

ADMINISTRATIVE LAW REVIEW
ACCORD
Volume 67

Comment

BED TIME FOR THE BED MANDATE: A CALL
FOR ADMINISTRATIVE IMMIGRATION
REFORM

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INTRODUCTION

An unfamiliar but essential fact about immigration removal proceedings¹ of noncitizens² is that these proceedings are civil in nature.³ The deportation or exclusion of noncitizens is not intended to be criminal punishment; rather the two actions are the outcome of a civil proceeding conducted after the noncitizen is found to be guilty on grounds of inadmissibility or deportability.⁴

During removal proceedings, some noncitizens are detained in over 200 facilities and jails located across the United States.⁵ As of 2013, these facilities held 35,000 immigrant detainees.⁶ Congress mandates the Immigration and Customs Enforcement (ICE) to fill 34,000 beds with such noncitizens on a daily basis.⁷ This requirement is known as the “bed mandate.” The Department of Homeland Security (DHS) Appropriations Act of 2010 initiated the bed mandate after former DHS subcommittee chairman and late Senator Robert Byrd (D-WV) introduced an amendment to the bill.⁸ After the amendment passed, Congress allocated funding for

1. See Immigration and Nationality Act (INA) § 240 codified at 8 U.S.C. § 1229a (2012) (stating that removal proceedings include the deportation and the exclusion of noncitizens).

2. “Noncitizens,” as used in this Comment, refers to any person present in the United States who is not a natural-born or naturalized citizen, and includes documented and undocumented noncitizens, rather than the legal, but dated term “alien.”

3. See Immigration and Nationality Act (INA) § 240, 8 U.S.C. § 1229a (2012) (stating that removal proceedings includes the deportation and the exclusion of noncitizens); *The Chinese Exclusion Case*, 130 U.S. 581, 606 (1889) (holding that Congress has power over immigration despite the Constitution’s silence); see also *Fong Yue Ting v. United States*, 149 U.S. 698, 730 (1893) (stating that deportation, however severe its consequences, has been consistently classified as a civil rather than a criminal procedure.).

4. See INA § 237 (listing the grounds of deportability or reasons to remove noncitizens from the United States); see also INA § 212 (listing the grounds of inadmissibility or reasons for excluding noncitizens from entering the United States). Although both categories are covered under removal proceedings, note the difference between deportability and exclusion. *Deporting* a noncitizen means he or she has entered the United States and is now being removed, while *excluding* a noncitizen means he or she has not yet been admitted to the United States and is not granted legal entry into the United States.

5. U.S. Immigr. & Customs Enforcement, *Fact Sheet: Detention Management*, ICE.GOV (Nov. 10, 2011), <http://www.ice.gov/news/library/factsheets/detention-mgmt.htm>.

6. See *Release of Criminal Detainees by U.S. Immigration and Customs Enforcement: Policy or Politics?: Hearing Before the H. Comm. on the Judiciary*, 113th Cong. 2 (2013) (written statement of John Morton, Director, U.S. Immigration and Customs Enforcement (ICE)) [hereinafter Morton 2013 Written Statement].

7. See *infra* note 12.

8. William Selway and Margaret Newkirk, *Congress Mandates Jail Beds for 34,000 Immigrants as Private Prisons Profit*, BLOOMBERG (Sep. 24, 2013 12:01 A.M.) <http://www.bloomberg.com/news/2013-09-24/congress-fuels-private-jails-detaining-34-000-immigrants.html>.

ICE to “maintain a level of not less than 33,400 detention beds through September 30, 2010.”⁹ The reason behind instituting the bed mandate is unclear, but speaking on behalf of Senator Byrd, Senator Richard Durbin (D-IL) emphasized at a Congressional debate Senator Byrd’s five goals for the new bill.¹⁰ He stated that those major five goals are

No. 1, securing our borders and enforcing our immigration laws; No. 2, protecting the American people from terrorist threats and other vulnerabilities; No. 3, preparing and responding to all hazards, including natural disasters; No. 4, supporting our State, local, tribal and private sector partners in homeland security with resources and information; and finally, giving the Department the management tools it needs to succeed.¹¹

The bed mandate increased to a minimum of 34,000 beds in fiscal year 2012.¹²

Almost two weeks before the sequestration¹³ took effect on March 1, 2013, ICE released 2,228 immigrant detainees¹⁴ from detention facilities across the United States.¹⁵ ICE, the principal investigative arm of DHS,¹⁶ was facing a \$300 million budget cut.¹⁷ Some worried lawmakers demanded an explanation from DHS Secretary Janet Napolitano and questioned the “poorly reasoned” decision to transfer the detainees to a supervised release program.¹⁸ They also accused her of violating DHS’s main security mission, although DHS and the White House claimed they did not know about ICE’s move beforehand.¹⁹ ICE Director John Morton was called to give testimony before the House Committee on the

9. Department of Homeland Security (DHS) Appropriations Act, 2010, Pub. L. No. 111-83, 123 Stat. 2142, 2149.

10. 155 CONG. REC. S7164 (July 7, 2009) (statement of Sen. Richard Durbin).

11. *Id.*

12. H.R. 5855, Rep. No. 112-492, 112th Cong., 2d Sess. 81 (2012).

13. A trillion dollars in budget cuts took effect early 2013 after Congress failed to find a plan reducing the United States deficit by \$4 trillion. *The Sequester*, WHITEHOUSE.GOV, <http://www.whitehouse.gov/issues/sequester> (last visited Jan. 28, 2014).

14. *See Release of Criminal Detainees by U.S. Immigration and Customs Enforcement: Policy or Politics?: Hearing Before the H. Comm. on the Judiciary*, 113th Cong. (2013) (oral statement of John Morton, Director, ICE) [hereinafter Morton 2013 Oral Statement].

15. *See* Morton 2013 Written Statement *supra* note 6; *see also* Alicia A. Caldwell, *AP Exclusive: DHS Released Over 2,000 Immigrants*, ASSOCIATED PRESS (Mar. 1, 2013, 7:57 PM), <http://bigstory.ap.org/article/documents-us-released-more-2000-immigrants>.

