration detainees differ in numerous critical respects from those of criminal detainees, and demand appropriate tailoring. But the evolution of Bureau of Prisons mechanisms for controlling and regulating prison conditions serves as an important model for ICE. First operating solely on policy statements and unofficial guidelines, the Bureau established an internal mechanism for the enforcement of standards and the management of complaints as a result of both public pressure and increasingly successful prisoner litigation in the courts. A mere three years later, however, the Bureau of Prison decided to promulgate legally binding regulations. The long experience of the Bureau of Prisons in managing a national system of detention, and its ultimate decision to promulgate binding regulations, serves as an instructive model to younger agencies, like ICE, currently facing public pressure concerning conditions of detention.

Many parallels exist between the pressures faced by the BOP in the 1970s and ICE today: just as public outcry eventually drove the BOP toward concrete standards, ICE faces increasing criticism as the public learns more about conditions in detention facilities; both agencies face the daunting task of coordinating detention conditions across the nation; and both suffer from overcrowding and under-funding. ICE should draw from

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<sup>72</sup> *Id.* §§ 542.13-542.14.

<sup>73</sup> *Id.*

<sup>74</sup> § 542.15(a).

<sup>75</sup> Organization of the Department of Justice, 28 C.F.R. § 0.96(o) (2006) (published in 41 Fed. Reg. 56802 as 28 C.F.R. § 0.96(t)).

<sup>76</sup> 42 Fed. Reg. 26344 (May 23, 1977); 42 Fed. Reg. 41368 (Aug 16, 1977); 42 Fed. Reg. 64084 (Aug 17, 1977); 43 Fed. Reg. 64082 (Dec 21, 1977); 43 Fed. Reg. 30574 (July 17, 1978); 44 Fed. Reg. 38244 (June 29, 1979); 44 Fed. Reg. 62248 (Oct. 29, 1979).

<sup>77</sup> 42 F.R. 26344 (1977).

the vast experience of the BOP and promulgate comprehensive, binding regulations tailored to the circumstances of civil immigration detainees.

#### **F. Codification of Humane Detention Standards will Complement U.S. Foreign Policy Goals and Strengthen Compliance with International Norms**

The increasing number of non-citizens in U.S. detention facilities who are subsequently removed to their countries of origin provides DHS with a unique opportunity to shape the image of the U.S. as perceived by hundreds of thousands of non-Americans. In FY 2003 alone, the Detention and Removal Office (DRO) of ICE removed over 140,000 non-citizens and detained more than 230,000 non-citizens. In its Strategic Plan for 2003-2012, DRO noted the rapidly increasing numbers of removable aliens subject to mandatory detention as a result of legislative and policy changes over the past decade.<sup>78</sup>

Codification and enforcement of humane detention standards for ICE detainees would serve to further U.S. foreign policy goals. The U.S. Department of State recently noted that: “Throughout the world, the public face of the United States generates strong opinions, positive and negative. These public attitudes directly affect our ability to achieve our foreign policy and development assistance objectives.”<sup>79</sup> DHS can further U.S. diplomatic goals by ensuring that hundreds of thousands of removable non-citizens return to their countries with a positive impression of the United States.

Detainees in ICE facilities consistently report that while in detention, they were made to feel like criminals even though a significant portion of the detainees have never committed a crime. One detainee, illustrating a common sentiment, explained that “the whole detention system is there to break you down further.” Another, an asylum seeker who fled persecution in his country of origin, stated in reference to his treatment while in detention, “I fled my country because of this [mistreatment]. I broke down and cried when it happened here.”<sup>80</sup> When detainees are removed, they carry these negative impressions to their countries of origin, and share them with family and friends. Improving detention conditions could have a profound positive impact on the image of the United States among formerly detained individuals. Even some prison officials realize the importance of immigration detainee experiences. At Florida’s Broward Detention facility, many guards feel that creating a positive impression of the United States for the detainees in their care is a crucial element of their professional duty.

In addition to promoting a positive image of the U.S. abroad, codification and promulgation of humane detention standards will strengthen U.S. compliance with

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<sup>78</sup> Endgame: Office of Detention and Removal Strategic Plan, 2003-2012 2-1 (2003), available at <http://www.ice.gov/graphics/dro/endgame.pdf>.

<sup>79</sup> Department of State and USAID Strategic Plan (August 2003), available at <http://www.state.gov/s/d/rm/rls/dosstrat/2004/23506.htm>.

<sup>80</sup> II Craig Haney, Ph.D., Report on Asylum Seekers in Expedited Removal 190 (United States Commission on International Religious Freedom) (2005).

international legal norms.<sup>81</sup> International law unequivocally mandates the humane treatment of all detainees, regardless of the reason for their detention. The prohibition against torture and cruel, inhuman and degrading treatment is a fundamental tenet of international human rights law, as codified in the Universal Declaration of Human Rights (UDHR),<sup>82</sup> the International Covenant on Civil and Political Rights (ICCPR),<sup>83</sup> and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).<sup>84</sup> The United States has ratified both the ICCPR and CAT,<sup>85</sup> acknowledging that, “all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.”<sup>86</sup>

The United Nations has provided guidelines for implementing the general prohibitions discussed above in the U.N. Standard Minimum Rules for the Treatment of Prisoners (Standard Minimum Rules).<sup>87</sup> The Standard Minimum Rules apply to all detainees, and reflect agreed-upon norms of treatment for detainees.<sup>88</sup> Many of the Standard Rules’ provisions are already reflected in the DOM.<sup>89</sup>

Among the population of detainees housed in ICE facilities are refugees, whose protection is mandated by the Convention Relating to the Status of Refugees.<sup>90</sup> To provide states with guidance regarding the treatment of refugees and asylum seekers in detention, the United Nations High Commissioner for Refugees has created the Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers (UNCHR Guidelines), rooted in the Refugee Convention.<sup>91</sup> Fundamentally, the

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<sup>81</sup> See Human Rights Watch, *Locked Away*, Section III. See also Physicians for Human Rights and the Bellevue/NYU Program for Survivors of Torture, *From Persecution to Prison: The Health Consequences of Detention for Asylum Seekers*, 167-173 (June 2003).

<sup>82</sup> Universal Declaration of Human Rights art. 5, December 10, 1948, U.N.G.A. res. 217 A(III).

<sup>83</sup> International Covenant on Civil and Political Rights art. 7 and 10, December 19, 1966, 999 U.N.T.S. 171.

<sup>84</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment arts. 2 and 16, December 10, 1984, 1465 U.N.T.S. 85.

<sup>85</sup> U.S. CAT ratification is subject to reservations with regard to the interpretation of the terms “torture” and “cruel, inhuman or degrading treatment or punishment.”

<sup>86</sup> ICCPR, *supra* note 83, at article 10.

<sup>87</sup> United Nations Standard Minimum Rules for the Treatment of Prisoners, May 13, 1977, Economic and Social Council res. 2076 (LXII).

<sup>88</sup> In 1998, the international community of states signaled its commitment to the Standard Minimum Rules through a U.N. General Assembly Resolution. See Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, 1998, G.A. res. 43/173, U.N. Doc. A/43/49.

<sup>89</sup> Provisions of the Standard Minimum Rules reflected in the DOM include a requirement that “civil prisoners” be kept separately from “persons imprisoned by reason of a criminal offence,” that each prisoner be allowed at least one hour of outdoor recreation daily, that dental services be made available to detainees, and that detainees be provided with a library for their use.

<sup>90</sup> Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150. As a party to the Convention’s 1967 Protocol, the United States is bound by Article 31 of the Convention, which limits the restrictions that States parties may make on the movements of refugees. See Protocol Relating to the Status of Refugees article 1, October 1967, 606 U.N.T.S. 267, which provides that all States Parties must “undertake to apply articles 2 to 34 inclusive of the Convention to refugees as hereinafter defined.” The Protocol removes the geographic and temporal limitations on refugee protection that were originally included in the Refugee Convention.

