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THE IMMIGRATION OVERSIGHT AND FAIRNESS
ACT: ENDING THE VIOLATION AND ABUSE OF
IMMIGRANT HEALTH

Cadence M. Moore*

In 1972, ten-year old Francisco Castaneda arrived in Los Angeles with his
family after fleeing the civil war in El Salvador.1 After living in the United
States for a number of years and losing his mother to cancer, Mr. Castaneda
began using drugs and was eventually sentenced to prison on a drug charge.2
Because Mr. Castaneda did not have legal status to be in the United States,
he was transferred from prison to an Immigration and Customs Enforcement
(ICE) detention center in March 2006.3

When he arrived at the detention center, Mr. Castaneda immediately
informed ICE authorities that he had developed a painful lesion on his penis
while he was in custody.4 Several days later, Mr. Castaneda was examined

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1. Detention and Removal: Immigration Detainee Medical Care: Hearing Before
the Subcomm. on Immigration, Citizenship, Refugees, Border Security, and International
Medical Care] (statement of Francisco Castaneda, former detainee), available at
http://judiciary.house.gov/hearings/printers/110th/38115.PDF. For additional stories
demonstrating circumstances in which ICE’s inadequate standard of care resulted in
detainee health catastrophes, see Nina Bernstein, Few Details on Immigrants Who Died
2008/05/05/nyregion/13detain.html. See also, Nina Bernstein, Ill and in Pain, Detainee
http://www.nytimes.com/2008/08/13/nyregion/13detain.html; Amy Goldstein and Dana

2. Detainee Medical Care, supra note 1, at 17.

3. Id.
by a doctor who advised him to see a specialist immediately. However, he was forced to wait a month before the Division of Immigration Health Services (DIHS) granted the request for a specialist consultation. Meanwhile, his lesion started to bleed and emit discharge.

Mr. Castaneda was allowed to see an oncologist and ultimately a urologist, both of whom informed him that the lesion might be cancerous and that he needed a biopsy. Nevertheless, ICE stated that it hoped to find a more cost-effective treatment and because the biopsy was elective surgery, it would not be provided. ICE informed Mr. Castaneda, who was in horrible pain due to the lesion, that he would only receive the biopsy when he was deported and no longer in ICE custody. Ten months after his symptoms first presented, with assistance from the American Civil Liberties Union (ACLU), Mr. Castaneda was finally scheduled for a biopsy. However, he was released from ICE custody just before the surgery and the procedure was cancelled. As he exited the detention facility, Mr. Castaneda was accompanied by a doctor who informed him that he was being released because of his serious medical condition. Once discharged, Mr. Castaneda received a biopsy and was told that he had been suffering from penile cancer while in detention. Because this form of cancer advances rapidly, it had already spread to his lymph nodes and stomach during his time in detention. In an effort to stop the spread of the cancer Mr. Castaneda had

4. Id.
5. Id.
6. Id.
7. Id.
8. Detainee Medical Care, supra note 1, at 17.
9. Id.
10. Id.
11. Id.
12. Id.
13. Id.
14. Detainee Medical Care, supra note 1, at 17.
his penis surgically removed and underwent five weeklong rounds of chemotherapy. Mr. Castaneda died on February 16, 2008, at the age of thirty-five.

Unfortunately, Mr. Castaneda’s story is not unusual in the world of detainee medical care. Although ICE is charged with providing care to detainees, several organizations have documented that medical care at detention centers is inadequate. One of the most prevalent complaints by detainees to non-governmental organizations (NGOs) about their confinement is that they are unable to access medical care. Despite this negligent treatment, detainees are unable to seek relief through the judicial system. The federal courts have historically been conflicted over what type

15. Id.


19. CONDITIONS OF CONFINEMENT, supra note 18, at 3.
of treatment constitutes a deprivation of medical care, in violation of the Due Process Clause of the Fifth Amendment of the United States Constitution.\(^{20}\)

In order to address this serious problem, on February 26, 2009, Representative Lucille Roybal-Allard (CA-34) introduced the Immigration Oversight and Fairness Act in the U.S. House of Representatives.\(^{21}\) This bill would require that:

[d]etention facilities shall afford a continuum of prompt, high quality medical care, including care to address medical needs that existed prior to detention, at no cost to detainees. Such medical care shall address all detainee health needs and shall include chronic care, dental care, eye care, mental health care, individual and group counseling, medical dietary needs, and other medically necessary specialized care. . . . \(^{22}\)

This Note argues that the Immigration Oversight and Fairness Act should be passed. Once enacted, this measure would ensure that the health care needs of detainees are met and would provide the federal judiciary with necessary guidelines explaining what constitutes appropriate medical care for detainees.\(^{23}\) By providing such guidelines, this Note contends that the Act would resolve the mixed holdings in the federal courts concerning when the lack of medical treatment for detainees violates the Due Process Clause of the Fifth Amendment.

\(^{20}\) See U.S. CONST. amend. V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation. \textit{Id.}

See infra Part II for a discussion of the arguments for and against labeling violations of detainee health care as an infringement of the Due Process Clauses of the Fifth Amendment.

\(^{21}\) Immigration Oversight and Fairness Act, H.R. 1215, 111th Cong. (2009).

\(^{22}\) H.R. 1215, 111th Cong. § 3(a)(2) (2009).


It begins by providing an overview of ICE’s detention system and the conditions that detainees face when they are confined. Next, the Note analyzes court cases involving the treatment of immigrant detainees. It will discuss the split between those federal courts that hold that detainees have a right to full medical care under the Due Process Clause of the Fifth Amendment, and those that find that aliens’ due process rights are not violated when they are unable to access medical care in detention.\footnote{24} Finally, it provides a summary of the Immigration Oversight and Fairness Act, and argues for its passage. This legislation would provide protection to a vulnerable population that is unable to access independent health care, while resolving the debate in the federal judiciary about whether inadequate health care for detainees violates the Due Process Clause of the United States Constitution.

I. THE CURRENT DETENTION STANDARDS RESULT IN INADEQUATE CARE FOR DETAINES

This section demonstrates that the existing practices developed by government agencies to provide health care for detainees fail to protect the health of detainees. First, it describes the terms by which aliens are classified in the United States and the different treatment they receive based on these labels. Second, it provides an overview of the governmental agencies responsible for aliens. Third, it presents the procedures used to detain a suspected illegal alien and the systems employed by the relevant governmental agencies to give health care to detainees. Finally, this section discusses documented failures of ICE to meet the health care needs of its detainees.

A. The Different Standards for Inadmissible and Deportable Aliens

The treatment that aliens receive within the United States differs based on whether they are classified as inadmissible or deportable.\footnote{25} An inadmissible alien is one who “is not lawfully admitted and entered without inspection.”\footnote{26} As a result, these individuals are not believed to have entered the United States, and therefore cannot assert that they have a liberty interest under the Due Process Clause to be admitted or freed from detention.\footnote{27} Inadmissible

\footnote{24} See discussion infra Part I.A.

\footnote{25} IRA J. KURZBAN, KURZBAN’S IMMIGRATION LAW SOURCEBOOK 35-36 (10th ed. 2006) [hereinafter KURZBAN’S IMMIGRATION LAW SOURCEBOOK].

\footnote{26} \textit{id.} at 51.