16. *Overview*, ICE, <http://www.ice.gov/about/overview/> (last visited Jan. 28, 2014).

17. *See* Morton 2013 Written Statement, *supra* note 6, at 1.

18. *See* Jordy Yager, *GOP Lawmakers Press Napolitano Over Decision to Release Illegal Immigrants*, THE HILL (Feb. 28, 2013, 12:03 PM), <http://thehill.com/homenews/news/285489-gop-lawmakers-press-napolitano-over-decision-to-release-illegal-immigrants>.

19. *See* Jordy Yager, *White House Says It Didn’t Approve Release of Illegal Immigrants*, THE HILL, (Feb. 2, 2013, 9:21 PM), <http://thehill.com/homenews/administration/285295-white-house-denies-signing-off-on-release-of-illegal-immigrants>.

Judiciary.²⁰ Director Morton explained ICE's function and its improving ability to apprehend, detain, and remove individuals who pose national security and public safety threats.²¹ Many²² among the daily average of 35,000 detainees "did not require detention by law,"²³ and were released after ICE used its risk-assessment tool to carefully examine each detainee.²⁴ Director Morton also explained ICE's commitment to complying with congressional mandates and how it allocates its Congressional funds.²⁵

Many politicians, immigration policymakers, and advocates worry that the bed mandate has negative legal effects on ICE agents and their ability to follow the guidelines set for them when detaining, holding, and removing noncitizens. This Comment argues that the bed mandate occasionally forces ICE to unnecessarily detain noncitizens, who are not required to be detained by law, just to fulfill the bed mandate and use the resources allocated to them. Additionally, the unnecessary detention and the conditions at detention centers raise humanitarian and fiscal concerns regarding unnecessary spending of taxpayers' money. Part I discusses the federal government's authority over immigration law and how this plenary power afforded to Congress and the Executive Branch has been interpreted through case law. Although the bed mandate does not violate the Constitution, this Comment argues against its effects. Part II analyzes the importance prosecutorial discretion holds in immigration proceedings, and how the bed mandate encroaches on this relief. Part III shows how this mandate and the lack of clear enforceable regulation regarding detention standards affect administrative duties. While the mandate is constitutional, specific aspects of the bed mandate's implementation are constitutionally suspect and undermine the Administration's core principles of accountability and protection of civil rights and liberties.²⁶ While individual ICE/DHS officers must abide by the bed mandate, policymakers are emphasizing the importance of flexibility and discretion. Part IV

20. See Morton 2013 Written Statement, *supra* note 6.

21. *Id.* at 1.

22. See Morton 2013 Oral Statement, *supra* note 14, at 51 (stating that "at any given moment, about a half to two-thirds of the people that we detain are mandatory detention. Congress has just told us people in these categories must be detained. And the rest are discretionary.").

23. See Morton 2013 Written Statement, *supra* note 6, at 1.

24. *Id.* at 2; see generally JAMES DINKINS, DEP'T OF HOMELAND SEC., IMMIGR. & CUSTOMS ENFORCEMENT, PRIVACY IMPACT ASSESSMENT UPDATE (2012) (DHS initiated a nationwide deployment of a new Risk Classification Assessment instrument in July 2012 to "improve transparency and uniformity in detention custody and classification decisions").

25. See Morton 2013 Oral Statement, *supra* note 14, at 50.

26. DEPARTMENT OF HOMELAND SECURITY, SECURING OUR HOMELAND: DEP'T OF HOMELAND SEC. STRATEGIC PLAN 2004 6-7.

argues that the bed mandate is fundamentally in tension with the plenary immigration power as the DHS and the Executive Branch have generally interpreted it. This Comment will provide recommendations on immigration reform with bed mandate-free appropriations bills.

I. BRIEF HISTORY OF IMMIGRATION LAW, PLENARY POWER, THE BED MANDATE, AND DETENTION

The United States Constitution does not directly address who has the authority to regulate immigration laws or the conditions of continued noncitizen presence in the country, but case history, tradition, and constitutional interpretation have long held that immigration regulation is exclusively a federal concern.²⁷ Historically and recently, the United States Supreme Court construed the enumerated powers of Congress under Article I, and particularly the Commerce Clause,²⁸ as giving immigration authority to the federal government.²⁹ The Supreme Court has also suggested that immigration regulation falls under the Executive Power, which has the authority to control and conduct foreign relations.³⁰ Additionally, Supreme Court cases found that Congress has plenary and discretionary power over immigration,³¹ and that the Executive Branch can take specific immigration

27. See, e.g., *De Canas v. Bica*, 424 U.S. 351, 354 (1976) (“Power to regulate immigration is unquestionably exclusively a federal power.”).

28. U.S. CONST. art. I, § 8, cl. 3 (stating that Congress has the power “[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes”).

29. See, e.g., *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S.Ct. 2566, 2585 (2012) (describing regulation of immigration as among Congress’s powers under the Commerce Clause); *Arizona v. United States*, 132 S.Ct. 2492, 2498 (2012) (finding that the authority to regulate immigration rests, in part, on the power to establish a “uniform Rule of Naturalization” (citing U.S. Const. art. I, § 8, cl. 4)); *Henderson v. Mayor of New York*, 92 U.S. 259 (1876) (striking down New York and Louisiana laws that required shipmasters to compensate states by paying fees or posting bonds in the case where immigrants ended up on public assistance because that law interfered with Congress’s power to regulate interstate commerce); *Chy Lung v. Freeman*, 92 U.S. 275 (1875) (striking down a California law regulating the entry of “lewd and debauched women” on the grounds that it interfered with Congress’s power to regulate the admission of noncitizens); *The Passenger Cases*, 48 U.S. 283 (1849) (striking down New York and Massachusetts laws that levied fees on arriving immigrant passengers, in part, on the grounds that such fees constituted unconstitutional regulations of foreign commerce).