<sup>91</sup> United Nations High Commissioner for Refugees Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers, February 1999. The UNCHR Guidelines state the

detention of asylum seekers must not be undertaken as a punitive measure.<sup>92</sup> The UNCHR Guidelines provide that in all cases, the conditions of detention of asylum seekers should be “humane with respect shown for the inherent dignity of the person,” and that such conditions “should be prescribed by law.”<sup>93</sup> Like the Standard Rules, many of the provisions found in the UNHCR Guidelines are already included in the DOM Standards.

Codification of the standards of U.S. treatment of non-citizen detainees, by ensuring humane and non-punitive treatment of detainees, will bolster U.S. compliance with international norms and ensure that ICE’s detention operations do not contribute to anti-American sentiment abroad.

## **VI. CURRENT MONITORING AND ENFORCEMENT MECHANISMS ARE INSUFFICIENT**

### **A. Suggested Enforcement Mechanisms**

Though regulations are an important first step, it is equally important that ICE establish effective procedures for their enforcement. The design of an effective enforcement mechanism may be the most crucial step ICE can take to ensure the safe, secure, consistent, and humane treatment of detainees.

The most important component of enforcement is meaningful oversight. ICE officers should inspect detention facilities regularly, using the inspection checklists included with the DOM. Petitioners recommend that inspections be carried out at least once a month, preferably more frequently as resources permit. We recommend that the inspecting officers be responsible for specific detention conditions so that officers may develop expertise in particular standards.

ICE does presently monitor and occasionally audit detention facilities, but the inspections are ineffective and inadequate, a point made vivid in the contrast between the myriad reports of non-compliance documented within this petition and the official results of many ICE inspections. There are a number of changes that ought to be made in order for the inspections to be more than a mere rubber stamp of existing conditions. ICE should establish a procedure to ensure follow-through with inspection findings. When an inspector identifies a violation, the head of the facility should be notified and given a period of time during which the violation must be corrected. This timeframe may vary depending on the difficulty of remedying the violation, but normally should not be longer than the length of time between inspections. On the subsequent visit, the head of the

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fundamental principle that: “The detention of asylum seekers is ... inherently undesirable.” The Guidelines provide that detention should occur only when absolutely necessary to verify identity; to determine the bases for a claim of refugee or asylee status; in cases where asylum seekers have destroyed their travel and/or identity documents or have used fraudulent documents in what is considered an attempt to mislead the authorities; or to protect national security and public order.

<sup>92</sup> *Id.* at 3. This requirement is rooted in Article 31 of the Refugee Convention.

<sup>93</sup> *Id.* at 10. Enumerated requirements for establishing such conditions include appropriate medical treatment and psychological counseling, access to outdoor recreational facilities, access to grievance procedures, and access to basic necessities such as “beds, shower facilities, [and] basic toiletries.”

facility should notify the inspector of any violations identified during the previous visit and should note whether the problem has been corrected. Facilities should maintain records of all past violations and make them available to the inspecting officer. This will help ensure that violations are not permitted to continue unaddressed and that facilities do not repeatedly fall out of compliance without consequences. In situations in which a facility fails to remedy a problem within two or three inspections or where a facility has multiple instances of noncompliance with the same standard (even if not successive), the head office should be notified, and it is essential that in such situations there be consequences for continued non-compliance. Otherwise, the inspection process will be meaningless and facilities will not take findings of non-compliance seriously. If a facility demonstrates continued non-compliance, that facility should be fined. In extreme cases their contract should be terminated.

#### *1. Factors not covered by current inspections*

There are several conditions not covered by current inspection procedures that ICE should add. An important suggested addition is that inspectors conduct confidential interviews with detainees. Detainees themselves may be a valuable resource to ICE in detecting potential violations before they become serious problems. We suggest that ICE interview at least two or three randomly selected detainees during each visit.

The detainee complaint process can also serve as a useful tool in identifying violations of the standards. The DOM does contain a Detainee Grievance Procedure, including both informal and formal complaints and some opportunity for administrative appeal. Many facilities are not in compliance with this standard, which in any event does not address detainee complaints of abuse or civil rights violations. In practice, when grievances cannot be resolved locally, advocates have been advised to notify ICE Headquarters and the OCRCL. Unfortunately, even when advocates do so, ICE and the OCRCL have failed to resolve most complaints relating to detention standards compliance.

Where detainee complaints are not resolved through the internal complaint process, detainees ought to have the opportunity to send their complaint to the ICE head office anonymously and free of charge. All complaints received by the head office should also be forwarded to the relevant ICE district office. The complaints should be received by an officer whose sole responsibility is processing and evaluating them. Facilities should keep records of all complaints, which can indicate systemic problems, and as contemplated by the present DOM standard. Complaints alleging serious violations, especially those involving the regulation of medical care, legal access, and physical abuse, should be given special scrutiny and subject to heightened investigation. Facilities or the head office should provide inspectors with information regarding any complaints filed before conducting inspections of that facility.

Additionally, more comprehensive audits ought to be used to ascertain problems not identified by regular inspections. An audit may be triggered by a number of factors, including a specified number of detainee complaints or complaints alleging serious

abuses. Alternatively, audits could be conducted randomly to improve facility compliance due to the possibility of being audited at any time.

The video surveillance systems that many prisons and jails already employ could serve as another effective tool for ICE enforcement of facility standards. Requiring facilities to use such systems for the documentation of compliance with ICE standards could be an extremely powerful deterrent to detainee abuse.

Finally, when making their inspections, ICE officers should be instructed that the mere appearance of compliance or superficial compliance is insufficient. Rather, what is required is meaningful compliance.

## 2. *Meaningful Compliance*

In order to be truly effective, the regulations should include a proviso requiring meaningful compliance with the standards. Meaningful compliance requires more than minimal efforts to comply with the letter of the standards; it demands honoring the purpose behind the standard.

Meaningful compliance should include, but not be limited to, requiring that a facility have the necessary infrastructure and technology to effectuate the standard. For example, meaningful compliance with a standard requiring facilities to have an adequate law library would require not only that a facility possess appropriate law books, but that detainees have access to the books; that they are stored in a clean library and in an orderly fashion; that when they are available on disk, computers work properly; and that legal material include all relevant jurisdictions including state legal references. Inadequate access thwarts the standard's purpose and the facility cannot be said to be in compliance.

### **B. Relative Lack of Enforcement has Resulted in Widespread Violations**

Legal service providers, the press, human rights organizations, and the U.S. Commission on International Religious Freedom, as well as DHS's own Inspector General, have reported on serious violations of DHS detention standards. Many recent allegations of abuse have appeared in the media, including the death of an 81-year old Haitian minister in a Florida detention center amidst allegations that, while detained, he was not properly given his medication or allowed visits from family members.<sup>94</sup> Other violations of the DOM, relating to less sensational issues such as phone access and access to legal materials, have been the subject of consistent complaints by detainees and their advocates. For detained non-citizens, every violation is a matter of personal urgency. The violation of a standard such as telephone access can cause serious delays in a detainee's case; inability to access information might prove fatal to his or her defense against deportation.

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<sup>94</sup> Jessica M. Walker, *Suit filed over Haitian man's death at Krome*, Broward Daily Business Review, February 8, 2005, P. 1. See Ruth Morris, *Detention Center Wins Accreditation; Krome Hopes to Shake its Troubled History*, Sun-Sentinel, January 22, 2005, 1B.