\footnote{27} \textit{id.} at 28.
aliens can only receive protection through legislation enacted by Congress.\textsuperscript{28} Therefore, individuals classified as inadmissible aliens cannot challenge the government’s decisions regarding their admission into the United States and whether they can be paroled from detention by claiming a constitutional right.\textsuperscript{29} However, the federal courts have found that inadmissible aliens are protected from gross physical abuse under the provisions of the Due Process Clause of the Fifth Amendment.\textsuperscript{30} In contrast, deportable aliens are individuals afforded full due process and equal protection rights because they have been admitted into the United States.\textsuperscript{31}

\textbf{B. ICE’s Procedures for Detaining Aliens}

The Immigration and Nationality Act (INA) was passed in 1952 and prescribes the rules by which aliens are admitted or excluded from the

\begin{footnotesize}
\footnotetext{28}{\textit{Id.}}
\footnotetext{29}{Amanullah v. Nelson, 811 F.2d 1, 8 (1st Cir. 1987). This case describes excludable aliens. However, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 changed several items of immigration terminology. Under this act, the term “excludable alien” was changed to “inadmissible alien.” While the terminology is different, the change in phrase did not change the definition or provide greater rights to inadmissible aliens. \textit{See} Benitez v. Wallis, 337 F. 3d 1289, 1291 n. 5 (11th Cir. 2003).}
\footnotetext{30}{\textit{See} Lynch v. Cannatella, 810 F.2d 1363, 1374 (5th Cir. 1987); \textit{see also} Medina v. O’Neill, 838 F.2d 800, 803 (5th Cir. 1988). In \textit{Lynch}, the court considered the claims of thirty Jamaican nationals who tried to enter the United States illegally by stowing away on a barge that was bound for ports on the Mississippi River. \textit{Lynch}, 810 F.2d at 1367-69. When caught, these individuals were placed in short-term detention facilities by the New Orleans Harbor Police and suffered abuse. \textit{Id.} at 1367. In determining whether the treatment these individual received violated constitutional standards against gross physical abuse, the court considered three factors. \textit{Id.} at 1375. These factors included “the severity of the injury, whether the state officer’s action was grossly disproportionate to the need for action under the circumstances, and whether the action was inspired by malice or was simply the result of carelessness or overzealousness.” \textit{Id.} at 1375-76. The court noted that allegations that one individual required hospitalization after being sprayed with a fire hose and another experienced a change in personality after being beaten and drugged by the New Orleans Harbor Police were sufficient to support a claim that these two people were subjected to gross physical abuse and a constitutional violation had occurred. \textit{Id.} at 1376.}
\footnotetext{31}{\textit{KURZBAN’S IMMIGRATION LAW SOURCEBOOK}, supra note 25, at 36; 8 C.F.R. § 217.4(b) (2005).}
\end{footnotesize}
United States. The INA granted power to the Attorney General to detain aliens while awaiting determination whether they should be removed from the United States. But after September 11, 2001, the Department of Homeland Security (DHS) was created, and the administration of detention of aliens moved from the Department of Justice's (DOJ) Immigration and Naturalization Service (INS) to DHS's Undersecretary of Border and Transportation Security. The Undersecretary of Border and Transportation Security's authority is exercised by ICE. ICE enforces the United State's customs and immigration laws, and is tasked with dealing with detention and removal operations. In contrast to the mandate of ICE, the United States Citizenship and Immigration Service (USCIS) manages the lawful immigration of new aliens and provides decisions on applications of prospective immigrants. Each of these agencies plays a specific role when an alien comes to the United States. An alien can be arrested without a warrant if the official arresting him has "reason to believe that the alien is in the United States in violation of any [immigration] law or regulation and is likely to escape before a warrant can be obtained for his arrest." Once arrested, the alien is supposed to be examined without "unnecessary delay" to determine whether he may remain in the United States. The examining officer cannot be the same as the arresting officer. If the examining officer finds that there is prima facie evidence that the alien has


34. Id.

35. Id. at 3.


39. Id.

40. 8 C.F.R. § 287.3(a) (2008).
violated an immigration law, the examining officer will refer the case to an immigration judge for further inquiry.\textsuperscript{41} ICE may hold an alien who was arrested without a warrant for forty-eight hours or longer if there are extraordinary circumstances.\textsuperscript{42} During this period, ICE must determine whether the alien will continue to be detained or be released on bond.\textsuperscript{43} Aliens who are believed to have committed a crime, or aliens certified as terrorist suspects require mandatory detention.\textsuperscript{44} Individuals who are not classified as such can nevertheless be detained, paroled, or released on bond.\textsuperscript{45}

\textbf{C. ICE's Procedures in Providing Health Care to Detainees}

Individuals who are held in ICE detention centers are supposed to be provided with care by the ICE Office of Detention and Removal Operations (DRO).\textsuperscript{46} DRO is mandated to provide "safe and humane conditions of

\begin{itemize}
  \item \textsuperscript{41} \textit{Id. at § 287.3(b).}
  \item \textsuperscript{42} \textit{Id. at § 287.3(d).}
  \item \textsuperscript{43} \textit{Id.}
  \item \textsuperscript{44} \textit{See SISKIN, supra note 33, at 1. The 1996 Anti-terrorism and Effective Death Penalty Act (AEDPA) and the 1996 Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA) substantially increased the number of non-citizens who were held in mandatory detention. American Civil Liberties Union, Analysis of Immigration Detention Policies (Aug. 18, 1999), http://www.aclu.org/immigrants/detention/11771leg19990818.html. AEDPA initiated new requirements for the mandatory detention of individuals who were convicted of a variety of offenses. This act was followed by the IIRAIRA, which increased the number of offenses resulting in mandatory detention for non-citizens. Id. These acts require that any non-citizen who is convicted of two crimes of moral turpitude or one crime of moral turpitude where a sentence of one year or more is imposed must be placed in mandatory detention. Id. A crime involving moral turpitude is one where the crime is "contrary to justice, honesty, principle, or good morals, or an act of baseness, vileness, or depravity in the private and social duties which a person owes to his or her fellow citizens or to society." Matter of Awajane, 14 I. & N. Dec. 117, 119 (B.I.A. 1972). For a further discussion of the concepts underlying a determination that a crime of moral turpitude has occurred and examples, see In re Torres-Varela, 23 I. & N. Dec. 78, 82-86 (B.I.A. 2001).
  \item \textsuperscript{45} SISKIN, \textit{supra} note 33, at 1.
  \item \textsuperscript{46} DRO: Detainee Health Care, \textit{supra} note 18.
\end{itemize}
confinement” for aliens, including health care. To ensure that its responsibilities are met, DRO created the Division of Immigration Health Services (DIHS), which provides medical personnel to the detention centers and medical services for conditions that “pose an imminent threat to life, limb, hearing or sight, rather than to elective or non-emergent conditions.” DIHS is exclusively responsible for the health care of detainees.

Since ICE was created in 2003, nearly 1.5 million individuals have been housed at its detention facilities. While confined to these detention centers, “care management was provided by the DIHS or local

47. Id. It is common practice for the United States government to rent jail beds from local county governments to house detainees. JUDY GREENE AND SUNITA PATEL, THE IMMIGRANT GOLD RUSH: THE PROFIT MOTIVE BEHIND IMMIGRATION DETENTION 1 (2007), http://www.aclu.org/pdfs/humanrights/detention_deportation_briefing.pdf [hereinafter THE IMMIGRANT GOLD RUSH]. While the majority of detainees have no criminal history, they are often mixed with the criminal population held in local jails. LUTHERAN IMMIGRATION AND REFUGEE SERVICE AND THE DETENTION WATCH NETWORK, OVERVIEW OF U.S. IMMIGRATION DETENTION AND INTERNATIONAL HUMAN RIGHTS LAW ON THE USE OF DETENTION IN THE U.S. 4 (2007), http://www.aclu.org/pdfs/humanrights/detention_deportation_briefing.pdf [hereinafter OVERVIEW OF THE U.S. IMMIGRATION DETENTION AND INTERNATIONAL HUMAN RIGHTS LAW]. For county jails, accepting these predominantly non-violent individuals results in a large influx of additional cash. JUDY GREENE AND SUNITA PATEL, THE IMMIGRANT GOLD RUSH: THE PROFIT MOTIVE BEHIND IMMIGRATION DETENTION 1. After entering an Intergovernmental Service Agreement, many counties had the funds to pay for additional jail construction while still recovering the costs of operating the jail. Furthermore, several were left with a surplus of money that was used for other county projects. Id. In New Jersey, the Passaic County jail was paid $17.7 million from ICE in 2004. The money received for housing the detainees encompassed seventy-four percent of the sheriff department’s total revenue. Id. In 2005, Passaic County stopped accepting detainees after national reports surfaced exposing the jail for using dogs to intimidate detainees and other forms of mistreatment. Id.

