ARTICLES

THE LAW AND LAWLESSNESS OF U.S. IMMIGRATION DETENTION

Alina Das

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Alina Das[*]

The United States operates the largest immigration detention system in the world. Immigrants and watchdog groups have reported poor conditions of confinement, including medical mistreatment and neglect, inadequate nutrition, unsanitary conditions, and overcrowding. To challenge these conditions of confinement, immigrants have raised a variety of constitutional, statutory, and administrative claims in federal court. Some courts have rejected these claims, reluctant to intercede in agency management of the detention system and override the will of the political branches. This emerging jurisprudence assumes that the sole interest of the political branches in detention is to facilitate the exclusion and deportation of immigrants, with little consideration given to how immigrants are detained. These courts view agency regulation of detention as gratuitous self-regulation, neither required by law nor enforceable, even when violations of these rules threaten the life and liberty of those detained. The result is a weakened rights framework that does little to protect the substantive rights of immigrants in detention.

This Article challenges these judicial assumptions by unearthing a more nuanced account of the political branches' "civil detention interest." A careful review of legislative and regulatory history across three periods of detention expansion demonstrates the political branches' interest in ensuring the civil conditions of immigration detention and a growing legislative distrust of agency management of detention conditions. This civil detention interest should inform how courts adjudicate challenges to immigration detention conditions. The relative failure of any branch of government to effectuate this interest exposes the lawlessness of the immigration detention system in the United States.

INTRODUCTION

On May 25, 2020, U.S. Immigration and Customs Enforcement (ICE) announced the death of Santiago Baten-Oxlaj, a thirty-four-year-old man who contracted COVID-19 while detained in the Stewart Detention Center in Lumpkin, Georgia.[1] He was the first person in Stewart and at least the second person nationwide to die from the disease while in ICE custody.[2] Watchdog groups had long been concerned about conditions at Stewart, a private immigration prison accused of medical

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[1] Press Release, U.S. Immigr. & Customs Enf't, Guatemalan Man in ICE Custody Passes Away in Georgia (May 25, 2020), https://www.ice.gov/news/releases/guatemalan-man-ice-custody-passes-away-georgia [https://perma.cc/L6XC-7L27]; Jeremy Redmon, *ICE Detainee Held in South Georgia Dies from COVID-19*, ATLANTA J.-CONST. (May 25, 2020), https://www.ajc.com/news/breaking-news/ice-detainee-held-south-georgia-dies-from-covid/Irdtr5BSTV7SpZP7Z3BNOL [https://perma.cc/3YC9-N2QJ].

[2] *See* Redmon, *supra* note 1.

neglect, abuse, and unsanitary living conditions.[3] As COVID-19 began to spread rapidly through the facility, immigrants held in Stewart and a neighboring Georgia immigration prison filed suit against ICE, arguing that their conditions of confinement violated substantive due process and the Agency's own rules governing the prevention of communicable disease in detention.[4] In *A.S.M. v. Warden, Stewart County Detention Center*,[5] a federal district court denied their claims.[6] The court held that ICE had done enough to meet constitutional requirements and that its detention standards — which direct the Agency to do more — were not enforceable.[7] Following the decision in *A.S.M.*, the disease continued to spread rapidly through the facility and three more people detained at Stewart — Cipriano Chavez-Alvarez, sixty-one; Jose Guillen-Vega, seventy; and Felipe Montes, fifty-seven — died from COVID-19 complications.[8]

The COVID-19 pandemic resurfaced a longstanding question: What law governs the conditions of confinement within the U.S. immigration detention system? The question is of significant importance. The United States operates the largest immigration detention system in the world, confining nearly 300,000 people each year.[9] Congress has authorized federal immigration officials to detain any immigrant[10] pending their possible exclusion or deportation (collectively described as "removal") from the country.[11] Procedural avenues for seeking release from immigration detention have narrowed over time.[12] As a result,

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[3] *See, e.g.*, PROJECT S. & PENN STATE L., CTR. FOR IMMIGRANTS' RTS. CLINIC, IMPRISONED JUSTICE: INSIDE TWO GEORGIA IMMIGRANT DETENTION CENTERS 31, 35, 37 (2017), https://projectsouth.org/wp-content/uploads/2017/06/Imprisoned_Justice_Report-1.pdf [https://perma.cc/E74B-CM99]; EUNICE HYUNHYE CHO & PAROMITA SHAH, S. POVERTY L. CTR. ET AL., SHADOW PRISONS: IMMIGRANT DETENTION IN THE SOUTH 40–41 (2016), https://www.splcenter.org/sites/default/files/ijp_shadow_prisons_immigrant_detention_report.pdf [https://perma.cc/VR9G-K3PN].

[4] *See* Petition for Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2241 and Complaint for Declaratory and Injunctive Relief at 16, 24, 44, A.S.M. v. Warden, Stewart Cnty. Det. Ctr., 467 F. Supp. 3d 1341 (M.D. Ga. 2020) (No. 20-CV-62).

[5] 467 F. Supp. 3d 1341 (M.D. Ga. 2020).

[6] *Id.* at 1344 (denying motion for preliminary injunction).

[7] *Id.* at 1353–57.

[8] *See* Jeremy Redmon, *Fourth ICE Detainee Dies from COVID-19 in Southwest Georgia*, ATLANTA J.-CONST. (Jan. 31, 2021), https://www.ajc.com/news/fourth-ice-detainee-dies-from-covid-19-in-southwest-georgia/TNPDEQCTD5AJNEJG3AB5UODNGQ [https://perma.cc/W9M5-LXD7].

[9] *See Immigration Detention 101*, DET. WATCH NETWORK, https://www.detentionwatchnetwork.org/issues/detention-101 [https://perma.cc/6H2U-9VJL].

[10] In this Article, I use the term "immigrant" to refer to any person within the United States who lacks U.S. citizenship status.

[11] *See* HILLEL R. SMITH, CONG. RSCH. SERV., IF11343, THE LAW OF IMMIGRATION DETENTION: A BRIEF INTRODUCTION 1 (2022).

[12] The Supreme Court has upheld the constitutionality of mandatory detention as applied to individuals who have conceded removability and has rejected lower court decisions construing

immigrants may face the prospect of weeks, months, or years of detention before their cases are resolved either through a grant of permission to remain in the United States or deportation.[13] While detained, immigrants rely on the government and government contractors to provide their necessary medical care, food, and safety. Yet the U.S. immigration detention system has become notorious for unsanitary conditions, inedible food, excessive use of force, racialized abuse, medical neglect, and preventable death.[14] The law — or lawlessness — governing the rights of people within the immigration detention system therefore has serious, even life-or-death consequences.

The answer to this question ostensibly rests within various sources of law, including the U.S. Constitution. The government has an affirmative constitutional duty to meet the "basic human needs" of the people it confines, including the provision of "food, clothing, shelter, medical care, and reasonable safety."[15] The government is prohibited from exhibiting "deliberate indifference to [a person's] serious medical needs" in confinement.[16] The Supreme Court has categorized immigration detention as a form of civil detention.[17] The government is prohibited from subjecting individuals in civil detention to punitive conditions of confinement, that is, conditions that are "express[ly] inten[ded] to punish," not rationally related to a legitimate government objective, or excessive to that objective.[18]

These constitutional rights are further supplemented by statutory and administrative law. The Immigration and Nationality Act[19] (INA)

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federal detention law narrowly, as a matter of statutory interpretation, to avoid prolonged detention. *See, e.g.*, Demore v. Kim, 538 U.S. 510, 513, 530–31 (2003) (holding that mandatory detention under 8 U.S.C. § 1226(c) is constitutional for the brief period of time necessary to conclude removal proceedings for an individual who conceded removability); Jennings v. Rodriguez, 138 S. Ct. 830, 842–44, 852 (2018) (rejecting the application of the constitutional avoidance canon to the mandatory detention provisions of 8 U.S.C. §§ 1226(c) and 1225(b) and thus reversing a lower court decision ordering bond hearings within six months of detention); Nielsen v. Preap, 139 S. Ct. 954, 971 (2019) (interpreting the "when . . . released" clause in 8 U.S.C. § 1226(c) to permit mandatory detention any time after release from prior custody); Johnson v. Arteaga-Martinez, 142 S. Ct. 1827, 1833 (2022) (rejecting the application of the constitutional avoidance canon to the detention provision of 8 U.S.C. § 1231(a)(6)).

[13] *See Detention by the Numbers*, FREEDOM FOR IMMIGRANTS, https://www.freedomforimmigrants.org/detention-statistics [https://perma.cc/FC6R-UKJD]; NAT'L IMMIGRANT JUST. CTR., LOCKED AWAY: THE URGENT NEED FOR IMMIGRATION DETENTION BOND REFORM 4 (2023), https://immigrantjustice.org/sites/default/files/content-type/research-item/documents/2023-06/NIJC-Policy-Brief_ICE-Bond-Reform_May-2023.pdf [https://perma.cc/CV6M-FB95].

[14] *See* sources cited *infra* note 69.

[15] DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 200 (1989) (citing Estelle v. Gamble, 429 U.S. 97, 103–04 (1976); Youngberg v. Romeo, 457 U.S. 307, 315–16 (1982)).

[16] *Gamble*, 429 U.S. at 104.

[17] *See* Wong Wing v. United States, 163 U.S. 228, 235 (1896); *see also* Zadvydas v. Davis, 533 U.S. 678, 690 (2001).

[18] Bell v. Wolfish, 441 U.S. 520, 538 (1979) (quoting Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168–69 (1963)) (citing Flemming v. Nestor, 363 U.S. 603, 617 (1960)).

[19] Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (codified as amended in scattered sections of 8 U.S.C.).

requires federal immigration officials to "arrange for appropriate places of detention"[20] and to work with states and localities to ensure "acceptable conditions of confinement" where jail settings are used.[21] After intense legislative scrutiny of detention conditions, the U.S. Immigration and Naturalization Service (INS) — the predecessor agency to ICE[22] — began working on a set of detention standards in 1980 to manage its growing network of contract facilities.[23] Released, amended, and reissued in 1998, 2000, 2008, 2011, 2016, and 2019,[24] the detention standards remain the Agency's primary written set of rules regulating the conditions of confinement in the U.S. immigration detention system and serve as the basis of a congressionally mandated inspection system.[25]

This array of constitutional, statutory, and administrative law is the main substantive law of immigration detention.[26] Yet when detained immigrants seek to enforce their rights under this body of law, the law is often unequal to the task. During the COVID-19 pandemic, many federal district courts applied constitutional, statutory, and administrative law principles to release medically vulnerable immigrants or order other remedies to protect the health and welfare of people in immigration detention.[27] But some federal district courts, like the court in *A.S.M.*, rejected detained immigrants' claims in light of the interests of the legislative and executive branches in maintaining their detention system.[28] Two of the most significant district court victories for detained immigrants were overturned by federal appellate courts based in part on this rationale.

One such case is *Hope v. Warden York County Prison*,[29] where the Third Circuit overturned a district court's decisions that released at-risk immigrants from facilities in Pennsylvania.[30] Similar framing characterized the Ninth Circuit's majority decision in *Fraihat v. U.S.*

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20 8 U.S.C. § 1231(g)(1).

21 *Id.* § 1103(a)(11)(B); *see also infra* section II.A, pp. 1217–24.

22 *See* Steven Neeley, Comment, *Immigration Detention: The Inaction of the Bureau of Immigration and Customs Enforcement*, 60 ADMIN. L. REV. 729, 730–32 (2008).

23 *See infra* notes 379–82 and accompanying text.

24 *See ICE Detention Standards*, U.S. IMMIGR. & CUSTOMS ENF'T (Aug. 8, 2023), https://www.ice.gov/factsheets/ice-detention-standards [https://perma.cc/XFZ9-TZA8]; *see also infra* notes 191–93 and accompanying text.

25 *See infra* section II.C, pp. 1233–44.

26 Throughout this Article, I focus primarily on the law and history of adult immigration detention. I do not incorporate the unique context of modern-era family and juvenile detention, in part because of the different interests involved when children are detained.

27 *See, e.g.*, Brandon L. Garrett & Lee Kovarsky, *Viral Injustice*, 110 CALIF. L. REV. 117, 151–54 (2022) (describing the relative success of COVID-19 claims for people in immigration detention when compared to other incarcerated individuals).

28 *See infra* Part I, pp. 1196–216; A.S.M. v. Warden, Stewart Cnty. Det. Ctr., 467 F. Supp. 3d 1341, 1353–54 (M.D. Ga. 2020).

29 972 F.3d 310 (3d Cir. 2020).

30 *See id.* at 317, 326, 330–31. For further discussion, see *infra* pp. 1202–04.

Immigration & Customs Enforcement,[31] which overturned a nationwide preliminary injunction ordering ICE to engage in individualized custody reviews for immigrants with certain disabilities or at high risk of serious medical complications or death from COVID-19.[32] The Ninth Circuit rejected the lower court's deliberate indifference analysis, faulting the court for its lack of deference to "the Executive Branch's preeminent role in managing immigration detention facilities and its greater institutional competence in this area."[33] It emphasized the government's legitimate interest in immigration detention and rejected the contention that conditions had become unconstitutionally punitive.[34] The court further concluded that the petitioners' claim of deliberate indifference was unlikely to succeed on the merits, emphasizing ICE's issuance of "mandatory" guidance to its detention facilities to address COVID-19.[35]

Immigrants' attempts to enforce compliance with the "mandatory" detention standards have also been fraught. The analysis in *A.S.M.* exemplifies the broader trend. After rejecting immigrants' substantive due process claims for the same reasons that were later adopted by the Third and Ninth Circuits, the court in *A.S.M.* also rejected the petitioners' claim that, at minimum, ICE must be required to comply with its standards.[36] For this claim, the petitioners relied on the doctrine applied in *United States ex rel. Accardi v. Shaughnessy*,[37] in which the Supreme Court invalidated a deportation order based on the Agency's failure to follow its own rules.[38] The district court rejected the *Accardi* claim, concluding that the *Accardi* doctrine applied only to agency procedural rules promulgated with the force and effect of law.[39] The court characterized the Agency's adoption of standards as purely voluntary and unenforceable, in part because there was no identified "source of statutory authority that would even permit such agency rule-making delegation under these circumstances."[40]

This recent line of cases raises a number of serious questions. If constitutional protections against punitive detention rise and fall on the courts' perception of the government's legitimate interest in detention, what meaningful limits on the conditions of confinement apply? If

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[31] 16 F.4th 613 (9th Cir. 2021).

[32] *See id.* at 618. Notably, the Ninth Circuit has declined to overturn district court relief addressing poor conditions of immigration confinement in the COVID-19 context. *See, e.g.*, Zepeda Rivas v. Jennings, 845 F. App'x 530, 535 (9th Cir. 2021); Roman v. Wolf, 977 F.3d 935, 939 (9th Cir. 2020).

[33] *Fraihat*, 16 F.4th at 638 (citing Bell v. Wolfish, 441 U.S. 520, 548 (1979); *Roman*, 977 F.3d at 947 (Miller, J., concurring in part and concurring in the judgment)).

[34] *See id.* at 647–48 (citing, inter alia, *Wolfish*, 441 U.S. at 539).

[35] *Id.* at 638.

[36] *See* A.S.M. v. Warden, Stewart Cnty. Det. Ctr., 467 F. Supp. 3d 1341, 1354 (M.D. Ga. 2020).

[37] 347 U.S. 260 (1954).

[38] *See A.S.M.*, 467 F. Supp. 3d at 1351–53 (citing *Accardi*, 347 U.S. at 264–68).

[39] *See id.* at 1353–54.

[40] *Id.* at 1354.

agency detention standards both are unenforceable *and* immunize the agency against claims of deliberate indifference, what law actually protects the rights and interests of people in detention? The answer is either nothing — a steady state of relative lawlessness in immigration detention — or that these courts are approaching the doctrinal inquiries incorrectly.

This Article explores the latter possibility as a potential salve for the former — that some courts have faltered in their approach to conditions of confinement claims in the immigration detention context. The analyses in cases like *Hope*, *Fraihat*, and *A.S.M.* suggest that part of the problem stems from a shared feature of immigration, administrative, and prison law: the judiciary's expansive deference to one or both political branches of government. In immigration law, the judiciary defers to the political branches' "plenary power,"[41] declining to scrutinize "the wisdom, the policy or the justice of the measures" by which noncitizens are excluded or expelled from the United States.[42] In administrative law, the judiciary defers to agency interpretations of ambiguous regulations.[43] In prison law, the judiciary employs "penal power,"[44] "canons of evasion,"[45] and "dispositional favoritism"[46] to defer to prison operators, observing that "the operation of our correctional facilities is peculiarly the province of the Legislative and Executive Branches of our Government, not the Judicial."[47] It is therefore unsurprising that the combination of immigration, administrative, and prison law — the law of immigration detention — also relies on significant deference to the political branches, which in turn undermines meaningful judicial constraints on the conditions of confinement.

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41 *E.g.*, Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 547 (1990).

42 Fong Yue Ting v. United States, 149 U.S. 698, 731 (1893).

43 *See, e.g.*, Kisor v. Wilkie, 139 S. Ct. 2400, 2408 (2019) (citing Auer v. Robbins, 519 U.S. 452, 461 (1997); Bowles v. Seminole Rock & Sand Co., 325 U.S. 410 (1945)); *Auer*, 519 U.S. at 461. Federal courts long deferred to agency interpretations of ambiguous statutes as well, but the Supreme Court recently overturned that doctrine. *See* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2273 (2024) (overturning Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984)).

44 Emma Kaufman, *Segregation by Citizenship*, 132 HARV. L. REV. 1379, 1383 (2019) (using the term "penal power doctrine" to describe how "in cases involving prisons, courts routinely defer to penal policies that restrict prisoners' rights, including the right to equal protection, on the ground that prisons are difficult institutions to run").

45 Sharon Dolovich, *The Coherence of Prison Law*, 135 HARV. L. REV. F. 301, 303 (2022) (emphasis omitted) (using the term "canons of evasion" to describe the Supreme Court's use of "a set of maneuvers . . . to construct doctrinal standards for prison law cases that strongly incline courts to rule in favor of the state").

46 *Id.* at 304 (emphasis omitted) (using the term "dispositional favoritism" to describe a "moral psychology . . . which orients courts to regard prison officials' arguments favorably while viewing prisoners' claims with skepticism and even hostility," which results in decisions that "wind up favoring defendants in any number of ways hard to square with either the record or the relevant legal rules").

47 Bell v. Wolfish, 441 U.S. 520, 548 (1979) (citing Procunier v. Martinez, 416 U.S. 396, 405 (1974)).

Scholars have rigorously critiqued the role of deference in the underenforcement of rights for people in confinement.[48] I have previously argued that deference to the Executive should have limited application in habeas challenges to the government's authority to detain.[49] Heavy deference to the political branches improperly amplifies the interests of the prosecutor and jailer over the interests of the person detained.[50] Eliminating deference can open space for greater enforcement of constitutional, statutory, and regulatory rights through liberty-enhancing norms.[51] The demise of *Chevron*[52] only buttresses these efforts for more searching judicial review.

This Article examines the issue of deference from a related angle: whether the courts have properly assessed the will of the political branches — particularly Congress — in the rush to defer. A closer look at legislative and regulatory history demonstrates that federal courts have largely conflated Congress's interests in exclusion and deportation with its interests in detention. The stock story is one of a legislative body eager to detain, broadly authorizing federal immigration officials to operationalize a detention system in any manner they see fit in order to meet the demands of legislative and executive exclusion and deportation priorities. This view of congressional intent has in turn colored courts' perspectives on executive action, or inaction, in managing detention conditions. Agency regulation of immigration detention operates in an informal sphere, manifesting primarily as standards, guidance, and other informal rules. Some courts have therefore viewed agency regulation of detention as gratuitous self-regulation, neither required by law nor enforceable, even when violations of these rules threaten the life and liberty of those detained. Because these courts believe that nothing

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[48] *See, e.g.*, Dolovich, *supra* note 45, at 308–16 (critiquing the Supreme Court's deference to prison officials in cases involving the constitutional rights of people in prison); Kaufman, *supra* note 44, at 1383–84 (describing and critiquing how, in the context of criminal incarceration of foreign nationals, "two discrete deference regimes — one from immigration law, the other prison law — combine to give federal prison officials broad latitude to determine how and where noncitizens can be punished," *id.* at 1384, and noting that the interaction of plenary and penal power doctrines has been overlooked); Alina Das, *Unshackling Habeas Review:* Chevron *Deference and Statutory Interpretation in Immigration Detention Cases*, 90 N.Y.U. L. REV. 143, 146–49 (2015) (critiquing the application of *Chevron* deference in immigration detention cases as creating "a presumption in favor of detention," *id.* at 149); Sharon Dolovich, *Forms of Deference in Prison Law*, 24 FED. SENT'G REP. 245, 245–46, 249 (2012) (describing and critiquing applications of deference in prison law).

[49] *See* Das, *supra* note 48, at 173–74.

[50] *See id.* at 148–49, 190.

[51] *See id.* at 191–205 (detailing the use of liberty-enhancing norms in detention law and their relationship with deference); *cf.* Nancy Morawetz, *Immigration Law After* Loper Bright*: The Meaning of 8 U.S.C. § 1103(a)(1)*, 99 N.Y.U. L. REV. ONLINE 282, 283 (2024) (characterizing the Solicitor General's pursuit of deference in immigration cases as "depriv[ing] immigrants facing deportation . . . the benefit of arguments available to other litigants challenging the government's interpretation of statutes").

[52] Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984), *overruled by* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244 (2024).

requires the agency to act, any action is laudable and any inaction is free from scrutiny.

These judicial perspectives on the will of the political branches are incorrect. The stock story misses two important aspects of the legislative and regulatory history of immigration detention. First is the legislative will to ensure civil — that is, humane and nonpunitive — conditions of immigration detention. Congress initially federalized immigration detention to standardize and improve the conditions of such detention and subsequently required the Executive to ensure "appropriate places of detention"[53] and "acceptable conditions of confinement."[54] Second is legislative distrust of agency management of detention conditions. Initially, federal immigration officials cooperatively engaged in the regulation of detention conditions.[55] Over time, however, reports of agency malfeasance and neglect prompted greater oversight from Congress.[56] Congressional inquiries and directives drove the Agency to adopt its modern-day detention standards and compliance mechanisms.[57] Most recently, congressional distrust of agency detention management prompted the creation of an independent office of investigation and compliance.[58] With this Article, I introduce the term "civil detention interest" to describe the two intertwined threads of this more nuanced account.

The civil detention interest is relevant to the substantive rights of detained immigrants in several important respects, three of which are the focus of this Article. First, the civil detention interest informs how courts should treat substantive due process challenges to immigration detention. By separating Congress's interest in regulating conditions from its interest in expanding detention, courts may reevaluate the proper approach to substantive due process claims in the immigration context. Courts may better assess whether a particular condition serves or is excessive to a legitimate nonpunitive governmental purpose, whether the Agency's issuance of informal rules should defeat a deliberate indifference claim, and whether deliberate indifference is the proper inquiry at all. A more fulsome consideration of the civil detention interest should also lead courts to question the application of deference to the Agency on issues requiring detention management expertise. Second, the civil detention interest informs how courts should construe provisions within the INA governing "appropriate places of detention"[59] and the "acceptable conditions of confinement."[60] Many courts have

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53 8 U.S.C. § 1231(g)(1).

54 *Id.* § 1103(a)(11)(B); *see also infra* section II.A, pp. 1217–24.

55 *See infra* section II.B, pp. 1224–33.

56 *See infra* section II.C, pp. 1233–44.

57 *See infra* section II.C, pp. 1233–44.

58 *See infra* pp. 1243–44.

59 8 U.S.C. § 1231(g)(1).

60 *Id.* § 1103(a)(11)(B).

either ignored these provisions or construed them as expanding executive authority to decide where to detain individuals and in what conditions.[61] By contrast, the legislative and regulatory history suggests that these provisions were intended to constrain such authority and direct the Agency to protect the rights of people in detention. Third, the civil detention interest informs how courts should assess claims seeking to enforce informal agency rules governing detention conditions. Agency action stems in part from longstanding congressional oversight concerning the rights and interests of detained people, and thus enforcement of detention standards fits well within the *Accardi* doctrine.[62] The Agency should be bound by its detention standards absent a conflict with more rigorous statutory or constitutional requirements.

By emphasizing the interests of the political branches in regulating the conditions of immigration detention, I do not suggest that Congress or the Agency has taken a benign approach to immigration detention, or that courts have properly categorized the purpose of immigration detention as civil. As scholars have argued, the expansion of mandatory detention in the 1980s and 1990s and its ties to criminal legal consequences suggest that the federal government uses immigration detention for punitive purposes of retribution and deterrence.[63] So long as courts continue to categorize immigration detention as a form of civil confinement, however, they must consider the full range of interests at stake. This Article challenges courts to take seriously their role in identifying and enforcing the substantive rights of immigrants in detention in light of the doctrinal frameworks that courts have created and continue to maintain.

This Article proceeds in three parts. Part I describes how federal courts have interpreted potential sources of substantive immigration detention law and why some have produced, through their decisions, lawlessness for immigrants facing poor conditions of confinement.[64] I focus on three areas: substantive due process, statutory immigration law interpretation, and the enforcement of agency detention standards. In each of these realms, a growing number of courts have rejected detained immigrants' claims based on a perceived conflict with the political branches' interest in unfettered detention authority.

Part II challenges this judicial account by unearthing the history of congressional and administrative action to address the conditions of civil immigration confinement, unwinding the political branches' civil

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[61] *See infra* pp. 1210–11.

[62] *See infra* notes 212–25 and accompanying text.

[63] *See, e.g.*, César Cuauhtémoc García Hernández, *Immigration Detention as Punishment*, 61 UCLA L. REV. 1346, 1372–79 (2014); Juliet P. Stumpf, *Civil Detention and Other Oxymorons*, 40 QUEEN'S L.J. 55, 68–72 (2014).

[64] By "lawlessness," I refer to the absence of predictable and enforceable standards by which detained immigrants may measure the lawfulness of their substantive conditions of confinement and seek meaningful redress.

detention interest from their broader expansion of detention overall. I focus on congressional and executive action to regulate the conditions of immigration confinement during three periods — the federalization of immigration detention at the turn of the twentieth century, the expansion of detention during the internal security era, and the entrenchment of detention during the modern era. I argue that the political branches have expressed significant concern over the conditions of immigration confinement, with Congress directing federal immigration authorities to ensure civil conditions in the face of perceived agency mismanagement.

Part III then considers the doctrinal implications of the civil detention interest, returning to the substantive due process jurisprudence, statutory interpretation questions, and enforcement of agency detention standards discussed in Part I. Courts have placed undue weight on the federal government's interest in detention when addressing whether conditions are unconstitutionally punitive and whether jailers demonstrate deliberate indifference. Courts have either ignored or misconstrued statutory provisions that direct administrative officials to ensure appropriate conditions of confinement. Courts' reluctance to require the Agency to comply with detention standards is misplaced, as the enforcement of these standards implicates the concerns at the heart of the *Accardi* doctrine and aligns with congressional intent. A shift in judicial approach to conditions claims — one that more fully considers the complex interests of the political branches in regulating the conditions of detention — should result in more robust enforcement of substantive rights for detained immigrants. I conclude, however, by taking seriously the proposition that some courts will continue to fail to enforce the substantive law governing the conditions of immigration detention. This failure lends weight to critiques of the immigration detention system as a whole.

I. The Lawlessness of Immigration Detention

The United States imprisons hundreds of thousands of adult immigrants each year pending civil proceedings to deport them from the United States or grant them a right to remain.[65] To sustain this system, ICE relies on a variety of arrangements with federal, state, local, and private entities. In fiscal year 2023, ICE relied on "150 . . . facilities across the nation"[66] to detain 273,220 immigrants.[67] While a small number of these facilities are federal facilities (as in, federally owned "Service Processing Centers" or "Staging Facilities"), the vast majority are private prisons (as in, privately owned "Contract Detention Facilities"), local jails (as in, facilities in the criminal legal system that set aside bed space

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[65] *See Immigration Detention 101*, *supra* note 9.