30. U.S. CONST. art. II, § 2, cl. 2 (granting the President “Power, by and with the Advice and Consent of the Senate, to make Treaties”); see also *Arizona*, 132 S.Ct., at 2585 (indicating that immigration policy can affect trade, investment, and tourism with other nations); *Ekiu v. United States*, 142 U.S. 651, 659 (1892) (“It is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe.”).

31. See *INS v. Chadha*, 462 U.S. 919, 940–41 (1983) (“The plenary authority of Congress over aliens under Art. I, §8, cl. 4, is not open to question.”).

related actions through the exercise of delegated legislative power.³²

Only Congress and the Executive Branch have power over immigration; state governments have no immigration authority.³³ Additionally, Congress specifically precluded most judicial oversight in the United States Code on removal matters.³⁴ The Supreme Court has also held that Congress and the Executive Branch are the more appropriate decisionmakers in immigration related actions.³⁵ The Court has suggested that the two branches share plenary power over immigration,³⁶ but in other cases, the Court expressly said that the President has inherent authority over other immigration issues.³⁷

In the wake of the September 11, 2001 attacks, Congress created DHS³⁸ because “no one single government agency ha[d] homeland security as its primary mission.”³⁹ The government intended to have one department responsible for securing the borders, transportation sector, ports, and other critical infrastructure.⁴⁰ The former Immigration and Naturalization Service (now ICE),⁴¹ which previously fell under the Department of Justice, now falls under DHS and is responsible for ensuring the

32. See *Ng Fung Ho v. White*, 259 U.S. 276, 280 (1922) (“Congress has power to order at any time the deportation of aliens whose presence in the country it deems hurtful; and may do so by appropriate executive proceedings.”); see also *The Japanese Immigrant Case*, 189 U.S. 86, 98 (1903) (“As to such [noncitizens within or outside the United States], the decisions of executive or administrative officers, acting within powers expressly conferred by Congress, are due process of law.”).

33. See generally *Arizona*, 132 S.Ct. 2492.

34. 8 U.S.C. § 1252(g) (2012) (stating in part that “no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter.”).

35. See *Mathews v. Diaz*, 426 U.S. 67, 81 (1976) (“Since decisions in [immigration] matters may implicate our relations with foreign powers . . . such decisions are frequently of a character more appropriate to either the Legislature or the Executive branches than to the Judiciary.”).

36. See *The Chinese Exclusion Case*, 130 U.S. 581, 607–09 (1889) (indicating that the federal government has the power to regulate immigration, because the “political department” of the United States had the responsibility for determining “who shall compose [society’s] members”).

37. See *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950) (stating that the President’s power to regulate does not only come from legislative authority but is also inherent in the executive power to control the foreign affairs of a nation).

38. Homeland Security Act of 2002, Pub. L. 107-296, 107th Cong., 116 Stat. 2135 (2002).

39. See PRESIDENT GEORGE W. BUSH, *THE DEPARTMENT OF HOMELAND SECURITY 1* (2002), available at <http://www.dhs.gov/xlibrary/assets/book.pdf> (stressing that “America needs a single, unified homeland security structure that will improve protection against today’s threats and be flexible enough to help meet the unknown threats of the future”).

40. *Id.*

41. DHS Name Change Notice, 72 Fed. Reg. 20,131 (Apr. 23, 2007).

enforcement of immigration laws.⁴² Because the government thought it was impossible for the Executive Branch to act alone in homeland security, it called for a shared responsibility of that goal with Congress.⁴³

The Appropriations Clause in the United States Constitution gives Congress the power to properly appropriate treasury funds to agencies.⁴⁴ The House Appropriations Committee for the DHS passes a yearly bill detailing the allocation of the budget. The House Committee passed the fiscal year 2013 Appropriations Bill, allotting almost 2.8 billion dollars for detention and removal alone.⁴⁵ No incarceration institution in the country, except for immigration detention facilities, has a bed mandate.⁴⁶ Each immigrant detainee costs ICE an average of one hundred and twenty-two dollars per day (amounting to approximately five million per day, or two billion per year in the aggregate), while alternatives to detention, such as electronic monitoring and house arrest, cost anywhere between thirty cents and fourteen dollars per day.⁴⁷

The purpose of detention facilities is “to hold, process, and prepare individuals for removal—as compared to the punitive purpose of the Criminal Incarceration System.”⁴⁸ Alternatives to detention (ATDs), available based on ICE’s discretion, provide a less expensive and safer alternative for both the government and noncitizens.⁴⁹ Unless law mandates the noncitizen’s detention, ICE exercises prosecutorial discretion for the apprehension, detention, and removal of noncitizens.⁵⁰ For

42. BUSH, *supra* note 39, at 4.

43. *Id.* at 16.

44. U.S. CONST. art. I, §9, cl. 7 (“No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.”).

45. See DHS Appropriations Act, 2010, Pub. L. No. 111-83, 123 Stat. 2142, 2149 (stressing that the Secretary of Homeland Security “shall prioritize the identification and removal of aliens convicted of a crime by the severity of that crime”).

46. ACLU & GEORGIA DETENTION WATCH, SECURELY INSECURE: THE REAL COSTS, CONSEQUENCES & HUMAN FACE OF IMMIGRATION DETENTION 1 (2011).

47. See Morton 2013 Oral Statement, *supra* note 14; see also *Building an Immigration System Worth of American Values, Before the S. Comm. on the Judiciary*, 113th Cong. 4–5 (Mar. 20, 2013) (statement of Paul Grussendorf) [hereinafter Grussendorf Statement]; Ruthie Epstein, *Immigration Detention Level ‘Mandate’ Is an Obstacle to Reform*, THE HILL’S CONG. BLOG (Apr. 12, 2013, 4:00 PM), <http://thehill.com/blogs/congress-blog/homeland-security/293647-immigration-detention-level-mandate-is-an-obstacle-to-reform>.

48. DR. DORA SCHIRO, DEP’T OF HOMELAND SEC., IMMIGR. & CUSTOMS ENFORCEMENT, IMMIGRATION DETENTION OVERVIEW AND RECOMMENDATIONS 2 (2009).

49. See Grussendorf Statement, *supra* note 47, at 5 (indicating that historically, ICE has not exercised this discretion which resulted in unnecessary detention and accrual of wasted taxpayers’ money).