48. DRO: Detainee Health Care, supra note 18.


50. DRO: Detainee Health Care, supra note 18.

51. Id.
Intergovernmental Service Agreement (IGSA) contractors to detainees at a cost of more than $360 million. In one of its more than 300 facilities, ICE can hold up to 33,000 immigration detainees. These individuals remain in detention for an average of 37.5 days. ICE has implemented standards so that when a detainee arrives in a detention center, the detainee should receive an initial health screening to determine if he needs any medical, mental, or dental health care. This process includes a chest x-ray or a skin test to determine if the detainee has tuberculosis. In fiscal year 2007, of the 184,448 initial screenings, thirty-four percent of the individuals were found to have chronic conditions, such as hypertension or diabetes. Within fourteen days after their arrival, detainees should receive physical examinations to determine if they have any medical conditions that will need to be examined or monitored.

ICE requires that all detainees have access to “sick call,” where they can request a time to meet with a physician or other qualified medical officer in a medical setting. Each facility must have regularly scheduled times where medical personnel will be available. The facility must also provide health care request forms to all detainees. In fiscal year 2007, DIHS facilities

52. Id.

53. Id.

54. Id. While waiting for the completion of the judicial procedures that determine if detainees may remain in the United States or will be issued a final order of removal, many individuals languish in detention for months or years. See OVERVIEW OF THE U.S. IMMIGRATION DETENTION AND INTERNATIONAL HUMAN RIGHTS LAW, supra note 47. For detainees who are nationals of countries with whom the U.S. does not have diplomatic relations or from countries who do not allow their nationals to return, they may remain in detention indefinitely. Id.


56. Id.

57. DRO: Detainee Health Care, supra note 18.


59. Id. at 4.

60. Id.

61. Id.
received 711,719 visits by detainees as part of the sick call process. In addition to providing access to medical examinations, each facility must have procedures through which detainees can access prescription medication.

D. The Treatment of Detainees in ICE’s Detention Facilities

As part of its oversight responsibilities, DHS’s Office of Inspector General completed a report in 2006 that explored the treatment of immigrant detainees housed in the detention facilities. In 2007, the Government Accountability Office (GAO) issued its own report observing whether or not ICE’s health care standards were being followed in the detention facilities and offered testimony on this topic to the House of Representatives’ Subcommittee on Immigration, Citizenship, Refugees, Border Security and International law in 2008. Both reports contained similar conclusions. The report released by DHS found that the health care standards ICE created were the absolute minimum requirements that detention facilities must follow. After studying five different detention facilities, DHS found that even with these minimum health care requirements four facilities had instances of non-compliance. In addition, DHS examined the files of these facilities and discovered that out of 101 new detainees, eight did not receive the required initial medical screening and fifteen detainees out of 111 did not receive the follow-up physical examination. Finally, in three out of five

62. DRO: Detainee Health Care, supra note 18.


67. Id. at 1.

68. Id. at 3.
detention centers, 196 detainees out of a total of 481 who submitted sick call requests did not receive a response in a reasonable amount of time.\footnote{Id. at 4. At this time, ICE standards do not provide information on what constitutes a reasonable timeframe in which to respond to a non-emergency sick call request. Id. Consequently, the detention facilities have developed their own standards regarding what constitutes a timely response to a non-emergency sick call request. Id. In three facilities, the response time ranged from twenty-four to seventy-two hours. Office of Inspector General Report, supra note 64, at 4.}

While examining adherence to medical standards in the detention facilities, the GAO visited twenty-three facilities and found that there were instances of non-compliance in three of them.\footnote{Richard M. Stana statement, supra note 65, at 2-3.} These incidents of non-compliance resulted from staff negligence in conducting the initial medical screening exam, failure to provide the mandatory physical examination within fourteen days to approximately 260 detainees, and the lack of readily available first-aid kits.\footnote{Id. at 3. When medical professionals in the detention facilities recommend that a detainee receive outside medical care, this decision must be approved by the Managed Care Coordinators (MCC) who are employed by ICE. \textit{Problems with Immigration Detainee Medical Care: Hearing on Problems with Immigration, Detainee Medical Care Before the H. Subcomm. on Immigration, Citizenship, Refugees, Border Security, and International Law of the H. Comm. on the Judiciary}, 110th Cong. 184 (2008) (written statement of Caroline Fredrickson, ACLU, Washington Legislative Office and Tom Jawetz, Immigration Detention Staff Attorney, ACLU National Prison Project) [hereinafter Fredrickson and Jawetz statement]. The MCC’s are composed of nurses who have the power to deny medical requests but are not subject to an independent review of their decisions. Id. All medical requests nationwide must be evaluated by one of three regional MCC. Id. at 17. It is problematic that the MCC’s are confined within DIHS’s parameter of primarily providing emergency care. Id at 16. Currently, when a detainee is suffering from a non-emergency condition that medical personnel believe warrants off-site care and “would cause deterioration of the detainee’s health or uncontrolled suffering affecting his/her deportation status,” the detainee will be considered for outside care. Division of Immigration Health Services, \textit{DIHS Medical Dental Detainee Covered Services Package}, available at http://icehealth.org/ManagedCare/Combined%20Benefit%20Package%202005.doc. Thus, the MCC’s are not mandated or equipped to make decisions to provide off-site care to detainees.} Some of the officials interviewed in these facilities stated that specialized medical and mental health care needs were difficult to provide because the medical staff were often unable to receive approval from ICE to take the detainee to an outside specialist.\footnote{Id. at 3.
ICE has a policy that each detention facility should be inspected annually to determine whether the facility is in compliance with its detention standards. Based on its compliance levels, a facility is rated as superior, good, acceptable, deficient, or at risk. ICE examined ninety percent of the facilities within the prescribed time period. As of June 1, 2007, it found that “16 facilities were rated as ‘superior’, 60 facilities were rated ‘good’, 190 facilities were rated ‘acceptable’, four were rated ‘deficient’, [and] . . . no facility was rated ‘at risk’.”

In addition to the investigations completed by the government, many NGOs have documented the treatment of detainees and found widespread abuse. The ACLU found the inability of detainees to receive medical care


74. Id. at 4.

75. Id.

76. Richard M. Stana statement, supra note 65, at 4. This information comes from ICE’s annual inspection reports. Id. Thus, ICE is reviewing itself for compliance and does not have effective oversight of its treatment of detainees. CONDITIONS OF CONFINEMENT, supra note 18, at 15.

for chronic conditions and in medical emergencies to be a prevalent problem.\textsuperscript{78} Often, detainees are forced to wait long periods before receiving medically prescribed surgeries.\textsuperscript{79} Detainees have stated that the facilities often do not have sick call forms available and complain that many medical officials in the detention centers are unresponsive to medical care requests.\textsuperscript{80} Many detainees reported having to wait for a week to receive an appointment for their conditions.\textsuperscript{81} In cases of serious health problems, like those presented by Mr. Castaneda, this delay often compounds the worsening health of the detainee.\textsuperscript{82}

The problems caused by the inability to access medical care are exacerbated in many facilities by inadequate record-keeping and sporadic compliance with medical screening when the detainees are admitted.\textsuperscript{83} If the initial medical screening is not performed at the time of entry, chronic health conditions may deteriorate and contagious diseases may be passed to other detainees.\textsuperscript{84} Even detainees who are screened when they enter detention

\textsuperscript{78} Conditions of Confinement, supra note 18, at 3.