[66] U.S. Immigr. & Customs Enf't, Fiscal Year 2023 ICE Annual Report 18 (2023), https://www.ice.gov/doclib/eoy/iceAnnualReportFY2023.pdf [https://perma.cc/S6CT-E2GQ].

[67] *Id.* at 19 fig.10.

for immigration detention through an "Intergovernmental Service Agreement"), or a combination of local-private partnerships.[68]

Throughout the sprawling immigration detention system, immigrants and nongovernmental groups have reported poor conditions of confinement.[69] Allegations of medical mistreatment and neglect, inadequate nutrition, physical and sexual abuse, excessive force, solitary confinement, discrimination, and retaliation are widespread.[70] To challenge these conditions of confinement, immigrants have raised a variety of constitutional, statutory, and administrative claims in federal court. In this Part, I describe how some federal courts have interpreted potential sources of substantive law to produce, through decisions denying claims for relief, lawlessness for immigrants facing poor conditions of confinement.

A. Constitutional Challenges

Courts apply constitutional law differently within prison walls. Until the 1960s, federal courts applied a "hands-off" approach to prisons in the United States, often refusing to intervene in cases challenging the constitutionality of prison conditions.[71] After courts began to engage

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[68] *See ICE Detention Statistics*, U.S. IMMIGR. & CUSTOMS ENF'T (2023), https://www.ice.gov/doclib/detention/FY23_detentionStats.xlsx [https://perma.cc/X8DS-HQZV].

[69] *See, e.g.*, REBECCA GENDELMAN, HUM. RTS. FIRST, "I'M A PRISONER HERE": BIDEN ADMINISTRATION POLICIES LOCK UP ASYLUM SEEKERS 41–56 (2022), https://humanrightsfirst.org/wp-content/uploads/2022/09/ImaPrisonerHere.pdf [https://perma.cc/SX9M-7YRV]; TIMANTHA GOFF ET AL., BLACK LGBTQIA+ MIGRANT PROJECT ET AL., UNCOVERING THE TRUTH: VIOLENCE AND ABUSE AGAINST BLACK MIGRANTS IN IMMIGRATION DETENTION 9, 11, 13–15 (2022), https://www.freedomforimmigrants.org/s/Uncovering-the-Truth.pdf [https://perma.cc/ZM8L-6BXN]; EUNICE HYUNHYE CHO ET AL., ACLU ET AL., JUSTICE-FREE ZONES: U.S. IMMIGRATION DETENTION UNDER THE TRUMP ADMINISTRATION 4, 8 (2020), https://www.aclu.org/sites/default/files/field_document/justice-free_zones_immigrant_detention_report_aclu_hrw_nijc_0.pdf [https://perma.cc/PTH4-UN4G]; CLARA LONG, HUM. RTS. WATCH ET AL., CODE RED: THE FATAL CONSEQUENCES OF DANGEROUSLY SUBSTANDARD MEDICAL CARE IN IMMIGRATION DETENTION 1, 15 (2018), https://www.hrw.org/sites/default/files/report_pdf/us0618_immigration_web2.pdf [https://perma.cc/H7MV-MBR6]; MARY SMALL & HEIDI ALTMAN, DET. WATCH NETWORK & NAT'L IMMIGR. JUST. CTR., ICE LIES: PUBLIC DECEPTION, PRIVATE PROFIT 8 (2018), https://www.detentionwatchnetwork.org/sites/default/files/reports/IceLies_NIJC_DWN.pdf [https://perma.cc/JK8D-Q787]; CARL TAKEI ET AL., ACLU ET AL., FATAL NEGLECT: HOW ICE IGNORES DEATHS IN DETENTION 3 (2016), https://www.aclu.org/sites/default/files/field_document/fatal_neglect_acludwnnijc.pdf [https://perma.cc/VM9M-K54S]; CLAUDIA VALENZUELA ET AL., NAT'L IMMIGR. JUST. CTR. & DET. WATCH NETWORK, LIVES IN PERIL: HOW INEFFECTIVE INSPECTIONS MAKE ICE COMPLICIT IN IMMIGRATION DETENTION ABUSE 29 (2015), https://immigrantjustice.org/sites/default/files/content-type/research-item/documents/2017-03/THR-Inspections-FOIA-Report-October-2015-FINAL.pdf [https://perma.cc/J98R-NH39].

[70] *See* sources cited *supra* note 69.

[71] Justin Driver & Emma Kaufman, *The Incoherence of Prison Law*, 135 HARV. L. REV. 515, 530–31 (2021) (describing "the 'hands-off' era" as "an attitude rather than a formal legal doctrine," *id.* at 530, and emphasizing that "courts regulated prisons intermittently before the 1970s," *id.* at 530–31 (quoting MALCOLM M. FEELEY & EDWARD L. RUBIN, JUDICIAL POLICY MAKING

more rigorously with constitutional claims in prisons, they soon adopted doctrinal approaches that heavily favor prison operators.[72] These doctrines, which Professor Sharon Dolovich describes as "canons of evasion,"[73] permit federal courts "to maintain the appearance of meaningful judicial review" while "readily finding for the [prison operators] almost regardless of the facts before them."[74] Professor Emma Kaufman describes a "penal power doctrine," which courts deploy to "defer to penal policies that restrict prisoners' rights . . . on the ground that prisons are difficult institutions to run."[75]

As a result of these doctrines, constitutional protections for people in criminal confinement have withered on the vine. Courts, for example, have interpreted the Eighth Amendment's prohibition on cruel and unusual punishment to create onerous burdens on plaintiffs seeking redress.[76] The doctrine permits prison officials to subject individuals to medical neglect so long as they do not demonstrate "deliberate indifference" to serious medical needs — a standard akin to "criminal recklessness."[77] Courts justify this standard in light of the interpretation "that the Eighth Amendment prohibit[s] 'the *wanton* infliction of pain'"[78] and requires a "culpable state of mind necessary for the punishment to be regarded as 'cruel,' regardless of the actual suffering inflicted."[79] Other acts that would violate the Constitution in the free world — for example, restrictions on freedom of speech — may be permitted in prison. *Turner v. Safley*[80] permits prisons to violate the constitutional rights of people in prison where there is "a 'valid, rational connection' between the prison regulation and the legitimate governmental interest put forward to justify it."[81] With this test, the views of jail and prison officials are often given primacy: "When accommodation of an asserted right will have a significant 'ripple effect' on fellow inmates or on prison staff,

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AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA'S PRISONS 30–34 (1998))); *see also* Dolovich, *supra* note 45, at 305–16; Margo Schlanger, *The Constitutional Law of Incarceration, Reconfigured*, 103 CORNELL L. REV. 357, 368 n.53 (2018).

72 *See supra* notes 46–48 and accompanying text.

73 Dolovich, *supra* note 45, at 308 (emphasis omitted) (citing Sharon Dolovich, *Canons of Evasion in Constitutional Criminal Law*, *in* THE NEW CRIMINAL JUSTICE THINKING 111, 111 (Sharon Dolovich & Alexandra Natapoff eds., 2017)).

74 *Id.* at 307 (citing Sharon Dolovich, *Evading the Eighth Amendment: Prison Conditions and the Courts*, *in* THE EIGHTH AMENDMENT AND ITS FUTURE IN A NEW AGE OF PUNISHMENT 133, 134 (Meghan J. Ryan & William W. Berry III eds., 2020); Dolovich, *supra* note 73, at 112–13).

75 Kaufman, *supra* note 44, at 1383.

76 *See* Dolovich, *supra* note 45, at 307–11.

77 *Id.* at 310 (citing Farmer v. Brennan, 511 U.S. 825, 837 (1994)).

78 Wilson v. Seiter, 501 U.S. 294, 297 (1991) (quoting Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459, 463 (1947) (plurality opinion) (emphasis added)).

79 *Id.*

80 482 U.S. 78 (1987).

81 *Id.* at 89 (quoting Block v. Rutherford, 468 U.S. 576, 586 (1984), *superseded by statute on other grounds*, Religious Land Use and Institutionalized Persons Act of 2000, Pub. L. No. 106-274, 114 Stat. 803 (codified at 42 U.S.C. §§ 2000cc to 2000cc-5)).

courts should be particularly deferential to the informed discretion of corrections officials."[82]

The heavy deference to the perspectives of prison officials carries over to the civil confinement context, despite the inapplicability of some prison law doctrines. Because civil confinement is not legally considered punishment, for example, the Eighth Amendment does not apply.[83] Instead, courts have assessed conditions of confinement claims under the substantive due process clauses of the Fifth and Fourteenth Amendments. In *Bell v. Wolfish*,[84] the Court held that "the proper inquiry" in a case challenging the conditions of civil confinement under substantive due process "is whether [the] conditions amount to punishment of the detainee."[85] Under this test too, however, courts center the interests and objectives of the government. A condition amounts to punishment only if (i) a detention facility official acts with an expressed intent to punish, (ii) the condition is not reasonably related to a legitimate governmental objective, or (iii) the condition is excessive to a legitimate governmental objective.[86]

In theory, the *Bell* standard should be more generous than an Eighth Amendment standard. In reality, however, some courts have conflated the standards. In medical mistreatment cases, for example, some federal courts have imported the Eighth Amendment standards into the civil confinement context.[87] Under the *Bell* standard, one could construe medical negligence in certain contexts as lacking a reasonable relationship to a legitimate governmental objective or being excessive to that objective.[88] Under Eighth Amendment standards, however, negligence is not enough — one must establish that prison officials acted with "deliberate indifference."[89] By importing deliberate indifference into the civil confinement context, courts have "ignored *Bell*'s requirement that conditions be reasonably related to a legitimate purpose in favor of [the]

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[82] *Id.* at 90 (citing Jones v. N.C. Prisoners' Lab. Union, Inc., 433 U.S. 119, 132–33 (1977)); *see also* Driver & Kaufman, *supra* note 71, at 535–40 (discussing the impact of *Turner v. Safley* on the rights of people in prison).

[83] *See* Sharon Dolovich, *Cruelty, Prison Conditions, and the Eighth Amendment*, 84 N.Y.U. L. REV. 881, 886 n.15 (2009). Courts and scholars have also debated whether the *Safley* test should apply to immigration detention centers. *See, e.g.*, Alina Das, *Immigration Detention and Dissent: The Role of the First Amendment on the Road to Abolition*, 56 GA. L. REV. 1433, 1468–69 & nn.178–80 (2022) (describing debate over the application of *Safley* to immigration detention).

[84] 441 U.S. 520 (1979).

[85] *Id.* at 535.

[86] *See id.* at 538–39 (quoting Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168–69 (1963)) (citing Flemming v. Nestor, 363 U.S. 603, 613–17 (1960)).

[87] "[C]ourts routinely regard the Fourteenth Amendment due process rights of plaintiffs challenging the conditions of their confinement in jail as identical to those accorded sentenced offenders under the Eighth Amendment." Dolovich, *supra* note 83, at 886 n.15 (collecting cases); *see also* Garrett & Kovarsky, *supra* note 27, at 136 & n.132.

[88] *See Bell*, 441 U.S. at 538–39 (quoting *Mendoza-Martinez*, 372 U.S. at 168–69) (citing *Flemming*, 363 U.S. at 613–17).

[89] Wilson v. Seiter, 501 U.S. 294, 297 (1991) (quoting Estelle v. Gamble, 429 U.S. 97, 106 (1976)).

Gamble [Court's Eighth Amendment] framework — even though the former is a blanket rule against punitive conditions and the latter is a rule subdividing punitive conditions into permissible and impermissible categories."[90] Dolovich argues that this conflation has led to an improper "parity of treatment" of claims regarding unconstitutional conditions in criminal and civil confinement.[91]

A growing number of courts have begun to correct this conflation in the pretrial detention context by shifting to a more objective standard of reasonableness. In 2015, the Supreme Court used an objective reasonableness standard in *Kingsley v. Hendrickson*[92] to hold that the Fourteenth Amendment protects people in pretrial detention from the use of excessive force by staff.[93] However, lower courts are divided as to whether similar reasoning applies to conditions claims outside the excessive force context, such as medical claims.[94]

Immigrants seeking to challenge the conditions of their civil detention wade into an even more tangled doctrinal thicket. In addition to the heavy deference afforded to prison officials, immigrants also must overcome the heavy deference afforded to federal immigration officials. Under the "plenary power" doctrine, federal courts defer to the political branches' authority over federal immigration laws, declining to review the constitutionality of exclusion or deportation power.[95] A competing vision — the ill-named "aliens' rights tradition" — recognizes the rights of immigrants in areas "outside of the realm of immigration law."[96] In the 1980s and 1990s, when litigants challenged the conditions of immigration detention, courts were confronted with which doctrinal lens applied.[97] As Professor Margaret Taylor has explained, the boundaries of immigration law are "porous," allowing the plenary power doctrine to bleed into both the criminal and civil confinement of immigrants.[98] The confusion led some courts to require immigrants to meet standards beyond even those in the prison context at the time in order to challenge the conditions of their detention.[99]

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90 Garrett & Kovarsky, *supra* note 27, at 136.

91 Dolovich, *supra* note 83, at 886 n.15 (collecting cases).

92 576 U.S. 389 (2015).

93 *See id.* at 402.

94 *See, e.g.*, Brawner v. Scott County, 14 F.4th 585, 593–94, 596 (6th Cir. 2021) (extending the objective standard of *Kingsley* to medical neglect claims and discussing the circuit split).

95 *See, e.g.*, Motomura, *supra* note 41, at 547.

96 Margaret H. Taylor, *Detained Aliens Challenging Conditions of Confinement and the Porous Border of the Plenary Power Doctrine*, 22 HASTINGS CONST. L.Q. 1087, 1091–92 (1995).

97 *See id.* at 1092–93.

98 *Id.* at 1095.

99 *Id.* at 1093 (explaining and critiquing cases limiting immigrants detained at the border solely to the "right to be free from 'malicious infliction of cruel treatment' or 'gross physical abuse,'" describing these heightened requirements as exceeding those in criminal confinement and "reflect[ing] the silent influence of the plenary power doctrine on cases that should be governed by the aliens' rights tradition" (quoting Medina v. O'Neill, 838 F.2d 800, 803 (5th Cir. 1988); Adras v. Nelson, 917 F.2d 1552, 1559–60 (11th Cir. 1990))).

The COVID-19 pandemic brought a fresh wave of constitutional conditions litigation, including in the context of civil immigration detention.[100] Many experts warned early on that the virus would spread rapidly in prisons, jails, and detention centers if appropriate measures were not taken.[101] The Centers for Disease Control and Prevention (CDC) issued guidance on preventing the spread of COVID-19 in confinement.[102] People in both criminal and civil confinement began to challenge their jailers' failure to implement appropriate measures — such as social distancing, quarantine, personal protective equipment, population reduction, and treatment — as violations of their constitutional rights.[103]

The judicial response was mixed. Some courts responded by granting injunctive relief, ordering prisons, jails, and detention centers to take specific measures to combat the virus and, in some cases, ordering releases or directing population reductions.[104] Other courts, however, responded by restricting rights and remedies through their interpretation and application of constitutional constraints.[105] Professors Brandon Garrett and Lee Kovarsky describe the latter response as a two-fold erosion of constitutional rights.[106] First, courts increasingly displaced the *Bell* framework with the deliberate indifference test, which by definition accepts that conditions may be punitive in nature and places the jailers' knowledge and reckless disregard of the risk at the center of the inquiry.[107] Second, some courts "ratchet[ed] up the necessary showing to a level well beyond recklessness" by requiring a subjective intent or knowledge that their acts or omissions were harmful.[108] Jailers who allege in court that they believed they were doing their best under the circumstances could evade responsibility for disregarding objective risks.

In the civil immigration detention context, similar dynamics unfolded. Following the CDC guidance, ICE issued its own "Pandemic

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[100] *See* Garrett & Kovarsky, *supra* note 27, at 132–34 (describing the major types of custody and the potential constitutional challenges to each respective type).

[101] *Id.* at 128–29.

[102] *Id.* at 129.

[103] *Id.* at 130–32.

[104] *See id.* at 141–58.

[105] *See id.* at 159–64; Dolovich, *supra* note 45, at 333–40 (describing courts' "frequent recourse to three main pro-state strategies: selective reading of the facts; a recasting of governing constitutional standards — here, Eighth Amendment deliberate indifference; and a studied disregard of prisoners' lived experience during Covid and what the case at hand would mean in practical terms for incarcerated plaintiffs," *id.* at 334); *see also* Sharon Dolovich, *Mass Incarceration, Meet COVID-19*, U. CHI. L. REV. ONLINE (Nov. 16, 2020), https://lawreview.uchicago.edu/online-archive/mass-incarceration-meet-covid-19 [https://perma.cc/Z5FN-MHLB] (discussing cases in which federal courts declined to protect the rights of individuals in Federal Bureau of Prisons custody in response to COVID-19).

[106] Garrett & Kovarsky, *supra* note 27, at 162.

[107] *Id.*

[108] *Id.* at 163.

Response Requirements," which used mandatory language regarding detention facilities' obligations to control the virus.[109] COVID-19 nonetheless spread rapidly through the immigration detention system, and many immigrants and watchdog groups reported that various detention operators were failing to comply with CDC and ICE pandemic rules.[110] Individuals and groups of immigrants — sometimes on a class-wide basis — brought constitutional challenges to their detention, alleging both deliberate indifference to their serious medical needs and unconstitutionally punitive conditions.[111] Many district courts treated these claims favorably, more so than in other carceral contexts, leading to thousands of immigrants being released from detention.[112] In two circuits, however, appellate courts began to recalibrate the legal standards to curtail immigrants' rights or remedies. These decisions demonstrate an erosion of substantive due process frameworks in favor of extreme deference to the enforcement goals of immigration detention.

In *Hope v. Warden York County Prison*, for example, the Third Circuit overturned a set of decisions by a federal district court ordering the release of twenty-two medically vulnerable immigrants from two civil immigration prisons in Pennsylvania on substantive due process grounds.[113] The petitioners had sought a temporary restraining order and preliminary injunction against their continued detention in the

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109 U.S. IMMIGR. & CUSTOMS ENF'T, COVID-19 PANDEMIC RESPONSE REQUIREMENTS 4 (2020), https://www.ice.gov/doclib/coronavirus/eroCOVID19responseReqsCleanFacilities-v1.pdf [https://perma.cc/E3B3-H6WQ].

110 *See generally, e.g.*, GREGORY HOOKS & BOB LIBAL, DET. WATCH NETWORK, HOTBEDS OF INFECTION: HOW ICE DETENTION CONTRIBUTED TO THE SPREAD OF COVID-19 IN THE UNITED STATES (2020), https://www.detentionwatchnetwork.org/sites/default/files/reports/DWN_Hotbeds%20of%20Infection_2020_FOR%20WEB.pdf [https://perma.cc/SFW4-9UD3].

111 Garrett & Kovarsky, *supra* note 27, at 151–54 (describing district court responses to COVID-19-related constitutional challenges to immigration detention conditions).

112 *See, e.g.*, Roman v. Wolf, 977 F.3d 935, 939 (9th Cir. 2020) (per curiam) (affirming in part the district court's decision to grant injunctive relief to noncitizen detainees alleging conditions at the center violated their constitutional rights); Zepeda Rivas v. Jennings, 845 F. App'x 530, 532–33 (9th Cir. 2021) (explaining that the district court had "issued . . . bail orders granting indefinite release to over 130 detainees" who had alleged their confinement conditions violated their Fifth Amendment rights, *id.* at 533); Yanes v. Martin, 464 F. Supp. 3d 467, 475 (D.R.I. 2020), *appeal dismissed*, No. 20-1762, 2020 WL 8482783 (1st Cir. Oct. 6, 2020); Medeiros v. Martin, 458 F. Supp. 3d 122, 130 (D.R.I. 2020); Gomes v. U.S. Dep't of Homeland Sec., 460 F. Supp. 3d 132, 152 (D.N.H. 2020); Savino v. Souza, 459 F. Supp. 3d 317, 320 (D. Mass. 2020); Basank v. Decker, 449 F. Supp. 3d 205, 209 (S.D.N.Y. 2020); Coronel v. Decker, 449 F. Supp. 3d 274, 279 (S.D.N.Y. 2020); Cristian A.R. v. Decker, 453 F. Supp. 3d 670, 674 (D.N.J. 2020); Coreas v. Bounds, 457 F. Supp. 3d 460, 464 (D. Md. 2020); Vazquez Barrera v. Wolf, 455 F. Supp. 3d 330, 342 (S.D. Tex. 2020); Malam v. Adducci, 469 F. Supp. 3d 767, 795 (E.D. Mich. 2020); Amaya-Cruz v. Adducci, No. 20CV789, 2020 WL 1903123, at *3 (N.D. Ohio Apr. 18, 2020); Favi v. Kolitwenzew, No. 20-cv-2087, 2020 WL 2114566, at *12 (C.D. Ill. May 4, 2020), *appeal dismissed*, No. 20-2372, 2020 WL 8262041 (7th Cir. Oct. 5, 2020); Alcantara v. Archambeault, 613 F. Supp. 3d 1337, 1353 (S.D. Cal. 2020); Pimentel-Estrada v. Barr, 458 F. Supp. 3d 1226, 1253 (W.D. Wash. 2020); Garrett & Kovarsky, *supra* note 27, at 151 (describing the relative success of COVID-19 claims for people in immigration detention when compared to other incarcerated individuals).

113 972 F.3d 310, 317, 334 (3d Cir. 2020).

spring of 2020, submitting declarations regarding the prisons' lack of "effective containment measures" such as regular COVID-19 testing, temperature checks, protective equipment like gloves and masks, quarantine, and cleaning procedures.[114] Applying the *Bell* substantive due process framework, the district court concluded there was "no rational relationship between a legitimate government objective and keeping Petitioners detained in unsanitary, tightly-packed environments — doing so would constitute a punishment to Petitioners."[115] While ICE argued that continued detention was justified by the government's legitimate interest in "preventing detained aliens from absconding and ensuring that they appear for removal proceedings,"[116] the district court held that "ICE has a plethora of means *other than* physical detention at their disposal by which they may monitor civil detainees and ensure that they are present at removal proceedings, including remote monitoring and routine check-ins."[117] On balance, the district court concluded that "[p]hysical detention itself will place a burden on community healthcare systems and will needlessly endanger Petitioners, prison employees, and the greater community. We cannot see the rational basis of such a risk."[118]

The district court entered a temporary restraining order releasing the petitioners, ordering them to "self-quarantine . . . for fourteen . . . days," and setting a deadline for the government to "show cause why the [temporary restraining order] should not be converted into a preliminary injunction."[119] Following a motion to reconsider, the district court modified its order to place conditions on the release of the detained individuals, permitting their redetention under certain circumstances, but again rejected the government's arguments on the merits of the claim despite additional evidence regarding the government's efforts to address the conditions of the prisons.[120] "[R]amp[ing] up their sanitation" efforts, the district court held, does not equate to social distancing, and the risk of the rapid spread of COVID-19 remained.[121]

On appeal, the Third Circuit vacated and remanded.[122] Addressing the district court's *Bell* analysis, the Third Circuit held that the court had discounted "the legitimate objectives and difficulties of managing a

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114 Hope v. Doll, No. 20-cv-562, 2020 WL 5035725, at *3 (M.D. Pa. Apr. 7, 2020), *vacated and remanded sub nom.* Hope v. Warden York Cnty. Prison, 972 F.3d 310 (3d Cir. 2020).

115 *Id.* at *4 (quoting Thakker v. Doll, 451 F. Supp. 3d 358, 370 (M.D. Pa. 2020)).

116 *Id.* (quoting Respondents' Response and Opposition to Petition for Writ of Habeas Corpus and Motion for Temporary Restraining Order and or Preliminary Injunction at 38, *Thakker*, 451 F. Supp. 3d 358 (No. 20-cv-480)).

117 *Id.* (quoting *Thakker*, 451 F. Supp. 3d at 371).

118 *Id.* (quoting *Thakker*, 451 F. Supp. 3d at 371).

119 *Id.* at *6 (emphases omitted).

120 Hope v. Doll, No. 20-cv-562, 2020 WL 5035724, at *1–2 (M.D. Pa. Apr. 10, 2020), *vacated and remanded sub nom.* Hope v. Warden York Cnty. Prison, 972 F.3d 310 (3d Cir. 2020).

121 *Id.* at *2.

122 *Hope*, 972 F.3d at 334.

detention facility, and the objectives of immigration detention: ensuring appearance at detention proceedings and protecting the public from harm."[123] The Third Circuit emphasized *Bell*'s admonition to defer to the judgment of corrections officials, quoting *Bell* for the proposition that "the operation of our correctional facilities is peculiarly the province of the Legislative and Executive Branches of our Government not the Judicial."[124] Citing Supreme Court precedent that civil immigration detention is constitutional, it further rejected the argument that the existence of alternatives to detention rendered the government's choice to rely on detention punitive.[125]

The Third Circuit also rejected the petitioners' alternative argument that the government was deliberately indifferent to their serious medical needs. Once again, the appellate court held that "deference is due [to] prison administrators here."[126] The Third Circuit held that the district court had not afforded appropriate "leeway to prison . . . officials" in light of their efforts to implement standards for managing communicable disease in the detention facilities.[127] It stated that the plaintiffs had to "show [that] the Government knew of *and disregarded* an excessive risk to their health and safety," suggesting a subjective standard drawn from Eighth Amendment case law.[128] Considering the unique challenges posed by COVID-19 and the government's evidence that it was attempting to address the virus within facilities, the Third Circuit concluded that the petitioners failed to establish any "likelihood of success" on their deliberate indifference claim.[129] It further chastised the district court for its "all-or-nothing" remedy of release, "[i]n view of the legitimacy of mandatory and discretionary detention."[130]

In the Ninth Circuit, detained immigrants sought a broader array of relief to address their conditions of confinement during the pandemic, but they too received pushback at the appellate level — at first as a matter of remedies, and subsequently as a matter of rights. In *Roman v. Wolf*,[131] for example, immigrants detained at the Adelanto Immigration and Customs Enforcement Processing Center filed a class action lawsuit seeking protective measures and habeas relief based on the detention center's "failure to implement necessary protective measures — including social distancing, sanitation, and the provision of sufficient masks and soap" in violation of the plaintiffs' substantive due process

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123 *Id.* at 326 (citation omitted) (citing Hubbard v. Taylor, 538 F.3d 229, 233 (3d Cir. 2008); Union Cnty. Jail Inmates v. Di Buono, 713 F.2d 984, 993 (3d Cir. 1983); 8 U.S.C. § 1226(c)).

124 *Id.* at 327 (quoting Bell v. Wolfish, 441 U.S. 520, 548 (1979)).

125 *Id.* at 328–29 (citing Demore v. Kim, 538 U.S. 510, 531 (2003); Wong Wing v. United States, 163 U.S. 228, 235 (1896)).

126 *Id.* at 330.

127 *Id.*

128 *Id.* at 329 (citing Nicini v. Morra, 212 F.3d 798, 811 (3d Cir. 2000)).

129 *Id.* at 331.

130 *Id.* at 333.

