COMMENTS

IMMIGRATION DETENTION: THE INACTION OF THE BUREAU OF IMMIGRATION AND CUSTOMS ENFORCEMENT

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INTRODUCTION

In 2000, following numerous complaints and lawsuits, the Immigration and Naturalization Service (INS) issued the National Detention Standards (NDS) to govern the treatment of immigration detainees.[1] The standards were designed to provide humane conditions of confinement for immigration detainees[2] and resulted from negotiations between INS, the Department of Justice (DOJ), and various advocacy groups.[3] In total, INS created thirty-eight standards,[4] all of which were compiled in a Detention Operations Manual (DOM).[5] Following the passage of the Homeland Security Act of 2002,[6] the newly created Department of Homeland Security (DHS) assumed the responsibilities of the former INS, while the Bureau of Immigration and Customs Enforcement (ICE) became responsible for detention and removal operations.[7] ICE adopted the NDS and continues to use these standards to govern its detention practices.[8] However, despite the purpose behind the NDS, neither INS nor DHS promulgated the detention standards as binding regulations.

The NDS apply to any facility that houses immigration detainees, including federal detention centers, privately owned and operated facilities, and state or local jails.[9] However, while the NDS theoretically apply to all

1. BUREAU OF IMMIGRATION & CUSTOMS ENFORCEMENT, DEP'T OF HOMELAND SEC., DETENTION OPERATIONS MANUAL (2000) [hereinafter DETENTION OPERATIONS MANUAL], *available at* http://www.ice.gov/partners/dro/opsmanual; *see also* Chris Hedges, *Policy to Protect Jailed Immigrants Is Adopted by U.S.*, N.Y. TIMES, Jan. 2, 2001, at A1 (describing the contextual background of the National Detention Standards (NDS) and outlining goals of improving conditions and ensuring fair and equal treatment for all those detained).

2. Hedges, *supra* note 1, at A1.

3. *See* OFFICE OF INSPECTOR GEN., DEP'T OF HOMELAND SEC., TREATMENT OF IMMIGRATION DETAINEES HOUSED AT IMMIGRATION AND CUSTOMS ENFORCEMENT FACILITIES 2 (2006) (explaining that the standards were a collaborative effort between the American Bar Association, the Department of Justice (DOJ), the former Immigration and Naturalization Service (INS), and other advocacy groups that engage in pro bono representation of immigration detainees).

4. *See id*. (stating that INS initially created thirty-six detention standards in 2000 and later added two additional standards).

5. DETENTION OPERATIONS MANUAL, *supra* note 1.

6. Pub. L. No. 107-296, 116 Stat. 2135 (2002) (codified at 6 U.S.C. § 111 (2006)).

7. *See generally* 6 U.S.C. § 252 (2006) (establishing the Bureau of Immigration and Customs Enforcement (ICE)); *see also* 6 U.S.C. § 251(2) (2006) (transferring authority for the detention and removal program from the Commissioner of the former INS to the Under Secretary of ICE).

8. *See* DETENTION OPERATIONS MANUAL, *supra* note 1 (listing all of the former INS detention standards as ICE detention standards).

9. Specifically, the NDS are applicable to Service Processing Centers (SPCs), Contract Detention Facilities (CDFs), and state or local jails that are used by the Department of Homeland Security (DHS) via Intergovernmental Service Agreements (IGSAs) to hold detainees for longer than seventy-two hours. BUREAU OF IMMIGRATION & CUSTOMS ENFORCEMENT, DEP'T OF HOMELAND SEC., DETENTION OPERATIONS MANUAL, INS

of these facilities, that is not always the case in practice. While each individual standard within the DOM contains a general policy statement, there are also more specific implementing procedures outlined throughout the standard, which are not applicable to state or local jails operating under an intergovernmental service agreement (IGSA).[10] Afraid of imposing additional burdens on IGSA facilities, INS decided that the implementing procedures should be mere guidelines for IGSA facilities,[11] and that such facilities should have the flexibility to determine how best to satisfy the policy objectives of the NDS.[12] Thus, alarmingly, the standards that supposedly govern immigration detention are not applicable to the most heavily used detention facilities, which are IGSA facilities.[13] Moreover, as the number of immigration detainees rises,[14] ICE is increasingly relying on IGSA facilities for detention because of the availability and flexibility that such facilities provide.[15]

Recently, government investigations showed that conditions at detention centers, particularly IGSA facilities, are much worse than those envisioned under the NDS. Investigations by both the DHS Office of Inspector General (OIG) and the Government Accountability Office (GAO) found

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DETENTION STANDARD: HOLD ROOMS IN DETENTION FACILITIES 1 (2000) [hereinafter HOLD ROOMS], *available at* http://www.ice.gov/doclib/partners/dro/opsmanual/holdrm.pdf.

10. *See id.* ("Within the [standard] additional implementing procedures are identified for SPCs and CDFs. . . . IGSA facilities may find such procedures useful as guidelines."). Thus, implementing procedures are specifications that SPCs and CDFs must follow in order to satisfy the goal of the broader standard in the NDS. For example, while the broad standard for hold rooms provides simply that "[h]old rooms will be used for the temporary detention of individuals awaiting removal," the more meaningful implementing procedures have specifications, such as "[s]ingle-occupant hold rooms shall contain a minimum of 37 square feet." *Id.* Accordingly, because IGSA facilities are not bound by the specific procedures, single-occupant hold rooms at such facilities can be smaller than thirty-seven square feet.

11. *See* Brian L. Aust, Comment, *Fifty Years Later: Examining Expedited Removal and the Detention of Asylum Seekers Through the Lens of the Universal Declaration of Human Rights*, 20 HAMLINE J. PUB. L. & POL'Y 107, 124–25 (1998) (explaining that the NDS do not apply to IGSAs because INS worried about antagonizing local jail officials and government entities which could have potentially resulted in losing needed bed space for detainees).

12. *See* HOLD ROOMS, *supra* note 9, at 1 ("IGSAs may adopt, adapt or establish alternatives to, the procedures specified for SPCs/CDFs, provided they meet or exceed the objective represented by each standard.").

13. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, ALIEN DETENTION STANDARDS: TELEPHONE ACCESS PROBLEMS WERE PERVASIVE AT DETENTION FACILITIES; OTHER DEFICIENCIES DID NOT SHOW A PATTERN OF NONCOMPLIANCE 7–8 (2007) (reporting that ICE uses eight SPCs, six CDFs, and over 300 IGSAs).

14. *See id.* at 1 (stating that the number of immigration detainees has increased from 95,214 in 2001 to 283,115 in 2006).