\textsuperscript{79} Id. One detainee who was held in a detention center in Oakdale, Louisiana, broke his nose during a fight in 2006. A doctor at the detention center examined his nose and stated that it was not broken. After asking for medical care for several weeks, the detainee was taken to a hospital where medical personnel determined that he had a badly broken nose and needed surgery. The surgery was performed two months after the detainee broke his nose. Id. At a detention facility in Arizona, a Liberian woman complained to medical personnel of nausea, pain in her abdomen, difficulty sleeping, and painful urination. Id. The records from the medical personnel at the detention center showed that they thought she had developed uterine fibroids and might need a hysterectomy. Id. Yet, she was only given 800 mg of Ibuprofen and told that she should exercise. When she was finally taken to a hospital to have an ultrasound performed, a cyst was found that was the size of a 5-month old fetus. Conditions of Confinement, supra note 18, at 3-4. The hospital stated that she required immediate surgery. But, ICE chose to place her under medical parole so it would not have to pay for the procedure. Id. at 4.

\textsuperscript{80} Conditions of Confinement, supra note 18, at 6.

\textsuperscript{81} Id.

\textsuperscript{82} Detainee Medical Care, supra note 1; Conditions of Confinement, supra note 18, at 6.

\textsuperscript{83} Id.

\textsuperscript{84} Id.
centers experience delays in receiving their medications and changes in their prescription regimes. Some are not even given all of the medications they need. For example, individuals who have health conditions that must be monitored regularly, such as diabetes or HIV, often state that the medical staff fails to check blood-sugar levels, T cell counts, and viral loads at appropriate intervals of time.

Finally, the ACLU has found that almost forty percent of medical staff positions in one facility remain unfilled. This facility, which houses 1,200 detainees, had only one staff physician. An opening for an additional physician remained unfilled for over fourteen months. Another center, housing 2,000 detainees, had one dentist, one physician, and one part-time psychiatrist. The number of accessible medical personnel is inadequate for the large population housed in these facilities.

II. THE FEDERAL JUDICIAL SYSTEM’S ANALYSIS OF DETAINEES RIGHTS

In determining whether detainees are being treated fairly, the courts have consistently found that deportable aliens have due process and equal protection rights under the Fifth Amendment, while detained. However, courts have reached inconsistent holdings on whether medical care is part of the due process rights provided to inadmissible aliens. Some courts have found that inadmissible aliens have a right to medical care as a due process

85. Id.
86. Id.
87. CONDITIONS OF CONFINEMENT, supra note 18.
88. Fredrickson and Jawetz statement, supra note 72, at 175.
89. Id. at 6-7.
90. Id. at 7.
91. Id.
92. Id.
93. KURZBAN’S IMMIGRATION LAW SOURCEBOOK, supra note 25, at 36; 8 C.F.R. § 217.4(b) (2005).
94. Infra Parts II.A, B.
right. Other federal courts, however, hold that under the Due Process Clause, inadmissible aliens are only protected against gross physical abuse during their detention. These courts often find that insufficient medical care is not a form of gross physical abuse.

A. Cases that Find that the Due Process Rights of Inadmissible Aliens Include Medical Care

In the line of cases finding that immigrants have due process rights, one of the earliest is Yick Wo v. Hopkins. This case explored whether an imprisoned immigrant who was still a citizen of China could claim protection under the Due Process Clause of the Fourteenth Amendment. Yick Wo involved a Chinese citizen who lived in San Francisco and owned a laundry business. He was arrested after violating a city ordinance requiring all laundry businesses within San Francisco to receive the Board of Supervisors' consent before operating, unless the business was run in a stone or brick building. The Court found that Chinese individuals owned the majority of laundry businesses located in wooden buildings. Further, the

95. Id.
96. Id.
97. Infra Parts II.A, B for further discussion of the conflicting holdings that courts have reached regarding whether medical care is a due process right granted to inadmissible aliens. Often, the courts who state that inadmissible aliens have no due process right to medical care rely on the plenary power doctrine to reach their conclusion. Margaret H. Taylor, Detained Aliens Challenging Conditions of Confinement and the Porous Border of the Plenary Power Doctrine, HASTINGS CONST. L.Q., Summer 1995 at 1127. This concept is based on the idea that “Congress and the executive branch must have unfettered authority to admit, exclude, or deport aliens.” Id. at 1128.
98. Yick Wo v. Hopkins, 118 U.S. 356, 356; 6 S. Ct. 1064, 1070 (for a more in-depth syllabus describing the factual situation) (1886); see also Wong Wing v. United States, 163 U.S. 228, 233-34, 238 (1896) (holding unconstitutional a statute prescribing imprisonment through hard labor for illegal Chinese immigrants because it violated the Sixth Amendment and the Due Process Clause of the Fifth Amendment).
100. Id. at 359; 1065.
101. Id. at 359; 1066.
Court discovered that all 200 Chinese-owned laundry businesses that applied for permission, pursuant to the city ordinance to continue to operate their businesses, had been denied.\(^{102}\)

The Supreme Court of the United States considered whether the plaintiff, a Chinese citizen who owned one of the laundry businesses that was denied the privilege to operate, had been deprived of a right guaranteed under the Constitution or laws of the United States.\(^{103}\) The Court found that the city's treatment of the Chinese citizen was in violation of the Fourteenth Amendment.\(^{104}\)

The Supreme Court held that the protections afforded by the Fourteenth Amendment were not limited to the benefit of citizens; rather, the "provisions are universal in their application, to all persons within the territorial jurisdiction [of the United States]."\(^{105}\) As a result, the Supreme Court determined that the ordinances giving the board authority to deny applications to operate laundries were created specifically to discriminate against a particular ethnic group and were "so unequal and oppressive as to amount to a practical denial by the state of that equal protection of the laws which is secured by the petitioners . . . by the . . . fourteenth amendment to the constitution of the United States."\(^{106}\) This case was one of the earliest instances in which the Supreme Court extended the rights provided in the Fourteenth Amendment to aliens living in the United States. The holding and reasoning of this case are often relied on by the federal courts that find non-resident aliens are afforded due process rights.\(^{107}\)

\(^{102}\) Id.

\(^{103}\) Id. at 365; 1068.

\(^{104}\) Id. at 374; 1073; see also U.S. CONST. amend. XIV, § 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Id.

\(^{105}\) Yick Wo, 118 U.S. at 369; 6 S. Ct. at 1070.

\(^{106}\) Id. at 373; 1073.

In 1982, the Supreme Court of the United States ruled on *Plyler v. Doe*.\(^{108}\) This case involved a challenge to the Texas legislature’s decision to revise its educational laws so that the state could withhold state funding from any local school district that educated children who were not legally admitted into the United States.\(^{109}\) In addition, the local school districts were permitted to refuse to educate any child who could not prove that he was lawfully admitted into the United States.\(^{110}\) As a result of these changes to the educational laws of Texas, a class-action lawsuit was filed on behalf of the children of Mexican origin who could not establish that they had been legally admitted into the United States and, consequently, were excluded from attending local public schools.\(^{111}\)

The Supreme Court reiterated its earlier holding in *Yick Wo* and found that the Fourteenth Amendment to the Constitution applied to any person in the jurisdiction of the states, and noted that “an alien is surely a ‘person’ in any ordinary sense of that term.”\(^{112}\) The Court stated that even aliens whose presence was not lawful in the United States were recognized as people under the Fifth and Fourteenth Amendments.\(^{113}\) Further, regardless of whether an alien’s presence in the United States is lawful, the Court held that an alien is provided protection under the Due Process Clauses of these amendments.\(^{114}\)

The appellants argued that the Fourteenth Amendment only required that a state provide protection to people in its jurisdiction, and that aliens who entered the United States illegally were not within the jurisdiction of the state.\(^{115}\) The Supreme Court rejected this argument, fearing that this line of reasoning may relieve states of their obligation to ensure that their “laws are

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109. *Id.* at 205.
110. *Id.*
111. *Id.* at 206.
112. *Id.* at 210.
113. *Id.*
115. *Id.* at 211.
designed and applied equally." Further, the Court warned that the argument’s effect would “undermine the principal purpose for which the Equal Protection Clause was incorporated in the Fourteenth Amendment.” Thus, the Supreme Court held that the protection given by the Fourteenth Amendment included every person within the jurisdiction of a state, even those who were in the territory unlawfully.