50. John Morton, Director to Immigration and Customs Enforcement, memorandum, “Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens”, Mar. 2, 2011, at 1–2 [hereinafter Morton 2011 Enforcement Memo], (aliens who

example, when ICE released the 2,228 detainees in early 2013, the Agency placed them in ATD programs, such as house monitoring, ankle bracelets, and bonds.⁵¹

From 1996 to 2006, sixty-five percent of detainees were detained after being arrested for non-violent crimes.⁵² Although this percentage decreased between 2009 and 2011, over fifty percent of the detainees did not have any prior criminal records.⁵³ In June 2010, Director Morton released a memorandum signaling the Agency's new steps toward a more focused enforcement.⁵⁴ ICE's new policy prioritized apprehension and detention of individuals convicted of serious criminal offenses,⁵⁵ but the policy did not prevent ICE from also detaining low-risk or even no-risk noncitizens. The memorandum also outlined ICE's civil immigration enforcement priorities, focusing on removing individuals who are threats to national security, public safety, and border security.⁵⁶ With regard to detention, Morton stated that "[a]s a general rule, ICE detention resources should be used to support the enforcement priorities . . . or [used] for aliens subject to mandatory detention by law."⁵⁷ However, the bed mandate, which caused many lawmakers to question its consequences in light of the unreasonable spending for detention and inefficiency within the Department, has negative implications for the autonomy of ICE and implementation of Director Morton's priorities.⁵⁸

II. THE IMPORTANCE OF PROSECUTORIAL DISCRETION

Prosecutorial discretion is an authority confined to the Executive and it is widely exercised by the DHS in immigration cases.⁵⁹ Prosecutorial

have been convicted of crimes, are at least 16 years of age and participate in organized criminal gangs, are subject to outstanding criminal warrants, or "otherwise pose a serious risk to public safety" constituting the highest priorities for removal).

51. See Morton 2013 Oral Statement, *supra* note 14, at 143.

52. See NATIONAL IMMIGRATION FORUM, THE MATH OF IMMIGRATION DETENTION: RUNAWAY COSTS FOR IMMIGRATION DETENTION DO NOT ADD UP TO SENSIBLE POLICIES 5 (2013).

53. DORIS MISSNER, ET. AL., MIGRATION POLICY INSTITUTE, IMMIGRATION ENFORCEMENT IN THE UNITED STATES, THE RISE OF A FORMIDABLE MACHINERY 10 (2013).

54. See generally Morton 2011 Enforcement Memo, *supra* note 50.

55. *Id.*

56. *Id.* at 3.

57. *Id.*

58. See generally Morton 2013 Oral Statement *supra* note 14 (including the questioning of several lawmakers who are opposed to, or at least questioning, the purpose behind the bed mandate).

59. See, e.g., *Heckler v. Chaney*, 470 U.S. 821, 831 (1985) (recognizing that the decision not to indict is a decision that has long been "regarded as the special province of the Executive Branch, inasmuch as it is the Executive who is charged by the Constitution to 'take Care that the Laws be faithfully executed.'"); Brief of Former Commissioners of the

discretion is defined as “the authority of an agency charged with enforcing a law to decide to what degree to enforce the law against a particular individual.”⁶⁰ The concept of prosecutorial discretion generally applies in criminal, administrative, and civil cases. Understanding how prosecutorial discretion is exercised in civil immigration cases is relevant to understanding how the bed mandate hinders ICE’s autonomy and discretion.⁶¹ DHS delegated to ICE the main responsibility of enforcing U.S. immigration laws in coordination with the U.S. Customs and Border Protection (CBP) and U.S. Citizenship and Immigration Services (USCIS).⁶² ICE must ensure that its removal proceedings represent the Department’s enforcement priorities, namely the promotion of national security, border security, public safety, and the integrity of the immigration system.⁶³ The exercise of prosecutorial discretion is important in immigration enforcement, and ICE agents and DHS attorneys may exercise prosecutorial discretion when apprehending, detaining, or otherwise enforcing immigration law.⁶⁴ Former ICE Director John Morton’s March 2011 memorandum specified how federal actors involved in immigration enforcement should consider their exercise of prosecutorial discretion.⁶⁵

United States INS as Amici Curiae Supporting Respondents, *Arizona v. United States*, 132 S.Ct. 2492 (2012) (“Congress has delegated discretionary authority to the relevant federal agencies to determine where the nation’s limited resources are deployed most productively.”); *see generally* AMERICAN IMMIGRATION COUNCIL, UNDERSTANDING PROSECUTORIAL DISCRETION IN IMMIGRATION LAW (2011), (explaining that the DHS has issued an agency-wide guidance to ICE, U.S. Citizenship and Immigration Services (USCIS), and Customs and Border Patrol (CBP) officers that ensures the appropriate exercise of discretion especially when dealing with low risk noncitizens).

60. John Morton, Director to Immigration and Customs Enforcement, memorandum, Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention and Removal of Aliens, 2 (June, 17 2011) [hereinafter Morton 2011 Discretion Memorandum].

61. *See* AMERICAN IMMIGRATION COUNCIL, *supra* note 59 (This special report by a notable immigration policy organization indicated that the exercise of prosecutorial discretion opens the doors in understanding how the United States Federal Government exercises its immigration power and how its incorporation is key to understanding how our immigration laws work).

62. Morton 2011 Discretion Memorandum, *supra* note 60.

63. *Id.* (indicating that this memorandum supports those priorities already outlined in the ICE Civil Immigration Enforcement Priorities Memorandum of March 2, 2011).

64. HIROSHI MOTOMURA, AMERICAN IMMIGRATION COUNCIL, PROSECUTORIAL DISCRETION IN CONTEXT: HOW DISCRETION IS EXERCISED THROUGHOUT OUR IMMIGRATION SYSTEM 2 (Apr. 2012) (noting that the decision makers who use discretion range in immigration enforcement and include an array of federal actors, such as members of Congress who enact laws, DHS officers who make arrests, ICE trial attorneys who represent the government in removal proceedings, and immigration judges who preside over those proceedings).