A tragic pattern of abuse at the Passaic County Jail serves as an illustrative example of the dangers posed by the lack of enforcement mechanisms available to detainees. Abuses against immigrant detainees at Passaic persisted unchecked for years despite repeated but futile attempts by detainees and their advocates to make use of existing enforcement mechanisms. The abuse only stopped after intense pressure was brought to bear by the media and local grassroots organizations.

Although Passaic held a small number of immigrant detainees prior to September 11, 2001, the numbers increased dramatically after that date. At times, the Jail held nearly 500 immigrant detainees. Beginning as early as December 2001, ICE detainees at Passaic complained of abuses. Many detainees participated in hunger strikes and protests, alleging overcrowding, unsanitary conditions, and physical abuse by guards. In March 2002, allegations were made public through an Amnesty International report and a visit to Passaic by U.S. Senator John Corzine.<sup>95</sup> Despite widespread violations of the DOM, no effective enforcement mechanisms were available to the Passaic detainees and their advocates. DHS did not act until a November 2004 National Public Radio report in which reporters produced corroborating evidence that immigrant detainees at Passaic had been beaten by guards and attacked and intimidated by guard dogs.<sup>96</sup> Although lawyers and civil rights organizations had been protesting the conditions in Passaic County Jail for years, it was in the month following the National Public Radio report that DHS announced that Passaic would be added to the list of detention facilities included in its nationwide audit of detention facilities.<sup>97</sup> Nonetheless, the problems at Passaic continued. In October 2005, the jail discontinued its practice of serving halal and kosher meals to inmates. Twenty detainees staged a hunger strike in response to this violation of their religious freedom.<sup>98</sup> On December 17, 2005, more than 90 detainees petitioned DHS for an end to ICE's contract with the jail, citing "very poor and health risk conditions at this jail."<sup>99</sup> In late December 2005, Passaic County Sheriff Jerry Speziale decided to stop holding immigration detainees at the Passaic County Jail.<sup>100</sup> For the detainees at Passaic, the decision marked the end of years of violations of not only the DOM but also violations of their basic human dignity, violations for which no viable recourse was available.

Organizations and practitioners providing legal and social services to immigrant detainee populations have identified the following five detention standards as those for which violations are the most rampant: Medical Care, Telephone Access, Visitation, Access to Legal Material, and Detainee Transfers. The following discussion and examples illustrate the most common problems.

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<sup>95</sup> Karen Keller, *County jail ends federal program; Widespread detainee abuses reported*, Herald News, December 29, 2005, at A01.

<sup>96</sup> National Public Radio, *Immigrant Detainees Tell of Attack Dogs and Abuse* (November 17, 2004), available at <http://www.npr.org/templates/story/story.php?storyId=4170152>.

<sup>97</sup> Jonathan Miller, *Calling off the Dogs*, The New York Times, December 5, 2004, 14NJ.

<sup>98</sup> Karen Keller, *Jail halts halal and kosher meals for inmates*, Herald News, October 19, 2005, A01.

<sup>99</sup> Keller, *County jail ends federal program*, *supra* note 95.

<sup>100</sup> *Id.*

## 1. Medical Care

The DOM Standard on Medical Care requires on-site access to medical service for routine evaluations and treatment. Additionally, arrangements are to be made as necessary for specialized health care, mental health care, and hospitalization. Dental care is to be provided in cases of emergency such as pain or acute infection.<sup>101</sup>

Violations of the Medical Care Standard are widespread and severe. Detainees with chronic health problems routinely report that they are not given their medication, or are given the wrong medication. For instance, A Haitian man detained at York County Prison in Pennsylvania reported problems with the medical care he received as an HIV-positive patient recently diagnosed with cancer in his right leg. The facility on occasion failed to give him his HIV medication. During an arranged visit to an oncologist, the doctor recommended that the man see an orthopedist for his swollen cancer-infected leg. Two months later, the facility had still not arranged for him to see an orthopedist.<sup>102</sup>

Despite the provision in the Standards for dental care in cases of severe pain or infection, detainees routinely report suffering severe tooth pain for months at a time. One detainee complained daily of tooth pain and was forced to wait three months before receiving care. When the tooth was finally pulled, the detainee was handcuffed during the procedure, and the health practitioner pulled the tooth before the anesthetic set in.<sup>103</sup>

## 2. Telephone Access

The DOM Standard on Telephone Access requires that detainees have “reasonable” and “equitable” access to telephones, including free calls for indigent detainees to contact legal counsel, consular officials, and government offices.<sup>104</sup> Telephone access is particularly important for ICE detainees, as they do not have a right to government-appointed counsel. Therefore, access to the phone is vital, whether to contact counsel or, for *pro se* detainees, to gather information regarding their legal cases.

Even if detainees have access to phones, that access is meaningless if they cannot afford to use them. Private phone companies providing services charge high per-minute rates in addition to hefty connection fees. For example, prisoners in New York State prisons are limited to collect calls, for which MCI (the only available provider) charges a \$3 connection fee and 16¢ per minute thereafter. The average prison phone call lasts 19

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<sup>101</sup> DOM, “Medical Care” Standard, available at <http://www.ice.gov/doclib/partners/dro/opsmanual/medical.pdf>.

<sup>102</sup> Letter from Coalition of 6 Non-Governmental Organizations to Richard L. Skinner, Inspector General, U.S. Department of Homeland Security (January 11, 2006); *see also* DHS OIG Report, *supra* note 3, at 3-7.

<sup>103</sup> Physicians for Human Rights and the Bellevue/NYU Program for Survivors of Torture, *From Persecution to Prison: the Health Consequences of Detention for Asylum Seekers* 90 (June 2003).

<sup>104</sup> DOM, “Telephone Access” Standard, available at <http://www.ice.gov/doclib/partners/dro/opsmanual/teleacc.pdf>.

minutes, costing just over \$6—a mark up of 630 percent over consumer rates.<sup>105</sup> Practitioners document many cases where prisoners, their families, and their lawyers have been subject to staggering phone bills.<sup>106</sup> Finally, calls are often dropped after a set period of time, thereby requiring the detainee initiate another call and therefore pay an addition connection fee.

Courts have ruled that such price-gouging is acceptable for the regular prison population.<sup>107</sup> However, immigrant detention is civil and non-punitive requiring a separate analysis. Many detainees have never been convicted of a crime; those with convictions have already served their sentences. Compounding the problem of exorbitant connection fees, many immigrants arrive in the United States with few if any resources (especially asylum seekers who are fleeing for their lives). High prices make contact with family members, friends, and attorneys prohibitively expensive.

Many other phone problems have been documented by organizations working with immigrant detainees. Some phone contracts allow detainees to make calls only after 5:00 pm, which makes contacting an office during regular business hours impossible. In other facilities phones are not pre-programmed to allow detainees to call free legal services. Even where phones are pre-programmed, there may be no notice of that fact provided to detainees.<sup>108</sup> At the Plymouth County Correctional facility in Plymouth MA, in order to make outgoing calls, detainees must have phone numbers programmed into their phone/call out lists and the process of adding numbers can take several days. In addition, the only way to make an outgoing call is to call collect. Detainees cannot call their ICE deportation officer because ICE does not accept collect calls. Also at this facility, detainees cannot buy phone cards to make non-collect outgoing calls, nor can they make international calls. In addition, many detainees are not allowed to make 1-800 calls. This makes it impossible for detainees who are eligible for bail to call bail bondsmen or other organizations who could help.<sup>109</sup> Most facilities do not allow attorneys to call into the facility to speak to their clients, and practitioners report that the staff often does not deliver phone messages to detainees. Despite the provision in the

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<sup>105</sup> The Center for Constitutional Rights, “New York Families of Prisoners Launch Campaign to End Backdoor Tax on Prison Phone Calls from the Kickback Contract with MCI”, available at <http://www.ccr-ny.org/v2/reports/report.asp?ObjID=0z90mxpZk5&Content=452>.