Following the holding in Plyler, the Fifth Circuit heard Lynch v. Cannatella in 1987. In this case, the Court considered the civil rights claims of sixteen Jamaican nationals who tried to enter the United States illegally by stowing away on a barge bound for ports on the Mississippi River. When the stowaways were discovered, they were forcefully taken into custody by the Port of New Orleans Harbor Police at gunpoint and held in short-term detention cells without beds, mattresses, pillows, heaters, or adequate toilet facilities. In addition to the deficient holding facilities, the Jamaican nationals also claimed that they were severely abused while detained in New Orleans. These individuals stated that they were forced to work for the New Orleans Harbor Police under duress of losing daily rations if they refused to do as instructed. They were also compelled to take showers in cold water, resulting in some of them becoming physically ill. When those individuals who were sick refused to shower, the Harbor Police sprayed them with a fire hose that was so powerful that it slammed them against the iron bars of their cells. The Jamaicans also claimed that they were beaten and threatened by the New Orleans Harbor Police.

116. Id. at 213.
117. Id.
118. Id. at 215.
119. Lynch v. Cannatella, 810 F.2d 1363 (5th Cir. 1987).
120. Id. at 1367-69.
121. Id. at 1367.
122. Id.
123. Id.
124. Id.
125. Lynch, 810 F.2d at 1367.
The Fifth Circuit stated that aliens who entered into the United States illegally are considered inadmissible. The court held that they had not entered the jurisdiction of the United States for purposes of immigration and deportation procedures. As a result, the Fifth Circuit held that aliens do not have a due process right to be free of detention while they were waiting to be deported. However, the Court also found that even inadmissible aliens receive the protection afforded by the Fifth and Fourteenth Amendments. These aliens "detained within United States territory [must still be given] . . . humane treatment." Consequently, the Court found that "whatever due process rights . . . [inadmissible] aliens may be denied by virtue of their status, they are entitled under the Due Process Clauses of the fifth and fourteenth amendments to be free of gross physical abuse at the hands of state or federal officials." Haitian Centers Council, Inc. v. Sale, a case from the U.S. District Court for the Eastern District of New York, resulted from the plight of Haitian refugees who fled Haiti after the military coup in 1991. Many of these individuals feared political persecution and escaped Haiti on overcrowded, unseaworthy vessels. Often, the Coast Guard boarded these vessels and detained the Haitians in camps at Guantanamo Bay Naval Base in Cuba, where they awaited a determination as to whether they had viable asylum claims. During this time, the State Department looked for third-party

126. Id.

127. See id. at 1370.

128. Id.

129. Id. at 1373.

130. Id.

131. Lynch, 810 F.2d at 1374. While the court found that the aliens were entitled to due process protection, the case was remanded back to the District Court with instructions that the plaintiffs must assert specific claims against individual officers who harmed them. Id. at 1377.


133. Id. at 1034-35.

134. Id. at 1035.
countries where the Haitians could be relocated once they left Guantanamo.\textsuperscript{135} Belize and Honduras offered to accept a limited number of Haitians but asked that they first be tested for HIV.\textsuperscript{136} When testing began, the government found that large numbers of Haitians had HIV.\textsuperscript{137} These individuals were quarantined in a specific camp for people who were HIV positive and treated by military medical personnel.\textsuperscript{138} However, these doctors stated that the medical facilities were inadequate to provide care to the Haitians who developed AIDS.\textsuperscript{139} The INS refused to evacuate these individuals to the United States for more appropriate care\textsuperscript{140} and a claim was brought on behalf of the Haitians by the Haitian Centers Council, Inc. This organization argued that the government had violated the HIV-positive refugees' due process rights when it refused to provide them with the medical care they needed.\textsuperscript{141}

The Eastern District of New York reiterated that the Haitians had due process rights because of the universal nature of the Fifth Amendment.\textsuperscript{142} Such due process requires that adequate medical care be given to individuals held in custody.\textsuperscript{143} Therefore, the Haitians were entitled to medical care while they were confined.\textsuperscript{144} The Court echoed the opinion of other courts that the due process rights of individuals held in detention without a conviction must be greater than the Eighth Amendment rights afforded to

\textsuperscript{135} Id.
\textsuperscript{136} Id.
\textsuperscript{137} Id.
\textsuperscript{139} Id. at 1038.
\textsuperscript{140} Id.
\textsuperscript{141} Id. at 1041.
\textsuperscript{142} Id.
\textsuperscript{143} Id. at 1043.
\textsuperscript{144} Haitian Ctrs. Council, Inc., 823 F. Supp. at 1043; see also Revere v. Massachusetts General Hosp., 463 U.S. 239, 244 (1983) (holding that the due process requires that satisfactory medical care be given to individuals in official custody).
convicted persons.\textsuperscript{145} Individuals who are in non-punitive custody have a right to reasonable medical care, while prisoners held in punitive detention are only protected from “deliberate indifference to serious medical needs.”\textsuperscript{146} The court found that

\begin{quote}
[d]eliberate indifference to medical needs includes government officials’ denial or delay of detainees’ access to medical care, interfering with treatment once prescribed, . . . their lack of response to detainees’ medical needs, rejection of recommendations or requests for medical treatment by [the detainees] own medical doctors that exposes the person detained to undue suffering or serious medical risk.\textsuperscript{147}
\end{quote}

Consequently, the Court held that the HIV-positive Haitian’s due process rights to medical care had been denied by the INS when it refused to medically evacuate them.\textsuperscript{148}

\textbf{B. Relevant Cases Holding that the Medical Rights of Detainees are not Protected by the Due Process}

While the Supreme Court and other federal courts have held that aliens are protected by the Due Process Clause of the Fifth and Fourteenth Amendments, these courts have limited the extent of protection these individuals can receive in the following cases. In 1889, the Supreme Court considered the case \textit{Chae Chan Ping v. United States}.\textsuperscript{149} The appellant was

\begin{quote}
\textit{Chae Chan Ping} v. \textit{United States}, 130 U.S. 581 (1889); \textit{see also} Fong Yue Ting v. \textit{United States}, 149 U.S. 698 (1893) (holding that the authority to detain and exclude aliens is part of the sovereign power of a nation and rests solely in Congress and the Executive branch).
\end{quote}

\textsuperscript{145}. \textit{Haitian Ctrs. Council, Inc.}, 823 F. Supp. at 1043-44. The Eighth Amendment of the U.S. Constitution provides that “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.” U.S. CONST. amend. XIII. For further cases holding that non-convicted detainees have due process rights that are greater than those afforded to convicted prisoners by the Eighth Amendment, see Bell v. Wolffish, 441 U.S. 520, 535-36 (1861) (holding that pretrial detainees had due process rights greater than the Eighth Amendment protections afforded to convicted prisoners); Youngberg v. Romeo, 457 U.S. 307, 321-22 (1982) (finding that involuntarily committed individuals have due process rights greater than those afforded to convicted prisoners under the Eighth Amendment).

\textsuperscript{146}. \textit{Id.}

\textsuperscript{147}. \textit{Id.} at 1044.