65. *See* Morton 2011 Discretion Memorandum, *supra* note 60, at 2 (considering, among other factors, the noncitizen’s length of presence in the United States (especially presence in lawful status), pursuit of education in the United States, and military service).

The same memo stated that, although prosecutorial discretion can be exercised to reduce immigration enforcement any time during an immigration proceeding, it is preferable to exercise it as early in the case or proceeding as possible.⁶⁶ Director Morton indicated that ICE was confronted with “more administrative violations than its resources can address”⁶⁷ and for this reason, the regular and proper exercise of prosecutorial discretion not to enforce immigration laws is important.⁶⁸

Congress and the Executive Branch have clearly defended their exclusive and vested discretionary power in immigration cases, and they rely on that authority to halt state action that undermines it.⁶⁹ Congress, however, has authorized DHS to enter into agreements with state and local law enforcement agencies to enforce federal immigration laws under § 287(g) of the Immigration and Nationality Act (INA).⁷⁰ This federal law allows states to conduct warrantless interrogations and arrests of noncitizens suspected of being in the country illegally.⁷¹ The decision to interrogate someone who is suspected of being illegally present in the United States is a discretionary decision of an immigration officer.⁷² Arresting a suspect is also based on a suspected belief rather than probable cause.⁷³ Even if an arrest does not result in detention,⁷⁴ compelling

66. *Id.* at 5.

67. *Id.* at 2.

68. *Id.*

69. 8 U.S.C. § 1229a(a)(3) (2012) (stating in part that with limited exceptions, the federal immigration court, an administrative body that does not fall under the Judicial Branch, has the “sole and exclusive procedure for determining whether an alien may be . . . removed from the United States”); *see, e.g.*, Brief for Respondent at 33, *Arizona v. United States*, 124 S.Ct. 2492 (2012) [hereinafter U.S. Brief 2012] (arguing that Congress has vested enforcement authority in a single decisionmaker to guarantee the “flexibility” to pursue a “somewhat delicate balance” of “difficult (and often competing) objectives.” Under the INA Congress has assigned the Executive Branch the responsibility and discretion to decide the disposition of an unlawfully present alien—ranging from expedited removal to temporary release to permanent adjustment of status. It is Congress’s action that preempts Arizona’s attempt to second-guess the Executive’s judgments. (Internal citations omitted).

70. 8 U.S.C. § 1357 (2012). In the first initiative, this congressional authorization occurred as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996.

71. *Id.*

72. *Id.* § 1357(a)(1) (clarifying that any immigration officer shall have the power without a warrant to “interrogate any alien or person *believed* to be an alien as to his right to be or to remain in the United States”) (emphasis added).

73. *Compare* U.S. CONST. amend. IV (implying that enforcement officers require probable cause before an arrest); § 1357(a)(2) (adding that any immigration officer shall have the power without a warrant to “arrest any alien in the United States, if he has reason to believe that the alien so arrested is in the United States in violation of any such law or regulation and is likely to escape before a warrant can be obtained for his arrest”).

74. § 1357(a)(2) (stating in part that “the alien arrested shall be taken without

immigration officers to abide by the statutory mandate that requires a 34,000 filled-bed count in immigration facilities forces them to not only refrain from exercising discretion when interrogating or arresting someone who might be innocent, but to also rely on a lower standard of suspicion (than that required by the Fourth Amendment) and racial profiling.⁷⁵ Some might argue that the lower standard of suspicion and the use of racial profiling is a right within an enforcement officer's authority and is sometimes necessary given the circumstances of illegal migration trends.⁷⁶ However, this new culture of strict immigration enforcement against undocumented noncitizens is detrimental to the freedoms the United States values.

In the American system, quotas are not unique to the immigration detention context. Officer Craig Matthews, a New York City Police officer, filed a suit against the New York Police Department in February 2012 for violating his right of free speech.⁷⁷ As a police officer he spoke against the quota system the NYPD had in place for its police officers, "contending that it 'was causing unjustified stops, arrests, and summonses because police officers felt forced to abandon their discretion in order to meet their numbers.'"⁷⁸ In his decision at the Southern District of New York, Judge Engelmayer acknowledged that "there is a paramount public interest in shining a light on a policy" that allegedly "causes police officers to violate citizens' rights not to be subject to unlawful stops and arrests," adding that "The quota system that Officer Matthews protested would, in fact, today violate New York State law."⁷⁹ The State of New York was able to make the quota system illegal because of the clear repercussions it caused. The same wisdom can be translated to the bed mandate. By placing ICE officers under the pressure of a quota system, Congress is compelling ICE supervisors to force ICE agents to "bring more bodies" to detention facilities in order to abide by quotas without assessing whether the noncitizen is subject to detention.⁸⁰ The agents "racially profiled the

unnecessary delay for examination before an officer of the Service having authority to examine aliens as to their right to enter or remain in the United States").

75. ABA, REFORMING THE IMMIGRATION SYSTEM: PROPOSALS TO PROMOTE INDEPENDENCE, FAIRNESS, EFFICIENCY, AND PROFESSIONALISM IN THE ADJUDICATION OF REMOVAL CASES 23 (2010) (stating concern with the increased number of Notices to Appear and the effects of racial profiling).

76. See generally *Arizona v. United States*, 132 S.Ct. 2492 (2012).

77. *Matthews v. New York*, 12 Civ. 1354 (S.D.N.Y. July 29, 2013); see also Benjamin Wiser, *Officer's Lawsuit Over Quotas Is Reinstated*, N.Y. TIMES (Nov. 28, 2012) http://www.nytimes.com/2012/11/29/nyregion/court-reinstates-police-officers-lawsuit-over-arrest-quotas.html?_r=0.

78. *Matthews*, 12 Civ. at 3.

79. *Id.* at 36.