<sup>106</sup> A retired couple living on a fixed income in New Hampshire paid \$5,000 in 2003 in order to accept collect calls from their daughter who was incarcerated in New York. A man living in Iowa pays \$18.89 for 15-minute collect calls from a person in prison in Texas, adding up to monthly phone bills of between \$500 and \$700. The Office of the Appellate Defender in New York City and the Metropolitan Public Defender’s Office in Davidson County, Tennessee each pay in excess of \$1,000 monthly to accept collect calls from their clients who are in prison. See *Ad Hoc Coalition for the Right to Communicate*, Comments of the Ad Hoc Coalition for the Right to Communicate Regarding Petition for Rulemaking Or, in the Alternative, Petition to Address Referral Issues in Pending Rulemaking 8-9 (2003)).

<sup>107</sup> See *Miranda v. Michigan*, 141 F.Supp.2d 747 (E.D. Mich. 2001).

<sup>108</sup> Interview with Malik Ndaula, National Immigration Project of the National Lawyers Guild (April 11, 2006); see also DHS OIG Report, *supra* note 3, at 23-25.

<sup>109</sup> Letter from National Immigration Forum, Immigration Equality, Capital Area Immigrants’ Rights Coalition, University of Detroit Mercy Immigration Law Clinic, Freedom House, Heartland Alliance for Human Needs & Human Rights, Midwest Immigrant & Human Rights Center to Richard L. Skinner, Inspector General, U.S. Department of Homeland Security (January 11, 2006) (hereinafter, “January 2006 NGOs letter to Inspector General”).

Standards requiring that “the facility shall take and deliver telephone messages to detainees as promptly as possible,” legal service providers at the Elizabeth Detention Facility in New Jersey note that messages regarding legal matters are given to detainees so rarely that attorneys must visit the facility each time they have a question or message for a detained client, an inconvenience that requires substantial time and resources. This puts a strain on many understaffed organizations providing legal services to the immigrant detainee population.<sup>110</sup> These factors combined with the high prices discussed above create nearly impossible attorney-client phone communication in many cases.<sup>111</sup>

The standards should require that detainees have *meaningful* access to phones. Such meaningful access includes the requirement that phone charges be reasonable, that collect calls be allowed, that dialing toll-free numbers be allowed, that phone numbers for free legal services be provided, and that phones should be pre-programmed to allow detainees to contact legal service providers, and that detainees are made aware of how to use the phones to take advantage of these features.

Inspecting officers should be instructed that meaningful compliance with the standards is required. The checklist used by the inspecting officers should reflect factors that represent meaningful compliance with the standards.<sup>112</sup> In addition the officer should be instructed to use his or her common sense to identify situations where a facility is technically complying, but where such compliance is not meaningful.

Immigration detainees are the *only* segment of the prison population that lacks the state-funded assistance of counsel. As a result, phone access is particularly important. The phone may be their only hope for finding an attorney. If detainees cannot make phone calls to free legal service providers, not only are they denied free legal counsel, they are constructively deprived even of the right to secure their own representation.

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<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> Auditors should physically test each phone when measuring the following:

- Whether phones are pre-programmed to allow detainees to make free calls to legal service organizations
- Whether detainees are notified about how preprogrammed phones operate; whether specific instructions are posted in the facility and accessible to detainees
- Detainee access to telephones during established facility waking hours
- Detainee notification of telephone access rules
- Number of telephones per detainee
- Number of telephones on which detainees can make private phone calls, and degree of privacy afforded (including overhearing and electronic monitoring)
- Number of telephones in proper working order/frequency of telephone maintenance and repair service when needed
- Frequency and length of direct calls (free) by detainee
- Restrictions (if any) on detainee calls to legal representatives
- Length of detainee calls to legal representatives
- Whether facility takes and delivers telephone messages to detainees
- Description of “emergency” during which telephones privileges have been suspended
- Whether lists of pro bono agencies are posted by each phone
- Whether multi-lingual instructions on how to operate the phone are posted by each phone.

### 3. Visitation

The DOM Standard on Visitation states that ICE “encourages visits from family and friends” in order to “maintain detainee morale and family relationships.” Immediate family, extended family, friends and associates are all to be permitted visitation periods of no less than 30 minutes, in a “comfortable” and “pleasant” atmosphere. Legal counsel and legal assistants are to be permitted to visit seven days a week including holidays, and to meet with their clients in private consultation rooms.<sup>113</sup>

Despite these provisions, facilities often severely restrict detainees’ visitation rights.<sup>114</sup> The official “Visitor Handbook” at Bergen County Jail, where many ICE detainees are housed, explicitly limits visitors to parents/legal guardians, spouses, children, siblings, and grandparents, in direct contravention of the DOM Standards.<sup>115</sup> In another example, legal service providers report that there is only one client-attorney visitation room at the Mira Loma Facility in California, where between 500-800 immigrant detainees are held at any given time.

### 4. Access to Legal Materials

The DOM Standard on Access to Legal Materials provides that each detainee shall have access to an adequately equipped law library. Attached to the DOM is a list of materials that are required to be placed in each library; the Standard provides that the list is to be reviewed annually and updated as necessary.<sup>116</sup> These requirements are vitally important for the immigrant detainee population, of which a large percentage argues their deportation cases on a *pro se* basis.

In addition to a list of required legal materials, the Standard also delineates the submission process for additional published or unpublished legal materials from outside persons or organizations. However, it is up to the discretion of the Officer in Charge (OIC) to accept or decline the material based on considerations of usefulness and space limitations.<sup>117</sup> The Standard is silent as to the definition of usefulness. The ambiguity of the term allows for possible abuse at the hands of the OIC. To improve this gap, the Standard needs to clearly define useful, consistent with judicial opinions regarding detained persons’ constitutional right to access to legal libraries sufficient to directly or collaterally attack their sentences and the conditions of their confinement.<sup>118</sup>

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<sup>113</sup> DOM Standards, “Visitation” Standard, available at <http://www.ice.gov/doclib/partners/dro/opsmanual/visit.pdf>.

<sup>114</sup> DHS OIG Report, *supra* note 3, at 25.

<sup>115</sup> Bergen County Jail, Bergen County Jail Visitor Handbook Rules & Regulations 2 (January 12, 2006).

<sup>116</sup> DOM Standards, “Access to Legal Material” Standard, available at <http://www.ice.gov/doclib/partners/dro/opsmanual/legal.pdf>.

<sup>117</sup> *Id.*

<sup>118</sup> *Bounds v. Smith*, 430 U.S. 817 (1977) (holding that prisoners’ constitutional right of access to courts requires that prison authorities provide inmates with adequate law libraries).

Practitioners report that detainees throughout the country have difficulties accessing the legal material necessary to prepare a *pro se* case.<sup>119</sup> In preparing its February 2005 report on Expedited Removal, the United States Commission on International Religious Freedom visited eighteen facilities housing ICE detainees. In *none* of the eighteen facilities were the materials required by the DOM Standards present and up-to-date in the facility's law library.<sup>120</sup>

## 5. Detainee Transfers

The DOM Standard on Detainee Transfers provides that detainees may be transferred for the following reasons: medical, change of venue, recreation, security, or "other needs of ICE" such as overcrowding problems or special detainee needs. Once a detainee is en route to a different facility, the facility must notify detainee's counsel of the transfer. Additionally, the Standard requires that all of the detainee's belongings be transferred with him to the receiving facility, together with medical records and medication.<sup>121</sup> Although the DOM recognizes that "[i]n deciding whether to transfer a detainee, ICE will take into consideration whether the detainee is represented before the immigration court,"<sup>122</sup> in practice ICE appears to give little or no weight to the presence of counsel, nor to the availability of witnesses.