\textsuperscript{148}. \textit{Id.}

\textsuperscript{149}. \textit{Chae Chan Ping} v. \textit{United States}, 130 U.S. 581 (1889); \textit{see also} Fong Yue Ting v. \textit{United States}, 149 U.S. 698 (1893) (holding that the authority to detain and exclude aliens is part of the sovereign power of a nation and rests solely in Congress and the Executive branch).
a citizen of China who worked as a day laborer in San Francisco. He returned to China for one year and carried a certificate issued by the collector of customs of the port of San Francisco, allowing him to return to the United States pursuant to the immigration laws in force at that time. When he returned to San Francisco, he was denied permission to land because, during his absence, Congress had passed an act that nullified the certificates permitting Chinese individuals to return to the United States. The appellant was prohibited from entering the United States and filed a writ of habeas corpus, claiming that his due process rights had been violated.

The Supreme Court of the United States found that it did not have the authority to consider the motives of Congress in passing legislation that would ban a certain group of citizens from immigrating to the United States. The court stated "[t]hat the government of the United States, through the action of the legislative department, can exclude aliens from its territory is a proposition which we do not think open to controversy." The Supreme Court believed that the power to exclude aliens developed from the sovereign power of the nation. Thus,

[t]o preserve its independence, and give security against foreign aggression and encroachment, is the highest duty of every nation. . . It matters not in what form such aggression and encroachment come, whether from the foreign nation acting in its national character, or from vast hordes of its people crowding in upon us.

Therefore, the Court held that the government had power to determine that certain people and groups should not be admitted and it was not the duty of the Court to question this finding. This case is an early example of the

150. *Chae Chan Ping*, 130 U.S. at 582.

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.* at 603.

155. *Id.*

156. *Chae Chan Ping*, 130 U.S. at 604-05.

157. *Id.* at 606.

158. *Id.* at 609.
plenary power doctrine that the Supreme Court and other federal courts have used to avoid determining the exact protection that the Due Process Clause provides for detainees.\textsuperscript{159}

The premise stated by the \textit{Chae Chan Ping} court was followed in the 1950 case, \textit{United States ex rel. Knauff v. Shaughnessy}.\textsuperscript{160} In this case, a man who had served in the armed forces of the United States during World War II met and married a German woman while he was abroad.\textsuperscript{161} When he returned to the United States, the German woman came with him and hoped to become a citizen.\textsuperscript{162} However, authorities detained her at Ellis Island and told her that she was permanently excluded from the United States because her admission would be prejudicial to the interests of the United States.\textsuperscript{163} She filed a writ of habeas corpus under the theory that the Attorney General could not exclude her without a hearing.\textsuperscript{164}

The Court stated that aliens who hope to come to the United States have no claim of right in seeking admission.\textsuperscript{165} Permission to enter the United States is a discretionary privilege given by the United States government.\textsuperscript{166} The Court found that the power to exclude aliens is held in the Legislative and Executive Branches under their power to control foreign affairs.\textsuperscript{167} Therefore, "[w]hatever the rule may be concerning deportation of persons who have gained entry into the United States, it is not within the province of

\textsuperscript{159} The plenary power doctrine is based on the idea that Congress and the Executive branch have "unfettered authority to admit, exclude, or deport aliens." Taylor, supra note 97, at 1128.

\textsuperscript{160} United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537 (1950); see also Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206 (1953) (holding that the power to exclude an alien classified as inadmissible is a legislative and executive power).

\textsuperscript{161} United States ex rel. Knauff, 338 U.S. at 539-40.

\textsuperscript{162} Id.

\textsuperscript{163} Id.

\textsuperscript{164} Id.

\textsuperscript{165} Id. at 542.

\textsuperscript{166} Id.

\textsuperscript{167} United States ex rel. Knauff, 338 U.S. at 542.
any court, unless expressly authorized by law, to review the determination of the political branch of the Government to exclude a given alien. From this finding, the Court stated that whatever procedure Congress used to determine whether an alien should be admitted or excluded fulfills this individual’s right to due process.

Following the holding in *Lynch*, the Fifth Circuit considered the case *Medina v. O’Neill* in 1988. Similar to *Lynch*, *Medina* involved twenty-six Colombian aliens who attempted to enter the United States as stowaways. Once found, they were detained in a private detention facility. While trying to escape, one alien was killed and another injured. The remaining stowaways claimed that because the immigration authorities did not monitor the detention facilities they were placed in, their detention inflicted punishment in violation of the Due Process Clause of the Fifth Amendment.

The Fifth Circuit has differentiated between the treatment of deportable and inadmissible aliens held in detention. The court found that under the INA § 1252(c), the Attorney General must provide appropriate detention facilities to deportable aliens, but there is no statutory duty to ensure that proper facilities are also provided for inadmissible aliens. As such, the conditions in the detention facilities did not violate the standards for pretrial detention. Despite the fact that one alien was shot and another was

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168. *Id.* at 543.

169. *Id.* at 544.


171. *Id.* at 801.

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.* at 802.


177. *Medina*, 838 F.2d at 802.

178. *Id.* at 802.
injured, the Fifth Circuit found that there was no evidence of intentional cruel treatment being maliciously inflicted upon them or that they suffered gross physical abuse. At most, the INS officials were only negligent in examining the facilities in which the aliens were placed. As a result, the court found that the due process rights of the stowaways had not been violated. This case was one in a series of cases that limited the protection afforded to inadmissible aliens under the Due Process Clause.

Two years later, in 1990, the Eleventh Circuit reached a similar holding in the case Adras v. Nelson. Similar to the situation presented in Haitian Centers Counsel, the court considered the claims of several Haitian refugees who were housed in the Krome Detention Center in southern Florida from 1981 to 1982. As part of their claim, the Haitians asserted that they had been kept in a detention facility that was severely overcrowded. Additionally, they claimed they were not given sufficient food, received substandard medical treatment, and were otherwise ill treated by being subject to abhorrent conditions. Consequently, they argued that their due process rights under the Fifth Amendment and the prohibition against cruel and unusual punishment under the Eighth Amendment had been violated.

The court noted that the immigration policies regarding inadmissible aliens were to be determined by Congress and the Executive branch.

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179. Id. at 801, 803.

180. Id.

181. Id.

182. Supra Part II.B.


184. Id. at 1553, 1559 (noting that the Haitians' allegations included being "subjected to "severe overcrowding, insufficient nourishment, inadequate medical treatment and other conditions of ill-treatment arising from inadequate facilities and care").

185. Id.

186. Id. at 1559.

187. Id. at 1557.

188. Id. at 1556 (citing Perez-Perez v. Hanberry, 781 F.2d 1477, 1479 (11th Cir. 1986)).
They indicated that the judiciary should not be involved in determining the rights of inadmissible aliens.\textsuperscript{189} However, citing earlier holdings, the court was able to determine whether the Haitian detainees could claim that they suffered “gross physical abuse” or “intentional and malicious infliction of harm by the INS agents” under the \textit{Lynch} standard.\textsuperscript{190} The court found that “any type of detention causes humiliation, disgrace and injured feelings, and we will accept the allegation that the conditions of plaintiffs’ detention were onerous . . . [s]till, the detention was lawful at all times and we find no complaint here approaching the ‘gross’ physical abuse outlined in \textit{Lynch}.”\textsuperscript{191} Therefore, the trial court determined that the Haitians were not subject to cruel and unusual punishment in violation of the Eighth Amendment.\textsuperscript{192}

As previously noted, there has been a split in the federal courts regarding the health care rights of immigrant detainees. Some courts have held that all immigrant detainees have a due process right to medical care under the Fifth Amendment.\textsuperscript{193} Others have found that only deportable detainees, not inadmissible aliens, may claim that their due process rights have been violated.\textsuperscript{194} The different holdings that these courts have reached stem from their varying definitions of “persons” under the Fifth and Fourteenth Amendments. Courts holding that health care rights are provided for all immigrant detainees have argued that any individual in the territory of the United States is a person and protected under the Due Process Clause of the Fifth Amendment.\textsuperscript{195} However, the courts that found that the health care rights of inadmissible aliens are not protected, came to this conclusion after determining that inadmissible aliens are not persons under the Due Process Clause of the Fifth Amendment because they have not entered the territory of the United States.\textsuperscript{196} The difficulty that the federal courts have

\textsuperscript{189}. \textit{Id.} at 1556.