131 977 F.3d 935 (9th Cir. 2020).

rights.[132] In April 2020, the district court "granted a preliminary injunction that . . . imposed a moratorium on Adelanto's receipt of new detainees, required specific sanitation measures, mandated compliance with guidance issued by the [CDC], and ordered the facility's detainee population to be reduced to a level that would enable social distancing."[133] The Ninth Circuit stayed the injunction pending appeal, except for the provision requiring compliance with CDC guidance.[134] On the merits, the Ninth Circuit affirmed the district court's conclusion that ICE had likely violated the substantive due process rights of the people it detained at Adelanto, but "nonetheless vacate[d] the [portion of the district court's decision] that ordered specific measures to be implemented at Adelanto."[135]

The Ninth Circuit sought to recalibrate the degree of judicial interference with the operations of Adelanto. Five months had passed since the injunction was ordered and "conditions at Adelanto appear[ed] to be evolving rapidly."[136] The Ninth Circuit observed that ICE had reduced the population substantially and had begun center-wide testing, "adjust[ing] its [various] procedures for 'cohort[ing]'" and quarantine accordingly.[137] It concluded that the district court would be in the best position to determine what ongoing measures would be required in light of the current circumstances.[138] To guide the district court on remand, the Ninth Circuit specified that while the "court had broad equitable authority to remedy a likely constitutional violation,"[139] such a remedy should not include an order to comply with CDC guidelines because "those guidelines do not provide a workable standard for a preliminary injunction."[140] The Ninth Circuit noted that the guidelines "span[] 25 pages and make[] hundreds of recommendations, many of which lack specificity" and "contain[] key caveats" allowing unspecified adaptations.[141] It generally cautioned against "imposing provisions that micromanage the Government's administration of conditions at Adelanto."[142]

The discomfort with judicial oversight of detention administration as a remedy to constitutional violations eventually bled into the Ninth Circuit's analysis of the scope of constitutional rights when it overturned nationwide class injunctive relief in *Fraihat*. Before the district court, a group of detained immigrants with certain health conditions or

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132 *Id.* at 939.
133 *Id.*
134 Roman v. Wolf, No. 20-55436, 2020 WL 2188048, at *1 (9th Cir. May 5, 2020).
135 *Wolf*, 977 F.3d at 945.
136 *Id.*
137 *Id.* (third alteration in original).
138 *See id.*
139 *Id.*
140 *Id.* at 946.
141 *Id.*
142 *Id.*

disabilities sought nationwide preliminary injunctive relief based on their vulnerability to "serious illness or death" due to COVID-19.[143] They alleged that ICE had failed to identify or track people at heightened risk of COVID-19 in immigration detention and that ICE's emerging COVID-19 guidance and custody review process were ineffectual because its rules were nonbinding and inadequately incorporated preventative measures like social distancing, medical isolation, and the provision of personal protective equipment.[144] After reviewing evidence of conditions across twenty-nine facilities nationwide, the district court granted classwide relief.[145] The court found deliberate indifference in light of ICE's failures to (a) "identify" and "require specific protection" for medically vulnerable detained immigrants and (b) "take measures within ICE's power to increase the distance between detainees and prevent the spread of infectious disease."[146] While ICE did issue some guidance, the court observed that "there is a serious question whether the issuance of non-binding recommendations is an objectively 'reasonable' response to a pandemic, given the high degree of risk and obvious consequences of inaction."[147]

The district court also held that the conditions were unconstitutionally punitive under *Bell*. Under Ninth Circuit precedent, plaintiffs may establish a rebuttable presumption of unconstitutional punitiveness if a civil detainee is "not afforded the 'more considerate' treatment"[148] available in a criminal pretrial facility or if the conditions are "employed to achieve objectives that could be accomplished in so many alternative and less harsh methods."[149] Once established, defendants may rebut if they "offer[] legitimate, non-punitive justifications for the restrictions."[150] Applying this test, the district court held that "it is likely punitive for a civil detention administrator to fail to mandate compliance with widely accepted hygiene, protective equipment, and distancing measures until the peak of the pandemic, and to fail to take similar systemwide actions as jails and prisons."[151] Comparing ICE's pandemic response to the "more decisive and urgent" directive from the Federal Bureau of Prisons to identify vulnerable people and reduce prison populations, the district court found that the conditions were presumptively

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143 Fraihat v. U.S. Immigr. & Customs Enf't, 445 F. Supp. 3d 709, 719, 736 (C.D. Cal. 2020), *order clarified*, No. 19-CV-01546, 2020 WL 6541994 (C.D. Cal. Oct. 7, 2020), *rev'd*, 16 F.4th 613 (9th Cir. 2021).

144 *Id.* at 727–28.

145 *Id.* at 728–34, 750–51.

146 *Id.* at 745.

147 *Id.* at 744.

148 Jones v. Blanas, 393 F.3d 918, 934 (9th Cir. 2004) (quoting Youngberg v. Romeo, 457 U.S. 307, 322 (1982)).

149 *Id.* (quoting Hallstrom v. City of Garden City, 991 F.2d 1473, 1484 (9th Cir. 1993)).

150 *Fraihat*, 445 F. Supp. 3d at 746 (citing *Jones*, 393 F.3d at 934).

151 *Id.* at 746–47.

punitive.[152] ICE's rebuttal focused on "[t]he legitimate purpose advanced by immigration detention . . . to secure attendance at hearings and to ensure the safety of the community."[153] The district court rejected this rebuttal, observing that "attendance at hearings cannot be secured reliably when the detainee has, is at risk of having, or is at risk of infecting court staff with a deadly infectious disease with no known cure" and "that public safety as a whole is seriously diminished by facility outbreaks, which further tax community health resources."[154] It therefore concluded that ICE's "inactions are likely 'arbitrary or purposeless,' and are excessive given the nature and purpose [of] civil detention."[155] On the basis of its constitutional and other legal findings, the court granted the plaintiffs a nationwide preliminary injunction, ordering "a broad range of obligations on the federal government, including" the identification of individuals at high risk of serious illness or death, custody review directives, and the issuance of "a comprehensive Performance Standard" to address COVID-19 related requirements.[156]

On appeal, the Ninth Circuit ruled 2–1 to overturn the preliminary injunction.[157] The majority characterized the plaintiffs as "challeng[ing] ICE's nationwide COVID-19 directives, asking a district court mid-pandemic to assume control over the top-level policies governing ICE's efforts to combat the viral outbreak."[158] Characterizing the remedy as "sweeping" and "extraordinary," the majority held that the plaintiffs were required, but failed, to demonstrate "constitutional and statutory violations on a programmatic, nationwide level."[159] The remedy ostensibly drove the majority to require the plaintiffs to make a heightened showing to succeed on its constitutional claims.[160]

With respect to deliberate indifference, the Ninth Circuit imported a separation of powers principle into its critique, suggesting "that far-reaching intrusion into matters initially committed to a coordinate Branch requires a commensurately high showing sufficient to warrant such a significant exercise of judicial power."[161] The majority faulted the district court's deliberate indifference analysis for failing to defer to "the Executive Branch's preeminent role in managing immigration detention facilities and its greater institutional competence in this area."[162] Because ICE "took steps to address COVID-19," the majority rejected

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[152] *Id.* at 747.
[153] *Id.* (citing Zadvydas v. Davis, 533 U.S. 678, 699 (2001)).
[154] *Id.*
[155] *Id.* (quoting Bell v. Wolfish, 441 U.S. 520, 539 (1979)).
[156] Fraihat v. U.S. Immigr. & Customs Enf't, 16 F.4th 613, 618 (9th Cir. 2021).
[157] *See id.*
[158] *Id.*
[159] *Id.*
[160] *See id.*
[161] *Id.* at 619.
[162] *Id.* at 638 (citing Bell v. Wolfish, 441 U.S. 520, 548 (1979); Roman v. Wolf, 977 F.3d 935, 947 (9th Cir. 2020) (Miller, J., concurring in part and concurring in the judgment)).

the possibility that the plaintiffs could demonstrate deliberate indifference — irrespective of whether or not the steps were effective.[163] "[W]hether one would characterize ICE's spring 2020 policy response to COVID-19 as strong, fair, needing improvement, or something else, it simply cannot be described in the way that matters here: as a reckless disregard of the very health risks it forthrightly identified and directly sought to mitigate."[164] In so holding, as the dissenting judge noted, the majority "functionally . . . evaluate[d] . . . [the] reckless disregard claim under a subjective, instead of the proper, objective, standard."[165]

The Ninth Circuit similarly rejected the *Bell* claim in light of ICE's issuance of "mandatory" pandemic guidance. "[R]egardless of ICE's earlier actions, by April 10, 2020, the Pandemic Response Requirements imposed a host of mandatory obligations on all ICE detention facilities, including mandatory compliance with the CDC Guidelines."[166] Without analyzing whether detention facilities complied with the guidance, the majority concluded that "[j]ust as ICE's national directives as of that time did not reflect deliberate indifference to COVID-19, they did not create excessive conditions of 'punishment' either."[167] It also questioned whether any presumption of punitive conditions could arise from comparing the treatment of people in immigration detention with people in criminal custody.[168] Even if any such presumption would apply, the Ninth Circuit held that it would require plaintiffs to make a "monumental comparison: all ICE detention facilities against (presumably) all prisons housing criminal detainees."[169] Once again, the majority held that the detained immigrants failed to prove their claim based on a heightened standard.[170]

Hope and *Fraihat* are troubling cases. Arguably, they can be limited to their factual contexts. In *Hope*, emergent circumstances prevented the record from being as developed as it ideally would have been.[171] In *Fraihat*, where the record was extensively developed, the majority seemed nonetheless troubled by "the immensity of the relief sought" in challenging nationwide policies, which the majority used to distinguish (without overruling) other Ninth Circuit precedent regarding unconstitutional conditions in specific immigration facilities within the circuit.[172]

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163 *Id.* at 637.

164 *Id.* at 638.

165 *Id.* at 651 (Berzon, J., dissenting) (citing *id.* at 636–39 (majority opinion)).

166 *Id.* at 648 (majority opinion).

167 *Id.*

168 *See id.*

169 *Id.* at 648–49.

170 *See id.* at 649.

171 Hope v. Warden York Cnty. Prison, 972 F.3d 310, 327–28, 334 (3d Cir. 2020) (discussing the challenges of record development during exigent circumstances like the COVID-19 pandemic).

172 *Fraihat*, 16 F.4th at 646 (distinguishing Roman v. Wolf, 977 F.3d 935 (9th Cir. 2020), and Zepeda Rivas v. Jennings, 845 F. App'x 530 (9th Cir. 2021)).

Even taken in their factual contexts, the reasoning underlying these decisions is problematic. Both cases apply deference principles to reinforce executive discretion to manage detention facilities as the Agency sees fit. A broad array of remedies — whether release or various forms of oversight of conditions — struck these appellate courts as judicial overreach and impermissible interference with the domain of the political branches. This emerging jurisprudence assumes that Congress intended executive detention power to be expansive and relatively free from judicial interference. It further assumes agency expertise in detention management and good faith in its adaptation of standards. Detained immigrants may still prevail under these standards, but only if they meet an increasingly heavy burden of proof to overcome heavy deference to the federal government.

B. Statutory Immigration Law Challenges

Statutory limitations on detention power have given detained immigrants even less substantive law to pursue conditions claims. The authority of federal immigration officials to detain is located within the INA.[173] The vast majority of these provisions authorize discretionary and, in some cases, mandatory detention pending inspection and deportation, and provide some procedural rules for bond hearings.[174] Only two provisions within the INA refer to the nature or conditions of such detention. First, 8 U.S.C. § 1231(g)(1) requires "[t]he Attorney General [to] arrange . . . appropriate places of detention" for individuals in immigration custody.[175] Second, 8 U.S.C. § 1103(a)(11) requires "[t]he Attorney General, in support of persons in administrative detention in non-Federal institutions," "to make payments . . . for necessary clothing, medical care, necessary guard hire, and the housing, care, and security"[176] of detained persons and "to enter into . . . cooperative agreement[s] with" state or local governments to ensure "acceptable conditions of confinement."[177]

Neither provision has been interpreted by courts as creating substantive rights for people in detention. Instead, courts tend to read the INA through a deferential, plenary power lens, giving the legislative and executive branches wide leeway to exercise detention power. They generally do not consider whether Congress may have instead sought to limit executive power to detain.

With this perspective in mind, several courts have examined the statutory requirement that the Attorney General arrange "appropriate

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[173] 8 U.S.C. §§ 1101–1537.
[174] *See, e.g.*, *id.* §§ 1225–1226, 1231.
[175] *Id.* § 1231(g)(1).
[176] *Id.* § 1103(a)(11)(A).
[177] *Id.* § 1103(a)(11)(B).

places of detention" for noncitizens in detention.[178] They generally view the statute as a grant, rather than a restraint, of authority to federal immigration officials to make certain detention decisions. They disagree primarily on the purpose of that grant of authority. For example, the Fourth Circuit has construed the statute as governing "the government's brick and mortar obligations for obtaining facilities in which to detain aliens" and granting implied detention authority, subject to judicial review.[179] The Tenth Circuit has interpreted the provision even more broadly to give the Attorney General unreviewable "discretionary power to transfer aliens from one locale to another, as she deems appropriate."[180] The Ninth Circuit described the provision as granting "plenary power" to the Executive to arrange places of detention, including through private prisons.[181] No court interpreted the term "appropriate" as limiting the discretion or otherwise restraining the authority of the Agency when arranging places of detention.

Even less attention has been paid to the meaning of 8 U.S.C. § 1103(a)(11). In one promising case, a group of noncitizens in ICE custody in a Clay County jail in Indiana filed a class action lawsuit seeking declaratory and injunctive relief to stop an unlawful detention arrangement between the county and ICE.[182] The plaintiffs alleged that the federal and county defendants failed to "properly allocate funds for the care and custody of noncitizens" at the jail and failed to ensure adequate living conditions as required under 8 U.S.C. § 1103(a)(11) and the terms of the detention contract.[183] In construing this provision, the district court held that "[t]he INA restricts both the purpose of the detention

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[178] *See, e.g.*, GEO Grp., Inc. v. Newsom, 15 F.4th 919, 930 (9th Cir. 2021), *reh'g en banc granted*, 31 F.4th 1109, 1110 (9th Cir.), *on reh'g en banc*, 50 F.4th 745, 757 n.6 (9th Cir. 2022); Reyna *ex rel.* J.F.G. v. Hott, 921 F.3d 204, 209 (4th Cir. 2019); Aguilar v. U.S. Immigr. & Customs Enf't, 510 F.3d 1, 20 (1st Cir. 2007); Ballesteros v. Ashcroft, 452 F.3d 1153, 1159 (10th Cir. 2006), *reh'g granted in part sub nom.* Ballesteros v. Gonzales, 482 F.3d 1205, 1205 (10th Cir. 2007); Wong v. United States, 373 F.3d 952, 967 n.20 (9th Cir. 2004), *abrogated by* Wilkie v. Robbins, 551 U.S. 537 (2007), *as recognized in* Pettibone v. Russell, 59 F.4th 449, 453 (9th Cir. 2023); Spencer Enters., Inc. v. United States, 345 F.3d 683, 697–98 (9th Cir. 2003); Van Dinh v. Reno, 197 F.3d 427, 433 (10th Cir. 1999); Comm. of Cent. Am. Refugees v. Immigr. & Naturalization Serv., 795 F.2d 1434, 1440 (9th Cir.), *amended by* 807 F.2d 769, 769 (9th Cir. 1986).

[179] *Reyna ex rel. J.F.G.*, 921 F.3d at 209; *see id.* at 210.

[180] *Van Dinh*, 197 F.3d at 433 (citing Rios-Berrios v. Immigr. & Naturalization Serv., 776 F.2d 859, 863 (9th Cir. 1985); Sasso v. Milhollan, 735 F. Supp. 1045, 1048 (S.D. Fla. 1990)).

[181] *GEO Grp., Inc.*, 15 F.4th at 931 n.4 ("Congress already provided plenary power to the Secretary to 'arrange for appropriate places of detention for aliens.' So there was no need to specify private parties." (citation omitted) (quoting 8 U.S.C. § 1231(g)(1))); *id.* at 935 ("It is thus 'clear and manifest' that the Secretary has broad power and discretion to arrange for appropriate places of detention, including the right to contract with private companies to operate detention facilities." (quoting Wyeth v. Levine, 555 U.S. 555, 565 (2009))).

[182] Class Action Complaint at 1, 7, Cardenas v. U.S. Immigr. & Customs Enf't, No. 22-CV-00801 (S.D. Ind. Mar. 29, 2023).

[183] *Id.* at 8; *see also id.* at 64, 67–68.

contracts and the use of federal funds paid under the contracts."[184] However, it also held that the statute "does not function to benefit detainees."[185] As a result, the court held that the "[p]laintiffs lack[ed] standing to enforce the [detention contract] directly against" the county.[186] While the plaintiffs had standing to bring certain claims against ICE,[187] the court held that they "ha[d] not cited any meaningful standard against which the Court may judge ICE's enforcement discretion" to continue payments to the jail despite the alleged misuse of funds.[188] In response, the plaintiffs amended their complaint to add new claims alleging that ICE knowingly made payments to Clay County for an improper purpose and affirmatively chose to abdicate its duty to enforce applicable regulations governing the monitoring of federal funding.[189] The district court allowed these new claims to go forward based on the heightened allegations of affirmative ICE misconduct, but dismissed other claims challenging ICE inaction based on the lack of "indicia of an intent by Congress to circumscribe the enforcement discretion" of the Agency to monitor and fund detention facilities.[190]

Courts have largely read the INA as reinforcing the Agency's broad enforcement discretion, viewing the legislative and executive branches as largely aligned in the goal of facilitating detention. Against this backdrop, detained immigrants face an uphill battle when trying to use the language of "appropriate places" or "acceptable conditions" to enforce their substantive rights in detention.

C. Administrative Law Challenges

The most detailed source of substantive law governing immigration detention conditions is found in a set of agency standards, known as the National Detention Standards.[191] Since 1998,[192] federal immigration officials have published versions of these standards to govern the health, safety, and care of individuals in detention.[193] The last major

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[184] Xirum v. U.S. Immigr. & Customs Enf't, No. 22-CV-00801, 2023 WL 2683112, at *2 (S.D. Ind. Mar. 29, 2023).

[185] *Id.* at *19.

[186] *Id.* at *21.

[187] *Id.* at *10, *12.

[188] *Id.* at *14.

[189] Xirum v. U.S. Immigr. & Customs Enf't, No. 22-CV-00801, 2024 WL 3718145, at *1 (S.D. Ind. Aug. 8, 2024).

[190] *Id.* at *9, *16.

[191] *See ICE Detention Standards*, U.S. IMMIGR. & CUSTOMS ENF'T (Aug. 8, 2023), https://www.ice.gov/factsheets/facilities-pbnds [https://perma.cc/XFZ9-TZA8].

[192] *See* JENNIFER BAILEY, HUM. RTS. WATCH, LOCKED AWAY: IMMIGRATION DETAINEES IN JAILS IN THE UNITED STATES (1998), https://www.hrw.org/legacy/reports98/us-immig/Ins989-03.htm#P367_55988 [https://perma.cc/U2J2-8YXA].

[193] *See* U.S. IMMIGR. & CUSTOMS ENF'T, NATIONAL DETENTION STANDARDS FOR NON-DEDICATED FACILITIES i (2019). In addition to its broad set of detention standards, ICE has also

supplement to the standards came in 2020 in response to the COVID-19 pandemic, when ICE published its Pandemic Response Requirements to contextualize the preexisting standards requiring detention facilities to comply with federal, state, and local public health rules.[194] Together, these standards present a series of rules for the provision of medical care, the prevention of communicable disease, sanitation, food services, legal visits and law library access, family and community visitation, solitary confinement and similar uses of segregation, disability access, sexual assault and abuse prevention and intervention, and language access.[195] From the start, however, federal immigration officials have framed the standards as nonbinding agency guidance that is judicially difficult to enforce.[196] The INS and its successor agency ICE relied solely on internal inspection and contract mechanisms to enforce compliance with the standards,[197] but watchdog groups quickly observed that these mechanisms were ineffective. For example, a U.S. Department of Homeland Security (DHS) Office of the Inspector General report identified noncompliance with detention standards in five audited facilities.[198]

Efforts to urge the federal government to replace the standards with formal rules were unsuccessful. In 2007, seven immigrant rights

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issued several standards and directives tailored to specific circumstances in detention. *See generally, e.g.*, U.S. IMMIGR. & CUSTOMS ENF'T, DIRECTIVE 11065.1, REVIEW OF THE USE OF SEGREGATION FOR ICE DETAINEES (Sept. 4, 2013), https://www.ice.gov/doclib/detention-reform/pdf/segregation_directive.pdf [https://perma.cc/5CLS-T9QZ]; U.S. IMMIGR. & CUSTOMS ENF'T, DIRECTIVE 11032.4, IDENTIFICATION AND MONITORING OF PREGNANT, POSTPARTUM, OR NURSING INDIVIDUALS (July 1, 2021), https://www.ice.gov/doclib/detention/11032.4_IdentificationMonitoringPregnantPostpartumNursingIndividuals.pdf [https://perma.cc/US3U-NZW2]; U.S. IMMIGR. & CUSTOMS ENF'T, DIRECTIVE 11063.2, IDENTIFICATION, COMMUNICATION, RECORDKEEPING, AND SAFE RELEASE PLANNING FOR DETAINED INDIVIDUALS WITH SERIOUS MENTAL DISORDERS OR CONDITIONS AND/OR WHO ARE DETERMINED TO BE INCOMPETENT BY AN IMMIGRATION JUDGE (Apr. 5, 2022), https://www.ice.gov/doclib/news/releases/2022/11063-2.pdf [https://perma.cc/GY9W-962L]; U.S. IMMIGR. & CUSTOMS ENF'T, DIRECTIVE 11003.5, NOTIFICATION, REVIEW, AND REPORTING REQUIREMENTS FOR DETAINEE DEATHS (Oct. 25, 2021), https://www.ice.gov/doclib/detention/directive11003-5.pdf [https://perma.cc/X7K9-WJKP]; U.S. IMMIGR. & CUSTOMS ENF'T HEALTH SERV. CORPS, ICE HEALTH SERVICE CORPS (IHSC) INDEX, https://s3.documentcloud.org/documents/6795526/IHSC-Index.pdf [https://perma.cc/T4NP-GLMJ]. Arguments about the enforceability of immigration detention standards also apply to these rules.

194 *See* ENF'T & REMOVAL OPERATIONS, U.S. IMMIGR. & CUSTOMS ENF'T, POST PANDEMIC EMERGENCY COVID-19 GUIDELINES AND PROTOCOLS VERSION 3.0, at 5–6 (Aug. 2, 2024), https://www.ice.gov/doclib/coronavirus/eroCOVID19PostPandemicEmergencyGuidelinesProtocol_08022024.pdf [https://perma.cc/VZS9-T2PJ].

195 *ICE Detention Standards*, *supra* note 191 (describing the iterations of the detention standards); *see also* Neeley, *supra* note 22, at 730–32 (describing the history of immigration detention standards).

196 Neeley, *supra* note 22, at 740 (describing the standards as nonbinding).

197 *See id.* at 739 (describing ICE's facilities inspections and detention contracts with state and local jails).

198 OFF. OF INSPECTOR GEN., DEP'T OF HOMELAND SEC., OIG-07-01, TREATMENT OF IMMIGRATION DETAINEES HOUSED AT IMMIGRATION AND CUSTOMS ENFORCEMENT FACILITIES 1 (2006), https://www.oig.dhs.gov/sites/default/files/assets/Mgmt/OIG_07-01_Dec06.pdf [https://perma.cc/VR4L-R2SV].

organizations and eighty-four detained immigrants petitioned DHS to initiate a rulemaking proceeding pursuant to section 553 of the Administrative Procedure Act[199] (APA).[200] The petitioners alleged that the "lack of enforcement" and gaps in existing detention standards had led to "widespread violations."[201] The petition observed that the Federal Bureau of Prisons had issued binding regulations to address the conditions of confinement in the federal prison system and asserted that similar steps "guarantee that minimum standards for humane treatment are honored."[202] After a year of inaction, some of the petitioners filed a lawsuit against DHS for its failure to respond to their petition.[203] ICE subsequently adopted an enhanced, but still nonbinding, version of its detention standards in 2008,[204] and DHS sought dismissal of the lawsuit without formally responding to the petition.[205] In light of DHS's lack of a direct response, however, the federal court granted petitioners relief and ordered DHS to respond in 2009.[206]

DHS responded by denying the petitioners' request.[207] DHS defended its internal monitoring procedures, asserting that internal monitoring "is the best way to ensure appropriate detention conditions and improve the quality of life of detainees," because it allows for flexible adjustment based on changing circumstances.[208] DHS also claimed that rulemaking to codify the detention standards "would be laborious, time consuming, and less flexible, and could impede DHS's ability to expeditiously respond to changed circumstances."[209]

The COVID-19 pandemic tested DHS's theory. ICE responded to the pandemic with additional standards, but oversight was poor and

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199 5 U.S.C. §§ 551–559, 701–706.

200 Nat'l Immigr. Project of the Nat'l Laws. Guild et al., Petition for Rulemaking to Promulgate Regulations Governing Detention Standards for Immigration Detainees 1 (Jan. 25, 2007) (on file with the Harvard Law School Library).

201 *Id.* at 3–4 (referencing findings by the DHS's Inspector General).

202 *Id.* at 8. Petitioners urged DHS to emulate the U.S. Bureau of Prisons's issuance of binding regulations regarding detention conditions and grievances. *Id.* at 16.

203 *See* Fams. for Freedom v. Napolitano, 628 F. Supp. 2d 535, 536 (S.D.N.Y. 2009).

204 Letter from Jane Holl Lute, Deputy Sec'y, Dep't of Homeland Sec., to Michael J. Wishnie, Clinical Professor of L., Yale L. Sch., & Paromita Shah, Assoc. Dir., Nat'l Immigr. Project of the Nat'l Laws. Guild 3 (July 24, 2009), https://www.prisonlegalnews.org/media/publications/dhs_denial_of_nlg_petition_for_rulemaking_to_promulgate_regulations_governing_detention_standards_for_immigration_detainees_2009.pdf [https://perma.cc/W3QZ-FB5Z].

205 Brandon Sample, *DHS Ordered to Respond to Petition Seeking National Standards at Immigration Detention Facilities*, PRISON LEGAL NEWS (Jan. 15, 2010), https://www.prisonlegalnews.org/news/2010/jan/15/dhs-ordered-to-respond-to-petition-seeking-national-stan-dards-at-immigration-detention-facilities [https://perma.cc/7NH8-X6GX].

206 *Fams. for Freedom*, 628 F. Supp. 2d at 541.

207 Letter from Jane Holl Lute, *supra* note 204, at 1.

208 *Id.* at 5.

209 *Id.* at 6. Notably, at least one state has created a cause of action for tortious violation of detention standards by private detention facility operators. *See* CAL. GOV'T CODE § 7320 (West 2024).

detention facilities routinely violated the new standards.[210] As such, detained immigrants sued to seek the enforcement of the detention standards.[211] Their efforts were impeded, however, by the nonbinding nature of the rules.

In a small number of cases, detained immigrants argued that the detention standards were judicially enforceable under the *Accardi* doctrine.[212] The *Accardi* doctrine refers to "the long-settled principle that rules promulgated by a federal agency that regulate the rights and interests of others are controlling upon the agency."[213] It gets its name from its most famous application in *United States ex rel. Accardi v. Shaughnessy*, an immigration case in which the Supreme Court invalidated a deportation order because of a violation of applicable regulations.[214] Federal courts have applied the *Accardi* doctrine to an array of agency rules — substantive and procedural, formal and informal — that regulate the interests of others, even when the rules go beyond any statutory requirement upon the agency.[215]

Detained immigrants argued that the detention standards were enforceable under *Accardi* because the standards affected their rights and interests in safe detention conditions.[216] At least one district court agreed with this theory, requiring three immigration detention centers in Florida to comply with guidance from the CDC based on an applicable immigration detention standard.[217] But soon, several courts began to question whether *Accardi* applied to substantive detention standards,

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[210] OFF. OF INSPECTOR GEN., DEP'T OF HOMELAND SEC., OIG-21-58, ICE'S MANAGEMENT OF COVID-19 IN ITS DETENTION FACILITIES PROVIDES LESSONS LEARNED FOR FUTURE PANDEMIC RESPONSES 4–18, 28–30 (2021), https://www.oig.dhs.gov/sites/default/files/assets/2021-09/OIG-21-58-Sep21.pdf [https://perma.cc/GZ5Q-KJD3].