80. Gillian Gaynair, *Report: Immigration Agents Pressured to Meet Arrest Quotas in 2007 Raid in Baltimore*, ASSOCIATED PRESS (Feb. 18, 2009, 8:04 P.M.),

people they arrested . . . ignored blacks and whites . . . as they rounded up all the Hispanics.”⁸¹ Forcing the agents to abide by the quota means that either there are not enough noncitizens who fall under the category of those who need to be detained as mandated by the law, or the agents are not doing their job correctly.

Many of the noncitizens that are arrested or detained by ICE do not require detention by law.⁸² ICE has the discretion to decide at any point during the detention and removal proceeding⁸³ whether the noncitizen in custody should be detained, released, or placed into the alternative to detention program.⁸⁴ By instilling the bed mandate, Congress has prevented ICE agents and DHS officials from exercising their prosecutorial discretion. This leads to the unnecessary detention of thousands of noncitizens while costing taxpayers billions of dollars.⁸⁵ There are concerns and strong opposition from both sides of the aisle against the bed mandate for fear that it will disrupt ICE agents from satisfying their stated enforcement priorities and compromise immigration reform.⁸⁶ For example, Congressman Ted Deutch (D-FL) stated, “It would be unimaginable for Congress to mandate to other law enforcement agencies how many people they must jail on a daily basis, but that is exactly what this detention bed mandate does to ICE . . . It is time to bring ICE offices across the country in line with the best practices of other law enforcement agencies, which apprehend and detain individuals based on actual need as opposed to a mandate from Washington.”⁸⁷ Congressman Spencer Bachus (R-AL), during a hearing John Morton, also voiced his concern about the possible overuse of detention and said, “I am just saying it looks to me like maybe there is an overuse of detention by this Administration. [. . .] If these people are not public safety risks, if they are not violent, if they do not have a criminal history, if they are not repeat offenders, if they are going to show

<http://www.casademaryland.org/news-archive/669-02182009>.

81. *Id.*

82. See Morton 2013 Written Statement, *supra* note 6, at 2; see also Grussendorf Statement, *supra* note 47, at 6.

83. See Morton 2011 Discretion Memorandum, *supra* note 60, at 5 (“While ICE may exercise prosecutorial discretion at any stage of an enforcement proceedings, it is generally preferable to exercise such discretion as early in the case or proceeding as possible in order to preserve government resources that would otherwise be expended in pursuing the enforcement proceeding.”).

84. See Grussendorf Statement, *supra* note 47, at 5.

85. See DHS Appropriations Act, *supra* note 12 (\$2,749,840,000).

86. See Grussendorf Statement, *supra* note 47; see also Press Release, Ted Deutch, Reps. Deutch and Foster Lead Effort to End Wasteful Immigrant Detention Bed Mandate (Sept. 26, 2013) available at <http://teddeutch.house.gov/news/documentsingle.aspx?DocumentID=351440>.

87. See Press Release *supra* note 86.

up for proceedings, why are they detained at all?”⁸⁸

These concerns are not unique, and supporters of the mandate have barely justified the bed mandate’s prolonged existence. For example, Representative Hal Rogers (R-KY), Chairman of the House Appropriations Committee, wrote that the “bed mandate is ‘intended to compel the agency to enforce existing immigration law.’”⁸⁹ Enforcing an arbitrary bed mandate as an incentive for DHS and ICE employees to enforce immigration laws—the main objective of their job responsibility—is not a compelling reason. Jessica Vaughan, the Director of the Policy Studies for the Center of Immigration Studies, also supports the mandate by shedding light on certain statistics.⁹⁰ She states that as of July 2013, ICE’s detention caseload is only 1.7% of its total active removal caseload (about 30,000 out of 1.8 million), which hardly suggests that Congress is forcing ICE to use more beds.⁹¹ She also adds that about 80% of detainees are mandatory detainees, meaning that ICE is not allowed to release them by law.⁹² Vaughan also voices her concern about the 870,000 noncitizens who have been ordered removed and have failed to leave the country.⁹³ Although her argument has some merit, the fact that ICE’s detention caseload is minimal does not justify the need for a mandate. ICE should be detaining based on need and not based on a prerequisite number. This point is proven by the fact that the detention of 20% of the detainees is not mandated by law. They cannot be ignored. If Congress allocated its tremendous budget for detention towards alternatives to detention, that cost much less, the Agency could have kept track of those noncitizens who absconded and made sure their removal proceeding is completed.

The purpose behind detaining noncitizens is not for punitive reasons; rather, it “serves to ensure court appearances and effective removal.”⁹⁴ The Attorney General has discretionary power to release any noncitizen who will not be a danger to the public and who does not provide a flight risk or is “likely to appear for any scheduled proceeding.”⁹⁵ These noncitizens

88. See Morton 2013 Oral Statement *supra* note 14, at 50.

89. Ted Robbins, *Little-Known Immigration Mandate Keeps Detention Beds Full*, NPR (Nov. 19, 2013, 3:05 A.M.), <http://www.npr.org/2013/11/19/245968601/little-known-immigration-mandate-keeps-detention-beds-full>.

90. Jessica Vaughan, *Enforcement Metrics Support Case for Detention Bed Mandate*, CENTER FOR IMMIGRATION STUDIES 1 (Nov. 2013), available at <http://cis.org/vaughan/enforcement-metrics-support-case-detention-bed-mandate>.

91. *Id.*

92. *Id.*

93. *Id.*

94. AM. BAR ASS’N, AM. BAR ASS’N CIVIL IMMIGRATION DETENTION STANDARDS 1 (2012), available at <http://www.americanbar.org/content/dam/aba/administrative/immigration/abaimmdetstds.authcheckdam.pdf>.

95. 8 U.S.C. § 1226(c)(2) (2012).

would be released on a \$1,500 bond or conditional parole.⁹⁶ In the instance of conditional parole, ICE places the noncitizen in an alternative to detention, which has been proven to be as effective as detention,⁹⁷ less costly,⁹⁸ and potentially safer for noncitizens than immigration detention facilities.⁹⁹ ICE has already implemented some alternative programs¹⁰⁰ that are available, at its employees' discretion, to low-risk noncitizens,¹⁰¹ but because of the bed mandate, ICE agents resort to detaining many of those low-risk noncitizens just to abide by the quota.¹⁰² This is particularly

96. §1226(a)(2)(A)-(B) (stating that a noncitizen who was released from custody on conditional parole has not been "paroled into the United States" for purposes of establishing eligibility for adjustment of status under section 245(a) of the INA).