15. *See* Aust, *supra* note 11, at 123–24 (noting that IGSAs are used when ICE does not have a detention facility in an area, when its facilities are full, or as a means of increasing detention capacity). Indeed, ICE is statutorily required to consider existing prisons and jails for use as detention facilities prior to authorizing the construction of a new detention facility. 8 U.S.C. § 1231(g)(2) (2006).

that detainees are denied access to medical treatment, telephones, and legal materials.[16] Additionally, these investigations revealed that ICE's internal compliance review procedures are inadequate for ensuring compliance with the NDS.[17] Both OIG and GAO offered several recommendations to bring detention conditions in line with the NDS, only some of which ICE implemented.[18] Moreover, ICE was unwilling to address certain key recommendations, alleging that the OIG report used a flawed methodology.[19]

Largely in response to these reports, in January 2007, the National Immigration Project of the National Lawyers Guild and eighty-four immigration detainees petitioned DHS and ICE to engage in notice-and-comment rulemaking to promulgate its detention standards as regulations.[20] As of the time of this writing, ICE has not officially responded to that petition.

This Comment argues that ICE's failure to enforce the NDS at IGSA facilities, while simultaneously relying predominantly on those facilities to house the majority of immigration detainees, constitutes "agency action

16. OFFICE OF INSPECTOR GEN., *supra* note 3, at 1–3; U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 13, at 10.

17. *See* OFFICE OF INSPECTOR GENERAL, *supra* note 3, at 1 (stating that ICE procedures do not provide a process for allowing detainees to report civil rights violations); *see also* U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 13, at 5–6 (finding that a "[l]ack of internal controls and weaknesses in ICE's compliance review process" prevented ICE from recognizing systemic problems with telephones at detention facilities).

18. *See generally* OFFICE OF INSPECTOR GEN., *supra* note 3, at 44–52 (containing ICE's letter response to the OIG recommendations which states that ICE concurs only in part with some recommendations and does not concur with others). For example, ICE refused to implement the OIG report's recommendation that facilities using double and triple bunk beds provide ladder access and a safety rail because the recommendation "will be extremely expensive" and "will significantly reduce the amount of available bedspace (particularly in areas of the country where IGSA bedspace is heavily relied upon)." *Id.* at 47.

19. One critical recommendation from the OIG report suggested that ICE ascertain why the level of noncompliance noted by ICE inspections was "significantly less" than the noncompliance issues identified by the OIG report. *Id.* at 51. ICE did not concur with this recommendation, arguing instead that the OIG's use of "'exception reporting' inherently leads to different outcomes" than ICE's use of random sampling investigations. *Id.* Additionally, ICE noted that the OIG spent a considerable amount of time on its investigation and that ICE's review process, which is shorter, allows a "reasonable assessment within a reasonable period of time" that is "minimally invasive to day-to-day operations of a facility." *Id.*

20. Press Release, Nat'l Immigration Project, Immigration Detainees Petition Homeland Security to Issue Enforceable, Comprehensive Immigration Detention Standards (Jan. 25, 2007), *available at* http://www.nationalimmigrationproject.org/press_releases/petition_PR_final.pdf (announcing the National Immigration Project's plan to file a petition for rulemaking with DHS); MICHAEL J. WISHNIE, PETITION FOR RULE-MAKING TO PROMULGATE REGULATIONS GOVERNING DETENTION STANDARDS FOR IMMIGRATION DETAINEES 1 (Jan. 25, 2007), *available at* http://www.nationalimmigrationproject.org/detention_petition_final.pdf (containing the text of the petition for rulemaking filed with DHS).

unlawfully withheld"[21] under the Administrative Procedure Act (APA). Part I explores the current situation of immigration detention with a particular focus on the conditions at IGSA facilities. Part II addresses the lack of enforcement mechanisms in the NDS and examines ICE's inadequate treatment of detainees. Part III argues that ICE's failure to enforce the NDS is an abdication of its statutory responsibility and outlines how detainees may persuade a court to compel ICE to promulgate the NDS as regulations. Finally, Part IV concludes that promulgation of the NDS as regulations is necessary to create greater accountability and transparency in immigration detention.

I. CURRENT CONDITIONS OF IMMIGRATION DETENTION

Immigration detention is an expanding form of incarceration that a conglomeration of federal facilities, private prisons, and state and local jails administer.[22] Within ICE, the Detention and Removal Office (DRO) has primary responsibility for the custody and management of immigration detainees while they await a decision regarding their removal.[23] To that end, DRO adopted the NDS (created by the former INS) and is responsible for inspecting ICE detention facilities annually to ensure compliance with those standards.[24]

A. Ideal Conditions Under the National Detention Standards

In total, thirty-eight detention standards govern conditions of immigration detention.[25] These standards prescribe, among other things, the conditions under which detainees receive medical care,[26] access to telephones[27] and legal materials,[28] procedures for reporting and

21. 5 U.S.C. § 706(1) (2006).

22. *See* Nina Bernstein, *New Scrutiny as Immigrants Die in Custody*, N.Y. TIMES, June 26, 2007, at A1 (describing immigration detention as the "fastest-growing form of incarceration" and as "a patchwork of county jails, privately run prisons and federal facilities").

23. OFFICE OF INSPECTOR GEN., *supra* note 3, at 2 (describing the responsibilities of ICE's Detention and Removal Office (DRO)).

24. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 13, at 2 (stating DRO's annual responsibility to inspect detention facilities for standards compliance).

25. *See* DETENTION OPERATIONS MANUAL, *supra* note 1.

26. *See* BUREAU OF IMMIGRATION & CUSTOMS ENFORCEMENT, DEP'T OF HOMELAND SEC., DETENTION OPERATIONS MANUAL, INS DETENTION STANDARD: MEDICAL CARE 1 (2000) [hereinafter MEDICAL CARE], *available at* http://www.ice.gov/doclib/partners/dro/opsmanual/medical.pdf ("All detainees shall have access to medical services that promote detainee health and general well-being.").

27. *See* BUREAU OF IMMIGRATION & CUSTOMS ENFORCEMENT, DEP'T OF HOMELAND SEC., DETENTION OPERATIONS MANUAL, INS DETENTION STANDARD: TELEPHONE ACCESS 1 (2000) [hereinafter TELEPHONE ACCESS], *available at* http://www.ice.gov/doclib/partners/dro/opsmanual/teleacc.pdf ("Facilities holding INS

documenting detainee grievances,[29] and the capacity and time requirements for using holding rooms.[30]

Ideally, a trained healthcare provider should administer an initial medical screening for all immigration detainees immediately upon arrival at a detention facility.[31] These screenings are crucial for identifying the "immediate medical, emotional, and dental needs of the detainees."[32] Moreover, facilities should have a "sick call" mechanism consisting of regularly scheduled times when detainees may request nonemergency health care from a physician or qualified medical officer.[33]

Additionally, facilities should maintain at least one properly functioning telephone for every twenty-five detainees.[34] Facilities should grant access to those telephones within eight waking hours of, and no later than twenty-four hours after, a detainee's request.[35] Detainees should also have the opportunity to make private phone calls to discuss legal matters[36] and free local calls to federal or state courts, local immigration courts, consular officials, government offices, and legal service providers.[37]

Immigration detainees should also have access to a well-lit, reasonably quiet law library, containing a sufficient number of typewriters, computers, and writing implements[38] for a minimum of five hours per week.[39] A designated employee at the facility should update legal materials when

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detainees shall permit them to have reasonable and equitable access to telephones.").