[211] *See* Garrett & Kovarsky, *supra* note 27, at 151–54 (describing COVID-19-related individual and class litigation in the immigration detention context).

[212] *See, e.g.*, Gayle v. Meade, No. 20-CV-21553, 2020 WL 2086482, at *5 (S.D. Fla. Apr. 30, 2020).

[213] Leslie v. Att'y Gen., 611 F.3d 171, 175 (3d Cir. 2010) (citing Columbia Broad. Sys., Inc. v. United States, 316 U.S. 407, 422 (1942)).

[214] United States *ex rel.* Accardi v. Shaughnessy, 347 U.S. 260, 268 (1954).

[215] *See, e.g.*, Morton v. Ruiz, 415 U.S. 199, 235 (1974) (applying *Accardi* doctrine to informal agency manual and stating that "[w]here the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures" and that "[t]his is so even where the internal procedures are possibly more rigorous than otherwise would be required" (citing Service v. Dulles, 354 U.S. 363, 388 (1957); Vitarelli v. Seaton, 359 U.S. 535, 539–40 (1959))); *Service*, 354 U.S. at 388 (applying *Accardi* doctrine to require an agency to adhere to the "more rigorous substantive and procedural standards" that the agency had adopted in its regulations, beyond what was required by statute).

[216] *See, e.g.*, Verified Petition for Writ of Habeas Corpus and Complaint for Declaratory and Injunctive Relief at 94–100, *Gayle*, No. 20-CV-21553.

[217] *Gayle*, 2020 WL 2086482, at *6 ("It is abundantly clear that ICE is required to comply with CDC's guidelines pursuant to its own regulations and policy statements."). Two cases prior to COVID-19 also held that ICE was required to abide by its detention standards with respect to detained immigrants' claims. Torres v. U.S. Dep't of Homeland Sec., 411 F. Supp. 3d 1036, 1068–69 (C.D. Cal. 2019) (applying *Accardi* to failure to enforce the 2011 immigration detention standards); Innovation L. Lab v. Nielsen, 342 F. Supp. 3d 1067, 1079 (D. Or. 2018) (finding a likelihood of success on claim of APA violation based on failure to abide by 2011 immigration detention standards).

influenced by the view that no law requires such standards to exist at all.

In *A.S.M. v. Warden, Stewart County Detention Center*, discussed in the Introduction, a federal district court rejected the application of the *Accardi* doctrine on several grounds.[218] The court began by limiting *Accardi* to its facts — the invalidation of a deportation order where a formal regulation implicating procedural due process was violated — and held that the principle had no application to the violation of an informal substantive standard.[219] The court then questioned whether the Agency had the statutory authority to regulate the substantive conditions of detention at all.[220] The court found "that the CDC did not intend to bind [detention] facilities" to its standards, observing that its "[g]uidance leaves facilities significant discretion in choosing how to adapt the recommendations to their needs."[221] It characterized ICE's decision to adopt CDC guidance into its standards as voluntary[222] and concluded that "[i]t is absurd to suggest that any time a detention facility fails to follow an internal operating procedure that a detainee can file a lawsuit in federal court."[223] Other courts have similarly rejected *Accardi* claims in this context, questioning the case's application to substantive, informal rules.[224]

The detention standards remain ICE's only written set of rules regulating the conditions of confinement in the U.S. immigration detention system. The reluctance of courts to apply *Accardi* in this context leaves detained immigrants with little certainty as to whether they have any right to enforce the detention standards. And yet the existence of the

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[218] A.S.M. v. Warden, Stewart Cnty. Det. Ctr., 467 F. Supp. 3d 1341, 1357 (M.D. Ga. 2020).

[219] *Id.* at 1352 (emphasizing that "[a]t its core, *Accardi* involved procedural due process" and rested on "the unremarkable principle that '[r]egulations with the force and effect of law supplement the bare bones of [the statute]'" (second and third alterations in original) (quoting *Accardi*, 347 U.S. at 265)); *id.* at 1353 (finding no support for the proposition "that an executive branch agency's operational policy relating to conditions of confinement for its detainees is the type of regulation contemplated by *Accardi* to support a due process violation"); *id.* at 1353–54 (observing that the pandemic guidance at issue, *id.* at 1353–54, was not a "formally promulgated and properly delegated regulation" like the regulation at issue in *Accardi*, *id.* at 1353).

[220] *Id.* at 1354 ("Petitioners have not explained the source of statutory authority that would even permit such agency rule-making delegation under these circumstances.").

[221] *Id.*

[222] *Id.*

[223] *Id.* at 1355.

[224] *See, e.g.*, C.G.B. v. Wolf, 464 F. Supp. 3d 174, 226 (D.D.C. 2020) ("[I]t is far from clear that the [Pandemic Response Requirements] are the type of rules or regulations that can be enforced through the *Accardi* doctrine. Plaintiffs contend that ICE is 'in violation of the Fifth Amendment Due Process Clause by depriving detainees the rights guaranteed under the COVID-19 regulations enacted by ICE.' But agency regulations do not create *substantive* due process rights. *Accardi* is rooted instead in notions of *procedural* due process." (citation omitted) (quoting Memorandum of Points and Authorities in Support of Petitioners' Motion for Temporary Restraining Order and Request for an Emergency Hearing at 29, *C.G.B.*, 464 F. Supp. 3d 174 (No. 20-cv-01072))); D.A.M. v. Barr, 474 F. Supp. 3d 45, 66 (D.D.C. 2020) (quoting *C.G.B.*, 464 F. Supp. 3d at 226) (reiterating analysis in *C.G.B.* in rejecting *Accardi* claim); Rizza Jane G.A. v. Rodriguez, No. 20-CV-5922, 2020 WL 6867169, at *12, *14 (D.N.J. Nov. 23, 2020) (questioning application of *Accardi* to detention standards).

standards has served the purpose of defeating, in some courts, claims of deliberate indifference by immigration officials.[225]

As Part I has shown, some courts have rejected constitutional, statutory, and/or administrative law challenges to poor conditions of immigration confinement based in part on the view that granting such claims would conflict with the political branches' interest and expertise in detaining immigrants. Missing from their analysis is any consideration of the political branches' interest in the regulation of confinement, or how the political branches perceive agency expertise in this context. Part II considers the history and context of immigration detention regulation, which reveal a more complex and nuanced story.

II. THE CIVIL DETENTION INTEREST

Throughout the history of federal immigration detention, the political branches have expressed two interests when regulating the conditions of immigration detention — with the legislative branch often acting and reacting to failures of the Executive. The first is an interest in facilitating the exclusion and deportation of specific groups of immigrants. The second is an interest in ensuring civil — that is, humane and nonpunitive — conditions of immigration detention, particularly in the face of agency mismanagement and neglect. While courts and scholars have focused substantially on the first interest, the second — the civil detention interest — has been largely overlooked.

This Part unearths the history of congressional and administrative debate and action to address the conditions of immigration detention to present a more complete and complex picture of the interests at stake. Using a range of congressional and agency records, media coverage, and watchdog reports, I trace the regulation of conditions during three periods of significant change in the immigration detention system to document the civil detention interest. First, I explore how Congress addressed detention conditions when it federalized the immigration detention system at the turn of the twentieth century. Next, I turn to the expansion of the federal immigration detention system as a tool of internal security during the first half of the twentieth century. Lastly, I turn to the massive expansion and entrenchment of the modern immigration detention system starting in the 1980s.

The political branches' choices during these three periods demonstrate that their interests in detention are not limited solely to the facilitation of exclusion and deportation. At key periods in history, the political branches acted upon an interest in monitoring, controlling, and regulating the conditions of confinement, even at the expense of their interest in increasing detention capacity. During the modern era, Congress expressed increasing distrust of agency detention management,

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[225] *See supra* notes 126–30 and accompanying text.

directing ICE to comply with standards and ultimately creating an independent office to address substandard conditions. Understanding the history of the political branches' civil detention interest is central to assessing legal challenges to the conditions of immigration detention, as will be discussed further in Part III.

A. The Federalization Era

For the first century of U.S. history, immigration regulation was primarily a project of the states.[226] States, drawing from colonial tradition, initially retained and exercised the power to decide who could enter their borders and the conditions under which they could remain.[227] On the East Coast, states imposed taxes and fees on arriving immigrants and required shipmasters to post bonds guaranteeing their passengers' lack of indigency.[228] During this period, states regularly confined individuals in need of charity, including poor immigrants, in almshouses and workhouses.[229] On the West Coast, states began to target Chinese immigrants and the vessels transporting them for taxes, screening, and wholesale exclusion.[230] The Supreme Court eventually struck down state legislation, and states pushed for federal intervention.[231]

The federal government first assumed responsibility for the inspection and exclusion of immigrants arriving to the United States in the late 1800s.[232] As the inspection process grew in complexity, a system of local and private immigration detention arose to facilitate the federal inspections. In 1882, Congress enacted the Chinese Exclusion Act,[233] prohibiting Chinese "laborers" from entering the United States and criminalizing shipmasters who knowingly permitted the excluded immigrants to land.[234] Shipmasters reacted by transferring Chinese passengers ship-to-ship pending inspection, eventually prompting shipping

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[226] Gerald L. Neuman, *The Lost Century of American Immigration Law (1776–1875)*, 93 COLUM. L. REV. 1833, 1834 (1993).

[227] *See* KUNAL M. PARKER, MAKING FOREIGNERS: IMMIGRATION AND CITIZENSHIP LAW IN AMERICA, 1600–2000, at 22–25, 63–80 (2015).

[228] *See* LUCY E. SALYER, LAWS HARSH AS TIGERS: CHINESE IMMIGRANTS AND THE SHAPING OF MODERN IMMIGRATION LAW 4 (1995); Paulina D. Arnold, *How Immigration Detention Became Exceptional*, 75 STAN. L. REV. 261, 274 (2023).

[229] Arnold, *supra* note 228, at 273.

[230] Kerry Abrams, *Polygamy, Prostitution, and the Federalization of Immigration Law*, 105 COLUM. L. REV. 641, 672–77 (2005).

[231] Arnold, *supra* note 228, at 286–87; HIDETAKA HIROTA, EXPELLING THE POOR: ATLANTIC SEABOARD STATES AND THE NINETEENTH-CENTURY ORIGINS OF AMERICAN IMMIGRATION POLICY 155, 184–92 (2017).

[232] In 1875, Congress enacted the Page Act, ch. 141, 18 Stat. 477 (1875) (repealed 1974), one of its first restrictive immigration laws. Aaron Korthuis, *Detention and Deterrence: Insights from the Early Years of Immigration Detention at the Border*, 129 YALE L.J.F. 238, 245–46 (2019); SALYER, *supra* note 228, at 3. While detention is not explicitly mentioned, the Page Act effectuated "an early form of brief detention aboard arriving passenger ships." Korthuis, *supra*, at 246.

[233] Ch. 126, 22 Stat. 58 (1882) (repealed 1943).

[234] *Id.* §§ 1–2, 22 Stat. at 59.

companies to lease dockside warehouses to hold passengers for inspection.[235] Later that same year, Congress passed a generalized Immigration Act,[236] excluding "any convict, lunatic, idiot, or any person unable to take care of himself or herself without becoming a public charge" from landing in the United States and authorizing the Treasury Department to contract with state commissions to ensure local inspections.[237] The Treasury Department contracted with state officials to screen immigrants arriving at the Castle Garden Emigrant Landing Depot in New York and similar ports.[238] While early federal immigration laws did not initially authorize detention,[239] shipping companies and states relied on detention to address the pragmatic needs of the federal inspection system.[240]

Concerns about the efficacy of local and private portside inspection provided a major incentive for Congress to federalize immigration detention. An 1891 report by the House Select Committee on Immigration and Naturalization summarized congressional intent at the time: "The intent of our immigration laws is not to restrict immigration, but to sift it, to separate the desirable from the undesirable immigrants, and to permit only those to land on our shores who have certain physical and moral qualities."[241] The portside screening system, described as a series of questions and a visual inspection lasting a mere thirty seconds on average per immigrant, was "little better than none."[242] In 1891, Congress formally authorized federal immigration officers to detain arriving immigrants "until a thorough inspection is made."[243]

A deeper examination of legislative history demonstrates, however, that Congress viewed the federalization of detention not only as a tool of greater control over immigration inspection but also as a means of ensuring better conditions for immigrants who were held pending their inspection. In particular, the New York media had long reported a "nest of corruption" at the Castle Garden Emigrant Landing Depot.[244] These

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[235] ERIKA LEE & JUDY YUNG, ANGEL ISLAND: IMMIGRANT GATEWAY TO AMERICA 10–11 (2010); CÉSAR CUAUHTÉMOC GARCÍA HERNÁNDEZ, MIGRATING TO PRISON: AMERICA'S OBSESSION WITH LOCKING UP IMMIGRANTS 24–26 (2019).

[236] Immigration Act of 1882, ch. 376, 22 Stat. 214.

[237] *Id.* § 2, 22 Stat. at 214.

[238] *See* Louis Anthes, *The Island of Duty: The Practice of Immigration Law on Ellis Island*, 24 N.Y.U. REV. L. & SOC. CHANGE 563, 570–71 (1998) (discussing state inspections at Castle Garden and the transfer of inspection power to the federal government in 1882).

[239] *See* Korthuis, *supra* note 232, at 245.

[240] *See* Anthes, *supra* note 238, at 571; LEE & YUNG, *supra* note 235, at 10–11; GARCÍA HERNÁNDEZ, *supra* note 235, at 24.

[241] H.R. REP. NO. 51-3807, at 2 (1891).

[242] *Id.* at 3.

[243] Immigration Act of 1891, ch. 551, § 8, 26 Stat. 1084, 1085 (codified as amended at 8 U.S.C. § 1552).

[244] *Emigrant Sharks in Castle Garden.*, N.Y. HERALD, Feb. 21, 1873, at 6; *see also The Castle Garden Emigrant Depot — Necessity of a Speedy Reform.*, N.Y. HERALD, Mar. 2, 1873, at 8; *Castle Garden Abuses.: How the State Laws Are Violated.*, N.Y. HERALD, Apr. 12, 1873, at 8.

complaints continued even as the federal government contracted with state officials under the 1882 Act to hold immigrants pending their inspection at Castle Garden. During a series of hearings in 1887, individuals testified that arriving immigrants were routinely charged exorbitant prices for railroad tickets and baggage rates and, if they would or could not pay, faced detention and expulsion.[245] Testimony also described how immigrants were charged "outrageous" rates for food "of the poorest quality."[246] Congress resolved to find a new, federally controlled immigration depot, appropriating funds in 1890 to locate the depot on Ellis Island.[247]

In the interim, federal officials began to inspect individuals at "the Barge Office" in New York,[248] where immigrants continued to be treated poorly.[249] In January 1891, the Rev. Dr. Thomas Drumm, a Protestant Episcopalian minister and Immigrant Port Chaplain in New York, wrote a letter to the *New York Times* describing "nightly horrors and indecencies of men, women, and children huddling together in groups on bare, unclean floors" upon arriving in New York with no means of continuing on to their intended destinations within the United States.[250] He described how immigrants held at the Barge Office lacked access to bedding or food, unless provided by charitable and religious organizations.[251] Rev. Dr. Drumm implored Congress to use federal immigration funds to help these immigrants secure lodging and food at boarding houses.[252] He wrote to a member of Congress and federal immigration officials directly with these requests.[253]

Rev. Dr. Drumm's letters prompted the House of Representatives to pass a resolution directing the Immigration Committee to "investigate the manner of the treatment of immigrants arriving in the port of New

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[245] *See, e.g.*, *Fleecing the Immigrants.: But No Wool Can be Pulled over Mr. Okey's Eyes.*, N.Y. HERALD, Aug. 25, 1887, at 8 (reporting exorbitant ticket charges by railroad agents); *Stalking into Light.: More Castle Garden Abuses Rise up as Investigation Prods Them.*, N.Y. HERALD, Aug. 26, 1887, at 8; *see also* HIROTA, *supra* note 231, at 196–97 (discussing how immigrants held at Castle Garden reported being pressured to return).

[246] *Stalking into Light.: More Castle Garden Abuses Rise up as Investigation Prods Them.*, *supra* note 245, at 8.

[247] *See* 21 CONG. REC. 2139–41 (1890). In explaining the interest in an island location, Treasury Secretary William Windom testified that Castle Garden "is surrounded by a class of people against whom complaint has been made for years" and emphasized that he "preferred an island or some point where we could exclude those people whom we did not think were proper persons." H.R. REP. NO. 51-3472, at 4 (1891).

[248] GEORGE J. SVEJDA, CASTLE GARDEN AS AN IMMIGRANT DEPOT, 1855–1890, at 145 (1968).

[249] Thomas Drumm, Letter to the Editor, *Badly-Treated Immigrants.: The Starvation Policy of the Barge Office Administration.*, N.Y. TIMES, Jan. 14, 1891, at 9.

[250] *Id.*

[251] *Id.*

[252] *Id.*

[253] *See* S. REP. NO. 51-2165, pt. 2, at 3, 37, 40 (1891) (referring to letters from Rev. Dr. Drumm to a member of the House Immigration Committee, the Superintendent of Immigration, and the Treasury Secretary).

York."[254] Days later, the committee took the testimony of witnesses in New York, including Rev. Dr. Drumm and other chaplains providing charitable and religious services to "delayed immigrants" — immigrants who were not excludable but were nonetheless unable to continue to their destinations in the United States.[255] Some of the witnesses described poor conditions — unsanitary floors, a shortage of bedding, and the lack of racial and gender segregation, considered immoral by the religious leaders at the time.[256]

The hearings demonstrated congressional concern for the conditions of immigrants. After hearing the testimony of Rev. Dr. Drumm, Representative William D. Owen asked: "[Y]ou want the instructions changed so that the delayed immigrant shall be cared for, housed, and fed?"[257] Rev. Dr. Drumm responded affirmatively, adding: "I would say further that they should be cared for in a building other than the landing bureau . . . ."[258] Colonel John Weber, Superintendent of Immigration at the Barge Office, interjected, asking in part: "Suppose we have proper accommodations at Ellis Island?"[259] Rev. Dr. Drumm agreed: "That would be all right, then, provided the building is not the landing bureau."[260] After Colonel Weber testified at length, Representative Herman Lehlbach asked the superintendent directly:

> When you put up your building at Ellis Island, can you arrange it, in case it is put in the law, as we intend to put it in — this committee — that the immigrant during that time of his landing and his detention or his examination, should be properly housed, fed, and cared for?[261]

Colonel Weber answered in the affirmative.[262] The 1891 law that authorized federal detention, as enacted by Congress, specified that the arriving immigrants in detention must be "properly housed, fed, and cared for" by the federal superintendent.[263]

The burgeoning federal bureaucracy took seriously its charge to not only inspect immigrants but also to ensure appropriate conditions. In his 1902 report to the Treasury Secretary, Commissioner-General of Immigration Frank Sargent urged congressional intervention to ameliorate the conditions affecting "the accommodation of aliens" at Ellis

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254 *Id.* at 2 (describing Rev. Dr. Drumm's letters as "instrumental in creating the investigation").

255 *See id.* at 3–36.

256 *Id.* Some supported Rev. Dr. Drumm's call for federal assistance, *see, e.g.*, *id.* at 14 (statement of Alexander Mackay Smith, Episcopal Archdeacon of New York), but some suggested that charitable assistance be left to religious institutions, *see, e.g.*, *id.* at 26–32 (statement of James Mathews, Missionary of Methodist Episcopal Church).

257 *Id.* at 13.

258 *Id.*

259 *Id.*

260 *Id.*

261 *Id.* at 49.

262 *Id.*

263 Arnold, *supra* note 228, at 288 (quoting Immigration Act of 1891, ch. 551, § 8, 26 Stat. 1084, 1085).

Island.[264] Describing the interior of Ellis Island as "injudiciously designed," Commissioner-General Sargent complained of "the crowding of immigrants together in a manner detrimental both to their health and comfort, and in other respects imposing unnecessary hardship and discomfort upon them."[265] He similarly urged the creation of a federal inspection station in Boston to alleviate the "serious discomfort" of arriving immigrants forced to remain on ships pending their inspection.[266]

Congressional and administrative interest in appropriate conditions of immigration detention on the East Coast was no doubt influenced by the understanding that many — if not most — European immigrants detained pending inspection would ultimately be permitted to enter the United States.[267] This was made clear by Congress's contrasting treatment of Chinese immigrants, whom legislators sought to exclude categorically.[268] However, even in the context of Chinese exclusion, a humanitarian interest in addressing conditions of confinement also emerged.

Congress initially approached the detention of Chinese immigrants as an overtly punitive exercise. The 1892 Geary Act[269] required any Chinese person in the United States who could not affirmatively prove lawful presence to "be imprisoned at hard labor for a period of not exceeding one year and thereafter removed."[270] Four years later, in *Wong Wing v. United States*,[271] the Supreme Court declared the Geary Act's punitive imposition of imprisonment at hard labor without trial to be unconstitutional.[272] However, the Supreme Court also used the case as an opportunity to signal the constitutionality of "civil" immigration detention: "We think it clear that detention, or temporary confinement, as part of the means necessary to give effect to the provisions for the exclusion or expulsion of aliens would be valid."[273]

Civil detention on the West Coast initially took the form of confinement on ships, some local jails and prisons, mission or boarding houses,

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[264] 1902 COMM'R-GEN. IMMIGR. ANN. REP. 51–52.

[265] *Id.* at 52.

[266] *Id.* at 53.

[267] When asked how to treat individuals subject to exclusion due to their likelihood of becoming a public charge, Rev. Dr. Drumm stated: "I am not in favor of such persons landing. But if [the government] does land such a person then it pledges itself to take care of such person for 12 months." S. REP. NO. 51-2165, pt. 2, at 10 (1891).

[268] *See* Chinese Exclusion Act, ch. 126, §§ 1–2, 22 Stat. 58, 59 (1882) (repealed 1943).

[269] Ch. 60, 27 Stat. 25 (1892) (repealed 1943).

[270] *Id.* § 4, 27 Stat. at 25.

[271] 163 U.S. 228 (1896).

[272] *Id.* at 238 (holding "that even aliens shall not be held to answer for a capital or other infamous crime, unless on a presentment or indictment of a grand jury, nor be deprived of life, liberty or property without due process of law").

[273] *Id.* at 235 ("Proceedings to exclude or expel [aliens] would be vain if those accused could not be held in custody pending the inquiry into their true character and while arrangements were being made for their deportation.").

and makeshift dockside detention sheds.[274] Many Chinese people subject to exclusion filed successful writs of habeas corpus to secure their release from detention on bond, much to the dismay of anti-Chinese policymakers.[275] A Department of Justice investigation alleged that some of the federal court proceedings were tinged with fraud.[276] Some critics of dockside detention claimed that the insecure nature of the shed facilities permitted Chinese immigrants to receive coaching in order to prove their admissibility and evade the Chinese Exclusion Act.[277] The decision to build a federal detention center at Angel Island helped to address the concerns — proponents emphasized its isolated location offshore as a deterrent to coaching and escape.[278]

But the decision to federalize detention for immigrants on the West Coast did not stem solely from a desire to build a more secure facility. The poor conditions of private detention in San Francisco in particular garnered significant notoriety among Chinese community groups and the press. After nearly two decades of steamship-based detention, the Pacific Mail Steamship Company infamously converted a dockside office on a San Francisco pier into a detention "shed" for Chinese passengers in 1898.[279] Chinese people who were detained in the notorious shed began to protest their conditions.[280] Media reports described dockside detention as "filthy,"[281] a "disgrace,"[282] and "unfit for human habitation."[283]

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[274] *See* LEE & YUNG, *supra* note 235, at 10–11.

[275] *See* Christian G. Fritz, *A Nineteenth Century "Habeas Corpus Mill": The Chinese Before the Federal Courts in California*, 32 AM. J. LEGAL HIST. 347, 347–48 (1988).

[276] ELLIOTT YOUNG, FOREVER PRISONERS: HOW THE UNITED STATES MADE THE WORLD'S LARGEST IMMIGRANT DETENTION SYSTEM 51 (2021).

[277] *See* LEE & YUNG, *supra* note 235, at 12.

[278] *Id.*

[279] *Id.* at 10–11.

[280] *Id.* at 11.

[281] *Wrongs of Chinese Exclusion.: Hardships of the Law as Enforced by United States Officials.*, SPRINGFIELD DAILY REPUBLICAN, July 10, 1902, at 12 (describing the death of a Chinese immigrant seeking to pass through the United States to Mexico after half a year of detention and describing the "filthy" conditions).

[282] *The Immigrant Station.: Proposal to Have the Establishment on Angel Island Opened at Once.*, S.F. CHRON., Oct. 8, 1909, at 6 (describing the Pacific Mail Company detention shed in San Francisco as "certainly a disgrace to this or any other civilization" and "condemned as unfit for occupation by human beings").

[283] *Coolies Scorn Mexico and Flock Across the Border into the United States.: Prompt Action Hampers the Exclusion Law Violators.*, S.F. CHRON., Sept. 30, 1901, at 4 (reporting that the "loft [where Chinese immigrants are detained] is declared by persons who have seen it to be unfit for human habitation" and describing efforts by the Pacific Mail Steamship Company to prevent journalists from visiting or photographing the loft); *see also Detention Sheds of the Pacific Mail Dock Swarm with Chinese from the Steamer Coptic*, S.F. CALL, May 12, 1900, at 7 (describing the Pacific Mail detention shed, stating that "[h]ealth regulations are violated openly" and that "[t]he Chinese are crowded into the pen like cattle and the odor which comes from their den is sickening," and warning "[s]hould disease break out among them nothing could be done to check its progress"); LEE & YUNG, *supra* note 235, at 11 (describing conditions in the Pacific Mail shed).

The conditions of detention in San Francisco became a prominent area of concern inside the federal immigration bureaucracy. In his 1903 Annual Report, Commissioner-General Sargent described his inspection of immigration stations:

> During the year I have made repeated visits to the various immigrant stations with a view to ascertaining . . . the needs at each station for an efficient administration of the law and a humane provision for the comfort of aliens detained there, pending a decision as to their admissibility.[284]

Describing the conditions in San Francisco, he stated:

> Chinese aliens have been temporarily landed from vessels, by permission, and placed in detention quarters furnished by the transportation lines. These quarters were so disgraceful — cramped in dimensions, lacking in every facility for cleanliness and decency — that it was necessary to insist upon an immediate remodeling thereof. . . . [I]t does not obviate the pressing demand for a structure to accommodate all alien arrivals. This is the principal port of arrival for Japanese and Chinese aliens, and provision of the nature indicated should be made at the earliest practicable moment.[285]

In 1904, Congress appropriated funds for the construction of a federal inspection site on Angel Island off the coast of San Francisco.[286] Design and construction problems slowed progress, and ultimately President Taft pressured the federal immigration bureaucracy — by then managed by the Department of Commerce and Labor — to open the facility.[287] In 1909, the *San Francisco Chronicle* reported:

> President Taft was prompted by the desire not to cause unnecessary annoyance and hardship to the Chinese and Japanese travelers and immigrants, who in the past have been subjected to what the higher classes might easily have construed as an indignity and for which they would retaliate with a boycott on American goods.[288]

Angel Island opened in 1910.[289] It too became a site of indignity, particularly as detention there became prolonged.[290] But it was designed in part as an improvement over the dockside sheds of the past.[291]

Subsequent legislation reflected Congress's continuing concern with the conditions of immigration detention. The Immigration Act of 1907[292] demarcated detention authority in part on the existence of "suitable" inspection sites, specifying "where a suitable building is used for the detention and examination of aliens[,] the immigration officials shall there take charge of such aliens" and shipping companies "shall be

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284 1903 COMM'R-GEN. IMMIGR. ANN. REP. 62.