\textsuperscript{190}. \textit{Adras}, 917 F.2d at 1559.

\textsuperscript{191}. \textit{Id}.

\textsuperscript{192}. \textit{Id.} at 1559-60.

\textsuperscript{193}. \textit{Supra} Part II.A.

\textsuperscript{194}. \textit{Supra} Part II.B.

\textsuperscript{195}. \textit{Supra} Part II.A.

\textsuperscript{196}. \textit{Supra} Part II.B.
experienced in determining whether immigrant detainees are persons who can receive constitutional protection underscores the need for Congressional action to outline the protections afforded to immigrant detainees. Without legislation that defines the rights of immigrant detainees, individuals held in these facilities will remain unable to access the protection against abusive treatment provided by the Fifth Amendment and enforced by the federal courts.

III. AN OVERVIEW OF THE IMMIGRATION OVERSIGHT AND FAIRNESS ACT

This section provides an overview of the Immigration Oversight and Fairness Act and its provisions. It begins by introducing the Act and discussing specific provisions that will help ensure that the United States government meets health care needs of detainees. Next, it discusses why Rep. Roybal-Allard (CA-34) introduced this piece of legislation and refutes the arguments against its passage. Finally, the section analyzes how the Immigration Oversight and Fairness Act will improve the health care of detainees.

A. The Current Status of the Immigration Oversight and Fairness Act

The Immigration Oversight and Fairness Act has been introduced in the U.S. House of Representatives and has been referred to the House's Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law and the House Committee on Homeland Security's Subcommittee on Border, Maritime, and Global Counterterrorism. The bill requires that each detention facility ensure that every detainee receives timely health care. Additionally, it calls for each detainee to receive an initial medical and mental health screening by a medical professional upon entry to the detention facility, followed by an additional exam fourteen days after admittance. It further requires that any decision to not provide treatment that was requested by an outside specialist shall be made within seventy-two hours. The denial of this request will be made in writing to the detainee with an explanation of why the treatment will not be provided.


In a situation where a treatment request is denied, the affected detainee shall have a chance to appeal the negative decision to a committee of independent health care professionals specializing in fields relevant to the request. The affected detainee will receive a determination as to the outcome of the appeal within seven days. Finally, the bill requires that the Secretary of Homeland Security compile a report of all detainee deaths. The report will be submitted on a semiannual basis to Congress detailing the conditions under which the death transpired and providing information on any investigations that occurred. The Secretary of Homeland Security must also give the same information to DHS’s Office of Inspector General within forty-eight hours of a detainee’s death. Had this legislation been implemented before Mr. Castaneda was detained, he would have received attention for his medical problem at an earlier date. It is possible that this would have prevented his cancer from advancing to his stomach and lymph nodes.

Rep. Roybal-Allard (CA-34) stated that she introduced this bill to “ensure that the Department of Homeland Security does not ignore its own detention standards. This bill gives these regulations the force of law, bringing accountability to a system in desperate need of better oversight.” Despite the basic provisions of this bill, in a hearing on medical care for detainees, Rep. Steve King (IA-5), the ranking Republican on the House Committee on the Judiciary, inquired, “[w]hy should the American taxpayer be liable for providing Rolls-Royce-quality medical care for aliens...”

201. Id.


203. Id.


205. Id.

206. Id.


In making this statement, Rep. King fails to recognize the severity of the medical emergencies that can result from inadequate detainee medical care. Currently, individuals held in detention are unable to access necessary health care, making them completely dependent on the government for appropriate and timely treatment. Rep. Roybal-Allard understood the powerless position detainees are in when she introduced the Immigration Oversight and Fairness Act in the House. She stated that “[f]inal passage of my legislation would help to ensure that detainees . . . are treated humanely . . . and obtain needed medical care.”

B. The Immigration Oversight and Fairness Act Would Provide Health Care Benefits to Detainees

The treatment that detainees receive is problematic because the standards developed by ICE in regard to medical care are not enforceable. Therefore, the health care needs of detainees have been largely ignored. Both the 2006 Office of Inspector General report discussing the treatment of ICE detainees and the 2007 GAO report on detention facilities noted several examples of non-compliance with the medical care guidelines. The Immigration Oversight and Fairness Act would address the issue by requiring detention facilities to follow procedures under which detainees would receive appropriate health care in a timely manner. Nevertheless,
the facilities would still be required to comply with the standards for health care presently issued by DHS.\textsuperscript{214}

The 2006 Office of Inspector General report noted instances in which individuals were not screened for medical problems when they entered the detention facilities.\textsuperscript{215} This is problematic for the detainee as his medical needs are not being addressed, and it is also problematic for the detainee population at large, as this lack of oversight can perpetuate the spread of communicable diseases.\textsuperscript{216} The Immigration Oversight and Fairness Act requires that every individual who enters detention be screened for medical conditions upon admission and that each detainee is given a more comprehensive medical exam within fourteen days of arrival.\textsuperscript{217} By insisting that DHS require these medical examinations be completed at the start of detention, the detainees housed in these facilities will be protected from communicable diseases and will receive immediate treatment for medical conditions.

As demonstrated by Mr. Castaneda’s story, many detainees who have medical conditions that require treatment by a specialist are unable to receive this care.\textsuperscript{218} The Immigration Oversight and Fairness Act would remedy this problem by ensuring that each request for specialized care would be decided within seventy-two hours.\textsuperscript{219} The act would require that a determination to not provide medical care would be provided in writing to the detainee with an explanation of the decision.\textsuperscript{220} Furthermore, the

\begin{itemize}
\item \textsuperscript{215} Office of Inspector General Report, supra note 64 at 3-4. For further discussion of the rates of noncompliance with the medical screening requirements see supra Part I.D.
\item \textsuperscript{216} Fredrickson and Jawetz statement, supra note 72, at 180.
\item \textsuperscript{217} H.R. 1215, 111th Cong. § 3(a)(2)(C) (2009).
\item \textsuperscript{219} H.R. 1215, 111th Cong. § 3(a)(2)(D) (2009).
\item \textsuperscript{220} Id.
\end{itemize}
Ending the Violation and Abuse of Immigrant Health

detainee would have a chance to appeal a negative decision and have a final decision offered by a group of outside experts within seven days.\textsuperscript{221} This provision of the Immigration Oversight and Fairness Act will ensure that DHS follows its own detention standards in treating detainees who require special medical supervision.\textsuperscript{222}