28. *See* BUREAU OF IMMIGRATION & CUSTOMS ENFORCEMENT, DEP'T OF HOMELAND SEC., DETENTION OPERATIONS MANUAL, INS DETENTION STANDARD: ACCESS TO LEGAL MATERIALS 1 (2000) [hereinafter LEGAL MATERIALS], *available at* http://www.ice.gov/doclib/partners/dro/opsmanual/legal.pdf ("Facilities holding INS detainees shall permit detainees access to a law library, and provide legal materials, facilities, equipment and document copying privileges, and the opportunity to prepare legal documents.").

29. *See* BUREAU OF IMMIGRATION & CUSTOMS ENFORCEMENT, DEP'T OF HOMELAND SEC., DETENTION OPERATIONS MANUAL, INS DETENTION STANDARD: DETAINEE GRIEVANCE PROCEDURES (2000) [hereinafter GRIEVANCE PROCEDURES], *available at* http://www.ice.gov/doclib/partners/dro/opsmanual/griev.pdf (mandating that every detention facility develop standard operating procedures to establish reasonable timetables for addressing detainee grievances).

30. *See* HOLD ROOMS, *supra* note 9, at 1 (providing that hold rooms should be used for temporary detention related to processing of detainees).

31. MEDICAL CARE, *supra* note 26, at 3.

32. OFFICE OF INSPECTOR GEN., *supra* note 3, at 6.

33. MEDICAL CARE, *supra* note 26, at 5 (prescribing the minimum sick call times as one day per week for facilities with fewer than fifty detainees, three days per week for facilities with fifty to 200 detainees, and five days per week for facilities with over 200 detainees).

34. TELEPHONE ACCESS, *supra* note 27, at 1.

35. *Id*. at 2.

36. *Id*. at 4–5.

37. *Id*. at 2.

38. LEGAL MATERIALS, *supra* note 28, at 1.

39. *Id*. at 3.

necessary.[40]

In order to minimize conflicts and disruptions, facilities should establish policies for detainees to submit oral or written grievances[41] and document these grievances in a Detainee Grievance Log.[42] Copies of grievances should remain in a detainee's file for no less than three years.[43]

Finally, a detainee should not be confined in a hold room for longer than twelve hours,[44] and the hold room should possess enough seating to accommodate the room's maximum capacity.[45] These provisions constitute the ideal immigration detention conditions that would result from compliance with the NDS.

B. Actual Conditions in ICE Detention Facilities

Unfortunately, the actual conditions in ICE detention facilities are often a substantial departure from the ideal conditions contemplated by the NDS. For example, the system of medical care available to immigrant detainees is fundamentally flawed. Although ICE spends significant sums of money on medical care,[46] as many as sixty-two immigrants have died in immigration custody since 2004, largely due to inadequate or untimely medical care.[47] Often, newly admitted detainees never receive either the medical screening or physical examination that the NDS require.[48] Moreover, while the NDS require regular responses to sick call requests, the actual sick call policies vary among detention facilities and often are

40. *Id*.
41. GRIEVANCE PROCEDURES, *supra* note 29, at 1–3.
42. *Id*. at 5.
43. *Id*.
44. HOLD ROOMS, *supra* note 9, at 3.
45. *Id*. at 2.
46. *See* Darryl Fears, *3 Jailed Immigrants Die in a Month: Medical Mistreatment Alleged; Federal Agency Denies Claims*, WASH. POST, Aug. 15, 2007, at A2 (quoting Marc Raimondi, an ICE spokesman, as saying that ICE spends more than $98 million per year to provide "humane and safe detention environments" to detainees).
47. *See, e.g.*, Bernstein, *supra* note 22 (chronicling the death of Sandra M. Kenley, who suffered from uterine bleeding, a fibroid tumor, and high blood pressure and was denied her medication while being detained at Hampton Roads Jail in Portsmouth, Virginia; eventually, she fell off of the top bunk of her bed and a cellmate had to pound on the door for twenty minutes before guards responded); *see also* Sandra Hernandez, *Denied Medication, AIDS Patient Dies in Custody*, DAILY JOURNAL, http://www.culturekitchen.com/shreya_mandal/forum/denied_medication_aids_patient_dies_in_0, Aug. 9, 2007 (describing how Victor Arellano, a transgender Mexican immigrant and AIDS patient, was denied vital AIDS medication while detained at San Pedro detention center, and that fellow detainees had to care for him by soaking bath towels in water to cool his fever and using a cardboard box as makeshift trashcan to collect his vomit).
48. *See* OFFICE OF INSPECTOR GEN., *supra* note 3, at 3 (finding, in a study of four detention facilities, that at least eight detainees did not receive a medical screening, while a minimum of fifteen detainees did not receive a physical examination during processing).

not enforced.[49] As a result, some detainees wait more than three days to receive medical attention.[50]

In addition to their substandard medical care, several facilities have systemic telephone problems, resulting in substantial impediments to detainees' access to pro bono services and legal counsel.[51] In several detention facilities, many telephones are not operational[52] and evidence of telephone maintenance or repairs is lacking.[53] Facilities have also failed to grant detainees access to telephones within twenty-four hours of their requests as required by the NDS, forcing some detainees to wait several days or file formal grievances in order to contact family members or attorneys.[54] Moreover, when detainees place calls to discuss legal matters, they are not afforded the privacy that the NDS require, either because telephones are located in heavily populated rooms or because a detention officer remains in the room during the private call.[55]

Detainee access to legal materials is also severely restricted because of reduced library time or lack of legal resources.[56] While the NDS require

49. *See id.* at 4 (noting that in three surveyed facilities employing varying policies for responding to nonemergency health care treatment, 196 of 481 immigration detainee nonemergency medical requests were not attended to within the time established by the facility).

50. *See id.* (observing that the Berks County Prison, an IGSA facility in Pennsylvania, failed to timely respond to 179 of 447 detainee sick call requests).

51. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 13, at 10 (finding that, of seventeen detention facilities that use a pro bono telephone system, test calls at sixteen of those facilities failed to complete because of inaccurate or incomplete phone number postings or various technical failures; observing further that the number to the OIG, where complaints about detention conditions are reported, was often blocked or restricted); *see also* OFFICE OF INSPECTOR GEN., *supra* note 3, at 24–25 (discovering that detainees were unable to reach representatives at fifty of sixty-three consulate numbers tested, and were unable to reach any of the twelve pro bono legal services numbers listed because the numbers either required a fee or failed to connect).

52. *See* OFFICE OF INSPECTOR GEN., *supra* note 3, at 24 (reporting that four of eleven telephones at the Passaic County Jail, an IGSA facility in Patterson, New Jersey, were not operational, and that thirteen of sixty telephones were not operational at a Corrections Corporation of America (CCA) CDF in San Diego, California).