Throughout the country, legal service providers have reported violations of the Detainee Transfer standards. Pro bono counsel for an asylum seeker who was transferred from the Queens Contract Detention Facility to the New Jersey Elizabeth Detention Facility in June 2005 never received notice from ICE or facility staff of the transfer. Requests made by detainees at the Calhoun facility in Michigan for transfer to the Monroe facility, two hours closer to access to counsel, are routinely denied.<sup>123</sup> Detainees at the Wicomico County Detention Center in Maryland reported a wave of transfers of all detainees who were friendly with Joseph Daniel Zarou, a detainee who died in November 2004 of complications that may have been exacerbated by the negligence of detention guards.<sup>124</sup> Additionally, legal service providers have noted that detainees' belongings are often not transferred from one facility to the next.

ICE has not made public in what manner and to what extent, if any, it does in fact "take into consideration whether the detainee is represented before the immigration court." The DOM does not elaborate on what weight ICE should give to the presence of counsel in a given case, nor to the availability of witnesses. Nor does it appear that ICE anywhere records or documents that it has taken the presence of counsel into consideration in making a transfer decision, thereby defeating efforts to monitor compliance with the existing DOM requirement. The experience of many practitioners is that cost and bed space determine where ICE will confine a detainee, and that the

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<sup>119</sup> January 2006 NGOs letter to Inspector General.

<sup>120</sup> Report on Asylum Seekers, *supra* at 80; *see also* DHS OIG Report, *supra* note 3, at 16-17.

<sup>121</sup> DOM Standards, "Detainee Transfers" Standard, available at <http://www.ice.gov/doclib/partners/dro/opsmanual/index.htm>.

<sup>122</sup> *Id.*

<sup>123</sup> January 2006 NGOs letter to Inspector General.

<sup>124</sup> *Id.*

presence of counsel is irrelevant. The result is that even those detainees who have succeeded in retaining counsel are *de facto* deprived of that counsel, and the ability to mount a defense to the removal proceedings, because they are transferred to jurisdictions to which their counsel and witnesses cannot travel. If ICE is to realize the promise to “take into consideration” the presence of counsel in making individual transfer decisions, it must clarify in what manner and to what extent the presence of counsel will affect such a decision, and it must document that determination.

## 6. Religious Practices

The DOM Standard on Religious Practices mandates that detainees’ opportunities to practice their faith may be limited only by concerns relating to safety, security, the “orderly operation of the facility,” or “extraordinary costs.” Dietary requirements and other special needs are to be facilitated to the greatest extent possible.<sup>125</sup>

Nonetheless, religious practices are routinely restricted. In a 2003 study of 70 asylum seekers detained in ICE facilities throughout New York, New Jersey and Pennsylvania, 17% of detainees reported difficulty practicing their religion. One detainee reported that he tried to save his food until the evening on numerous occasions in order to carry out his Ramadan fast, only to see the food thrown away by facility staff. Another detainee reported that facility staff repeatedly confiscated the materials he had mail-ordered from the American Bible Academy.<sup>126</sup>

## 7. Segregation

The DOM Standard on Disciplinary Segregation allows for the use of a disciplinary unit somewhat akin to a solitary confinement unit found in correctional facilities. The Standard requires that use of the unit be subject to strict requirements of due process and humane conditions.<sup>127</sup>

Unfortunately, the use of disciplinary “segregation” is widely abused.<sup>128</sup> The due process requirements are often disregarded, particularly in county jails where facility staff uses terminology more appropriate to correctional facilities, referring to segregation by terms such as “the hole.” Segregation is often used as a disproportionate response to minor offenses. One detainee, for example, reported being placed in segregation for two days as punishment for arguing with another detainee. Other detainees have stated that the arbitrary use of segregation led them to hide suicidal thoughts from facility staff for fear that confiding such thoughts would result in segregation.<sup>129</sup>

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<sup>125</sup> DOM Standards, “Religious Practices” Standard, available at <http://www.ice.gov/doclib/partners/dro/opsmanual/relpract.pdf>.

<sup>126</sup> PHR/Bellevue Report, at 14, 127.

<sup>127</sup> DOM, “Special Management Unit (Disciplinary Segregation)” Standard, available at [http://www.ice.gov/doclib/partners/dro/opsmanual/smu\\_dis.pdf](http://www.ice.gov/doclib/partners/dro/opsmanual/smu_dis.pdf).

<sup>128</sup> See DHS OIG Report, *supra* note 3, at 14-16.

<sup>129</sup> PHR/Bellevue Report, at 75, 77, 115.

Detainees report inhumane conditions in segregation. Some of the segregation rooms are dirty, odorous and subject to frigid temperatures.<sup>130</sup> The use of segregation as a type of solitary confinement can be particularly psychologically damaging for refugees and asylum seekers, many of whom have suffered forced imprisonment and harsh jail conditions as a part of the persecution from which they have fled. The use of segregation in such cases, particularly without the restrictions that the Standards caution, can result in retraumatization.<sup>131</sup>

## 8. Use of Force

The DOM Standards authorize the use of force against immigrant detainees “only after all reasonable efforts to resolve a situation have failed.” Even in such dire situations, officers are to use “as little force as necessary to gain control of the detainee.”<sup>132</sup> Widespread reports of physical abuse of ICE detainees persist throughout the country, however, particularly in county jails.

Detainees often report seeing their fellow detainees hit or beaten by guards, for “talking back” or quarreling with other detainees.<sup>133</sup> An illustrative example of detainee abuse is the story of Jose Mancilla Gutierrez, formerly detained at the Northwest Detention Facility in Seattle. In 2004, Mancilla filed suit against the Correctional Services Corp., alleging that he suffered an unprovoked and brutal beating at the hands of facility officers. Mancilla reports that he was stopped by a guard while returning to his cell. The guard handcuffed him, slammed his face into a wall, and threw him to the ground where he and another officer repeatedly beat and kicked him while other detainees yelled out for them to stop. The many detainees who witnessed the event corroborated Mancilla’s story.<sup>134</sup>

## 9. Issuance and Exchange of Clothing, Bedding, and Towels

The DOM Standard provides that “basic hygiene is essential to the well-being of detainees.” The Standard specifically requires that detainees’ socks and undergarments be exchanged daily.<sup>135</sup> In some facilities, however, women detainees are given two pair of underwear which are not exchanged daily or replaced when they wear out. Women detainees often report difficulty in obtaining feminine hygiene products.<sup>136</sup>

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<sup>130</sup> *Id.*

<sup>131</sup> PHR/Bellevue Report, at 115.

<sup>132</sup> DOM, “Use of Force” Standard, available at <http://www.ice.gov/doclib/partners/dro/opsmanual/useoffor.pdf>.

<sup>133</sup> PHR/Bellevue Report, at 120.

<sup>134</sup> Paul Shukovsky, *Immigration Prisoners Allege Guard Abuse*, The Seattle Post-Intelligencer, November 4, 2004, B2.

<sup>135</sup> DOM, “Issuance and Exchange of Clothing, Bedding, and Towels” Standard, available at <http://www.ice.gov/doclib/partners/dro/opsmanual/cloth.pdf>.

<sup>136</sup> See also DHS OIG Report, *supra* note 3, at 21-22.