Since 2003, at least eighty-three individuals have died while detained by ICE or shortly after their release from custody.\textsuperscript{223} However, ICE currently has no duty to report when a detainee dies while in custody.\textsuperscript{224} The Immigration Oversight and Fairness Act would require DHS to report all detainee deaths that occur in ICE detention facilities.\textsuperscript{225} This would ensure greater oversight of the detention facilities and would provide enforceable detention standards that would make certain the medical needs of the detainees are being met.\textsuperscript{226}

\begin{itemize}
\item \textsuperscript{221} H.R. 1215, 111th Cong. § 3(a)(2)(E) (2009).
\item \textsuperscript{223} Fredrickson and Jawetz statement, supra note 72, at 187.
\item \textsuperscript{224} Id.
\item \textsuperscript{225} H.R. 1215, 111th Cong. § 3(a)(2)(J) (2009).
\item \textsuperscript{226} Press Release, Rep. Roybal-Allard, Congresswoman Lucille Roybal-Allard (CA-34) Introduces Legislation to Ensure the Humane Treatment of Immigration Detainees (Feb. 26, 2009), available at http://www.house.gov/list/press/ca34_roybal-allard/pr090226.html. See also Nina Bernstein, Few Details on Immigrants Who Died in Custody, N.Y. TIMES, May 5, 2008, at A1, available at http://www.nytimes.com/2008/05/05/nyregion/05detain.html. Bernstein describes a man from Guinea who collapsed, hit his head on a toilet, and was placed in solitary confinement after medical personnel in the facility concluded that his complaints resulted from behavioral problems. He was left in solitary confinement where he was found foaming at the mouth and unresponsive. Despite these symptoms, the medical personnel at the facility refused to check on him. Fourteen hours after his fall, he was taken to a hospital where it was determined that he had fractured his skull and had multiple brain hemorrhages. He remained in a coma and died four months later. Id.
\end{itemize}
C. The Immigration Oversight and Fairness Act Would End the Debate in the Federal Courts Regarding Whether Health Care is Part of the Due Process Rights of Detainees

The Immigration Oversight and Fairness Act would increase the oversight of health care needs of individuals in ICE custody. The Act would provide the necessary standards to guarantee the health care needs of detainees are met. Additionally, the Act would help courts reach a consensus on what constitutes appropriate medical treatment in detention centers. In cases where the courts have held that the Due Process Clause protects the medical needs of inadmissible aliens, the Act would provide the courts with an understanding of the level of medical care required in order to conform to basic constitutional standards. However, the Act would have the greatest effect in cases where courts have stated that, absent the existence of gross physical abuse or intentional and malicious cruel treatment, medical care is not part of the due process rights of inadmissible aliens. By passing the Act, Congress would establish that the right to medical care is part of the due process rights provided to every alien, no matter what immigration status they might hold. Thus, courts would have a statutory basis to conclude that Congress expects medical care to be part of the due process rights of inadmissible aliens. As a result, inadmissible aliens held in the detention centers would be able to receive relief in the courts if they were prevented by the detention facility from receiving adequate medical care.

228. Id.
229. Id.
230. Id.
D. The Immigration Oversight and Fairness Act Would Ensure that Immigrant Detainees Receive the Protections Afforded by the Eighth Amendment

Under the Constitution, extensive parameters have been developed for the treatment of convicted prisoners. The Eighth Amendment to the U.S. Constitution protects convicted prisoners against "cruel and unusual punishments." For a convicted prisoner to establish that a violation of the Eighth Amendment has occurred, he must show that there has been a denial of a "basic human need" and "deliberate indifference." Where a convicted prisoner is claiming that the medical or mental health care they are receiving is a violation of the Eighth Amendment, they must prove "deliberate indifference to serious medical needs."

While the provisions regarding the treatment of convicted prisoners provide clear standards for the government to follow, immigration detainees receive a higher level of protection because of their status as civil detainees. These individuals are protected by the Fifth Amendment "from conditions that amount to punishment without due process of law." In *Jones v. Blanas*, the U.S. Court of Appeals for the Ninth Circuit held that the circumstances of confinement that civil detainees are held under must be better than those provided for convicted prisoners and pretrial criminal detainees. Thus, if an immigrant detainee is held under "conditions identical to, similar to, or more restrictive than those under which pretrial criminal detainees are held," then their treatment is presumptively

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233. *CONDITIONS OF CONFINEMENT*, *supra* note 18, at 1.

234. *Id.* See also U.S. CONST. amend. VIII ("[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted").


237. *Id.*


239. *Id.*

240. *Jones v. Blanas*, 393 F.3d 918, 933-34 (9th Cir. 2004).
unconstitutional. By passing the Immigration Oversight and Fairness Act, the House would provide that these individuals are receiving treatment that meets the standards developed in Jones. Section Three of this Act would require that each detention facility shall provide:

- a continuum of prompt, high quality medical care, including care to address medical needs that existed prior to detention, at no cost to detainees. Such medical care shall address all detainee health needs and shall include chronic care, dental care, eye care, mental health care, individual and group counseling, medical dietary needs, and other medically necessary specialized care.

These mandates would make certain that detainees receive necessary medical care that exceeds the level of care provided for convicted prisoners. The Immigration Oversight and Fairness Act would protect the health of detainees while confirming that their treatment meets the minimum constitutional requirements of civil detainees developed by the federal courts in their interpretation of the Fifth and Eighth Amendment's of the U.S. Constitution.

E. The Immigration Oversight and Fairness Act Will Provide the Necessary Protection to Detainees that will Fulfill the Provisions of U.S. Ratified Human Rights Treaties

As a result of the ratification of the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR), the United States is bound by the provisions of these treaties that relate to the treatment of individuals, including detainees. The UDHR prohibits treatment that amounts to torture, including “cruel, inhuman or degrading treatment or punishment.” This provision is substantially similar to that provided for in Article Seven of the ICCPR, which states, “[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.” Additionally, Article Ten of the ICCPR

241. Id. at 934.


244. Universal Declaration of Human Rights, Res. 217 A art. 5.

provides that "[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person." In Wilson v. Philippines, the United Nations Human Rights Committee used the standards developed in Articles Seven and Ten of the ICCPR to determine that the maltreatment of a pre-trial, non-citizen detainee was in violation of their right to be free from torture and was contrary to their right to receive acceptable treatment.

The treatment received by many immigrant detainees in the United States is in violation of these standards. Since the United States is allowing the inadequate treatment of immigrant detainees to continue in its detention facilities, it is failing to fulfill its international obligations under the UDHR and the ICCPR by allowing detainees to suffer without medical treatment. The Immigration Oversight and Fairness Act would require that the detention facilities provide prompt medical care addressing all of the health care needs of detainees. The Immigration Oversight and Fairness Act would guarantee that detainees receive the protections outlined by the UDHR and the ICCPR. Additionally, the Act would provide standards to help the United States fulfill its international obligations.

F. The Immigration Oversight and Fairness Act Would Provide Standards for the Treatment of Immigrant Detainees that Would Fulfill the Fifth Amendment of the U.S. Constitution.

The Immigration Oversight and Fairness Act would require that immigrant detainees receive basic medical treatment, ensuring that the United States government is not in violation of the Fifth Amendment. The Fifth Amendment requires that no person be deprived of "life, liberty, or property, without due process of law." However, at this time, many

246. Id. at 176.


251. See U.S. CONST. amend. V.
detainees are unable to access the protection of the courts because of their immigration status, thus denying them their due process of law. This legislation would provide specific standards that the government must follow in providing health care to detainees, providing detainees with the necessary cause of action to gain access to the court system. Immigrants who experienced abuses of their health care rights would then be able to bring a claim in federal court against the United States government for failing to fulfill its responsibilities.

IV. CONCLUSION

As Mr. Castaneda’s story demonstrates, the failure of the current system in providing medical care for immigrant detainees is resulting in terrible consequences for the individuals held in detention. Not only are the detainees barred from procuring their own health care while in the facility, they also may be unable to find relief from inadequate medical care through the judicial system because of the current confusion in the courts over whether deficient medical care is a violation of a detainee’s due process rights. The Immigration Oversight and Fairness Act should be passed because it would ensure that detainees receive the medical care they require, while also guaranteeing that the courts hold that medical care is part of the due process rights provided to inadmissible aliens. The Immigration Oversight and Fairness Act would play a crucial role in preserving the dignity and health of a vulnerable population and would protect them from the inhuman situation of being unable to access health care.

252. CONDITIONS OF CONFINEMENT, supra note 18, at 16.