285 *Id.* at 63.

286 LEE & YUNG, *supra* note 235, at 11.

287 *See Immigration Station to Be Opened at Once: Taft Stirs Up Commerce and Labor Department over Angel Island.*, S.F. CHRON., Oct. 10, 1909, at 57.

288 *Id.*

289 LEE & YUNG, *supra* note 235, at 10.

290 *See id.* at 14–16.

291 *See id.* at 11–12.

292 Ch. 1134, 34 Stat. 898 (repealed 1917).

relieved of the responsibility for their detention thereafter until the return of such aliens to their care."[293] While the language specifying that immigrants detained during inspection be "properly housed, fed, and cared for" did not appear in the statute, the Attorney General opined that the directive had not been repealed and was consistent with the requirement of suitable detention facilities.[294]

The text, history, and context of conditions requirements during the federalization of immigration detention demonstrate that the political branches were motivated by twin concerns — a desire to ensure an effective inspection and exclusion process and a desire to ensure humane conditions of immigration detention. The federalization of detention is thus best understood as an example of interest convergence — where the interest in enforcing immigration laws converged with the civil detention interest in maintaining humane standards of detention — to support federal control of detention.[295] During the turn of the twentieth century, the political branches were aligned in pursuing these interests and, if anything, pushed each other to do more to ensure a modernized, more humane federal inspection system that avoided the ills of private or local detention.

B. The Internal Security Era

Federal immigration officials continued to rely heavily on immigration inspection stations to detain arriving immigrants through the first half of the twentieth century, while also expanding the detention and deportation of "undesirable" immigrants from within the United States. By 1917, Congress enacted legislation broadly authorizing the detention and deportation of classes of noncitizens living in the United States, largely mirroring the classes of excludable immigrants.[296] In the 1920s, eugenicists successfully urged Congress to limit immigration from countries outside Northern and Western Europe and to expand the ban on immigration from Asia, culminating in overtly racist quotas and restrictions in the Immigration Act of 1924.[297] In the decades that followed, violations of the Immigration Act of 1924 were the leading cause of deportations.[298] Immigration from Western Hemisphere countries — including Mexico — was not directly included in the quotas.[299] But Congress created a new agency to police the U.S.-Mexico border — the

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[293] *Id.* § 16, 34 Stat. at 903.

[294] 53 CONG. REC. 11260–61 (1916) (reciting a letter from Attorney General T.W. Gregory).

[295] *Cf.* Derrick A. Bell, Jr., Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980).

[296] Immigration Act of 1917, ch. 29, § 19, 39 Stat. 874, 889–90 (repealed 1952).

[297] Ch. 190, 43 Stat. 153 (repealed 1952); *see* MAE M. NGAI, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA 21–27, 37 (2004); ALINA DAS, NO JUSTICE IN THE SHADOWS: HOW AMERICA CRIMINALIZES IMMIGRANTS 51–52 (2020).

[298] *See, e.g.*, 21 SEC'Y LAB. ANN. REP. 54 (1933).

[299] *See* DAS, *supra* note 297, at 52.

U.S. Border Patrol — to control unwanted Mexican migration.[300] During the Great Depression, nearly two million people of Mexican descent — U.S. citizens and noncitizens — were "repatriated" to Mexico.[301]

During this period, the Department of Labor detained some immigrants as part of its inspection, exclusion, and deportation efforts, relying on a patchwork of facilities, including local jails.[302] In 1933, the Labor Department formed the INS to enforce immigration law, including detention.[303] The Labor Department's annual report that year emphasized the humanitarian cost of detention, stating that "[e]very effort is made to shorten the detention period of aliens pending determination of their cases."[304] Noting that some individuals remained in detention simply because they could not afford bond, immigration officials experimented with "permitting [them] to remain at liberty . . . with very satisfactory results."[305] The report also flagged an issue that would receive increasing attention in subsequent years: the difficulty in securing passports, and therefore effectuating the deportation orders, of individuals whose countries of nationality were no longer able or willing to receive them.[306]

Although the number of people lacking passports or other travel documents was relatively small, their presence was sensationalized into a hot-button issue as anti-immigrant sentiment rose in the 1930s and 1940s.[307] In 1939, Representative Samuel Hobbs introduced the first of several bills that sought to authorize the indefinite detention of individuals with deportation orders.[308] A version of his proposal became law in Title I of the Internal Security Act of 1950,[309] a law authorizing broader detention, exclusion, and deportation authority, particularly as applied to ideologically disfavored groups.[310] It expanded the Attorney General's discretionary authority to continue to detain immigrants or subject them to conditions of supervision if the government could not deport them within six months of their deportation orders.[311]

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[300] *See id.* at 53.

[301] *See id.* at 54.

[302] *See* BRIANNA NOFIL, THE MIGRANT'S JAIL: AN AMERICAN HISTORY OF MASS INCARCERATION 83–85 (2024).

[303] U.S. CITIZENSHIP & IMMIGR. SERVS., OVERVIEW OF INS HISTORY 5, 7 (2012), https://www.uscis.gov/sites/default/files/document/fact-sheets/INSHistory.pdf [https://perma.cc/K42C-3D5G].

[304] 21 SEC'Y LAB., *supra* note 298, at 53.

[305] *Id.* at 54.

[306] *See id.*; *see also* 22 SEC'Y LAB. ANN. REP. 51 (1934).

[307] *See Immigration to the United States 1933–41*, U.S. HOLOCAUST MEM'L MUSEUM, https://encyclopedia.ushmm.org/content/en/article/immigration-to-the-united-states-1933-41 [https://perma.cc/TUF6-YH6G].

[308] H.R. 4768, 76th Cong. (1939).

[309] Ch. 1024, 64 Stat. 987 (codified as amended at 50 U.S.C. §§ 831–835).

[310] *Id.* §§ 22–23, 64 Stat. at 1006–12.

[311] *Id.* § 23, 64 Stat. at 1011.

In response to a split among federal courts as to whether deportable immigrants maintain a right to bail subject to judicial review, Representative Hobbs successfully proposed the insertion of language specifying that the decision to grant bail was at the discretion of the Attorney General.[312]

In *Carlson v. Landon*,[313] the Supreme Court upheld the constitutionality of the detention provisions in the context of deportation proceedings against four alleged communists.[314] After reaffirming Congress's plenary power to deport those deemed "hurtful" to the nation,[315] the Court reiterated its assessment in *Wong Wing* that "[d]etention is necessarily a part of this deportation procedure."[316] It added that detention was justified because, without it, "aliens arrested for deportation would have opportunities to hurt the United States during the pendency of deportation proceedings."[317] In dissent, Justice Black sounded an alarm about what he viewed as an unconstitutional expansion of the legal justification of civil immigration detention — from a tool solely in aid of exclusion or deportation to one that permits a "Washington bureau agent" to detain people he believes to be members of the Communist Party, and therefore "dangerous," without trial and in his sole discretion.[318]

While Title I of the 1950 Internal Security Act was thus most notable for its expansion of executive detention authority, a different provision within the Act underscored Congress's continuing interest in regulating the conditions of immigration confinement. In amending the Immigration Act of 1917[319] to expand the Attorney General's detention authority for individuals subject to deportation,[320] Congress "authorized and directed" the Attorney General "to arrange for appropriate places of detention for those aliens whom he shall take into custody and detain."[321]

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312 Carlson v. Landon, 342 U.S. 524, 528 n.5, 538–40 (1952) (discussing the legislative history of the Internal Security Act of 1950, *id.* at 538–39, and explaining that the phrase "in the discretion of the Attorney General," *id.* at 528 n.5 (quoting Internal Security Act of 1950, § 23, 64 Stat. at 1011), was proposed by Rep. Hobbs to foreclose noncitizens from asserting the right to bail, *id.* at 538–40).

313 342 U.S. 524 (1952).

314 *Id.* at 544–46 (rejecting noncitizens' excessive bail challenge to their mandatory detention and noting that the "[bail] clause has never been thought to accord a right to bail in all cases, but merely to provide that bail shall not be excessive in those cases where it is proper to grant bail," *id.* at 545 (footnote omitted)).

315 *Id.* at 536 (quoting Bugajewitz v. Adams, 228 U.S. 585, 591 (1913)).

316 *Id.* at 538.

317 *Id.*

318 *Id.* at 547–51 (Black, J., dissenting) ("Today the Court holds that law-abiding persons, neither charged with nor convicted of any crime, can be held in jail indefinitely, without bail, if a subordinate Washington bureau agent believes they are members of the Communist Party, and therefore dangerous to the Nation because of the possibility of their 'indoctrination of others.'" *Id.* at 547–48. "Since it is not necessary to keep them in jail to assure their compliance with a deportation order, their imprisonment cannot possibly be intended as an aid to deportation." *Id.* at 551.).

319 Ch. 29, 39 Stat. 874 (repealed 1952).

320 Internal Security Act of 1950, ch. 1024, § 23, 64 Stat. 987, 1010–11 (repealed 1952).

321 *Id.* § 23, 64 Stat. at 1011.

This language — requiring "appropriate places of detention" — was carried over to the Immigration and Nationality Act two years later in 1952 and continues to appear in the law today.[322] While the provision has been interpreted by some federal courts as a grant of unfettered discretion to the Attorney General,[323] legislative history reveals that the law emphasized *appropriate* places of detention to signal a constraint on agency power.

The term "appropriate places of detention" can be traced to Representative Hobbs's initial 1939 bill regarding immigrant detention, which directed federal immigration officials (then still within the Labor Department) "to arrange for appropriate places of detention"[324] where immigrants without passports would be "confined, though not at hard labor."[325] The initial version of the bill authorized the Secretary of Labor to "select established institutions or . . . establish such appropriate places of detention as may be necessary, including such acreage for farming as may be desirable to provide an opportunity for voluntary employment and a part of the farm products required for the sustenance of the inmates."[326]

The language — with its ominous reference to inmate farms — was incorporated into a bill introduced by Representative Howard Smith that proposed the registration of all noncitizens living in the United States and the targeting of suspected communists and anarchists for criminal and deportation penalties.[327] In a hearing on the Smith bill, several civil groups specifically opposed the section on detention, fearing the rise of concentration camps in the United States.[328] In the words of

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[322] *See supra* note 175 and accompanying text; 8 U.S.C. § 1231(g)(1).

[323] *See supra* pp. 1209–10.

[324] H.R. 4768, 76th Cong. § 2 (1939).

[325] *Id.* § 1.

[326] *Id.* § 2.

[327] H.R. 5138, 76th Cong. §§ 4, 14(7), 15, 24, 27 (1939).

[328] *Crime to Promote the Overthrow of Government: Hearing on H.R. 5138 Before Subcomm. No. 3 of the H. Comm. on the Judiciary*, 76th Cong. 40 (1939) (statement of Ralph Emerson, Rep., Maritime Unions of the Committee for Industrial Organizations) (opposing the detention provisions "[i]nsofar as [they] would go towards setting up any specific concentration camps" and stating: "[W]e would hate to see this country adopt a law that would in any way follow the example of Nazi Germany. . . . I think we can take other measures to take care of them if they are deportable, without regimenting them in such camps as that, which I would not want to see any human being in"); *id.* at 24 (statement of Read Lewis, Rep., Foreign Language Information Service) (opposing detention provision as authorizing the detention of immigrants "in a concentration camp for the rest of [their] li[ves]"); *id.* at 70–71 (statement of Paul Scharrenberg, Legislative Rep., American Federation of Labor) ("We are . . . apprehensive about the possible results of the establishment of such camps. We do not know how many persons would be involved, how many would be subject to consignment to a life term in those camps. We have not been able to get that information so we are very apprehensive about the introduction of detention or concentration camps." *Id.* at 70. "[H]ere we propose to go further with the possibility of 'detaining' men in camps for life just because their native lands refuse to take them back. Therefore, as I have attempted to say, we have read so much about detention and concentration camps in recent years that a sort of a horror creeps over us when we think of establishing them in our country." *Id.* at 71.).

one hearing witness: "[W]e would hate to see this country adopt a law that would in any way follow the example of Nazi Germany."[329] The detention language was ultimately omitted from the Smith bill,[330] and Representative Hobbs quickly introduced a new version of his stand-alone detention bill that authorized only "appropriate places of detention," without any reference to detention farms.[331] The bill also provided for authorization of "[t]he appropriation of such sums of money as may be necessary from time to time for the maintenance and care of detained aliens in such places of detention."[332] In his role on the Judiciary Committee, Representative Hobbs authored a report in support of the revised bill, emphasizing that the "additional detention is not punishment" and "is provided to be in existing institutions" with "[n]ecessary appropriations . . . for maintenance and care."[333]

Despite the quick shift away from the language of detention farms, several legislators and civil groups continued to raise concerns about the types of facilities in which immigrants would be held. The initial reference to detention farms, in their view, demonstrated "the philosophy underlying this type of legislation."[334] Representative Emanuel Celler wrote, in his minority report for the Judiciary Committee on the revised bill, that the legislation "smacks too much of the lettres de cachet of the Bourbon monarchs or the concentration camps of totalitarian governments."[335] During debate, many legislators agreed, arguing against the establishment of concentration camps on U.S. soil.[336] The media

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[329] *Id.* at 40 (statement of Ralph Emerson, Rep., Maritime Unions of the Committee for Industrial Organizations).

[330] *See* Alien Registration Act of 1940, ch. 439, 54 Stat. 670 (codified as amended at 18 U.S.C. §§ 2385, 2387).

[331] H.R. 5643, 76th Cong. § 3 (1939).

[332] *Id.*

[333] H.R. REP. NO. 76-397, at 2 (1939).

[334] 84 CONG. REC. 5176 (1939) (statement of Rep. Orrice Abram Murdock, Jr.); *see also id.* (statement of Rep. Emanuel Celler) ("There is every possibility and every likelihood that the broad language of the present wording of the bill now under consideration would permit the establishment of any kind of stockade or a concentration camp anywhere in this land.").

[335] H.R. REP. NO. 76-397, at 3 (1939).

[336] 84 CONG. REC. 5177 (1939) (statement of Rep. William Lemke) ("Mr. Chairman, I am opposed to this bill because I am against concentration camps. I do not care whether they are constitutional or unconstitutional, they are un-American. I believe that this is the beginning of the system that some European nations have adopted, a system of barbarism and brutality. I believe this bill will be followed and enlarged upon, if it is held constitutional, and that this system will continue to grow . . . ."); *id.* at 5164 (statement of Rep. Caroline Love Goodwin O'Day) ("[I]t is a negation of every idea and policy and principle that our country holds most dear. I can imagine with what satisfaction Hitler will learn that his emissaries in this country have so influenced Congress that it is following his example and setting up detention or concentration camps during peacetime. Of course, they are not called concentration camps, they are called detention camps, but Hitler knows as well as anyone else how swiftly a detention camp can be transformed into a concentration camp. This bill is a vicious and un-American bill and should be defeated."); *id.* at 5171 (statement of Rep. Orrice Abram Murdock, Jr.) ("By this bill, if enacted, we will transplant to the free soil of America

reported the opposition to the Hobbs bill from members of Congress, civil rights groups, and religious leaders, noting that they criticized the legislation "as a thinly disguised attempt to establish concentration camps."[337]

To counter this line of argument, Representative Hobbs and supporters of his legislation again emphasized that the new version of the bill had eliminated authorization for such objectionable places of confinement.[338] Under the new version of the bill, they argued, immigrants would be held only in "established institution[s]" like Ellis Island — which was characterized as an immigration inspection station for all arriving immigrants, "not a prison."[339] In response, opponents to the bill shifted their opposition in part to focus less on concerns over the types of facilities in which immigrants could be detained and more on the lack of process by which people could be detained.[340] The Hobbs bill passed in the House, but the legislation was "pigeonholed" by the

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the vilest weed of fascism. We shall establish concentration camps, we shall herd together like cattle tiny groups of helpless people, surround them with prison walls or barbed-wire entanglements, torture the sick, the stranded, the homeless, hound and harass the hapless men without a country. . . . Surely this is not the march of progress, but the goose step of reaction.").

337 *Alien Internment Is Voted by House: Bill by Hobbs to Imprison Deportees Barred by Their Own Lands Is Passed, 286–61*, N.Y. TIMES, May 6, 1939, at 8; *see also Many Groups Hit Curbs on Aliens: Proposed Bills Are Assailed as Menace to the Civil Rights of All Americans*, N.Y. TIMES, May 14, 1939, at 37 (describing human rights critique of Hobbs bill); Associated Press, *Aliens' Detention Bill to Reach House Floor*, EVENING STAR (D.C.), Apr. 27, 1939, at A-5 (reporting that Reps. Celler and O'Day "vigorously opposed the measure, charging it would result in setting up detention camps similar to those operated in totalitarian states abroad"); *Rabbis Indorse Bill to Admit 20,000 Children*, EVENING STAR (D.C.), June 19, 1939, at B-5 (describing rabbis' opposition to the Hobbs bill, which they disapproved of as "one of nearly 70 bills now before Congress all of which are part of a reactionary campaign to make innocent and often bewildered foreigners the scapegoat to confuse other issues").

338 Representative Earl Michener, for example, pointed to the amended language as proof that the bill would require "appropriate places" akin to Ellis Island:

> It is true that the bill as originally introduced did give the Secretary of Labor authority to establish detention farms. This has been eliminated and when this bill becomes a law, and these aliens are detained, it will be in an established institution, and the Judiciary Committee was advised that the place would probably be Ellis Island in New York. You will recall that this is the immigration station through which all immigrants entering the United States through New York must pass. It is not a prison. It is not a stockade or anything of that kind and, for my part, it is really too good a place to keep these undesirable aliens at Government expense.

84 CONG. REC. 5165–66 (1939).

339 *Id.* at 5165.

340 *See id.* at 5167 (statement of Rep. Vito Marcantonio) ("If a person is sent by due process to a place that is surrounded with a barbed-wire fence, that is not a concentration camp. What constitutes a bastille and what constitutes a concentration camp is the method by which persons are sent to those places."); *id.* at 5169 (statement of Rep. Thomas F. Ford) ("I am convinced that this democracy of ours should not stultify itself by employing the methods of the dictator nations. Among these methods is the 'detention' of suspected or feared or 'undesirable' persons, not as punishment of crime but because the Government fears or hates them. Such detention is without due process of law and is therefore inimical to all.").

Senate.[341] After numerous failed attempts, a version of the legislation — including the requirement of "appropriate places of detention" — was eventually included in Title I of the 1950 Internal Security Act.[342] The lengthy debate over the "appropriate places" of detention demonstrated Congress's continuing interest in ensuring the civil nature of detention.

Even before the Internal Security Act, the Executive branch had been experimenting with the types of facilities in which individuals could be detained. In anticipation of war, Congress passed the Reorganization Act of 1939,[343] authorizing the Roosevelt Administration to reorganize the Executive branch.[344] Under Reorganization Plan No. V, the INS was transferred to the Department of Justice, and the Attorney General was authorized to make the final determination as to the interpretation or application of any immigration law.[345] Under the Justice Department, the INS began to increase its capacity for detention and internment during the World War II period, opening three detention camps in New Mexico, Montana, and North Dakota because of the inability to deport many immigrants due to the ongoing war.[346] After the United States entered the war, the INS rapidly expanded its detention capacity further to detain or intern "alien enemies" under proclamations by President Franklin Delano Roosevelt,[347] utilizing its preexisting inspection centers and opening new camps to increase its detention capacity seven fold.[348] Separate camps for families and women were also opened during the war period.[349] To fulfill wartime labor shortages, temporary Mexican migration was encouraged under the Bracero Program beginning in 1942.[350] As the war came to an end, some detention camps were closed, but Border Patrol apprehensions of Mexican

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[341] *House Kills Bill to Detain Aliens: Measure Would Have Given to Justice Department Wide Powers over Foreigners*, N.Y. TIMES, Nov. 19, 1941, at 8.

[342] H.R. 6333, 80th Cong. § 4 (1948); Internal Security Act of 1950, ch. 1024, § 23, 64 Stat. 987, 1011 (repealed 1952).

[343] Ch. 36, 53 Stat. 561 (1939) (expired 1941).

[344] *Id.* §§ 4–5, 53 Stat. at 562–63.

[345] Reorganization Plan No. V, 5 Fed. Reg. 2223 (June 14, 1940).

[346] 1941 IMMIGR. & NATURALIZATION SERV. ANN. REP. 2-b ("The ordinary detention facilities at the various immigration stations were inadequate, being designed for normal times, and it was necessary to select sites and to erect, equip, and staff detention camps thereon.").

[347] Shortly after entering World War II, President Roosevelt issued Proclamations 2525, 2526, and 2527 authorizing the summary apprehension of certain "alien enemies" of Japanese, German, and Italian descent, including for potential deportation. *See* Presidential Proclamation No. 2525, 6 Fed. Reg. 6321 (Dec. 8, 1941); Presidential Proclamation No. 2526, 6 Fed. Reg. 6323 (Dec. 9, 1941); Presidential Proclamation No. 2527, 6 Fed. Reg. 6324 (Dec. 9, 1941).

[348] *See* 1942 IMMIGR. & NATURALIZATION SERV. ANN. REP. 4–5.

[349] *Id.* at 25 (describing the establishment of several internment camps for women in detention); *see* 1944 IMMIGR. & NATURALIZATION SERV. ANN. REP. 23 (describing family internment camps).

[350] Yolanda Vázquez, *Constructing Crimmigration: Latino Subordination in a "Post-Racial" World*, 76 OHIO ST. L.J. 599, 620 (2015); Kevin R. Johnson, *International Human Rights Class Actions: New Frontiers for Group Litigation*, 2004 MICH. ST. L. REV. 643, 660.

immigrants increased rapidly.[351] To meet the needs of the Border Patrol, the INS opened two detention camps along the U.S.-Mexico border in 1945.[352]

The wartime expansion of detention — leading to significant hardship for those in executive custody — demonstrated the INS's willing participation in the expansion of immigration detention at the expense of maintaining humane conditions of confinement. However, foreshadowing its soon-to-be congressionally mandated role in choosing "appropriate places" of detention, the Agency also used the wartime period to promulgate federal regulations to dictate the types of facilities that were appropriate for immigration detention purposes. Beginning in 1941, federal regulations gave "special treatment" to women and children by prohibiting, unless "unavoidable," their detention in jails.[353] By 1944, federal regulations provided that the INS may detain immigrants "only" in either an INS-operated facility, a jail "approved by the [INS] as a detention facility," or "upon approval from the Central office, in some other suitable quarters," while continuing the general prohibition of detention of women and children in jails.[354] The 1944 law specified that women and children, if detained at all, should "be detained in a private or other home or facility operated under contract with the Service for the maintenance of aliens."[355] By 1945, the INS openly espoused the view that it should take greater care in inspecting immigration detention facilities, observing that "[e]xperience gained through the application of minimum standards of care and treatment of interned alien enemies demonstrated the need for establishing clear and uniform standards for all persons detained by the Service, whether held in Service detention facilities or elsewhere."[356] Thus, by the time Congress directed the Attorney General to "arrange for appropriate places of detention" in 1950, the proposition that immigration detention facilities should meet a

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[351] 1945 IMMIGR. & NATURALIZATION SERV. ANN. REP. 24 (stating that Border Patrol apprehensions increased by 122% "due to [an] . . . influx of Mexican nationals" into California, Arizona, and Texas during fiscal year 1945); *id.* at 27 (describing the closure of several internment camps).

[352] *Id.* at 27 ("Because of the unusually large number of Mexican [nationals] apprehended by the Border Patrol, it was necessary to establish detention facilities at Border Patrol Sector Headquarters at McAllen, Texas, and El Centro, California.").

[353] 8 C.F.R. § 150.5(c) (1941) (italics omitted) (providing that "[w]omen and children under 16 years of age shall not be incarcerated in jails or similar places by immigration officials unless such incarceration is unavoidable" and expressing a preference that any required detention be in "a room suitable for such purpose" that is "attached to the immigration station or quarters" or some other "proper institution," otherwise federal immigration officials were to make arrangements for such individuals to be held "by some philanthropic or similar society").

[354] Custody of Arrested Aliens, 9 Fed. Reg. 9346, 9347 (July 31, 1944); 8 C.F.R. § 150.5(d) (1944) (specifying that an immigrant "may be confined *only* in a detention facility operated by the Service, or in a jail which has been approved by the Service as a detention facility or, upon approval from the Central office, in some other suitable quarters" and continuing the general prohibition of detention of women and children in jails (emphasis added)); *see also* 8 C.F.R. § 150.6(c) (1952) (same).

[355] 8 C.F.R. § 150.5(d) (1944); *see also* 8 C.F.R. § 150.6(c) (1952) (same).

[356] 1945 IMMIGR. & NATURALIZATION SERV., *supra* note 351, at 30.

certain standard of care, and that only certain types of facilities were therefore appropriate, was understood, although the actual conditions of detention during this period fell short.

The reality of the conditions of detention gained more public attention during the postwar period with the cases of Ellen Knauff and Ignatz Mezei.[357] Knauff was a German-born refugee who worked for the Allied forces during World War II, when she met and married a U.S. Army veteran.[358] She arrived at Ellis Island in 1948 under the War Brides Act,[359] but was refused entry based on secret evidence.[360] Ignatz Mezei was the husband of a U.S. citizen who became trapped at Ellis Island after returning from a visit to see his dying mother in Romania.[361] He too was held on secret evidence, and when he attempted to leave Ellis Island, he could not find a country willing to accept him.[362] The Supreme Court upheld the detentions of Knauff and Mezei as legitimate exercises of plenary power.[363] The decisions were "excoriated" by the press and brought attention to the plight of detained immigrants.[364]

In 1954, the Eisenhower Administration announced a shift away from the use of portside detention toward preinspection procedures. At a naturalization ceremony on Veteran's Day at Ebbets Field in New York, Attorney General Herbert Brownell, Jr., announced the closure of six detention facilities, including Ellis Island.[365] Preinspection of arriving noncitizens would obviate the need for most detention, Brownell explained,[366] with the exception of "those deemed likely to abscond or those whose freedom of movement could be adverse to the national security or the public safety."[367] Brownell estimated that less than 1,000 of 38,000 people detained portside pending exclusion in the past year would be subject to detention under the new policy.[368] Notably, his numbers did not include "those cases involving migrant workers along the Mexican border"[369] — detention camps at the border continued to

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357 GARCÍA HERNÁNDEZ, *supra* note 235, at 32–35; Charles D. Weisselberg, *The Exclusion and Detention of Aliens: Lessons from the Lives of Ellen Knauff and Ignatz Mezei*, 143 U. PA. L. REV. 933, 954 (1995).

358 GARCÍA HERNÁNDEZ, *supra* note 235, at 32.

359 Ch. 591, 59 Stat. 659 (1945) (expired 1948).

360 GARCÍA HERNÁNDEZ, *supra* note 235, at 32–33.

361 Weisselberg, *supra* note 357, at 964–66.

362 *Id.* at 965–66.

363 *See* United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 543, 547 (1950); Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 210–12, 216 (1953).

364 *See* Weisselberg, *supra* note 357, at 970.

365 Herbert Brownell, Jr., Att'y Gen. of the U.S., Address at Naturalization Ceremonies at Ebbets Field & Polo Grounds 5–6 (Nov. 11, 1954).

366 *Id.* at 3–4.

367 *Id.* at 5.