53. *See id.* at 25 (documenting that the Passaic County Jail staff responsible for telephone maintenance did not keep records of maintenance or repairs prior to June 2005).

54. *See id.* at 24 (noting six instances at one IGSA when detainees had to file formal grievances for an emergency phone call to notify their families that they were detained, and one instance when a detainee had to wait sixteen business days before being granted access to a phone to contact an attorney).

55. *See id.* (finding that detainees at Berks County Prison, an IGSA facility, were required to make private calls in a day room where they could be overheard by other detainees or detention officers, and that at the CCA detention facility, detainees were allowed access to the manager's office for legal calls provided that a detention officer remain in the room with the detainee).

56. *See id.* at 16 (documenting that detainees at Berks County Prison, Passaic County Jail, and Hudson County Correctional Center did not have access to legal software for at least a month because detention officials had failed to install software or had allowed the software licenses to expire).

that facilities allow detainees a minimum of five hours per week in the law library,[57] several facilities allow detainees far less time.[58] Such limited library access drastically reduces detainees' efforts to understand and participate in their immigration cases.

Facilities have also failed to appropriately document detainee grievances.[59] Some facilities do not maintain grievance logs,[60] while others fail to maintain complete detainee files.[61] In addition to their failure to document grievances, numerous facilities do not respond to detainee grievances within the five-day time frame required by the NDS.[62] These longer response times may be due in part to detention officers' ignorance of the five-day response window.[63]

Also troubling is the fact that detainees are often in holding rooms longer than the maximum twelve hours permitted by the NDS.[64] This excess time is often due to staff shortages or low prioritization of the processing of new detainees.[65] Moreover, holding rooms are often not compliant with the NDS in that they do not provide sufficient seating or floor drains.[66]

Thus, despite the broad purpose of the NDS, actual conditions of immigration detention facilities oftentimes remain unsafe, insecure, and

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57. LEGAL MATERIALS, *supra* note 28, at 3.

58. *See* OFFICE OF INSPECTOR GEN., *supra* note 3, at 17 (stating that Hudson County Correction Center allowed detainees only one-and-a-half hours per week in the law library and that Passaic County Jail allowed detainees only four hours per week).

59. *See* GRIEVANCE PROCEDURES, *supra* note 29, at 5 (requiring that all detention facilities maintain, at a minimum, a Detainee Grievance Log and a copy of all detainee grievances in a detainee's file for three years).

60. *See* OFFICE OF INSPECTOR GEN., *supra* note 3, at 20 (observing that Passaic County Jail did not maintain a Detainee Grievance Log and that ICE detention staff at the Detention and Removal Field Office did not maintain one before June 2005, even though the NDS grievance standard became effective in September 2000).

61. *See id.* at 13 (documenting that of fifteen detainee files requested at the Krome Service Processing Center (SPC) in Miami, Florida, four files were missing altogether, and seven others were missing documents such as grievances).

62. *See id.* at 20–21 (finding that grievance response time at Berks County Prison ranged from seven to twenty-two days, with an average of nine days, and that in one instance, ICE itself waited twenty-five days before responding to a detainee grievance that was faxed directly).

63. *See id.* at 20 (observing that officials at the Hudson County Correctional Center were not aware of the five-day requirement for responding to detainee grievances).

64. *See id.* at 15 (discovering that forty detainees at the Krome SPC were held from thirteen to twenty hours in noncompliant holding rooms).

65. *See id.* (interviewing a Supervisory Immigration Enforcement agent who stated that detainees are held longer than twelve hours because there are not enough processing officers to handle a large group of newly admitted detainees, or the officer in charge orders a priority task to be completed and processing duties to be postponed).

66. *See id.* (noting that hold rooms at the Krome SPC did not provide an adequate number of benches to accommodate the number of detainees held, and that several of the rooms lacked floor drains).

considerably inhumane.[67]

II. INADEQUACIES OF ICE DETENTION STANDARDS

The inadequacies of the NDS stem in large part from their status as guidelines and not binding regulations. This status creates two problems. First, as previously mentioned, the specific implementing procedures detailed in the NDS are not applicable to the most widely used detention centers—the IGSA facilities—creating a substantial void of accountability and lack of oversight in a great number of detention facilities.[68] Second, because the NDS serve only as guidelines—not binding regulations—they are not judicially enforceable.[69]

A. Lack of Internal Controls to Ensure Compliance

The widespread use of IGSA facilities creates significant accountability problems, as ICE has less control over these facilities[70] and is unwilling to force them to comply with the specific implementing procedures of the NDS.[71]

When drafting the NDS, INS was particularly reluctant to force compliance at IGSA facilities out of fear that local jails would refuse to accept detainees—a result that would have left INS in a difficult situation.[72]

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67. *See* Hedges, *supra* note 1 (quoting a previous immigration commissioner describing the purpose of the NDS as providing "safe, secure and humane conditions of detention" for immigration detainees).

68. *See* BUREAU OF IMMIGRATION & CUSTOMS ENFORCEMENT, DEP'T OF HOMELAND SEC., ENDGAME: OFFICE OF DETENTION AND REMOVAL STRATEGIC PLAN, 2003–2012, DETENTION AND REMOVAL STRATEGY FOR A SECURE HOMELAND 2–11 (2003) [hereinafter ENDGAME] (explaining that during the early 1990s, the majority of immigration detainees were held in SPCs, CDFs, or Bureau of Prison Facilities, but that now "the majority of detainees are housed in county and local institutions through inter-governmental service agreements"); *see also* U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 13, at 7 (stating that "[t]he majority of ICE's alien detainee population is housed with general population inmates in about 300 state and local jails that have intergovernmental service agreements with ICE"); OFFICE OF INSPECTOR GEN., *supra* note 3, at 2 (explaining that "the need to modify contractual agreements" with IGSA facilities prevented ICE from requiring compliance with those procedures).

69. *See* AM. CIVIL LIBERTIES UNION, U.S. IMMIGRATION DETENTION SYSTEM: SUBSTANDARD CONDITIONS OF CONFINEMENT AND INEFFECTIVE OVERSIGHT 1 (May 3, 2007) [hereinafter DETENTION SYSTEM] (stating that the NDS are "nonbinding and not judicially enforceable").

70. *See* ENDGAME, *supra* note 68, at 2–11 (admitting that "[b]ecause DRO does not own [IGSA] facilities, they have less control over mixing criminal vs. noncriminal populations and ensuring compliance with other jail standards that affect detention").

71. *See, e.g.*, HOLD ROOMS, *supra* note 9, at 1–3 (containing more than an entire page of specifications for hold room construction and permissible time limits for detention in hold rooms that are applicable only to SPCs and CDFs; IGSA facilities "may find such procedures useful as guidelines," but remain free to use their existing hold rooms).