97. Julie Myers Wood and Steve J. Martin, *Smart Alternatives to Immigrant Detention*, WASHINGTON TIMES (Mar. 28, 2013) <http://www.washingtontimes.com/news/2013/mar/28/smart-alternatives-to-immigrant-detention/> ("One alternative-to-detention program at ICE is called the Intensive Supervision Appearance Program II (ISAP II) . . . In 2011, 96 percent of active participants in the full-service ISAP II programs showed up for their final hearing, and 84 percent complied with final orders . . . As the agency fine-tunes the program, it should become *even more effective*") (Julie Myers Wood is the Former Assistant Secretary of Homeland Security for ICE).

98. *Id.* ("Alternatives costs taxpayers less than \$9 per person per day, compared to \$116 per person per day for those in detention); *see also* Grussendorf Statement, *supra* note 47 at 5 ("Detention is a costly way for the government to ensure appearances at immigration proceedings and protect public safety. Legislation should permit judges to consider alternatives to detention for individuals who are vulnerable or pose little risk to communities, and to consider in each case whether continued detention is necessary and lawful.").

99. *See* Ian Urbina & Catherine Rentz, *Immigrants Held in Solitary Cells, Often for Weeks*, N.Y. TIMES, Mar. 23, 2013, <http://www.nytimes.com/2013/03/24/us/immigrants-held-in-solitary-cells-often-for-weeks.html?pagewanted=all> (reporting on many human rights violations in detention facilities and explaining that immigration proceedings are civil charges not criminal; therefore, the prisoners "are not supposed to be punished; they are simply confined to ensure that they appear for administrative hearings").

100. U.S. Immigr. & Customs Enforcement, *Fact Sheet, Alternatives to Detention for ICE Detainees*, ICE.GOV (Oct. 23, 2009), <http://www.aila.org/content/default.aspx?bc=1016%7C6715%7C12053%7C26286%7C31038%7C30487> (listing three of the Alternatives to Detention programs (ATD): Intensive Supervision Appearance Program (ISAP), Enhanced Supervision/Reporting (ESR), and Electronic Monitoring (EM)).

101. *See* ALISON SISKIN, CONG. RESEARCH SERV., RL32369, IMMIGRATION-RELATED DETENTION: CURRENT LEGISLATIVE ISSUES 13 (2004) (explaining that the interest in alternatives to detention rose from the constraints imposed on the high costs of detaining the high amount of noncitizens with final orders of removal, and that ICE conducted an electronic monitoring pilot program for low-risk, non-violent offenders).

102. *See* Grussendorf Statement, *supra* note 47, at 5 (stating that "individualized detention decisions may be overridden by the requirement to meet a detention quota"); *see also* Epstein, *supra* note 47 (explaining that "the mandate . . . precludes ICE officers from making decisions about detention based on individual risk and the agency's priorities and policies."); Royce Bernstein Murray, *House Budget Bill Attempts to Thwart Congress's Progress on Immigration Detention Reform*, THE HILL'S CONGRESS BLOG (May 30, 2013, 3:00 PM), <http://thehill.com/blogs/congress-blog/homeland-security/302563-house-budget->

troubling considering that the United States clarified in its brief against the State of Arizona in *Arizona v. United States*¹⁰³ that detention is not justified in all cases.¹⁰⁴ However, in the 2013 Appropriations Bill, Congress was still strict with its requirements to abide by the bed mandate, while expressing its clear intent to limit the agents' prosecutorial discretion.¹⁰⁵

III. LACK OF ENFORCEABLE REGULATIONS

When discussing immigration, many Americans have questioned whether noncitizens have rights in the United States. The Supreme Court found that in certain circumstances, noncitizens are entitled to certain constitutional rights.¹⁰⁶ Considering the civil nature of immigration proceedings and the non-punitive nature of detention, noncitizens are not protected under the Fourth¹⁰⁷ or Sixth Amendments,¹⁰⁸ even though they

bill-attempts-to-thwart-congress-progress-on-immigration-detention-reform ("The House Appropriations Committee's bed mandate and unnecessarily cumbersome reporting requirement cripple ICE's ability to exercise prosecutorial discretion, which all law enforcement agencies must have to prioritize and allocate resources according to public safety needs.").

103. 132 S.Ct. 2492 (2012).

104. See U.S. Brief 2012, *supra* note 69, at 21 ("Congress has qualified the Executive Branch's discretion in some respect by adopting eligibility requirements . . . and annual limits on certain categories of relief. But those tailored limitations only underscore Congress's judgment that unlawful presence does not in all cases justify detention, much less criminal punishment.").

105. H.R. 2217, Rep. No. 113-91, 113th Cong., 1st Sess. (2013) ("Adequate resources and reprogramming authority are provided in this recommendation to enforce the 34,000 bed mandate. ICE is *directed to refrain from administratively releasing* any individual who has been placed in other than short-term detention to a less restrictive form of supervision *unless it notifies the Committee in advance*, including an explanation of the rationale for such release and a certification that such individual clearly meets ICE's criteria for a particular non-detention form of supervision.") (emphases added).

106. See, e.g., *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) (finding that "the Fourteenth Amendment to the constitution is not confined to the protection of citizens. It says: '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.' These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws."); *Padilla v. Kentucky*, 559 U.S. 356 (2010) (finding that noncitizens have a constitutional right to effective counsel in criminal proceedings); *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) ("[O]nce an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent.").