368 *Id.*

369 *Id.*

operate, and in poor conditions.[370] Nonetheless, the policy shift took on legal significance. In 1958, the Supreme Court stated that "[p]hysical detention of aliens is now the exception, not the rule," observing that "[c]ertainly this policy reflects the humane qualities of an enlightened civilization."[371]

This shift in detention policy just two years after the 1952 Act obviated the need for the Attorney General to question what types of new facilities would be "appropriate" for civil detention. However, the vigorous, decade-long debate objecting to "concentration camps," and the INS's experience managing detention and internment of immigrants during World War II, demonstrate how the political branches maintained a civil detention interest, recognizing a need for oversight to ensure humane conditions of confinement. This history would prove to be an important backdrop for the next and much more extensive expansion and entrenchment of immigration detention in the 1980s and 1990s.

C. The Entrenchment Era

The 1960s and 1970s marked a watershed shift in prison regulation. A prisoners' rights movement, marked by increased organizing and litigation from people in prison and deeper scrutiny from federal courts, helped spur regulation efforts.[372] The American Correctional Association adopted an accreditation process to regulate prison and jail management,[373] and the Bureau of Prisons promulgated federal prison regulations.[374]

The INS, however, still had no detention standards. Complaints about detention conditions in the New York City Service Processing Center prompted the House Judiciary Committee in April 1980 to propose an amendment to a pending version of the appropriations bill for the Department of Justice, H.R. 6846, which would have "require[d] the Attorney General to develop comprehensive detention standards for [the] INS and to conduct an evaluation, based on such standards within 1 year from the date of enactment of this legislation" in "consultation

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[370] *See* JESSICA ORDAZ, THE SHADOW OF EL CENTRO: A HISTORY OF MIGRANT INCARCERATION AND SOLIDARITY 52 (2021) (describing the continuing detention of migrants along the U.S.-Mexico border).

[371] Leng May Ma v. Barber, 357 U.S. 185, 190 (1958).

[372] Bruce Bernstein, Comment, *The Federal Bureau of Prisons Administrative Grievance Procedure: An Effective Alternative to Prisoner Litigation?*, 13 AM. CRIM. L. REV. 779, 779–81 (1976) (describing how the Attica uprising and similar events, in conjunction with prisoner litigation, spurred regulation efforts in prisons); Driver & Kaufman, *supra* note 71, at 530 (describing how "high-profile protests galvanized the prison reform movement and paved the way for a new chapter in federal courts' engagement with prisoners' civil rights").

[373] Sharon Dolovich, *The Failed Regulation and Oversight of American Prisons*, 5 ANN. REV. CRIMINOLOGY 153, 161 (2022) (discussing the role of the American Correctional Association in the 1970s).

[374] *See, e.g.*, Control, Custody, Care, Treatment, and Instruction of Inmates, 42 Fed. Reg. 26334, 26334 (proposed May 13, 1977) (to be codified at 28 C.F.R. ch. V).

with the Bureau of Prisons and the American Correctional Association."[375] The committee report observed that "there are no comprehensive standards for detention facilities operated by INS."[376] It described the development of policies and procedures at the five INS-operated facilities as "piecemeal and haphazard."[377] While recognizing that immigrants were generally held in short-term detention of less than forty-eight hours, the committee stated: "Nevertheless, the committee believes that short-term detainees (who are being held for deportation, not for criminal violations) are entitled to a humane and sanitary environment, with adequate food, lodging, medical care and recreational activities."[378]

Shortly thereafter, the INS drafted its first set of "Standards for Detention" in August 1980, citing 8 U.S.C. § 1252 as providing the Agency with its authority to maintain detention facilities.[379] The 1980 INS Standards for Detention adopted twenty categories of standards on a range of topics like "Administration, Organization and Management," "Training and Staff Development," "Food Services," "Medical and Health Care Services," and "Detention Rights."[380] While the INS emphasized that the standards were modeled in part on standards developed by the American Correctional Association and the Department of Justice,[381] it expressly declined to adopt standards relating to rehabilitation or preparation for community reentry on the theory that "those issues dealing with long-term detention and associated rehabilitation are not within the statutory mandate or function of INS."[382]

The nature, duration, and scope of detention were in the process of changing rapidly, however. Large numbers of Haitians were fleeing the United States–backed Duvalier regime in Haiti for Florida.[383] The arrival of Haitians by sea led to a backlash in the Southeastern United States.[384] In response, the INS began to adopt a policy of denying parole to Haitians even as it continued to apply a presumption of release to other asylum seekers, including those fleeing from the Castro regime in

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375 *See* H.R. REP. NO. 96-873, pt. 1, at 16 (1980) (ordering the development of standards "[i]n order to insure critically needed improvements in INS detention facilities, policies, and programs").

376 *Id.*

377 *Id.*

378 *Id.*

379 *See* DET. & DEPORTATION DIV., IMMIGR. & NATURALIZATION SERV., STANDARDS FOR DETENTION (1980), *reprinted in Detention of Aliens in Bureau of Prison Facilities: Hearing Before the Subcomm. on Cts., C.L. & the Admin. of Just. of the H. Comm. on the Judiciary*, 97th Cong. 100, 101 (1982) [hereinafter INS STANDARDS FOR DETENTION].

380 *Id.* at 101–75.

381 *Id.* at 101.

382 *Id.* at 102.

383 *See* CARL LINDSKOOG, DETAIN AND PUNISH: HAITIAN REFUGEES AND THE RISE OF THE WORLD'S LARGEST IMMIGRATION DETENTION SYSTEM 13–32 (2018) (detailing the resurgence of immigration detention in response to an influx of Haitian asylum seekers fleeing Haiti during the Duvalier regime).

384 DAS, *supra* note 297, at 66 (describing the backlash to Haitian refugees in Florida).

Cuba.[385] The differential treatment of Haitians and Cubans was stark, and several refugee law and human rights experts emphasized that the Haitian-focused policies were discriminatory.[386] The backlash to asylum seekers then widened over the course of a six-month period starting in April 1980, when Fidel Castro temporarily lifted restrictions preventing people from departing Cuba from Mariel Bay.[387] More than 125,000 people left Cuba, including some who had been released from Cuban prisons and mental institutions.[388] In response, the INS detained many of the Cubans.[389] The INS began to hold Haitians and Cubans in converted former military bases and prisons.[390]

In 1981, the Reagan Administration implemented an official shift in detention policy. Attorney General William French Smith announced that the INS would now "treat[] those who arrive by sea in the same way we have long treated those who arrive over our land borders" by presumptively detaining them.[391] The plan called for thirty-five million dollars in funding[392] "for the construction of permanent facilities in which to house undocumented aliens temporarily until their eligibility for admission can be determined."[393] Associate Attorney General Rudolph Giuliani defended the plan the following year, explaining that the detention of Haitians and Cubans was necessary[394] to fix an "invitation to exploitation" of U.S. immigration laws.[395]

The changes in detention policy affected the experience of people in detention. Giuliani testified to Congress that "[t]he nature of detention . . . has changed" because of the backlog in asylum processing times, necessitating the construction of new immigration detention facilities "to have educational programs, recreational programs, the kinds of things that are needed if you are holding someone beyond a several-day period."[396] The Reagan Administration proposed that the new detention

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[385] *Id.* at 67; LINDSKOOG, *supra* note 383, at 107.

[386] LINDSKOOG, *supra* note 383, at 106–07; U.S. COMM. FOR REFUGEES & IMMIGRANTS, A HISTORY OF HAITIAN DISCRIMINATION BY UNITED STATES IMMIGRATION POLICY 1–2 (2021), https://refugees.org/wp-content/uploads/2021/09/Haiti-Snapshot_.pdf [https://perma.cc/6SJ6-QJNX].

[387] DAS, *supra* note 297, at 66–67.

[388] *Id.* at 67.

[389] *Id.*

[390] Das, *supra* note 83, at 1444–45.

[391] *Administration's Proposals on Immigration and Refugee Policy: Joint Hearing Before the Subcomm. on Immigr., Refugees & Int'l L. of the H. Comm. on the Judiciary & the Subcomm. on Immigr. & Refugee Pol'y of the S. Comm. on the Judiciary*, 97th Cong. 12 (1981) (statement of William French Smith, Att'y Gen. of the United States).

[392] *Id.* at 11.

[393] *Id.* at 12.

[394] *Detention of Aliens in Bureau of Prison Facilities: Hearing Before the Subcomm. on Cts., C.L. & the Admin. of Just. of the H. Comm. on the Judiciary*, 97th Cong. 17–18 (1982) (statement of Rudolph W. Giuliani, Associate Att'y Gen. of the United States).

[395] *Id.* at 17.

[396] *Id.* at 21.

facilities be run by or close to facilities run by the Bureau of Prisons.[397] The Bureau of Prisons was already detaining 2,000 Haitians and Cubans for lengthy periods across several facilities, where they were segregated from those in criminal custody but were otherwise "prisoners just like the other prisoners."[398] Giuliani explained that the Bureau of Prisons had more experience with long-term detention than the INS and was preferable to "the contractors to which INS might otherwise have to turn" given their experience with detained immigrants.[399] Plans were made to open a new 1,000-bed joint INS/Bureau of Prisons facility in Oakdale, Louisiana.[400]

Federal immigration officials also relied heavily on contracts with states and counties to provide space in their local prisons and jails.[401] Sensing financial opportunity, the Corrections Corporation of America (later rebranded as CoreCivic) "opened a private immigration detention facility . . . in Houston, Texas," becoming the first of many private prison corporations to secure lucrative detention contracts.[402] While the Reagan Administration successfully secured funds to expand detention, it did not change the standards that applied to its new facilities, nor did it limit detention expansion to federally operated facilities. As detention rapidly expanded, many detention facilities became sites of protest due to overcrowding, poor conditions, and prolonged detention.[403]

As numerous scholars have described, this growth in the detention system — and its increasing reliance on penal facilities — came as the federal and state governments adopted a more punitive stance toward drug policy and crime more broadly, and politicians often linked immigration and criminal policies in policy proposals.[404] In 1988, as part of the Anti-Drug Abuse Act,[405] Congress enacted a scheme of "mandatory detention" for immigrants convicted of a small class of "aggravated

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397 *See id.* at 1, 3.

398 *Id.* at 22 (statement of Rep. Robert W. Kastenmeier); *see id.* at 21 (statement of Norman A. Carlson, Director, Fed. Bureau of Prisons).

399 *Id.* at 6 (statement of Rudolph W. Giuliani, Associate Att'y Gen. of the United States).

400 *Immigration and Naturalization Service Budget Authorization — Fiscal Year 1986: Hearings Before the Subcomm. on Immigr., Refugees & Int'l L. of the H. Comm. on the Judiciary*, 99th Cong. 10 (1985) (statement of Alan C. Nelson, Comm'r, Immigr. & Naturalization Serv., U.S. Dep't of Just.).

401 Livia Luan, *Profiting from Enforcement: The Role of Private Prisons in U.S. Immigration Detention*, MIGRATION POL'Y INST. (May 2, 2018), https://www.migrationpolicy.org/article/profiting-enforcement-role-private-prisons-us-immigration-detention [https://perma.cc/VG5A-ASGH].

402 John F. Pfaff, *The Incentives of Private Prisons*, 52 ARIZ. ST. L.J. 991, 994 (2020); *see* DAS, *supra* note 297, at 120–21, 133.

403 *See* Das, *supra* note 83, at 1445–49 (describing protests and uprisings of detained people in the 1980s and 1990s).

404 *See, e.g.*, DAS, *supra* note 297, at 71–72, 120–21; García Hernández, *supra* note 63, at 1372–76; Stumpf, *supra* note 63, at 68–72.

405 Pub. L. No. 100-690, §§ 7341–7350, 102 Stat. 4181, 4469–73 (codified as amended in scattered sections of 8 U.S.C.).

felonies" pending their deportation.[406] By 1996, Congress passed a pair of laws that vastly expanded the list of "aggravated felonies" to include offenses that were neither aggravated nor felonies, and expanded the triggers for mandatory deportation.[407] In *Demore v. Kim*,[408] the Supreme Court upheld the constitutionality of mandatory detention, at least as applied to someone who had conceded removability for the "brief period" of time "necessary [to complete] removal proceedings."[409]

The Department of Justice, which in the 1990s housed both the enforcement and adjudicatory arms of the immigration administrative state, embraced Congress's demand for more detention.[410] In 1997, the Department of Justice promulgated federal regulations that placed the burden of proof in the INS's initial custody determinations on the noncitizen, reversing the presumption against detention.[411] The Agency defended the reversal by noting that the INS "has been strongly criticized for its failure to remove aliens who are not detained" and asserting that "[t]he mandate of Congress, as evidenced by budget enhancements and other legislation, is increased detention to ensure removal."[412] The following year, the Department of Justice promulgated "automatic stay" regulations that limited the ability of immigration judges to release immigrants by lowering their bond amounts if the INS appeals.[413] Two years later, the Board of Immigration Appeals interpreted the INS's burden-shifting regulation to apply to bond hearings, jettisoning its own presumption against detention.[414] As a result of congressional and administrative law changes, immigration detention rapidly skyrocketed.[415]

Even during this period of detention entrenchment, however, Congress took several discrete actions that appeared to regulate the increasingly penal character of immigration detention facilities. In the 1980s, the U.S. Marshals Service raised concerns about severe "overcrowding

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406 *Id.* §§ 7343(a)(4), 7347(a), 102 Stat. 4470, 4472.

407 Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 440, 110 Stat. 1214, 1276–77 (codified as amended in scattered sections of 8 U.S.C.); Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 303(a), 110 Stat. 3009-546, 3009-585 (codified as amended at 8 U.S.C. § 1226).

408 538 U.S. 510 (2003).

409 *Id.* at 513–14.

410 Maria Baldini-Potermin, *Immigration Detention and Custody Redeterminations: The Evolution from the 1996 IIRIRA to Current Procedures and Strategies*, IMMIGR. BRIEFINGS, May 2015, at 1, 1–2.

411 Mary Holper, *The Beast of Burden in Immigration Bond Hearings*, 67 CASE W. RSRV. L. REV. 75, 89–90 (2016) (discussing federal regulatory history shifting the burden to noncitizens in bond hearings).

412 *Id.* at 90 (quoting 62 Fed. Reg. 10312, 10323 (Mar. 6, 1997)).

413 Mary Holper, *Taking Liberty Decisions Away from "Imitation" Judges*, 80 MD. L. REV. 1076, 1088–89 (2021) (describing federal regulatory history leading to "automatic stay" regulations).

414 *In re* Adeniji, 22 I. & N. Dec. 1102, 1113 (B.I.A. 1999), *modified by In re* Garcia Arereola, 25 I. & N. Dec. 267 (B.I.A. 2010).

415 DORA SCHRIRO, DEP'T OF HOMELAND SEC., IMMIGRATION DETENTION OVERVIEW AND RECOMMENDATIONS 2 (2009) (describing how immigration detention capacity had expanded "from fewer than 7,500 beds in 1995 to over 30,000" in 2009).

and substandard conditions in" state and local jails, which they relied upon to hold people awaiting trial or sentencing in federal cases and federal witnesses.[416] The Service sought "permanent authority for [its] Cooperative Agreement Program," which gave "[f]ederal funds . . . to state and local authorities to improve" detention conditions "in exchange for" space to hold people in federal custody.[417] Members of the Senate, including then-Senator Joe Biden, proposed language to authorize such funding in the United States Marshals Service Act of 1985.[418] In 1996, Congress adopted a near-identical amendment to section 103 of the INA, authorizing the Attorney General to do the same in the context of immigration detention:

> The Attorney General, in support of persons in administrative detention in non-Federal institutions, is authorized — (A) to make payments from funds appropriated for the administration and enforcement of the laws relating to immigration, naturalization, and alien registration for necessary clothing, medical care, necessary guard hire, and the housing, care, and security of persons detained by the Service pursuant to Federal law under an agreement with a State or political subdivision of a State; and (B) to enter into a cooperative agreement with any State, territory, or political subdivision thereof, for the necessary construction, physical renovation, acquisition of equipment, supplies or materials required to establish acceptable conditions of confinement and detention services in any State or unit of local government which agrees to provide guaranteed bed space for persons detained by the Service.[419]

Notably, the immigration version did not include explicit authorization for the involvement of private contractors, a provision included in 1988 amendments addressing the U.S. Marshals Service.[420] The common thrust of both pieces of legislation is the recognition of the importance of ensuring "acceptable conditions of confinement" rather than merely authorizing cooperative agreements for jail space irrespective of conditions.

The INS remained reluctant, however, to regulate state and local jails and prisons directly. A federal regulation applicable to detention in non-INS facilities contained only "four mandatory criteria for usage": "24-[h]our [s]upervision," compliance "with [s]afety and [e]mergency

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416 *See U.S. Marshals Service Budget Authorization for Fiscal Year 1987: Hearing Before the Subcomm. on Sec. & Terrorism of the S. Comm. of the Judiciary*, 99th Cong. 33, 43–44 (1986).

417 *Id.* at 41.

418 S. 2044, 99th Cong. (1986); *see* 132 CONG. REC. 1586–88 (1986).

419 Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, § 373, 110 Stat. 3009, 3009-647 (1996) (codified as amended at 8 U.S.C. § 1103). The present-day version of the provision is codified in 8 U.S.C. § 1103(a)(11).

420 Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7608(d)(1), 102 Stat. 4181, 4516 (codified as amended at 18 U.S.C. § 4013) (specifying a conforming amendment authorizing "the housing, care, and security of persons held in custody of a United States marshal pursuant to Federal law under agreements with State or local units of government *or contracts with private entities*" (emphasis added)).

[c]odes," food provision, and "[e]mergency [m]edical" assistance.[421] The INS published new detention standards in 1998, covering a much wider range of requirements, but it applied them only to the federal government's own facilities ("Service Processing Centers") and private prisons, excluding local jails.[422] The INS was afraid that compliance with detention standards would make contracts cost prohibitive for local jails, reducing their incentive to enter into agreements to provide the INS with much-needed detention space.[423] In the words of one senior INS official, "[i]t's not in the INS's interest to force the jails to meet certain standards because we need the space."[424]

Watchdog organizations published reports documenting hundreds of cases of abuse as immigrants detained in county jails in Louisiana, New Jersey, and Illinois filed lawsuits alleging substandard conditions and abuse.[425] The criticism prompted the INS to adopt new detention standards, which applied to local jails with contracts to hold people for more than seventy-two hours in detention.[426] However, the INS relied solely on internal mechanisms like annual inspections and contractual provisions to enforce compliance.[427] Many jails with immigration contracts expressed a lack of awareness of the standards and faced little consequence for failing to comply.[428]

The terrorist attacks on September 11, 2001, ushered in a new era of expansive immigration enforcement, leading to the abolition of the INS and the creation of ICE, a bureau within the newly formed DHS.[429] Over the next several years, ICE received billions of dollars for immigration enforcement, including immigration detention.[430] Nongovernmental organizations, however, continued to criticize ICE for

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421 8 C.F.R. § 235.3(e).

422 BAILEY, *supra* note 192, at 6; Nat'l Immigr. Project of the Nat'l Laws. Guild, *supra* note 200, at 5.

423 Neeley, *supra* note 22, at 738–39.

424 Nat'l Immigr. Project of the Nat'l Laws. Guild, *supra* note 200, at 6 (quoting BAILEY, *supra* note 192, at 27).

425 Chris Hedges, *Policy to Protect Jailed Immigrants Is Adopted by U.S.*, N.Y. TIMES (Jan. 2, 2001), https://www.nytimes.com/2001/01/02/us/policy-to-protect-jailed-immigrants-is-adopted-by-us.html [https://perma.cc/G4GL-3GN3].

426 *Id.*; *see* Orantes-Hernandez v. Gonzales, 504 F. Supp. 2d 825, 851 (C.D. Cal. 2007) (specifying requirements for compliance with the new standards), *aff'd sub nom.* Orantes-Hernandez v. Holder, 321 F. App'x 625 (9th Cir. 2009); Nat'l Immigr. Project of the Nat'l Laws. Guild, *supra* note 200, at 6.

427 Neeley, *supra* note 22, at 739–40 (noting that the INS's sample contract with jails did not reference the National Detention Standards and had vague requirements).

428 *See id.* (noting instances where jails claimed a lack of awareness of standards).

429 *See* 68 Fed. Reg. 10922 (Mar. 6, 2003).

430 DORIS MEISSNER ET AL., MIGRATION POL'Y INST., IMMIGRATION ENFORCEMENT IN THE UNITED STATES: THE RISE OF A FORMIDABLE MACHINERY 19 (2013), https://www.migrationpolicy.org/pubs/enforcementpillars.pdf [https://perma.cc/F7ED-Q8WB] (describing the budgetary growth for ICE's removal and detention operations).

inadequate medical care and other poor conditions in detention.[431] The *New York Times*, the *Washington Post*, and other national news outlets began reporting on deaths and medical neglect in immigration detention, exposing the experience of people in detention to the broader public.[432]

Through its oversight and appropriation powers, Congress exerted pressure on ICE to ensure compliance with detention standards. In 2006, the House Appropriations Committee expressed its "concern[] with recent reports of possible deficiencies in the health care at some ICE detention facilities" and "direct[ed] ICE to report . . . on all activities undertaken to ensure compliance with detention standards, including how ICE monitors compliance."[433] A 2006 audit of five immigration detention facilities by the DHS Office of the Inspector General identified noncompliance with the 2000 National Detention Standards in all five facilities.[434] The House Judiciary Committee, Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law received testimony from nongovernmental organizations and formerly detained individuals confirming poor medical care in immigration detention.[435] One of the detained individuals, Francisco Castañeda, died

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[431] *See generally* PHYSICIANS FOR HUM. RTS. & THE BELLEVUE/NYU PROGRAM FOR SURVIVORS OF TORTURE, FROM PERSECUTION TO PRISON: THE HEALTH CONSEQUENCES OF DETENTION FOR ASYLUM SEEKERS (2003); ACLU OF N.J., BEHIND BARS: THE FAILURE OF THE DEPARTMENT OF HOMELAND SECURITY TO ENSURE ADEQUATE TREATMENT OF IMMIGRATION DETAINEES IN NEW JERSEY (2007); HUM. RTS. WATCH, CHRONIC INDIFFERENCE: HIV/AIDS SERVICES FOR IMMIGRANTS DETAINED BY THE UNITED STATES (2007); ACLU, BRIEFING MATERIALS SUBMITTED TO THE UNITED NATIONS SPECIAL RAPPORTEUR ON THE HUMAN RIGHTS OF MIGRANTS (2007).

[432] *See, e.g.*, Nina Bernstein, *New Scrutiny as Immigrants Die in Custody*, N.Y. TIMES (June 26, 2007), https://www.nytimes.com/2007/06/26/us/26detain.html [https://perma.cc/W2BZ-FVYE]; Nina Bernstein, *Few Details on Immigrants Who Died in Custody*, N.Y. TIMES (May 5, 2008), https://www.nytimes.com/2008/05/05/nyregion/05detain.html [https://perma.cc/BY66-PS6E]; Nina Bernstein & Julia Preston, *Better Health Care Sought for Detained Immigrants*, N.Y. TIMES (May 7, 2008), https://www.nytimes.com/2008/05/07/washington/07detain.html [https://perma.cc/QP6N-YNZV]; Nina Bernstein, *Death of Detained Immigrant Inspires Online Game with Goal of Educating Players*, N.Y. TIMES (Oct. 4, 2008), https://www.nytimes.com/2008/10/05/nyregion/05detain.html [https://perma.cc/9YZB-UA5D]; *see also* Darryl Fears, *Illegal Immigrants Received Poor Care in Jail, Lawyers Say*, WASH. POST, June 13, 2007, at A4; Dana Priest & Amy Goldstein, *System of Neglect*, WASH. POST (May 10, 2008), https://www.washingtonpost.com/archive/national/2008/05/11/system-of-neglect/a9aef59e-0f59-4371-8745-b055352c9007 [https://perma.cc/VF99-XFBP]; *Detention in America*, CBS NEWS (May 9, 2008, 1:13 PM), https://www.cbsnews.com/news/detention-in-america [https://perma.cc/A9Z5-2J9G].

[433] H.R. REP. NO. 109-476, at 43 (2006).

[434] *See* OFF. OF INSPECTOR GEN., DEP'T OF HOMELAND SEC., TREATMENT OF IMMIGRATION DETAINEES HOUSED AT IMMIGRATION AND CUSTOMS ENFORCEMENT FACILITIES 1 (2006), https://www.oig.dhs.gov/sites/default/files/assets/Mgmt/OIG_07-01_Dec06.pdf [https://perma.cc/T6PB-G3GM].

[435] *Detention and Removal: Immigration Detainee Medical Care: Hearing Before the Subcomm. on Immigr., Citizenship, Refugees, Border Sec. & Int'l L. of the H. Comm. on the Judiciary*, 110th Cong. 13–16, 53–55, 68–70 (2007).

of cancer a few months after the hearing.[436] In light of reports of noncompliance, the House Appropriations Committee directed ICE to expend funds on "a third-party compliance review pilot program to ensure standards are met at detention facilities managed by private contractors."[437]

By 2008, ICE adopted a third-party audit system and announced a new set of Performance-Based National Detention Standards by which to hold accountable its rapidly expanding array of detention facilities.[438] But medical staff within detention facilities reported that the facilities often violated the standards.[439] Detention experts and formerly detained individuals testified to Congress about the deficiencies in care in June 2008.[440]

In September 2008, Congress adopted a "Two Strikes Mandate" in federal appropriations legislation for DHS.[441] While it praised ICE for embracing an audit system, it observed that a significant number of facilities were found to be deficient.[442] "While ICE rightly gives contract facilities the opportunity to correct cases of non-compliance with its standards, it is important that chronic failures to meet detention standards are not ignored."[443] Congress therefore enacted a provision that prohibits the use of federal funds to continue any contract for a detention facility that has received a less than "adequate" score on two consecutive performance evaluations, which use the agency detention

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436 *See id.* at 13–16 (statement of Francisco Castañeda); Gabriel Eber, *Remembering Francisco Castañeda*, ACLU (May 5, 2010), https://www.aclu.org/news/smart-justice/remembering-francisco-castaneda [https://perma.cc/T25D-UBL7].

437 H.R. REP. NO. 110-181, at 43 (2007).

438 U.S. IMMIGR. & CUSTOMS ENF'T, 2008 OPERATIONS MANUAL ICE PERFORMANCE-BASED NATIONAL DETENTION STANDARDS (2008), https://www.ice.gov/detain/detention-management/2008 [https://perma.cc/9T2C-S8Y6]; *Department of Homeland Security Appropriations for 2009: Hearings Before the Subcomm. on Homeland Sec. of the H. Comm. on Appropriations*, 110th Cong. 60, 66 (2008) [hereinafter *Department of Homeland Security Appropriations for 2009*] (statement of Julie Myers, Assistant Secretary, United States Immigration & Customs Enforcement); *id.* at 194–204 (describing audit and compliance reviews, which mark facilities as "[s]uperior," "[g]ood," "[a]cceptable," "[d]eficient," or "[a]t risk" based on "how well the detention functions identified in the guidelines are being carried out," *id.* at 203).

439 *See* Priest & Goldstein, *supra* note 432.

440 *See Problems with Immigration Detainee Medical Care: Hearing Before the Subcomm. on Immigr., Citizenship, Refugees, Border Sec. & Int'l L. of the H. Comm. on the Judiciary*, 110th Cong. 61–159 (2008); ALISON SISKIN, CONG. RSCH. SERV., RL34556, HEALTH CARE FOR NONCITIZENS IN IMMIGRATION DETENTION 9 (2009) (summarizing concerns about detainee medical care).