## 10. Marriage Requests

The DOM Standard requires that a detainee's request for permission to marry must be granted unless one of the following circumstances apply: he/she is not legally eligible to marry; he/she is not mentally competent to marry; his/her fiancé(e) has not provided written affirmation of his/her intent to marry; the marriage would present a security threat; or a "compelling government interest exists for denying the request." The Standard provides as an example of a "compelling interest" a situation where the marriage would require postponement of removal. However, the Standard specifically states that "'compelling interests' ordinarily do not include administrative inconvenience or the possibility that the marriage may allow the detainee to pursue a new avenue of relief from deportation."<sup>137</sup>

For immigrant detainees, marriage requests may be particularly important because a marriage may be the detainee's only available immigration relief. Legal service providers, however, report that marriage requests are rarely granted to ICE detainees, regardless of the legitimacy of the request. Advocates in the New York and New Jersey area report that none of their clients' numerous marriage requests have ever been granted. One client requested a marriage to his longtime common-law wife, the mother of his children and a U.S. citizen. The request was denied.

## 11. Grievance Procedures

Although the DOM Standards provide for a Detainee Grievance Procedure, detainees and their advocates have found the system to be largely ineffective.<sup>138</sup> Legal service providers point to stacks of unanswered complaints filed by their clients alleging violations of the DOM. When complaints cannot be resolved locally, advocates are advised to notify ICE Headquarters and the OCRCL. Unfortunately, even when advocates do so, ICE and the OCRCL have failed to resolve most complaints relating to detention standards compliance. The DOM Standards are intended to provide protection to a growing population of immigrant detainees and to ensure accountability for those responsible for their care. Without the force of the law behind them, the Standards will never fully serve either purpose.

### **C. Gaps in the Detention Standards**

In addition to the lack of enforcement of the DOM Standards, immigrant detainees also suffer due to problems that the current standards do not even address. While many advocates regard the DOM Standards as currently written to be generally adequate, some problems reported by detainees to practitioners and NGOs point to specific detainee issues that could be addressed by additions to the existing Standards. The following are descriptions of a number of these reported problems:

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<sup>137</sup> DOM, "Marriage Requests" Standard, available at <http://www.ice.gov/doclib/partners/dro/opsmanual/marreq.pdf>.

<sup>138</sup> DHS OIG Report, *supra* note 3, at 20-21.

## 1. Medical Care

One of the most common complaints from detainees concerns medical care. Many problems with detainees' medical care stem from the lack of enforcement of the Detention Manual standards. However, even full compliance with the standards allows for insufficient access to medical care. Furthermore, there are no provisions for access to a mental health practitioner, which is particularly important for immigrant detainees.<sup>139</sup> Requiring an audit of medical care and medical facilities at any facility before it is approved to house immigrant detainees would ensure that proper medical care is given to detainees. Revised ICE medical standards promulgated as regulations should include:

### *a. Medical Screenings*

According to the Detention Manual, detainees' initial medical screening may be conducted by a health care provider or by "an officer trained to perform this function." Screening by non-medical professionals may result in improper screenings that miss significant medical problems, or may delay necessary emergency care. In addition, detainees may feel uncomfortable discussing certain sensitive medical topics, such as HIV status, with a non-medical professional.

A second concern about medical screenings is the use of other detainees to provide translation services during screenings. Though the detainee being screened must consent to translation by another detainee, detainees may feel pressured to consent, especially if they have urgent medical issues or do not know when another translator will be available. Translations by other detainees run the risk of inaccuracies, especially when complicated medical terms are involved, and also raise serious issues of confidentiality. The required use of professional services such as telephone translation services would be more likely to ensure accuracy and confidentiality.

### *b. Dental Care*

Other than emergency care, under the current Standards, no dental care need be provided to detainees. The DOM Standards state routine dental care "may be provided" to those in detention for more than six months. Changing this standard to mandate routine dental care, besides the positive impact on detainees' health, could even result in cost savings for facilities, because of the potentially catastrophic expense of emergency dental care.

### *c. Chronic/Long-Term Care*

When an immigrant is first confined, the duration of detention is usually unknown. Many individuals who facility staff expect will be detained just for a short period of time but are ultimately detained for months or years never receive adequate non-acute care.

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<sup>139</sup> "From Persecution to Prison: The Health Consequences of Detention for Asylum Seekers," Physicians for Human Rights and The Bellevue/NYU Program for Survivors of Torture, available at [http://www.phrusa.org/campaigns/asylum\\_network/detention\\_execSummary/detention\\_pdf.pdf](http://www.phrusa.org/campaigns/asylum_network/detention_execSummary/detention_pdf.pdf).

Since a medical professional does not need to conduct the initial medical screening under the current DOM Standards and since the standards provide fourteen days in which the initial screening may be conducted, individuals with chronic conditions such as HIV/AIDS or kidney disease run the risk of not receiving adequate screening or may find their health seriously compromised in even the relatively short pre-screening if they are denied proper medications or other care. The general Standards for medical care state only that detainees must receive “initial medical screening, cost-effective primary medical care, and emergency care.” Specialty care, mental health care, and hospitalization must only be provided within the local community when it is arranged by the Officer in Charge (OIC). There are no provisions as to the frequency or consistency with which this outside care must be provided.

*d. Sick Call Procedures*

The Standards mandate that sick call is available for all detainees but offer no guarantees of the adequacy of these services. First, the DOM Standards state that the health care provider determines when a detainee is seen, but do not provide specific standards for how quickly detainees must be seen beyond general numerical requirements as to the frequency of sick call based on the detainee population.<sup>140</sup> Waiting a week for an appointment could cause serious health consequences for detainees with some health conditions. In addition, there is no system in place to track detainee requests and ensure that they are actually received by medical staff within a given time frame.

Confidentiality is also a significant problem associated with sick call. In some facilities, detainees are required to leave sick call request slips between the bars of their cells, allowing other detainees access to the information and in some cases discouraging candor by detainees about the reason for their request. The DOM Standards as written have no confidentiality requirements pertaining to sick call.

*e. Emergency Care*

The Standards include requirements to train staff to respond to medical emergencies within four minutes. However, the Standards do not actually address provisions for ensuring that a four-minute response time is enforced; they require only that relevant staff training take place.

*f. Accreditation*

The Division of Immigration Health Services Policies and Procedures Manual states that facilities housing detainees should comply not only with National Commission on Correctional Healthcare (NCCHC) standards, but also with Joint Commission on Accreditation of Healthcare Organizations (JCAHO) standards. However, the detention standards require only NCCHC accreditation while stating that facilities should “strive”

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<sup>140</sup> The DOM requires that facilities housing fewer than 50 detainees must have sick call available at least once a week; those with 50-200 detainees, three times a week; and with more than 200, five times a week.

for JCAHO accreditation. In addition, NCCHC accreditation is required only for SPCs and CDFs, and not for IGSAAs.

Besides the fact that JCAHO standards are much more extensive and would ensure higher quality care, requiring compliance with JCAHO standards would be important as an acknowledgment that immigrant detainees are not in criminal detention and therefore should have access to the quality of care deemed minimally acceptable for non-detained individuals in the United States.

*g. Mental Health Care*

Other than provisions to identify and monitor those detainees deemed suicidal, the general provisions that the initial screening should evaluate detainees for mental illness, and that mental health care should be available in the community; there are no specific standards for the provision of regular mental health care to detainees.

*h. HIV/AIDS Issues*

HIV-positive detainees face a number of specific problems resulting from omissions in the DOM Standards. First, it is unclear from the Standard as written whether HIV/AIDS is categorized as a communicable disease for purposes of isolation. The INA does consider HIV a “communicable disease,” but the Standards state that the facility physician will determine whether a specific individual with HIV may be housed with the general detainee population. There is no information in the Standards as to how a physician should make this determination.

In addition, as noted above, HIV-positive individuals may not receive their medications and other necessary care for one to two weeks after they arrive at a facility because of the screening policy. There should be specific standards in place to assure that HIV-positive individuals are identified by medical staff immediately after arrival in facilities. HIV-positive detainees’ care is also sometimes delayed by the unavailability of necessary drugs at the pharmacy or the fact that their medical records have not been transferred with them.