72. *See* Aust, *supra* note 11, at 124 (explaining INS's fear that if the NDS were

Accordingly, INS adopted a standard detention contract for state and local jails that does not even mention the NDS.[73] Rather, the standard contract contains vague language that gives IGSA facilities substantial discretion to determine what constitutes appropriate conditions of detention.[74] When IGSA facilities fail to comply with these vague contractual standards, there are limited means of recourse, which ICE is reluctant to employ.[75] Moreover, while ICE could presumably strengthen its contractual requirements and demand that IGSA facilities comply with the specific implementing procedures of the NDS, the increased costs that would result could reverse the facilities' financial incentives to house immigration detainees[76] and put ICE in the precarious position of having vastly more detainees than detention facilities vacancies.

Also exacerbating the accountability problem is ICE's ineffective oversight of conditions at IGSA facilities. ICE's internal compliance procedures for IGSA facilities consist primarily of the Detention Standards Compliance Unit (DSCU), which conducts annual inspections of detention facilities.[77] However, the ICE reviewers conducting these inspections apply the standards inconsistently, resulting in a substantial risk of underreporting the lack of compliance.[78] Additionally, while ICE theoretically informs IGSA detention officers about the NDS, several IGSA facility officers admitted to having no knowledge of the detention standards and, as a result, treating immigration detainees the same as criminal

applicable to IGSA facilities, local jails would refuse to house immigration detainees altogether).

73. *See, e.g.*, IMMIGRATION AND NATURALIZATION SERV., DETENTION AND DEPORTATION OFFICERS' FIELD MANUAL Appendix 21-7 (Oct. 9, 1998) (containing a standard intergovernmental service agreement for detention of immigration detainees by state and local jails).

74. *See, e.g.*, *id.* (requiring merely that IGSA facilities provide "reasonable access" to public telephones, legal rights groups, and legal materials, and "reasonable visitation" with legal counsel).

75. *See id.* (providing that if the IGSA facility fails to remedy compliance deficiencies, then the detention contract *may* be terminated) (emphasis added); *see also* U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 13, at 9 (stating that while ICE may discontinue use of a facility, remove detainees, or withhold payment for noncompliance, "ICE has never technically terminated an agreement for noncompliance with its detention standards").

76. *See* Christopher Nugent, *Towards Balancing a New Immigration and Nationality Act: Enhanced Immigration Enforcement and Fair, Humane and Cost-Effective Treatment of Aliens*, 5 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 243, 254–55 (2005) (explaining that the per diem rate that ICE pays to IGSA facilities under the standard detention contract is often higher than the actual operating costs that IGSA facilities spend on detaining an individual).

77. *See* Orantes-Hernandez v. Gonzales, 504 F. Supp. 2d 825, 863–64 (C.D. Cal. 2007) (specifying the standards prescribed, number of detention centers, and other measures taken to ensure that each center complies with appropriate regulations).

78. *See id.* at 865 (finding that the testimony of ICE reviewers shows inconsistent application of the NDS and that reviewers "may severely under-report non-compliance with the detention standards") (internal quotation marks omitted).

inmates.[79] Moreover, GAO found that the systemic telephone problems at various detention facilities were largely attributable to ICE's admittedly ineffective oversight[80] and lack of internal control mechanisms to ensure proper functioning.[81] These are significant findings given that ICE's failure to provide meaningful internal recourse prevents immigration detainees from appealing to ICE for remedies to substandard detention conditions at IGSA facilities.

B. Absence of Judicial Oversight

In addition to ineffective internal recourse, detainees cannot obtain independent oversight of their detention conditions because the NDS are nonbinding standards rather than regulations,[82] and therefore judicial review is difficult or altogether unavailable.[83] While this is not to say that detainees are completely incapable of challenging their conditions in court,[84] such recourse is rare and requires individual detainees to bear the burden of constant challenges. Thus, deprived of their normal recourse through ICE's compliance review processes, detainees essentially find themselves without adequate means to assert their rights and combat inadequate detention conditions.

79. *See* OFFICE OF INSPECTOR GEN., *supra* note 3, at 31 (finding that five Berks County Prison officials claimed that they were unaware of specific standards for immigration detainees and that correctional officers were therefore trained to treat detainees similarly to inmates). This is alarming considering the Ninth Circuit's holding in *Jones v. Blanas* that civil detainees' treatment must be better than that of convicted prisoners and pretrial criminal detainees, and that if a civil detainee's treatment is similar, such treatment is presumptively punitive and unconstitutional. 393 F.3d 918, 933–34 (9th Cir. 2004), *cert. denied*, 546 U.S. 820 (2005).

80. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 13, at Highlights (quoting ICE officials as admitting that "there was little oversight of the telephone contract" that allowed detainees free calls to courts, government agencies, and legal representation).

81. *See id.* (finding that "insufficient internal controls and weaknesses in ICE's compliance review process resulted in ICE's failure to identify telephone system problems at most facilities GAO visited").

82. *See id.* at 9 (explaining that ICE's detention standards are "not codified in law and thus represent guidelines rather than binding regulations").

83. *See* DETENTION SYSTEM, *supra* note 69 (stating that the NDS are "nonbinding and not judicially enforceable").

84. *See generally* Orantes-Hernandez v. Meese, 685 F. Supp. 1488 (C.D. Cal. 1988) (granting, before the adoption of the NDS, a permanent injunction that required INS to inform detainees of their right to apply for asylum, obtain counsel at their own expense, and to be allowed adequate access to telephones, law libraries, and medical care).

III. ICE'S INACTION

A. Evasive Response to Petition for Rulemaking

In response to the current detention conditions, several immigration detainees have petitioned DHS for relief.[85] After observing the detainees' inadequate detention conditions through its Keeping Hope Alive program,[86] that National Immigration Project (NIP) petitioned DHS to initiate a notice-and-comment rulemaking.[87] Numerous organizations, including the American Bar Association, filed letters in support of NIP's petition.[88] While ICE has not yet made a formal decision,[89] it has agreed to consider the petition.[90] Nevertheless, ICE did express significant reservations, believing that regulations would reduce flexibility and consume valuable resources.[91] Accordingly, ICE has delayed the promulgation of the NDS regulations for over a year, and the future prospects are uncertain.

B. ICE's Authority to Promulgate Rules

Pursuant to Title 8 of the *United States Code*, the Secretary of Homeland Security possesses the authority and obligation to promulgate regulations governing immigration detention, and this obligation is equally forceful in the IGSA context.[92] When Congress authorized the Secretary of Homeland

85. *See* WISHNIE, *supra* note 20, at 7–8 (arguing that DHS has the experience and expertise to promulgate regulations that will allow for meaningful enforcement).

86. The Keeping Hope Alive program provides legal assistance to immigration detainees by, *inter alia*, bringing class action lawsuits in cases of abused detainees. *Id*. at 1.

87. *See id.* (requesting that DHS "initiate a rulemaking proceeding pursuant to the Administrative Procedures [sic] Act, 5 U.S.C. § 553, to promulgate regulations governing detention standards for immigration detainees").