441 *See* Consolidated Security, Disaster Assistance, and Continuing Appropriations Act, 2009, Pub. L. No. 110-329, Div. D, Tit. II, 122 Stat. 3574, 3659 (2008) (codified as amended at 6 U.S.C. § 211 note (Use of Funds to Continue Detention Services Contracts)) ("[N]one of the funds provided under this heading may be used . . . for the provision of detention services if the two most recent overall performance evaluations received . . . are less than 'adequate' . . . .").

442 H.R. REP. NO. 110-862, at 54 (2008).

443 *Id.*

standards as a guide.[444] The Two Strikes Mandate continues to govern detention oversight, even as the Agency has expanded its detention standards, most recently in 2019, with additional measures added to respond to the coronavirus in 2020.[445]

In 2009, the Obama Administration announced an overhaul of the immigration detention system, purporting to ensure that the conditions of confinement were more suited to its civil purpose.[446] The effort led to a comprehensive report, which included a recommendation to revamp immigration detention standards and shift away from overly restrictive standards adapted from the jail and prison context.[447] ICE issued new Performance-Based National Detention Standards in 2011.[448] In the preface to the new standards, ICE Director John Morton stated the standards were issued "[i]n keeping with our commitment to transform the immigration detention system" and "reflect ICE's ongoing effort to tailor the conditions of immigration detention to its unique purpose" of detaining people solely "to secure their presence both for immigration proceedings and their removal."[449] As the preface explained: "Because ICE exercises significant authority when it detains people, ICE must do so in the most humane manner possible with a focus on providing sound conditions and care."[450]

The new standards still relied on internal enforcement mechanisms to ensure compliance, and complaints about immigration detention conditions and lack of accountable oversight continued.[451] One study found that substandard care contributed to the majority of deaths in immigration detention over a two-year period.[452] In 2016, the Homeland Security Advisory Council issued a report observing that "[t]he full potential

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444 Consolidated Security, Disaster Assistance, and Continuing Appropriations Act, 2009, Div. D, Tit. II, 122 Stat. at 3659; *see Department of Homeland Security Appropriations for 2009*, *supra* note 438, at 204 (defining "[a]cceptable" as "the 'baseline' for the rating system," meaning that "[t]he detention functions are being adequately performed").

445 *See* Consolidated Appropriations Act, 2023, Pub. L. No. 117-328, Div. F, Tit. II, § 214(a), 136 Stat. 4459, 4736 (2022) (codified as amended at 6 U.S.C. § 211 note (Use of Funds to Continue Detention Services Contracts)); U.S. IMMIGR. & CUSTOMS ENF'T, 2019 NATIONAL DETENTION STANDARDS FOR NON-DEDICATED FACILITIES (2019), https://www.ice.gov/doclib/detention-standards/2019/nds2019.pdf [https://perma.cc/DU8E-ULSE]; U.S. IMMIGR. & CUSTOMS ENF'T, *supra* note 109, at 5–16.

446 *See* Nina Bernstein, *U.S. to Reform Policy on Detention for Immigrants*, N.Y. TIMES (Aug. 5, 2009), https://www.nytimes.com/2009/08/06/us/politics/06detain.html [https://perma.cc/5322-LRNX].

447 *See* SCHRIRO, *supra* note 415, at 2–4, 21.

448 U.S. IMMIGR. & CUSTOMS ENF'T, PERFORMANCE-BASED NATIONAL DETENTION STANDARDS 2011, https://www.ice.gov/doclib/detention-standards/2011/pbnds2011r2016.pdf [https://perma.cc/MLT9-K5F7].

449 *Id.* at i.

450 *Id.*

451 *See, e.g.*, OFF. OF INSPECTOR GEN., DEP'T OF HOMELAND SEC., CONCERNS ABOUT ICE DETAINEE TREATMENT AND CARE AT DETENTION FACILITIES 3–8 (2017), https://www.oig.dhs.gov/sites/default/files/assets/2017-12/OIG-18-32-Dec17.pdf [https://perma.cc/6ZAT-M8MD]; *see also supra* note 69 and accompanying text.

452 CLARA LONG, *supra* note 69, at 15.

of the civil model has not been realized"[453] and recommended increased oversight and a shift away from private, for-profit detention and county jail contracts.[454] The Trump Administration did not adopt the recommendations. In June 2018, the DHS Office of the Inspector General released a report condemning the inspection and compliance process as ineffective.[455] In September 2019, the House Oversight, Management, and Accountability Subcommittee of the Committee on Homeland Security held a hearing on the ICE detention inspection process.[456] Nongovernmental organizations criticized the "sham" inspections of ICE's contractor, The Nakamoto Group, Inc.[457]

Congress responded to these concerns by creating the Office of the Immigration Detention Ombudsman (OIDO) within the Department of Homeland Security "to resolve problems related to and improve conditions of individuals and families in immigration detention."[458] Congress created the office out of concern that, "despite several reviews, audits, and investigations revealing substandard care and conditions at the Department's short- and long-term civil detention facilities, little progress has been made."[459] Congress gave the OIDO "unfettered access to any location within each . . . detention facility" and the authority to "[c]onduct unannounced inspections."[460] It further ordered the OIDO to "[e]stablish and administer an independent, neutral, and confidential process to receive, investigate, resolve, and provide redress . . . for cases in which Department officers or other personnel, or contracted, subcontracted, or cooperating entity personnel, are found to have engaged in misconduct or violated the rights of individuals in immigration detention."[461] This includes direct "assistance to individuals affected by . . . violations of . . . detention standards."[462] Moreover, in light of the criticism of The Nakamoto Group, Inc., Congress mandated that ICE's Office of Professional Responsibility conduct inspections under the Two

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[453] HOMELAND SEC. ADVISORY COUNCIL, REPORT OF THE SUBCOMMITTEE ON PRIVATIZED IMMIGRATION DETENTION FACILITIES 13 (2016), https://www.dhs.gov/sites/default/files/publications/DHS%20HSAC%20PIDF%20Final%20Report.pdf [https://perma.cc/UMH8-B3DQ].

[454] *Id.* at 11 & n.14.

[455] OFF. OF INSPECTOR GEN., DEP'T OF HOMELAND SEC., ICE'S INSPECTIONS AND MONITORING OF DETENTION FACILITIES DO NOT LEAD TO SUSTAINED COMPLIANCE OR SYSTEMIC IMPROVEMENTS 4 (2018), https://www.oig.dhs.gov/sites/default/files/assets/2018-06/OIG-18-67-Jun18.pdf [https://perma.cc/V2MF-9UH7].

[456] *Oversight of ICE Detention Facilities: Is DHS Doing Enough?: Hearing Before the Subcomm. on Oversight, Mgmt., & Accountability of the H. Comm. on Homeland Sec.*, 116th Cong. 1 (2019).

[457] *Id.* at 48–50, 59–60.

[458] *About the Office of the Immigration Detention Ombudsman (OIDO)*, DEP'T OF HOMELAND SEC. (May 17, 2023), https://www.dhs.gov/aboutoido [https://perma.cc/SD96-MW5V]; *see also* 6 U.S.C. § 205(a).

[459] H.R. REP. NO. 116-180, at 12 (2019).

[460] 6 U.S.C. § 205(b)(3), (c).

[461] *Id.* § 205(b)(1).

[462] *Id.* § 205(b)(5).

Strike Mandate beginning in 2021.[463] These efforts, according to recent reports, have not resulted in significant changes to detention conditions, due in large part to continuing inefficacies in ICE's oversight process.[464] But they demonstrate Congress's continuing interest in ensuring civil conditions of confinement.

Even in the period of massive detention expansion and entrenchment, the legislative and executive branches have maintained a civil detention interest in regulating the conditions of immigration detention. Congressional oversight prompted ICE to adopt detention standards, and when the Agency proved unequal to the task of self-regulation, Congress enacted modest provisions to facilitate and even require the maintenance of acceptable detention conditions. These actions and reactions underscore Congress's desire to ensure civil conditions of immigration detention and its growing distrust of the Agency to manage detention conditions.

III. The Law of Immigration Detention

Some courts have rejected challenges to inadequate conditions of immigration detention by emphasizing the will of the political branches to detain and the expertise of the Agency in managing the difficulties of detention facilities. Missing from this account is a recognition of the civil detention interest, that is, the interest in ensuring humane and nonpunitive conditions of immigration detention, particularly in light of the legislature's growing distrust of the Agency's management of the detention system.

This Part considers whether and how the civil detention interest impacts the enforceability of the substantive rights of immigrants in detention. It returns to and explains the potential impact on three sources of law outlined in Part I: constitutional challenges, statutory immigration law challenges, and administrative law challenges to the conditions of immigration confinement. Consideration of the civil detention interest, if taken seriously, should encourage greater intervention by the judicial branch to address the conditions of immigration detention.

A. Constitutional Challenges

Immigrants have a substantive due process right to constitutionally adequate conditions of civil immigration detention.[465] Many of these

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[463] Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, Div. F, Tit. II, § 215(b), 134 Stat. 1182, 1457 (2020) (codified as amended at 6 U.S.C. § 211 note (Use of Funds to Continue Detention Services Contracts)).

[464] *See generally* Jesse Franzblau, Nat'l Immigrant Just. Ctr., Beyond Repair: ICE's Abusive Detention Inspection and Oversight System (2023), https://immigrantjustice.org/sites/default/files/content-type/research-item/documents/2023-11/NIJC-Policy-brief_ICE-detention-inspections_November2023.pdf [https://perma.cc/MRU8-XG79].

[465] *See supra* notes 15–18 and accompanying text.

standards have been adapted from the Eighth Amendment context, to varying degrees.[466] Numerous courts have upheld immigrants' substantive due process rights and found various conditions unconstitutional.[467] Other courts, however, have rejected immigrants' substantive due process claims under both *Bell v. Wolfish* and deliberate indifference standards. Those courts' decisions emphasize the political branches' interest in detaining immigrants and the Agency's perceived expertise in operating detention facilities.[468] The existence of — rather than compliance with — detention standards has been perceived as a demonstration of the Agency's lack of deliberate indifference, raising the burden detained immigrants must meet to establish constitutionally inadequate conditions on a systemic basis.[469] Missing from this analysis is any serious consideration of the government's civil detention interest.

One may argue that judicial recognition of the civil detention interest would not meaningfully change the calculus. *Bell*, for example, requires courts to consider the government's interest in imposing the challenged condition. Where there are competing interests, perhaps only the political branches themselves should decide which interest to prioritize. Viewed in this light, the interest in facilitating deportation through detention will likely outweigh the interest in maintaining acceptable conditions of confinement.

Such a view oversimplifies the questions posed by *Bell*'s substantive due process framework. *Bell* asks courts to consider whether the challenged condition is "reasonably related" or "excessive" to a legitimate objective.[470] The civil detention interest matters because it helps define the reasonableness and excessiveness of the challenged condition. The Third and Ninth Circuits, for example, chastised lower courts for ignoring the government's legitimate interests in immigration detention, but proffered little analysis as to why the challenged conditions (acts and omissions relating to the spread of a deadly communicable disease) were reasonably related and not excessive to those objectives.[471] Their decisions read as if detention itself is the challenged condition, which confuses the constitutional violation (whether the conditions of civil immigration detention during COVID-19 were punitive) with the remedy (whether release, or something short of release, was appropriate in light of the constitutional violation). Their analyses therefore skip the

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[466] *See supra* notes 87–91 and accompanying text.

[467] *See supra* notes 15–18 and accompanying text.

[468] *See supra* notes 105–72 and accompanying text.

[469] *See supra* notes 127, 138–39 and accompanying text.

[470] Bell v. Wolfish, 441 U.S. 520, 538–39 (1979) (quoting Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168–69 (1963)).

[471] *See supra* notes 113–18, 157–60 and accompanying text.

very inquiry that the Constitution demands and render the distinction between punitive and nonpunitive detention meaningless.[472]

Proper consideration of the civil detention interest offers standards by which the reasonableness or excessiveness of detention conditions should be measured. For more than forty years, Congress and the Agency have repeatedly measured the appropriateness of conditions referring to agency detention standards, several of which implicate the government's affirmative duty to meet the "basic human needs" of people in its custody and care in a nonpunitive manner.[473] After hearing testimony on the impact of ICE's failure to meet its own minimum standards of care, Congress implemented a statutory scheme by which federal funding cannot be expended on detention facilities that fail consecutive inspections.[474]

Compliance with detention standards in the immigration context is akin to the civil version of what Dolovich calls the state's "carceral burden" in the penal context.[475] By expressing its civil detention interest through immigration legislation and appropriations, Congress has at the very least answered the question of how the Executive may *not* detain immigrants for the purpose of facilitating their deportation.[476] This is not to suggest that detention standards necessarily represent the constitutional floor for a *Bell* analysis — courts may consider broader evidence of the standards of care with respect to serious harms alleged by detained immigrants, and those may require more or less than detention standards provide.[477] But courts should not reflexively accept a claim

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[472] By contrast, there are numerous lower courts that engaged in a more rigorous *Bell* analysis to consider the objective unreasonableness of COVID-19 conditions in immigration courts. *See supra* note 112 (collecting cases).

[473] "[B]asic human needs" include "food, clothing, shelter, medical care, and reasonable safety." DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 200 (1989); *see also* Dolovich, *supra* note 83, at 921 (describing the "basic human needs" of people in prison).

[474] *See supra* notes 433, 435–37, 440–45 and accompanying text.

[475] Dolovich, *supra* note 83, at 921–22 (describing the state's "carceral burden" as the state's obligation to "ensur[e] the minimum conditions for maintaining prisoners' physical and psychological integrity and well-being — those basic necessities of human life, including protection from assault, without which human beings cannot function and that people in prison need just by virtue of being human").

[476] *See generally supra* Part II, 1216–44.

[477] The Executive has revised the detention standards on various occasions, sometimes to better reflect the nonpunitive nature of immigration detention. *See* Joseph Summerill, *Immigration and Customs Enforcement Introduces "Friendly" Federal Detention Standards and New, Softer Detention Facilities*, FED. LAW., Sept. 2012, at 46, 47–48, 50–51 (describing the adoption of the 2011 version of the Performance-Based National Detention Standards as "implementing policies that provide better protection of immigrant detainees' human rights," *id.* at 50–51, including in areas of medical care, religious freedom, and access to counsel). But the Executive also has been accused of weakening detention standards. *See* Eunice Hyunhye Cho, *The Trump Administration Weakens Standards for ICE Detention Facilities*, ACLU (Jan. 14, 2020), https://www.aclu.org/news/immigrants-rights/the-trump-administration-weakens-standards-for-ice-detention-facilities [https://perma.cc/4N27-R9DY] (describing multiple modifications in the 2019 version of the National Detention Standards that "weaken critical protections and lower oversight requirements" in areas like medical care and use of force).

that ongoing or egregious violations of detention standards (which represent the political branches' minimum expectations for a civil immigration detention system) somehow bear a reasonable relationship and are not excessive to the government's interest in facilitating deportation or managing a detention facility. At a minimum, evidence of ongoing or egregious violations of detention standards should shift the burden to the government to identify a legitimate interest in maintaining the specific condition beyond its generalized interest in maintaining detention facilities for purposes of facilitating deportation.[478]

The civil detention interest also supports the application of burden-shifting when conditions of immigration detention mirror those of jails and prisons. In *Jones v. Blanas*,[479] a case involving a state civil detention statute, the Ninth Circuit held that the conditions of confinement for people in civil detention must be superior to the conditions for people held on criminal charges or sentences.[480] The court therefore applied a presumption of unconstitutionally punitive conditions where people in civil detention face conditions similar to those faced by people held on criminal charges or sentences.[481] In *Fraihat*, the Ninth Circuit questioned, without deciding, whether such a presumption applies to people held in federal immigration detention.[482]

In light of the civil detention interest, the *Jones* presumption should apply in the immigration detention context. Congress enacted provisions that required the Attorney General to arrange "appropriate places of detention," differentiating its civil system from punitive camps and farms.[483] When mandatory detention necessitated, in the federal government's view, reliance on local jails, Congress predicated such reliance on cooperative agreements and funding designed to ensure "acceptable conditions of confinement" for the care of federal detainees, recognizing the need for more humane conditions.[484] Congress then mandated that ICE enforce compliance with immigration-specific detention standards

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[478] *Cf.* Jones v. Blanas, 393 F.3d 918, 934 (9th Cir. 2004) (applying presumption of unconstitutionality when conditions fall below a certain standard).

[479] 393 F.3d 918 (9th Cir. 2004).

[480] *See id.* at 933–34 (citing Youngberg v. Romeo, 457 U.S. 307, 321–22 (1982)).

[481] *Id.* at 934 (holding that "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"); *see also* King v. County of Los Angeles, 885 F.3d 548, 557 (9th Cir. 2018) (explaining that, if a plaintiff establishes that the punitive presumption in *Jones* applies, "the burden shifts to the defendant to show (1) 'legitimate, non-punitive interests justifying the conditions of the detainee's confinement' and (2) 'that the restrictions imposed . . . [are] not "excessive" in relation to these interests'" under *Bell* (alteration in original) (quoting *Jones*, 393 F.3d at 935)).

[482] *See* Fraihat v. U.S. Immigr. & Customs Enf't, 16 F.4th 613, 648–49 (9th Cir. 2021) (questioning whether the *Jones* presumption applies but holding that, even if it does, it does not necessarily apply to the fact of detention and that to the extent plaintiffs were challenging immigration detention conditions nationwide, the plaintiffs had not made a "commensurately high showing," *id.* at 649, for such a "monumental comparison," *id.* at 648).

[483] *See supra* notes 334–56 and accompanying text.

[484] *See supra* notes 416–24 and accompanying text.

nationwide.[485] If ICE detains individuals in conditions equivalent to the conditions of criminal pretrial detention or incarceration, it should carry the burden of establishing why those conditions do not violate substantive due process under *Bell*.

Irrespective of the burden of proof, the civil detention interest also demonstrates why courts should not defer to detention officials when they violate their own rules. *Bell* and its progeny state that courts, when considering the objective reasonableness of a particular condition, "must take account of the legitimate interests in managing a jail" and exercise "deference to policies and practices needed to maintain order and institutional security."[486] In the context of civil immigration detention, however, Congress has repeatedly expressed distrust of federal immigration detention management and has required the Agency to adopt and enforce policies and practices for detention management through civil detention standards.[487] Deference to an agency's decision to violate detention standards would improperly elevate the interests of the Agency above the interests of Congress in ensuring civil immigration detention conditions.

Similarly, proper consideration of the civil detention interest exposes the flaws in courts' application of the deliberate indifference standard. Some courts have pointed to the mere existence of detention standards as proof that federal immigration officials are not deliberately indifferent to the serious needs of detained people, suggesting that actual compliance with those standards is irrelevant to the inquiry.[488] As section II.C details, compliance is a core congressional interest. The documented failures of ICE detention management prompted Congress to require third-party audits and eventually create an independent office to investigate complaints.[489] As the district court in *Fraihat* observed, little weight ought then to be placed on federal immigration officials' mere issuance of guidance where there is evidence of actual noncompliance and risk of harm.[490] Simply put, Congress does not trust the Agency. Rather than give "leeway" to ICE's efforts to handle detention management as part of deliberate indifference analysis,[491] the civil detention interest suggests courts should exercise more rigorous scrutiny of agency efforts to ensure civil detention conditions.

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485 *See supra* notes 433–45 and accompanying text.

486 Kingsley v. Hendrickson, 576 U.S. 389, 399–400 (2015) (applying the *Bell* framework to excessive force in pretrial detention).

487 *See, e.g.*, *supra* notes 53–58 and accompanying text.

488 *See, e.g.*, *supra* notes 127, 140–43 and accompanying text.

489 *See, e.g.*, *supra* notes 433–45, 458–64 and accompanying text.

490 *See* Fraihat v. U.S. Immigr. & Customs Enf't, 445 F. Supp. 3d 709, 744 (C.D. Cal. 2020), *order clarified*, No. EDCV 19-01546, 2020 WL 6541994 (C.D. Cal. Oct. 7, 2020), *rev'd*, 16 F.4th 613 (9th Cir. 2021).

491 *Cf.* Hope v. Warden York Cnty. Prison, 972 F.3d 310, 330 (3d Cir. 2020).

More fundamentally, the recognition of the civil detention interest calls into question whether courts should require a showing of deliberate indifference in the immigration detention context at all. The deliberate indifference standard derives from the Eighth Amendment, which starts from the principle that confinement is intended to punish and that only cruel or unusual punishment is prohibited.[492] Numerous scholars have questioned its applicability to civil pretrial detention.[493] Following *Kingsley*, where the Supreme Court applied an objective reasonableness standard to excessive force claims in the pretrial detention context, there has been a growing trend in case law toward adopting an objective reasonableness standard for all civil detention claims.[494] As the Court explained in *Kingsley*, because people in pretrial detention cannot be punished at all, there is no need for a subjective test to assess whether punishment is unconstitutional.[495]

The civil detention interest underscores the logic of jettisoning the deliberate indifference test in favor of an objective reasonableness test for immigration detention conditions. Many courts have already held that people in immigration detention have substantive due process rights at least as great as those in pretrial detention.[496] In light of congressional

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[492] Catherine T. Struve, *The Conditions of Pretrial Detention*, 161 U. PA. L. REV. 1009, 1033 (2013) (describing how the punitive concept of "just deserts" influences courts' reading of the Eighth Amendment).

[493] *See, e.g.*, *id.* at 1009, 1061; Garrett & Kovarsky, *supra* note 27, at 136 (critiquing the application of subjective deliberate indifference to civil detention claims); Shad M. Brown, Note, *Giving Due Process Its Due: Why Deliberate Indifference Should Be Confined to Claims Arising Under the Cruel and Unusual Punishment Clause*, 27 WASH. & LEE J. C.R. & SOC. JUST. 649, 688 (2021) (proposing an "objective unreasonableness" standard in the context of pretrial detention); DeAnna Pratt Swearingen, Comment, *Innocent Until Arrested?: Deliberate Indifference Toward Detainees' Due-Process Rights*, 62 ARK. L. REV. 101, 117 (2009) (suggesting an alternative burden-shifting approach in the pretrial detention context in which the litigant need only meet "the burden of establishing that he had been denied access to medical care for a serious medical need," after which "the burden would then shift to the state to demonstrate that the denial of access was the least-restrictive measure possible to achieve a legitimate government objective"); David C. Gorlin, Note, *Evaluating Punishment in Purgatory: The Need to Separate Pretrial Detainees' Conditions-of-Confinement Claims from Inadequate Eighth Amendment Analysis*, 108 MICH. L. REV. 417, 439 (2009) (proposing that courts apply an objective deliberate indifference standard in the context of pretrial detention).

[494] *See, e.g.*, Miranda v. County of Lake, 900 F.3d 335, 352 (7th Cir. 2018) (medical claim); Short v. Hartman, 87 F.4th 593, 605 (4th Cir. 2023) (medical claim); Brawner v. Scott County, 14 F.4th 585, 596 (6th Cir. 2021) (medical claim); Charles v. Orange County, 925 F.3d 73, 86–87 (2d Cir. 2019) (medical claim); Gordon v. County of Orange, 888 F.3d 1118, 1123–25 (9th Cir. 2018) (medical claim); Darnell v. Pineiro, 849 F.3d 17, 34–35 (2d Cir. 2017) (environmental health and safety); Hardeman v. Curran, 933 F.3d 816, 823 (7th Cir. 2019) (lack of water for drinking and sanitation); Castro v. County of Los Angeles, 833 F.3d 1060, 1070 (9th Cir. 2016) (en banc) (failure to protect).

[495] Kingsley v. Hendrickson, 576 U.S. 389, 400–01 (2015).

[496] *See, e.g.*, *Charles*, 925 F.3d at 89–90; E.D. v. Sharkey, 928 F.3d 299, 306–07 (3d Cir. 2019) (citing, inter alia, *Charles*, 925 F.3d 73); Chavero-Linares v. Smith, 782 F.3d 1038, 1041 (8th Cir. 2015) (citing, inter alia, Walton v. Dawson, 752 F.3d 1109, 1117–18 (8th Cir. 2014)); Belbachir v. County of McHenry, 726 F.3d 975, 979 (7th Cir. 2013) (citing, inter alia, Gibson v. County of Washoe, 290 F.3d 1175, 1187 (9th Cir. 2002)); Porro v. Barnes, 624 F.3d 1322, 1326 (10th Cir. 2010); Edwards v. Johnson, 209 F.3d 772, 778 (5th Cir. 2000).

interests to ensure civil immigration detention conditions, the subjective state of mind of detention officials should not override objective evidence that immigration detention conditions are unreasonable. Congress federalized immigration detention to ensure civil conditions of confinement for noncitizens and required the Agency to ensure compliance with standards.[497] It pressured the Executive branch to adopt immigration detention standards, which purportedly recognized the unique and nonpunitive nature of immigration detention.[498] Deliberate indifference is a punishment-centric standard.[499] Applying *Bell v. Wolfish* or a similar objective reasonableness standard[500] better aligns with the civil detention interest.

By considering seriously the civil detention interest, courts can better enforce the substantive due process rights of detained immigrants in ways that align with the will of the political branches. Rather than import punitive standards, the judiciary should consider the civil purpose and design of the immigration detention system while holding officials accountable for conditions that objectively exceed civil boundaries.

B. Statutory Immigration Law Challenges

Section I.B observes the lack of case law interpreting, let alone enforcing, statutory provisions that require "appropriate places of detention" and "acceptable conditions of confinement."[501] Some federal courts have interpreted "appropriate places of detention" as granting federal immigration officials unfettered discretion or "plenary power" to choose where noncitizens are detained.[502] The legislative history of the provision demonstrates a different purpose — a civil detention interest — in mind.[503] By requiring the federal government to arrange "appropriate" places of detention and expressing a preference for existing federal institutions, Congress placed guardrails on the type of facilities that immigration officials could utilize. Detention farms and camps are not "appropriate places," and Congress indicated its preference for federal inspection facilities like Ellis Island.[504]

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497 *See supra* section II.A, pp. 1217–22.

498 *See supra* notes 375–79 and accompanying text.

499 *See* Struve, *supra* note 492, at 1061 (proposing an objective reasonableness test under the Fourth Amendment for claims challenging the conditions of detention prior to a judicial determination of probable cause).

500 *Id.*; *see also* Amelia Wilson, *Immigration Detention as Continuing Seizure* (forthcoming) (manuscript at 43) (on file with the Harvard Law School Library) (arguing that courts should apply an objective reasonableness test under the Fourth Amendment to assess the conditions of immigration detention).

501 *See supra* section I.B, pp. 1209–11.

502 *See supra* notes 178–81 and accompanying text.

503 *See supra* notes 295–342 and accompanying text.

504 *See supra* notes 310–42 and accompanying text.

This history has important doctrinal implications. First, it undermines several circuit courts' assumptions that 8 U.S.C. § 1231(g)(1) was designed to give unfettered discretion to federal immigration officials to transfer detained immigrants to any location.[505] Nowhere in the lengthy debate over the clause did legislators discuss agency authority to transfer immigrants between detention centers.[506] Nor is the provision a sweeping grant of "plenary power" over detention.[507] Rather, as the Fourth Circuit has held, the provision is about the government's "brick and mortar obligations."[508] More specifically, the legislative history demonstrates that the provision is about the government's obligations to ensure that noncitizens are detained in the appropriate type of civil detention facility, rather than in punitive camps or farms.[509] The federal government has been reading the scope of § 1231(g)(1) too broadly, often in a misplaced attempt to thwart judicial action.

Second, the history suggests that immigrants seeking to challenge the siting of their detention as inappropriate — particularly in the context of makeshift detention camps and similar plans[510] — have a statutory hook. Congress chose the language of § 1231(g)(1) to help prevent the creation of punitive detention facilities.[511] The erection of immigration detention camps or farms violates the brick and mortar obligations of the Agency.