The lack of comprehensive confidentiality provisions in the Standards, as mentioned above, has particular significance for HIV-positive detainees. Other omissions in standards addressing confidentiality include the public distribution of medications in many facilities.

2. Telephone Access

Detainees report a number of problems with telephone access beyond non-compliance with the DOM Standards. While instructions for phone use are posted next to the phones (as provided in the Standards), they are often not posted in any language other than English and sometimes Spanish. Detainees who do not speak these languages find it difficult or impossible to use the phone to contact their family or legal

representative. Additionally, detainees generally do not know the telephone code needed to reach their consulate or the contact information for any free legal service providers unless they can learn it from other detainees. Finally, detainees are often unable to dial necessary toll-free (including 1-800) numbers, such as court dial-in systems, since they are often blocked.

### 3. Detainee Handbook

The current Standards require merely that detainees be given a handbook that “will list detainee rights and responsibilities.”<sup>141</sup> Detainees report that they are often given the facility’s regular inmate handbook, which does not contain information pertinent to them as immigrant detainees. If the standards more clearly laid out the content to be included in the handbook, the rights and responsibilities of detainees would be much more clearly and effectively communicated to them.

### 4. Visitation

Detainees report that the time they are allowed to meet with family visitors is unreasonably short. As the DOM Standards recognize, family visitation is important for maintaining detainee morale and family relationships.<sup>142</sup> Increasing the minimum allowable length for visits in the Standards would better meet this goal<sup>143</sup>.

Another significant problem is the inadequate number of attorney meeting rooms in many facilities. While the standards provide that there shall be private consultation rooms for meetings with attorneys, they do not indicate that there should be a minimum number of them.<sup>144</sup> One attorney reports that he routinely waits an hour to see his clients at Otey Mesa, and must wait an additional thirty or forty-five minutes for each subsequent client he might see on the same visit. The meetings themselves often need only be a few minutes, but time wasted waiting to meet privately with clients can impose a substantial cost on legal services and *pro bono* lawyers, or on the detainee if s/he has retained private counsel.

### 5. Access to Legal Materials

Many detainees do not know how to use the law library. Allowing the required legal presentation to be held in the library so that detainees could learn how to use it would help alleviate this problem. Additionally, NGOs and other groups report that a significant amount of legal resources donated to law libraries at immigrant detention facilities are rejected, with little apparent reason. A more clearly explicated process by which facilities would review donated materials would help ensure that usable material makes its way to the law libraries.

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<sup>141</sup> DOM, “Detainee Handbook” Standard, available at <http://www.ice.gov/doclib/partners/dro/opsmanual/handbk.pdf>.

<sup>142</sup> DOM, “Visitation” Standard, available at <http://www.ice.gov/doclib/partners/dro/opsmanual/visit.pdf>.

<sup>143</sup> Currently, the minimum visit for friends and family is 30 minutes. *Id.*

<sup>144</sup> *Id.*

## 6. Detainee Transfers

A commonly reported problem regarding detainee transfers is that detainees with legal counsel are often transferred to facilities far away from their counsel, family, and witnesses, such that the attorney-client relationship is effectively terminated and the detainee's ability to mount a defense to removal is severely compromised. Little or no notice is given. While transfers may be necessary at times, the Standard describing transfer decisions should better account for the importance to the detainees of maintaining their legal counsel, and should obligate the agency to document to what extent the presence of counsel is taken into consideration in determining transfers.

## 7. Living Conditions

There is currently no standard that directly addresses living conditions and requires that detainees be kept in humane and hygienic conditions. Detainees report that bathrooms are often in unhygienic states. One detainee reported contracting a skin fungus due to unsanitary conditions in the shower.<sup>145</sup>

## 8. Training

The United States Commission on International Religious Freedom, Heartland Alliance for Human Needs & Human Rights, Lutheran Immigration and Refugee Services, Amnesty International-USA, and the National Immigration Forum have all recommended training for detention guards and health care personnel working with detained immigrants and asylum seekers.<sup>146</sup> Often detention facility staff do not understand the status of ICE detainees and do not have the training to respond to the issues they face. Heartland Alliance and Lutheran Immigration and Refugee Services each found that detention facility staff was better able to communicate and work with ICE detainees after receiving training. Such required training could include (1) an overview of immigration detention and legal pathways for detainees, (2) medical and mental healthcare concerns, (3) cultural competency and language access, and (4) resources and support available to detention facility staff.<sup>147</sup>

## 9. Sexual Abuse

The DOM Standards do not address the problem of sexual abuse in immigrant detention centers. The organization Stop Prisoner Rape issued a report in 2004 compiling accounts of the sexual abuse of female, male, and youth detainees nationwide. Such problems continue today, and are wholly unaddressed by the current standards.<sup>148</sup>

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<sup>145</sup> Human Rights Watch Young Advocates Letter to Robert Hodgson, INS, available at <http://hrw.org/press/2002/10/san-ltr0906.htm>.

<sup>146</sup> Letter from Coalition of Four NGOs to Daniel Sutherland, DHS (October 25, 2005).

<sup>147</sup> *Id.*

<sup>148</sup> "Stop Prisoner Rape Releases Report on Sexual Abuse in Immigration Detention," Stop Prisoner Rape, available at <http://www.spr.org/en/pressreleases/2004/1007.html>.

**VI. CONCLUSION**

For the reasons stated above, petitioners respectfully request that DHS initiate a rulemaking proceeding pursuant to the Administrative Procedures Act, 5 U.S.C. § 553, to promulgate regulations governing detention standards for immigration detainees .

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Respectfully submitted,

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## **APPENDIX A: Short-Term Detention on the Southwest Border**

### **For Future Consideration: Regulations Regarding Short-Term Detention on the Southwest Border**

The ICE Detention Operations Manual discussed in this petition delineates standards that apply to Service Processing Centers, Contract Detention Facilities, and Intergovernmental Service Agreements (“IGSAs”) under which ICE may detain non-citizens for 72 hours or longer. DHS has not, however, created a coherent and consistent set of standards governing the treatment of detainees held for shorter periods of time, including in Border Patrol custody. This Appendix presents the existing situation faced by those individuals placed into Border Patrol custody along the southwest border, and outlines the pressing need for regulations to ensure that such individuals are treated in a uniform and humane manner.

Border Patrol records indicate that from 1994 to 2004, between 0.9 million and 1.7 million migrants were apprehended in the nine southwest Border Patrol sectors each year.<sup>149</sup> While the number of apprehensions overestimates the number of individuals who find themselves in Border Patrol custody, due to repeated crossing attempts, each apprehension represents an encounter between a migrant and the agency. The vast majority of these apprehensions result in voluntary departures, in which migrants who admit to being illegally in the country and agree to depart voluntarily receive no legal penalty of any kind.<sup>150</sup> These deportations generally do not fall under the standards developed to guide treatment of detainees held 72 hours or more due to the rapidity with which Mexican crossers are returned to Mexico.

The harsh and often life-threatening conditions along the southwest border require that particular attention be paid to the treatment of those in Border Patrol custody. After the Southwest Border Strategy was announced in 1994, migration patterns started to shift. The Border Patrol focused its resources on urban areas with the highest volumes of crossers, such as San Diego and El Paso. Migrant traffic therefore shifted from traditional corridors to more remote areas, particularly the harsh terrain of the Arizona-Sonora border.<sup>151</sup> The number of deaths along the southwest border increased dramatically – data from the Border Patrol’s Border Safety Initiative shows that the number of deaths along the southwest border increased from 241 in 1999 to 472 in 2005.<sup>152</sup> As migrant traffic patterns shifted, exposure replaced traffic accidents as the leading cause of death.