88. *See, e.g.*, Letter from Karen J. Mathis, President, Am. Bar Ass'n, to Michael Chertoff, Sec'y, Dep't of Homeland Sec., 1 (Jan. 31, 2007), *available at* http://www.abanet.org/poladv/letters/immigration/2007jan31_detenstandards_l.pdf (supporting the NIP petition for rulemaking because "it has become clear that the lack of a legal enforcement mechanism for the detention standards has seriously undermined their effectiveness").

89. Julie Myers, Responses to S. Comm. on Homeland Security and Government Affairs Pre-hearing Questionnaire for the Nomination of Julie Myers to be Assistant Secretary, Department of Homeland Security 62,109 (July 26, 2007) (on file with author).

90. *See* Letter from Michael Chertoff, Sec'y, Dep't of Homeland Sec., to Karen J. Mathis, President, Am. Bar Ass'n (Mar. 19, 2007) (on file with author) (responding that DHS regards full NDS compliance to be an important priority and that DHS will "consider the request that the NDS be formally codified").

91. *See id.* ("[A]n NDS-related rulemaking would be a lengthy and resource-intensive process. Moreover, once implemented, updating the regulation would be equally laborious and protracted, thereby undermining agency flexibility to respond to changed circumstances or crises."); *see also* Myers, *supra* note 89, at 62 (stating that ICE has taken several steps to improve oversight, training, and compliance that would have been more difficult to implement with regulations in place).

92. *See* 8 U.S.C. § 1103(a)(1) (2006) (charging the Secretary with the administration

Security to enter into IGSAs with local jails,[93] it also authorized the Secretary to expend funds necessary to cover the costs of immigration detention at IGSA facilities.[94] Thus, DHS does not relinquish authority to issue regulations governing IGSA facilities simply because local jails exercise immediate control over detainees.[95]

Despite this obligation, the Secretary has promulgated regulations that provide relatively few guarantees concerning detention conditions.[96]

C. Case for Compelling ICE to Promulgate Rules

While it is not possible to bring a claim against ICE for noncompliance with the NDS, detainees have a potential case against ICE for agency inaction with regard to the NIP rulemaking petition. Under the APA, immigration detainees could reasonably argue that ICE has failed to act by not promulgating binding regulations for IGSA facilities.[97] Under this argument, a reasonable remedy would be for the court to compel ICE to

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and enforcement of all "laws relating to the immigration and naturalization of aliens"); *see also* 8 U.S.C. § 1103(a)(3) (2006) (requiring that the Secretary "establish such regulations . . . as he deems necessary for carrying out his authority under the provisions" of the Immigration and Nationality Act (INA)).

93. *See* 8 U.S.C. § 1231(g) (2006) (requiring the Attorney General to "arrange for appropriate places of detention for aliens detained pending removal or a decision on removal" and to consider, prior to constructing a new detention facility, "the availability for purchase or lease of any existing prison, jail, detention center, or other comparable facility suitable for such use"); *see also* 6 U.S.C. § 251(2) (2006) (transferring the detention functions from the Attorney General and INS to DHS and the Secretary of Homeland Security).

94. *See* 8 U.S.C. § 1103(a)(11)(A) (2006) (authorizing the expenditure of funds for "necessary clothing, medical care, necessary guard hire, and the housing, care, and security of persons detained . . . pursuant to Federal law under an agreement with a State or political subdivision of a State").

95. *See* Roman v. Ashcroft, 340 F.3d 314, 320 (6th Cir. 2003). *Roman* held the following:

> [I]t is clear that 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 federal INS detainees, they have that control solely pursuant to the direction of the INS.

Id. *See also* ACLU of N.J., Inc. v. County of Hudson, 799 A.2d 629, 654 (N.J. Super. Ct. App. Div. 2002) (finding that "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").

96. *See, e.g.*, 8 C.F.R. § 235.3(e) (2007) (providing that an alien may be detained only in facilities that meet four mandatory criteria: twenty-four hour supervision, compliance with safety and emergency codes, food service, and availability of emergency medical care); *see also* 8 C.F.R. § 215.4(a)–(b) (2007) (providing a detainee a "right to be represented, at no expense to the government, by counsel of his own choosing").

97. *See* 8 U.S.C. § 1103(a)(3) (2000) (directing the Secretary of Homeland Security to establish regulations carrying out his authority under the INA); *see also* 5 U.S.C. § 702 (2000) (granting a right of judicial review to any person suffering a legal wrong because of, among other things, an agency's failure to act).

promulgate regulations on the ground that ICE has unlawfully withheld the regulations or that ICE's failure to promulgate is an abuse of discretion.[98] While ICE has substantial discretion to allocate its resources,[99] it is likely an abuse of that discretion not to enforce its standards at IGSA facilities while simultaneously relying predominantly on those facilities to house the majority of immigration detainees.

1. Availability of Judicial Review

To successfully bring a claim against ICE for its inaction regarding IGSA facilities, the first step is for detainees to establish that judicial review of ICE's inaction is available.[100] To do so, detainees must show, pursuant to § 701(a) of the APA, that the Immigration and Nationality Act (INA) does not preclude judicial review and that ICE's failure to promulgate the NDS as regulations is not committed to ICE's discretion by law.[101]

Detainees may reasonably argue that the INA does not preclude judicial review of ICE's inaction. While the INA does contain a broad jurisdiction-stripping provision for discretionary decisions,[102] ICE's obligation to promulgate regulations is not contained within the subchapters to which the provision applies.[103] ICE also cannot assert its general discretion to interpret the INA, as such discretion is not specifically delineated in the INA itself.[104] Moreover, a court must interpret the provision in light of

98. *See* 5 U.S.C. § 706(1)–(2) (2000) (allowing courts to compel agency action that is unlawfully withheld or unreasonably delayed and to set aside agency actions that are arbitrary, capricious, or an abuse of discretion). *But see In re* Bluewater Network, 234 F.3d 1305, 1315 (D.C. Cir. 2000) (stating that a writ of mandamus under § 706 is an extraordinary remedy that is used for only the most blatant violations of a clear duty).

99. *See* Massachusetts v. EPA, 127 S. Ct. 1438, 1459 (2007) (stating that "an agency has broad discretion to choose how best to marshal its limited resources and personnel to carry out its delegated responsibilities").

100. *See* Heckler v. Chaney, 470 U.S. 821, 828 (1985) (holding that while the APA does provide judicial review for agency inaction, a party must first show that judicial review is available under § 701(a) of the APA).

101. *See* 5 U.S.C. § 701(a) (2000) (providing that judicial review of agency action is available "except to the extent that—(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law").

102. *See* 8 U.S.C. § 1252(a)(2)(B)(ii) (2006) (removing jurisdiction for any decision or action of the Attorney General "the authority for which is specified under this subchapter [8 U.S.C. §§ 1151–1378] to be in the discretion of the Attorney General").

103. *See* Khan v. Att'y Gen. of the U.S., 448 F.3d 226, 230 (3d Cir. 2006) (explaining that § 1252(a)(2)(B)(ii) removes jurisdiction only for decisions that are specified as discretionary within the appropriate subchapter, namely §§ 1151–1378). The provision which requires the Secretary of Homeland Security to promulgate regulations, § 1103(a)(3), does not fall within that subchapter.