A recognition of the civil detention interest also provides support for more rigorous enforcement of the statutory requirements in 8 U.S.C. § 1103(a)(11) and related provisions governing the use of federal funds for the care of detained individuals and the maintenance of "acceptable conditions of confinement" in contracted jail space. ICE detention

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505 *See supra* notes 334–39 and accompanying text.

506 *See supra* notes 328–31 and accompanying text (discussing concern expressed by civil groups and legislators over the potential siting of "concentration camps" within the United States). If anything, during this period, federal immigration officials expressed a desire to avoid costs associated with the transportation of detained immigrants within the United States.

507 *Contra* GEO Grp., Inc. v. Newsom, 15 F.4th 919, 930 n.4 (9th Cir. 2021).

508 Reyna *ex rel.* J.F.G. v. Hott, 921 F.3d 204, 209 (4th Cir. 2019).

509 Notably, 8 U.S.C. § 1231(g) requires "appropriate places" of detention, with a preference for using existing federal government facilities, whereas 8 U.S.C. § 1103(a)(11) requires that the government ensure "acceptable conditions of confinement" when nonfederal institutions are used. The focus of § 1231(g) is therefore on the type of facility, whereas § 1103(a)(11) is about the conditions within contract facilities. *See* 8 U.S.C. §§ 1103(a)(11), 1231(g).

510 *See, e.g.*, Manny Fernandez, *Two New Tent Cities Will Be Built in Texas to Hold Migrants*, N.Y. TIMES (Apr. 17, 2019), https://www.nytimes.com/2019/04/17/us/mcaleenan-migrants-border-texas.html [https://perma.cc/3DAJ-LYKT]; *see also* Charlie Savage et al., *Sweeping Raids, Giant Camps and Mass Deportations: Inside Trump's 2025 Immigration Plans*, N.Y. TIMES (Nov. 11, 2023), https://www.nytimes.com/2023/11/11/us/politics/trump-2025-immigration-agenda.html [https://perma.cc/LE8D-LPMC] (discussing President Trump's plan "to build huge camps to detain people while their cases are processed and they await deportation flights").

511 *See supra* notes 319–42 and accompanying text.

contracts require adherence to detention standards,[512] and detained individuals should be able to enforce the standards through the statutory provisions designed to ensure acceptable conditions.[513] Congress's authorization of cooperative agreements with states and localities includes explicit provisions to benefit detained immigrants and improve conditions in local jails in light of the civil nature of immigration detention.[514] In addition, Congress prohibits funding for contracts with facilities that fail consecutive federal inspections, recognizing the need for adherence with standards.[515] Rather than frustrate the purpose of the INA, broader mechanisms to ensure that jails adhere to their contractual obligations serve the civil detention interest underlying such cooperative agreements.

While courts have not given sufficient consideration to the history and context of these statutory provisions, it is equally true that the provisions themselves do little to clarify their purpose. The text of the INA does not tell the full story, and courts are often hesitant to rely on legislative history to fill these gaps.[516] Arguably, Congress should do more to clarify its intentions. The failure of Congress to do more, however, does not excuse judicial misunderstanding about what Congress has done or the promotion of textual readings that conflict with that history. Even courts that outwardly eschew legislative history as a tool of statutory interpretation should still read the text of these statutory provisions in their full context.[517] Congress enacted provisions regarding the appropriateness of detention facilities and the acceptability of detention

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[512] *See Fact Sheet: ICE Detention Standards*, U.S. IMMIGR. & CUSTOMS ENF'T (Aug. 8, 2023), https://www.ice.gov/factsheets/ice-detention-standards [https://perma.cc/ZH48-R682] ("Each detention facility with an [sic] U.S. Immigration and Customs Enforcement (ICE) contract must comply with one of several national detention standards . . . .").

[513] *See supra* notes 216–24 and accompanying text.

[514] *See supra* notes 417–24 and accompanying text.

[515] *See supra* note 444 and accompanying text.

[516] *See, e.g.*, Aaron-Andrew P. Bruhl, *Supreme Court Litigators in the Age of Textualism*, 76 FLA. L. REV. 59, 67–68 (2024) [hereinafter Bruhl, *Supreme Court Litigators*] ("The story of textualism in the judiciary, especially in the Supreme Court, is a story of one set of sources seeming to displace another. The Court cites legislative history less, and it cites textualist tools (dictionaries, textual canons) more."); Aaron-Andrew P. Bruhl, *Statutory Interpretation and the Rest of the Iceberg: Divergences Between the Lower Federal Courts and the Supreme Court*, 68 DUKE L.J. 1, 57 (2018) ("[T]he use of legislative history reached a recent peak at all three levels [— federal district court, appellate court, and the U.S. Supreme Court —] in the mid- to late-1980s and has declined since then."); Chase Wathen, Note, *Textualism Today: Scalia's Legacy and His Lasting Philosophy*, 76 U. MIA. L. REV. 864, 869 (2022) (mapping trends in the citation of textualism versus legislative history by circuit and timeframe).

[517] *See* Bruhl, *Supreme Court Litigators*, *supra* note 516, at 97 (describing the continuing use of legislative history in briefs, particularly from the Solicitor General's office, and suggesting that it "may reflect litigators' awareness that at least some of the Justices still care about legislative history, even if the Court's opinions rarely disclose it"); Jarrod Shobe, *Agency Legislative History*, 68 EMORY L.J. 283, 285 n.2 (2018) (providing a list of recent Supreme Court cases where legislative history was contested).

conditions to constrain detention power and ensure the civil nature of immigration detention.

C. Administrative Law Challenges

The recognition of the civil detention interest arguably has the most impact on administrative law claims. As explained in section I.C, detained noncitizens have repeatedly sought the enforcement of agency detention standards, relying primarily on the *Accardi* doctrine. Under *Accardi*, an agency must follow its own rules when those rules affect the rights and interests of others.[518] At a surface level, detention standards fall clearly within the ambit of *Accardi*, since they are written with the rights and interests of detained immigrants in mind. Detained immigrants' nutrition, medical care, safety, access to legal counsel and community, and numerous other basic needs are regulated by these standards.[519] The legislative and regulatory history demonstrates that the very existence of standards — and increasingly intrusive legislative oversight of the Agency's efforts to ensure compliance with the standards — is motivated by concern over the poor conditions of confinement facing immigrants.[520]

Several courts have nonetheless concluded that the detention standards fall outside the ambit of *Accardi*.[521] One might argue, correctly, that such conclusions are driven in part by a narrow reading of *Accardi* rather than solely a misunderstanding of the history and context behind ICE's detention standards. Several courts, for example, have declined to find an *Accardi* violation based on violations of detention standards on the theory that *Accardi* applies only to procedural rules.[522] Such a reading of *Accardi* has no basis in precedent. The Supreme Court and appellate courts have repeatedly recognized that the *Accardi* doctrine applies to procedural and substantive rules.[523] Indeed, these courts

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[518] *See supra* notes 212–15 and accompanying text.

[519] *See supra* notes 192–95 and accompanying text.

[520] *See supra* notes 375–82, 416–50 and accompanying text.

[521] *See supra* notes 218–24 and accompanying text.

[522] *See, e.g.*, C.G.B. v. Wolf, 464 F. Supp. 3d 174, 226 (D.D.C. 2020) ("*Accardi* is rooted instead in notions of *procedural* due process." (citing Lopez v. Fed. Aviation Admin., 318 F.3d 242, 246 (D.C. Cir. 2003))); D.A.M. v. Barr, 474 F. Supp. 3d 45, 66 (D.D.C. 2020) (reiterating the analysis in *C.G.B.* in rejecting *Accardi* claim); A.S.M. v. Warden, Stewart Cnty. Det. Ctr., 467 F. Supp. 3d 1341, 1352 (M.D. Ga. 2020) (emphasizing that "[a]t its core, *Accardi* involved procedural due process"); *see also* Jane G.A. v. Rodriguez, No. 20-5922, 2020 WL 6867169, at *14 (D.N.J. Nov. 23, 2020) (questioning whether *Accardi* has any application to substantive rules).

[523] *See, e.g.*, Service v. Dulles, 354 U.S. 363, 388 (1957) (applying *Accardi* principle to require agency to adhere to the "more rigorous substantive and procedural standards" that the agency had adopted in its regulations, beyond what was required by statute); United States v. Morgan, 193 F.3d 252, 266 (4th Cir. 1999) ("While it is of course true that . . . the Secretary was not obligated to impose upon himself these more rigorous substantive and procedural standards, . . . having done so he could not, so long as the Regulations remained unchanged, proceed without regard to them."

provided no principled reason to limit *Accardi* to the procedural context. Even prior to *Accardi*, federal courts long recognized that immigration officials must follow their own rules because "[a]liens must be deported according to law, and not according to men," and immigrants have a "right to rely upon the observance of . . . those rules by those charged with their enforcement."[524] Federal immigration officials do not have the discretion to disregard rules, whether procedural or substantive, lest their powers become arbitrary.

A second, more complex question is when *Accardi* applies to informal rules.[525] Courts generally have held that *Accardi* applies to rules — formal or informal — that affect the rights or interests of others.[526] The legislative and regulatory history that gave rise to ICE's detention

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(alterations in original) (quoting *Service*, 354 U.S. at 388)); Ctr. for Auto Safety v. Dole, 828 F.2d 799, 809 (D.C. Cir. 1987) ("Given *Service* and the multitude of cases following it, . . . judicial review is available to hold an agency to procedural and substantive standards contained in its own regulations . . . ."); Gulf States Mfrs., Inc. v. NLRB, 579 F.2d 1298, 1309 (5th Cir. 1978) ("It was not material whether the regulation was substantive or procedural in order to bind the Board . . . ."); Holden v. Finch, 446 F.2d 1311, 1315 (D.C. Cir. 1971) (noting the "unexceptionable" principle that an agency could not act "in violation of any procedural or substantive rights accruing by reason of" the "additional protections" adopted by the agency (citing *Service*, 354 U.S. at 388)); Wilkinson v. Legal Servs. Corp., 27 F. Supp. 2d 32, 50 n.28 (D.D.C. 1998) (explaining that the *Accardi* doctrine can encompass "a self-imposed binding substantive or procedural rule that limits an agency's discretion").

524 Sibray v. United States, 282 F. 795, 798 (3d Cir. 1922).

525 *See* Elizabeth Magill, *Foreword: Agency Self-Regulation*, 77 GEO. WASH. L. REV. 859, 877–82 (2009) (describing how courts have addressed which types of rules are subject to enforcement through *Accardi*).

526 *See, e.g.*, Morton v. Ruiz, 415 U.S. 199, 235 (1974) (applying *Accardi* to violation of Bureau of Indian Affairs Manual rule and explaining "[w]here the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures"); Alcaraz v. Immigr. & Naturalization Serv., 384 F.3d 1150, 1162 (9th Cir. 2004) (recognizing *Accardi* extends beyond formal regulations and applies to rules that affect "the rights of individuals" (quoting *Ruiz*, 415 U.S. at 235)); Montilla v. Immigr. & Naturalization Serv., 926 F.2d 162, 167 (2d Cir. 1991) (holding that *Accardi*'s "ambit is not limited to rules attaining the status of formal regulation[]" and that it applies where the rule affects "the rights or interests of the objecting party" (citing, inter alia, United States v. Caceres, 440 U.S. 741, 752–55 (1979); Am. Farm Lines v. Black Ball Freight Serv., 397 U.S. 532, 538–39 (1970))); Mass. Fair Share v. Law Enf't Assistance Admin., 758 F.2d 708, 711 (D.C. Cir. 1985) (applying *Accardi* to violation of a memorandum of understanding between agencies because "a federal agency must adhere firmly to self-adopted rules by which the interests of others are to be regulated" and stating that "[t]his precept is rooted in the concept of fair play and in abhorrence of unjust discrimination, and its ambit is not limited to rules attaining the status of formal regulations" (footnotes omitted) (citing, inter alia, United States *ex rel.* Accardi v. Shaughnessy, 347 U.S. 260, 266–67 (1954))); United States v. Leahey, 434 F.2d 7, 10–11 (1st Cir. 1970) (applying *Accardi* to violation of an INS guideline because the "self-imposed rule of conduct," *id.* at 10, was "designed to protect taxpayers by setting a clear and uniform standard," *id.* at 11); United States v. Heffner, 420 F.2d 809, 811–12 (4th Cir. 1969) (applying *Accardi* to violation of an INS guideline and explaining that applicability of *Accardi* to an informal rule is "consistent with the doctrine's purpose to prevent the arbitrariness which is inherently characteristic of an agency's violation of its own procedures," *id.* at 812); Torres v. U.S. Dep't of Homeland Sec., 411 F. Supp. 3d 1036, 1068–69 (C.D. Cal. 2019) (holding that ICE must follow its own detention standards and that because ICE has incorporated the rules into its detention contract, the failure to enforce the contract is a final decision for purposes of alleging a violation of the APA); Innovation L. Lab v. Nielsen, 342 F. Supp. 3d 1067, 1079–80 (D. Or. 2018) (holding that ICE must follow the rules on the books under the APA).

standards demonstrates that the standards were written with the rights and interests of detained immigrants specifically in mind. Congress initially contemplated requiring the INS to draft detention standards in 1980 in light of specific reports of poor conditions within detention facilities.[527] Through its appropriations powers, Congress repeatedly required ICE to audit and enforce compliance with its detention standards, eventually enacting the Two Strikes Mandate and creating the independent OIDO to ensure enforcement.[528] It justified these actions by expressing concern about the conditions of the lives of detained people, in the wake of widespread reporting of avoidable death and medical neglect.[529] Under the rights-and-interests test, ICE must follow its own detention standards.

The D.C. Circuit applies a narrower test to determine if *Accardi* applies to informal agency rules, applying *Accardi* only if the agency intended the rule to create a "binding norm."[530] Under this test, courts examine indicia of the agency's intent, including the existence of mandatory language, compliance mechanisms, and other standards.[531] It is under this alternative test that several courts have rejected the application of *Accardi* to detention standards.[532] These courts — including the *A.S.M.* court discussed in the Introduction — have concluded ICE intended its detention standards to provide internal, voluntary guidance to the Agency and questioned whether ICE would have the statutory authority to regulate the substantive conditions of detention at all.[533]

An exploration of the civil detention interest demonstrates why, even under a binding norm test, *Accardi* applies to ICE's detention standards. Courts like *A.S.M.* seem to assume that ICE decided to develop detention standards on its own accord, as a form of self-regulation divorced from statutory authority or influence.[534] However, the legislative and regulatory history demonstrates that the INS developed its first

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[527] *See supra* notes 375–82 and accompanying text.

[528] *See supra* notes 433–45, 458–64 and accompanying text.

[529] *See supra* notes 418–20, 433, 437 and accompanying text.

[530] *See* Padula v. Webster, 822 F.2d 97, 100 (D.C. Cir. 1987).

[531] *Id.* ("In determining whether an agency's statements constitute 'binding norms,' we traditionally look to the present effect of the agency's pronouncements. Statements that are merely prospective, imposing no rights or obligations on the respective parties, will not be treated as binding norms. We also examine whether the agency's statements leave the agency free to exercise its discretion. Pronouncements that impose no significant restraints on the agency's discretion are not regarded as binding norms. As a general rule, an agency pronouncement is transformed into a binding norm if so intended by the agency[,] and agency intent, in turn, is 'ascertained by an examination of the statement's language, the context, and any available extrinsic evidence.'" (citations omitted) (quoting Doe v. Hampton, 566 F.2d 265, 281–82 (D.C. Cir. 1977)) (citing Am. Bus Ass'n v. United States, 627 F.2d 525, 529 (D.C. Cir. 1980); *Doe*, 566 F.2d at 281–82)).

[532] *See, e.g.*, C.G.B. v. Wolf, 464 F. Supp. 3d 174, 226 (D.D.C. 2020).

[533] *See id.* at 227–28; *see also* A.S.M. v. Warden, Stewart Cnty. Det. Ctr., 467 F. Supp. 3d 1341, 1354 (M.D. Ga. 2020).

[534] *A.S.M.*, 467 F. Supp. 3d at 1354 ("Petitioners have not explained the source of statutory authority that would even permit such agency rule-making delegation under these circumstances.").

detention standards in 1980 in response to a proposal to require such standards by the House Appropriations Committee.[535] From the first iteration of the standards, the INS identified its statutory authority to regulate the conditions of confinement as part of its broader detention powers.[536] While federal immigration officials resisted engagement in rulemaking, the INS nonetheless adopted a plethora of compliance measures — often under the direction of Congress's oversight and appropriations committees — to ensure that detention facilities complied with the standards.[537] When its third-party audit system did little to address concerns of poor conditions, Congress enacted the Two Strikes Mandate to defund repeatedly noncompliant contracts and ultimately created an independent agency office to redress violations.[538] Detention standards are thus subject to statutory compliance with the Two Strikes Mandate and oversight by the OIDO.[539] The language within the standards and within contracts and statutory provisions that invoke the standards is often mandatory, providing minimum standards of care and safety.[540] In light of the high level of congressional oversight and compliance mechanisms, there is no plausible argument that the standards were intended to be internal, voluntary operating procedures. To the contrary, violations of the standards carry serious repercussions for the Agency.

The repercussions of violations are so serious — defunding under the Two Strikes Mandate — that inspections have become difficult to fail, and ICE routinely certifies detention facilities as compliant even when evidence indicates otherwise.[541] In egregious cases, litigants have asked courts to declare unlawful ICE's decision to certify a particular detention facility as compliant with the governing detention standards under the APA.[542] Such a result would align with congressional intent behind

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535 *See supra* notes 379–82 and accompanying text.

536 *See* INS STANDARDS FOR DETENTION, *supra* note 379, at 101, 103.

537 *See supra* notes 433–50 and accompanying text.

538 *See supra* notes 441–45 and accompanying text.

539 *See supra* notes 441–45 and accompanying text.

540 *See generally, e.g.*, U.S. IMMIGR. & CUSTOMS ENF'T, NATIONAL DETENTION STANDARDS FOR NON-DEDICATED FACILITIES (2019), https://www.ice.gov/doclib/detention-standards/2019/nds2019.pdf [https://perma.cc/BU97-SCZ5] ("Before using emergency capacity, the facility *must* certify to ICE/ERO that required medical, mental health, and security staffing are available to properly support the additional detainee population. The facility *must* stay within overall emergency capacity limits and ensure all local fire safety requirements are met." *Id.* at 7 (emphasis added)); U.S. IMMIGR. & CUSTOMS ENF'T, *supra* note 109, at 4 ("[A]ll facilities housing ICE detainees are required to have a COVID-19 mitigation plan . . . .").

541 *See* JESSE FRANZBLAU, NAT'L IMMIGRANT JUST. CTR., CUT THE CONTRACTS: IT'S TIME TO END ICE'S CORRUPT DETENTION MANAGEMENT SYSTEM 5 (2021).

542 Xirum v. U.S. Immigr. & Customs Enf't, No. 22-CV-00801, 2023 WL 2683112, at *9 (S.D. Ind. Mar. 29, 2023) (observing that "[a] declaration that the Jail should have failed its December 2021 evaluation would require ICE to cease detaining Plaintiffs and other noncitizens at the Jail under the Two Strikes Mandate" (citing Matushkina v. Nielsen, 877 F.3d 289, 292 (7th Cir. 2017)));

the Two Strikes Mandate and with the civil detention interest more broadly.[543] Applying *Accardi* to detention standards is a more modest requirement by comparison, and would require the Agency to meet standards designed to protect the rights and interests of detained people.

Recognition of the civil detention interest holds the potential of shifting judicial approaches to detained immigrants' conditions claims. A grant of relief does not necessarily tread upon the will of the political branches to detain or the expertise of an agency with unfettered detention authority. It instead gives meaning to Congress's longstanding interest in ensuring civil conditions of immigration detention and the restrictions Congress has placed on agency authority in light of the Agency's mismanagement of immigration detention conditions.

CONCLUSION

Courts have underenforced the substantive law of detention, deferring to their perception of the political branches' interest in detaining immigrants without consideration of the civil detention interest. The civil detention interest captures two important aspects of the legislative and regulatory history of immigration detention: the political will to ensure civil conditions of confinement and legislative distrust of agency management of detention conditions. Consideration of the civil detention interest provides a lens through which courts should reconsider their approach to constitutional, statutory, and administrative law claims seeking to vindicate immigrants' substantive rights in detention.

While the legislative and regulatory history of immigration detention reveals the civil detention interest, this history can also be read as a story of failure — which raises the question of whether the substantive rights of people in detention will ever be meaningfully realized. The political branches have long been aware of the poor conditions facing immigrants in detention. While they have taken steps to address these conditions, these steps are ineffective at best, which is why detained immigrants turn to the courts in the first place. The immigration detention system is "beyond repair," as one immigrant rights group explained.[544]

One might argue that the solution is not for the judiciary to step in but for the political branches to do more. Congress, for example, could enact legislation to regulate detention conditions and ensure that investigative governmental bodies have the power to enforce their recommendations. The Executive could curtail or prohibit the use of private prisons and jail contracts and engage in notice-and-comment

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see also Class Action Complaint at 45, Doe v. U.S. Immigr. & Customs Enf't, No. 23-CV-00971 (D.N.M. Nov. 3, 2023) (seeking, among other relief, a declaration that ICE's certification of Torrance County Detention Facility as "Meets Standards" under the applicable detention standards in April 2022 was arbitrary and capricious).

[543] *See supra* notes 441–45 and accompanying text.

[544] *See generally* FRANZBLAU, *supra* note 464.

rulemaking to turn detention standards into formal regulations. Immigrant rights organizations have advocated for these measures in the past.[545]

Learning from the prison reform context, however, immigrants and their advocates have become increasingly wary of focusing their policy efforts on improving detention conditions. Too often, such efforts are cited as a reason to increase funding for detention.[546] Past experience shows only sporadic changes in conditions, while detention itself rapidly expands.[547] This was the primary lesson that immigrant advocates learned about detention reform during the Obama Administration, which declared its commitment to changing detention conditions but ultimately expanded detention overall.[548]

In recent years, most advocates have focused their policy goals on the reduction of governmental reliance on detention and the closure of detention facilities.[549] Advocates support legislative and regulatory efforts to end for-profit immigration detention, protect immigrants' right to release, fund community-based alternatives to detention, and otherwise scale back detention.[550] They also have called upon the Executive to close detention facilities, beginning with those that exemplify the most egregious features of detention.[551] These latter efforts have seen a small measure of success, with the Department of Homeland Security closing several facilities during the Biden Administration.[552]

In the absence of a more fundamental shift away from detention, however, new facilities replace the old ones.[553] Prolonged loss of liberty, infliction of solitary confinement, isolation from family and community, physical and psychological abuse, discrimination, medical neglect, and

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545 *See, e.g.*, FRANZBLAU, *supra* note 541; *Featured Issue: Immigration Detention and Alternatives to Detention*, AM. IMMIGR. LAWS. ASS'N (Dec. 16, 2024), https://www.aila.org/library/featured-issue-immigration-detention#congress [https://perma.cc/FN4Q-HFKQ].

546 SILKY SHAH, UNBUILDING WALLS 142 (2024).

547 *Id.* at 149.

548 *Id.* at 8–9, 47.

549 *See Roadmap to Dismantle the U.S. Immigration Detention System*, NAT'L IMMIGRANT JUST. CTR. (July 28, 2021), https://immigrantjustice.org/research-items/white-paper-roadmap-dismantle-us-immigration-detention-system [https://perma.cc/22RH-G7W5].

550 *See id.*

551 DETENTION WATCH NETWORK, FIRST TEN TO COMMUNITIES NOT CAGES 2 (2021), https://www.detentionwatchnetwork.org/sites/default/files/reports/DWN%20First%20Ten%20to%20Communities%20Not%20Cages.pdf [https://perma.cc/HF99-V5AK].

552 SHAH, *supra* note 546, at 150, 180.

553 Eunice Hyunhye Cho, *Unchecked Growth: Private Prison Corporations and Immigration Detention, Three Years into the Biden Administration*, ACLU (Aug. 7, 2023), https://www.aclu.org/news/immigrants-rights/unchecked-growth-private-prison-corporations-and-immigration-detention-three-years-into-the-biden-administration [https://perma.cc/38WP-UQAU] (describing how federal immigration officials have increased their reliance on private prisons under the Biden Administration, entering into new contracts and expanding the number of people detained since 2021).

preventable death continue.[554] In the face of such intractable harms, immigrant rights organizations are increasingly committed to the abolition of immigration detention.[555] Until that goal is realized, they continue to demand that courts do their part to enforce the substantive rights of detained immigrants.[556]

The civil detention interest provides courts with a basis by which they may enforce the rights of detained immigrants more meaningfully. But whether courts will take this path is by no means clear. A plethora of judicially created doctrines already dictate that "rights[-based] challenges to the federal political branches' immigration decisions generally swim upstream."[557] Even if courts begin to acknowledge the civil detention interest when addressing substantive due process claims, they may nonetheless adopt new immigration-based "canons of evasion" to avoid finding in favor of detained immigrants.[558] In cases involving statutory or regulatory interpretation, courts may ignore legislative and regulatory history in favor of textualism, even when that history demonstrates that their interpretation is wrong.[559] Courts no doubt have a multitude of tools that would permit them to ignore the civil detention interest.

Ultimately, the failure to enforce the substantive rights of detained immigrants only reinforces the conclusion that the immigration detention system is a lawless space, at least for the immigrants who experience it. This reality lends further credence to efforts to abolish immigration detention, even as detained immigrants seek some measure of justice from the courts in the interim.

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554 *See, e.g.*, EUNICE HYUNHYE CHO & TESSA WILSON, ACLU ET AL., DEADLY FAILURES: PREVENTABLE DEATHS IN U.S. IMMIGRATION DETENTION 6–10 (2024); PHYSICIANS FOR HUM. RTS. ET AL., "ENDLESS NIGHTMARE": TORTURE AND INHUMAN TREATMENT IN SOLITARY CONFINEMENT IN U.S. IMMIGRATION DETENTION 1–2 (2024); SARAH DECKER & ANTHONY ENRIQUEZ, ROBERT F. KENNEDY HUM. RTS. ET AL., INSIDE THE BLACK HOLE: SYSTEMIC HUMAN RIGHTS ABUSES AGAINST IMMIGRANTS DETAINED & DISAPPEARED IN LOUISIANA 5–6 (2024); TIMANTHA GOFF ET AL., BLACK ALL. FOR JUST IMMIGR. ET AL., UNCOVERING THE TRUTH: VIOLENCE AND ABUSE AGAINST BLACK MIGRANTS IN IMMIGRATION DETENTION 9–10 (2022).

555 *See* Das, *supra* note 83, at 1437 n.13 (collecting examples of immigrant rights organizations and scholars who have called for the abolition of immigration detention).

556 The struggle to protect the rights of detained immigrants is a form of harm reduction that is consistent with abolitionist goals to end immigration detention. *See* Jamelia Morgan, *Responding to Abolition Anxieties: A Roadmap for Legal Analysis*, 120 MICH. L. REV. 1199, 1214 (2022) (discussing how abolitionists are "committed to reducing harm in the short term" and that "rights rhetoric — framing needs, protections, and injuries in the language of rights — can be framed as a kind of harm reduction").

557 David S. Rubenstein & Pratheepan Gulasekaram, *Immigration Exceptionalism*, 111 NW. U. L. REV. 583, 597 (2017); *see also supra* notes 41–52, 95–99 and accompanying text (describing the plenary power doctrine and other doctrines of deference that courts have applied in the context of rights-based challenges to detention power).

558 Dolovich, *supra* note 45, at 303 (using the term "canons of evasion" to describe the Supreme Court's use of "a set of maneuvers . . . to construct doctrinal standards for prison law cases that strongly incline courts to rule in favor of the state").

559 *See supra* note 516 and accompanying text.