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<sup>149</sup> United States General Accounting Office, Report to the Honorable Bill First, Majority Leader, United States Senate: Illegal Immigration: Border-Crossing Deaths Have Doubled Since 1995: Border Patrol’s Efforts to Prevent Deaths Have Not Been Fully Evaluated, GAO-06-770 (August 2006), p. 44, *available at* <http://www.gao.gov/new.items/d06770.pdf>.

<sup>150</sup> David Dixon, Spotlight on U.S. Immigration Enforcement, Migration Information Source (September 2005), *available at* <http://www.migrationinformation.org/USFocus/display.cfm?ID=335>.

<sup>151</sup> GAO Report on Border-Crossing Deaths, at 6-9.

<sup>152</sup> *Id.* at 4.

For migrants, vulnerability to harsh desert conditions is often heightened by poor health and a generally weakened state exacerbated by multiple crossing attempts often occurring in rapid succession. Because migrants cross repeatedly, their experiences while in Border Patrol custody are likely to affect their actions and reactions in future encounters. Increasing their vulnerability, migrants from Mexico who are leaving through voluntary departure are transported to the border and dropped off on the U.S. side to walk across to Mexico under surveillance. They may have no money or resources and may never have visited the city they are entering before, making them particularly vulnerable. While all individuals should be treated in a humane and consistent manner, such treatment is particularly important for those migrants encountered in the more remote and life-threatening terrain in which many now cross.

Migrants report that treatment in the field and at detention centers is arbitrary and inconsistent. While many field agents carry water and food, others are unable or unwilling to offer even water to detained migrants, some of whom may have been in the desert for more a week or more by the time they are encountered. Humanitarian groups in Arizona relate that agents in the field often decline offers of food and water to immigrant detainees, even when these detainees indicate that they are hungry and thirsty. Conditions in detention facilities are similarly uneven. Immigrants report being held for up to three days with minimal nourishment, consisting of one small glass of water and one hamburger a day.<sup>153</sup>

DHS should create basic regulations that are uniform across all sectors and that ensure humane treatment of all immigrant detainees, including those held for less than 72 hours. Such regulations must include standards on the treatment of detainees in the field, as well as in processing and detention centers. Regulations should cover:

1. Access to Water

Many migrants encountered by the Border Patrol are severely dehydrated and in a vulnerable condition, yet migrants report being detained for up to 24 hours without water or food. Hydration in these instances is of paramount concern. One migrant deported through Agua Prieta reported begging officers who were drinking water in front of her group of nine detainees for water for her children aged six and nine. The detainees were denied water although they were detained for over fourteen hours.<sup>154</sup> Migrants deported from the Tucson Sector almost uniformly report inadequate water and food in the field and in detention, and many report receiving no water.<sup>155</sup> Regulations must ensure that sufficient water is available in the field and in detention centers and that migrants have unlimited access to drinking water.

2. Access to food

Migrants often report receiving only cookies or crackers while held in detention

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<sup>153</sup> Archives, No More Deaths Summer 2006 Documentation Project.

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

for periods ranging from six to thirty-six hours.<sup>156</sup> Regulations must ensure that there is an adequate supply of appropriate food and that there is a consistent supply of food throughout their detention.

3. Basic medical treatment

Migrants report insufficient medical treatment in relation to: pre-existing medical conditions; injuries sustained during crossing attempts; and deportation from hospitals.

*a. Pre-existing medical conditions*

Many migrants report pre-existing medical conditions, including diabetes, high or low blood pressure, heart conditions, and arthritis. Generally, migrants report that the Border Patrol takes migrants' medicine along with their other belongings when they are taken into custody. Although claim checks may be issued and items eventually returned, it is not uncommon for individuals to be deported without their possessions.<sup>157</sup> Regulations must guarantee that detainees receive all of their belongings when they are released, and that they have access to necessary medications while detained even for short periods. Additionally, the Border Patrol should not release individuals in compromised and vulnerable conditions without ensuring that they have adequate medical care. Volunteers have reported a recurrent need to call ambulances for deported migrants upon their arrival in Mexico; in one instance, this need arose after the Border Patrol had refused treatment for a detainee known to be diabetic.<sup>158</sup>

*b. Injuries sustained during crossing attempts*

Humanitarian groups offering medical aid to migrants upon deportation into Mexico report untreated or severely under-treated wounds, blisters, serious sprains, broken bones, advanced stages of dehydration and heat exhaustion, and other severe conditions. Untreated blisters and wounds may be life threatening as infection sets in – one migrant deported to Nogales, Sonora, arrived with an advanced infection due to blisters sustained during his journey, eventually resulting in the amputation of his feet.<sup>159</sup>

*c. Direct deportation from hospitals*

Migrants are sometimes deported directly from hospitals, occasionally still wearing hospital gowns. Paperwork they carry with them often includes directions for filling prescriptions and returning for follow-up visits.<sup>160</sup> Regulations must guarantee that individuals have access to necessary medical care.

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<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

4. Safe transportation

Migrant detainees report being held in the field in vehicles without air conditioning on days with temperatures exceeding 110 degrees. Migrants have also complained of instances in which agents denied requests to turn down the air conditioning and in fact turned it up in response to their requests. Buses used to transport migrants frequently lack seatbelts. Conditions are often crowded, and women report being asked to lie among men to be transported from the field to processing centers.<sup>161</sup> Regulations must ensure that conditions for transportation from the field to the processing center and to the port of entry are humane and do not threaten detainees' safety.

5. Freedom from verbal and physical abuse

Short-term immigration detainees consistently report being verbally abused and cursed at by agents in the field and in detention centers. Reported instances of physical abuse during arrests and subsequent detention include: being shoved into cacti; being kicked or otherwise struck, particularly in the knees, head, and chest; the use of momentary chokeholds; the use of nightsticks to wake migrants; being forced to sit or stand in positions that are painful due to previous injury; and being handcuffed in "strange" and painful positions.<sup>162</sup> These instances of physical abuse affect not only the individual detainee, but all those who witness the abuse, reducing the likelihood that migrants will turn themselves in when faced with life-threatening situations and increasing the likelihood that they will flee in future encounters, possibly provoking additional abuse. Humanitarian workers have encountered migrants lost in the desert who have asked if they are likely to be shot, and found migrants reluctant to call an ambulance due to a fear of being beaten. Migrants have reported being forced to sign legal documents under the threat of criminal charges by men with guns, without understanding the content of the documents they are signing.<sup>163</sup>

6. Safe Deportation

Migrant detainees are currently deported 24 hours a day through ports of entry on the border. In many instances, they have never been to the city through which they are being deported and have no familiarity with the resources that might be available, making them particularly vulnerable on unfamiliar streets.

a. *Night-time deportations*

While any deportation at night is a matter for concern, migrants report the consistent deportation of women (including pregnant women) and children between the hours of 10:00 p.m. and 6:00 a.m., long after shelters have closed their doors.<sup>164</sup> Regulations should prevent these unnecessary night-time deportations.

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<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

*b. Separating families*

Short-term detainees are often separated from their family members and deported at separate times, despite standards that are designed to avoid this. This is particularly problematic in cities such as Nogales where migrants must walk several miles between the two ports of entry used for deportations and find it difficult if not impossible to reunite or find news of their relatives.<sup>165</sup> Regulations must prioritize family unity throughout the detention and removal process.

The transitory nature of detention in this instance poses special challenges for establishing effective enforcement mechanisms. Detainees are not afforded the opportunity to make telephone calls to family, friends, or legal aid, and there is little opportunity for them to pursue any complaint regarding their treatment. DHS should establish a community review board to monitor the treatment of detainees and to ensure accountability for compliance with standards and regulations. In order to function effectively, the review board should be granted access to detention centers and officers in the field, and authority to conduct on-going surveys and interviews in migrant centers in northern Mexico.

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<sup>165</sup> *Id.*