104. *See* Soltane v. U.S. Dep't of Justice, 381 F.3d 143, 146–48 (3d Cir. 2004) (explaining that statutory language must specifically provide discretionary authority for the particular action before the jurisdictional bar applies and that Congress did not intend for

"the strong presumption in favor of judicial review of administrative action"[105] and the tendency to construe ambiguities in favor of immigrants.[106]

Detainees can also demonstrate that ICE's decision to promulgate the NDS regulations is not committed to agency discretion by law.[107] Although courts are reluctant to interfere with an agency's decisions regarding how to best allocate its limited resources,[108] when a court has manageable standards to apply to the agency's actions, the action is not committed to agency discretion.[109]

Applying this analysis in *Heckler v. Chaney*,[110] the Supreme Court found that an agency's refusal to bring an enforcement action is generally unsuitable for judicial review.[111] The Court upheld the Food and Drug Administration's (FDA) refusal of inmates' petitions to prevent the use of lethal injection drugs on the ground that the drugs were not approved for such use.[112] In reaching this conclusion, the Court relied on a variety of factors, including the agency's allocation of resources and ordering of priorities.[113]

Significantly, application of the *Heckler* factors to ICE's inaction regarding the NIP rulemaking petition demonstrates that the decision to promulgate NDS regulations is not committed to ICE's discretion by law. First, while ICE does exercise substantial discretion over its resources, it is not likely that Congress intended such discretion to permit ICE to avoid the

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§ 1252(a)(2)(B)(ii) to allow agencies to avoid judicial review by relying on broad incumbent discretion to interpret statutory language).

105. Arar v. Ashcroft, 414 F. Supp. 2d 250, 267 (E.D.N.Y. 2006) (citing INS v. St. Cyr, 533 U.S. 289, 298 (2001)) (internal quotation marks omitted).

106. *See id.* (citing to the immigration rule of lenity caseline, which stands for the proposition that ambiguities in deportation statutes should be construed in favor of aliens).

107. *See* Heckler v. Chaney, 470 U.S. 821, 830 (1985) (stating that action is committed to an agency's discretion by law "if no judicially manageable standards are available for judging how and when an agency should exercise its discretion").

108. *See id.* at 831 (expressing concern over the "complicated balancing" involved in an agency's decision not to enforce and the incumbent difficulties an agency faces in determining how best to spend its resources).

109. *See id.* at 830 (explaining that "if no judicially manageable standards are available for judging how and when an agency should exercise its discretion, then it is impossible to evaluate agency action for 'abuse of discretion'").

110. 470 U.S. 821 (1985).

111. *See id.* at 831 ("This Court has recognized on several occasions over many years that an agency's decision not to prosecute or enforce . . . is a decision generally committed to an agency's absolute discretion.").

112. *See id.* at 823 (holding that FDA's decision not to take enforcement action was not subject to review).

113. *See id.* at 831–32 (stating that an agency's decision not to enforce involves decisions concerning allotment and prioritization of resources, and noting the fact that "when an agency refuses to act it generally does not exercise its *coercive* power over an individual's liberty or property rights").

statutory mandate of promulgating regulations governing detention conditions.[114] Second, whereas an agency generally does not infringe upon a person's liberty or property rights when it refuses to act, that is not the case here.[115] Given the actual conditions that detainees face at IGSA facilities, ICE's failure to enforce the NDS is a real and substantial infringement of detainees' liberty and property rights. Third, while agency enforcement decisions may be akin to prosecutorial discretion,[116] ICE's refusal to enforce the NDS in IGSA facilities, given ICE's prevalent use of those facilities, is extreme enough to conclude that ICE has abdicated its responsibilities.[117]

Additionally, it is important to note that if ICE had refused or denied the NIP petition for rulemaking, ICE's refusal, and its reasoning, undoubtedly would be reviewable.[118] It would be difficult to suggest that ICE has complete discretion in responding to a petition for rulemaking until it actually responds.

2. Merits of the Case

Having established that judicial review is available, detainees then have the difficult task of persuading a court to compel ICE to act under § 706 of the APA.

In *Norton v. Southern Utah Wilderness Alliance*,[119] the Supreme Court established a high burden of persuasion for compelling agency action.[120] At issue in that case was whether the Secretary of the Interior and the Bureau of Land Management (BLM) failed to act by not preventing the use

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114. *See* Cass R. Sunstein, *Reviewing Agency Inaction After* Heckler v. Chaney, 52 U. CHI. L. REV. 653, 675 (1985) (arguing that "the problem of limited resources does not justify a broad rule immunizing inaction from judicial review").

115. *See* Barbara Hines, *An Overview of U.S. Immigration Law and Policy Since 9/11*, 12 TEX. HISP. J.L. & POL'Y 9, 20 (2006) (finding that many detainees are unable to deal with the stress of lengthy imprisonment and therefore give up the right to a deportation hearing, that detained immigrants have less access to legal representation because of reduced economic resources from detention and remote locations, and that prolonged detention negatively affects a detainee's chances of winning a deportation case).

116. *See Heckler*, 470 U.S. at 832 (recognizing the similarities between an agency's refusal to institute proceedings and the decision by a prosecutor of the Executive Branch not to indict, and finding that both decisions are the special province of the Executive).

117. *See id.* at 833 n.4 (expressing a willingness to find that judicial review is available when an agency has knowingly adopted such an extreme policy that it amounts to an "abdication of its statutory responsibilities").

118. *See* Massachusetts v. EPA, 127 S. Ct. 1438, 1459 (2007) (holding that "[r]efusals to promulgate rules are thus susceptible to judicial review, though such review is extremely limited and highly deferential") (internal quotation marks omitted).

119. 542 U.S. 55 (2004).

120. *See id.* at 64 (explaining that § 706(1) claims to compel agency action will only succeed where a plaintiff can show that "an agency failed to take a *discrete* agency action that it is *required to take*").

of off-road vehicles on Utah public lands.[121] Finding that BLM did not fail to act,[122] the Court held that when seeking to compel agency action, the action sought must be both discrete and legally required.[123] In other words, the aggrieved individual "must direct [his] attack against some particular agency action that causes [him] harm."[124] Accordingly, general compliance problems typically are not sufficiently discrete for a court to compel agency action.[125]

Contrary to the result in *Norton v. Southern Utah Wilderness Alliance*, which involved a broad land management directive,[126] the action that immigration detainees seek—namely a response to the rulemaking petition—is both sufficiently discrete and legally required. Accordingly, a court would be well within its discretion to compel ICE to promulgate the NDS. First, the NDS regulations are legally required because the Secretary of Homeland Security has the clear duty to promulgate regulations that carry out the purposes and intentions of the various immigration laws.[127] The obligation to provide adequate detention conditions is thus statutorily required,[128] and cannot reasonably be considered as discretionary.[129] Additionally, ICE's response to the rulemaking petition is legally required and therefore cannot be withheld unreasonably.[130]

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121. *See id.* at 60 (discussing the alliance's requested relief in light of BLM's inaction).

122. *See id.* at 67 (holding that BLM did not fail to act by allowing off-road vehicles because BLM enjoyed significant discretion in implementing the Wilderness Act, and because "[t]he prospect of pervasive oversight by federal courts over the manner and pace of agency compliance . . . is not contemplated by the APA").

123. *See id.* at 63 (describing an exemplary discrete failure to act as a failure to promulgate a rule, and a legally required action as an unequivocal command); *see also id.* at 66 (explaining that the purposes of the limitations to compelling agency action are "to protect agencies from undue judicial interference with their lawful discretion, and to avoid judicial entanglement in abstract policy disagreements which courts lack both expertise and information to resolve").

124. *Id.* at 64 (citing Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 891 (1990)) (internal quotation marks omitted).

125. *Id.* at 66–67 (explaining that if general deficiencies in compliance were sufficient, then courts would necessarily entangle themselves in an agency's functions); *see also* Sunstein, *supra* note 114, at 682–83 (asserting that an argument that an agency acted arbitrarily simply because it failed to act against a particular violation of the relevant statute presents the weakest claim for reviewability).

126. *See* Norton v. S. Utah Wilderness Alliance, 542 U.S. at 58 (describing BLM's task of "multiple use management" as an "enormously complicated task of striking a balance among the many competing uses to which land can be put").

127. *See* 8 U.S.C. § 1103(a)(3) (2006) (stating that the Secretary of Homeland Security "shall establish such regulations" and "issue such instructions" necessary to execute his duties of enforcing the immigration laws).

128. *See* 8 U.S.C. § 1231(g)(1) (2006) (requiring the Secretary of Homeland Security to "arrange for appropriate places of detention for aliens detained pending removal or a decision on removal").

129. *See S. Utah Wilderness Alliance*, 542 U.S. at 64 (explaining that a court can only compel "a ministerial or non-discretionary act") (internal quotation marks omitted).

130. *See* 5 U.S.C. § 553(e) (2006) ("Each agency shall give an interested person the

Second, because detainees likely would seek a writ of mandamus to compell ICE to promulgate the NDS as regulations or to at least respond to the NIP rulemaking petition, the action sought would be discrete and would not be an attack based on general noncompliance.[131]

Third, ICE's action is truly a failure to act because, for seven years,[132] ICE has neither enforced its own standards nor promulgated binding regulations that could be enforced by the courts.[133]

Fourth, a court can compel ICE to act without mandating how ICE must act.[134] The problem with IGSA facilities is not the manner of enforcement at the facility, but rather the complete lack of enforcement. Thus, a court can compel ICE to promulgate the NDS as binding regulations for IGSA facilities while leaving ICE free to determine the best manner of enforcement.

CONCLUSION

Detainees should utilize their potential APA claim for compelling ICE to promulgate the NDS as binding regulations. NDS regulations are the most viable option for providing meaningful relief to detainees suffering from inadequate detention conditions. While ICE could strengthen the IGSA contractual requirements relating to conditions of detention, this likely would have little effect, as ICE is reluctant to actually terminate an IGSA for noncompliance because of its dependence on such facilities. It is also unlikely that Congress could, or would, authorize the construction of additional federal detention facilities given the immediate demand for detention bed space and Congress's stated preference for utilizing IGSA facilities.[135] ICE almost certainly will continue to use IGSA facilities; if anything, it may increase the number of such facilities as the number of detainees rises.

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right to petition for the issuance, amendment, or repeal of a rule."); *see also* Massachusetts v. EPA, 127 S. Ct. 1438, 1459 (2007) (explaining that an agency's refusal to promulgate is "subject to special formalities, including a public explanation").

131. *See S. Utah Wilderness Alliance*, 542 U.S. at 66 (finding that the action sought from BLM was not discrete where the plaintiff complained primarily of noncompliance and was not seeking a concrete action).

132. The NDS were applied to detention facilities in 2000. DETENTION OPERATIONS MANUAL, *supra* note 1.

133. *See S. Utah Wilderness Alliance*, 542 U.S. at 63 (describing a failure to act as "simply the omission of an action without formally rejecting a request—for example, the failure to promulgate a rule or take some decision by a statutory deadline").

134. *See id.* at 64 (explaining that § 706(1) of the APA only allows a court to compel agency action "without directing *how* it shall act") (citation omitted).

135. *See* 8 U.S.C. § 1231(g)(2) (2000) ("Prior to initiating any project for the construction of any new detention facility for the Service, the Commissioner shall consider the availability for purchase or lease of any existing prison, jail, detention center, or other comparable facility suitable for such use.").

Once promulgated, regulations will provide substantial benefits to immigration detainees and will help ensure compliance with the standards at all facilities, including the numerous IGSA facilities.[136] Regulations will increase transparency and confidence in the immigration system and prevent ICE from engaging in ad hoc departures from its detention standards.[137] While binding regulations will likely increase costs for both ICE and IGSA facilities, the benefits to immigration detainees, and the immigration system as a whole, outweigh the potential costs. Regulations are necessary if immigration detainees who suffer deplorable detention conditions are to have meaningful recourse to remedy their situations.

If the APA claim is unsuccessful and regulations do not issue, at the very least, the filing of a lawsuit may motivate ICE to make a final decision regarding the rulemaking petition. Then, even if the petition is denied, the mere denial may open up new avenues for further action.[138]

136. *See* Sunstein, *supra* note 114, at 656 (arguing that when regulatory agencies are aware of the availability of judicial review, such knowledge can help combat unduly lax enforcement of the agency's obligations).

137. *See* Lisa Schultz Bressman, *Judicial Review of Agency Inaction: An Arbitrariness Approach*, 79 N.Y.U. L. REV. 1657, 1690–91 (2004) (arguing that when agencies are subject to judicial review, they have incentives to discipline themselves by providing reasons for their decisions and setting clear standards for their actions, which increases transparency and reduces the potential for corruption and irrational decisions).

138. On April 30, 2008, as this piece was being edited for publication, several immigration detainees and immigrants' rights groups, represented by Michael Wishnie and the Jerome N. Frank Legal Services Organization at Yale Law School, filed a complaint in United States District Court for the Southern District of New York against Michael Chertoff, the Secretary of Homeland Security. *See* Families for Freedom v. Chertoff, No. 08-40567 (S.D.N.Y. filed Apr. 30, 2008), *available at* http://www.nationalimmigrationproject.org/Detention_Standards_%20Complaint_final.pdf. Among other things, the lawsuit seeks a court order directing Secretary Chertoff "to initiate a rulemaking procedure and to enact regulations covering conditions of confinement for detained immigrants within a reasonable period of time" or, alternatively, "to respond to [the NIP Petition for Rulemaking], including an explanation of his decision and the reasons supporting it within thirty (30) days of the Court's order." *Id.* at 15–16. While the case is still in the early stages, it could have important ramifications for detainees and the conditions they face in the future.