107. U.S. CONST. amend. IV (protecting people against unreasonable searches and seizures conducted by the Government in criminal contexts); accord *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1039 (1984) (finding that the body or identity of a defendant in a criminal or civil proceeding is never suppressible as a result of an unlawful arrest. Justice O'Connor claimed she does not condone Fourth Amendment violations, but explained that there are INS regulations in place for that, and "if there developed good reason to believe

are treated as criminal prisoners in detention facilities.¹⁰⁹ They are, however, allowed to retain counsel, but not at the expense of the government, subject to some exceptions.¹¹⁰ Most detainees barely have access to the outside world. Phone calls are very expensive, and often detainees are transferred to states far away from their families.¹¹¹ This hinders their ability to find effective counsel to take on their cases, especially when lawyers must navigate different state laws and possibly argue in courts in different jurisdictions. Exercising prosecutorial discretion, therefore, can help eliminate these hardships especially among the most vulnerable detainees.¹¹²

ICE agents follow a set of principles and guidelines when identifying and apprehending removable noncitizens.¹¹³ In the same Morton memo detailing ICE's prosecutorial discretion in apprehending, detaining, and

that Fourth Amendment violations by INS officers were widespread, then [the Supreme Court's] conclusion on the exclusionary rule might change"); *see generally* Stella J. Burch, "Good Reason to Believe": Widespread Constitutional Violations in the Course of Immigration Enforcement and the Case for Revisiting Lopez-Mendoza, Yale Law School Student Scholarship (2008) (arguing that the *Lopez-Mendoza* case should be revisited because many changes took place over the past twenty-five years including widespread violations of immigrants' constitutional rights), available at http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1067&context=student_papers

108. U.S. CONST. amend. VI ("In all *criminal prosecutions*, the accused shall enjoy the right to . . . *have the Assistance of Counsel for his defence*.") (emphases added).

109. *See Urbina, supra* note 99 (stating that immigration proceedings are civil and for that reason, detainees should not be punished while in detention).

110. *See* INA § 240(b)(4)(A) codified at 8 U.S.C. § 1229a(b)(4)(A) (2012) (stating "the alien shall have the privilege of being represented, at no expense to the Government, by counsel of the alien's choosing who is authorized to practice in such proceedings."). Noncitizens do not have a constitutional right to counsel, but are allowed to be represented because they are protected under the Due Process Clause of the Fifth Amendment; *but see* S. 744, 113th Cong., 1st sess., 712 (improving access to counsel, upon the Attorney General's discretion, for children and people with significant mental disabilities in removal proceedings).

111. Michael McLaughlin, *10 Worst Immigrant Detention Centers Should be Closed, Detention Watch Network Report Says*, HUFFINGTON POST (Nov. 16, 2012, 11:29 A.M.), http://www.huffingtonpost.com/2012/11/16/worst-detention-centers-detention-watch-network_n_2138999.html.

112. *See Urbina, supra* note 99 ("Trauma experts say the psychological impact of solitary confinement may be more acute for immigrant detainees because many are victims of human trafficking, domestic violence or sexual assault or have survived persecution and torture in their home countries.")

113. *See* Morton 2011 Enforcement Memo, *supra* note 50, at 1–3; *see also Fact Sheet: Updated Facts on ICE's 287(g) Program*, ICE.GOV, <http://www.ice.gov/news/library/factsheets/287g-reform.htm> (last visited Feb. 13, 2013) (stating that "racial profiling is simply not something that will be tolerated, and any indication of racial profiling will be treated with the utmost scrutiny and fully investigated. If any proof of racial profiling is uncovered, that specific officer or department could have their authority and/or agreement rescinded.").

removing noncitizens, Director Morton highlighted the principles and priorities set for ICE agents when enforcing the nation's immigration laws, and he was also clear on who should not be subject to detention.¹¹⁴ The list in the Morton memorandum includes three priorities for detention: (1) "aliens who pose a danger to national security or a risk to public safety" (i.e. terrorists, felons, criminal gang members);¹¹⁵ (2) "recent illegal entrants" (historically referred to as "catch and release");¹¹⁶ and (3) "aliens who are fugitives or otherwise obstruct immigration controls" (including those who reenter the country illegally).¹¹⁷ Section 287 of the Immigration Nationality Act spells out how enforcement officers can identify and arrest a noncitizen, without undermining their discretionary power.¹¹⁸

Many noncitizens do not fit under the three prioritized categories (e.g., dangerous noncitizens, illegal entrants, or fugitives) and they are being stopped, interrogated, and detained by immigration officers.¹¹⁹ Some studies have shown that a high percentage of those who are arrested and detained only have minor traffic infractions.¹²⁰ Some agents have attested to detaining people just to meet the mandate imposed by Washington.¹²¹ The Morton memo specifically stated that the purpose of the guidelines

114. *Id.* at 3 ("Absent extraordinary circumstances or the requirements of mandatory detention, field office directors should not expend detention resources on aliens who are known to be suffering from serious physical or mental illness, or who are disabled, elderly, pregnant, or nursing, or demonstrate that they are primary caretakers of children or an infirm person, or whose detention is otherwise not in the public interest.")

115. *Id.* at 1.

116. *Id.* at 2.

117. *Id.* at 3.

118. 8 U.S.C §1357 (the general consensus that ICE agents must have sufficient reason to believe that someone is unlawfully present in order to interrogate them and/or arrest them).

119. *See, e.g., Urbina supra* note 99 (recounting the story of a Mr. BinRashed, a Yemeni detainee, who arrived in the United States after fleeing his "civil-war-ravaged country in 1999." He arrived as an asylum seeker but falsely listed his country of origin as Somalia. He was detained for almost three years before winning his case.).

120. *Accord* MARGOT MENDELSON ET. AL, COLLATERAL DAMAGE: AN EXAMINATION OF ICE'S FUGITIVE OPERATIONS PROGRAM 11 (2009) (indicating that "[w]hile [National Fugitive Operations Program] NFOP was designed to focus on apprehending dangerous fugitives, our results make clear that the program has primarily been arresting the easiest targets, including many persons without a criminal history and nonfugitives, whose cases have not yet been heard by an immigration judge."); *see also* TRAC IMMIGRATION, WHO ARE THE TARGETS OF ICE DETAINERS? 2 (2013) (showing that during a fifty-month period covering FY 2008 through the start of FY 2012 out of 949,126 detainees, only 214,544 had been convicted of a crime, or 22.6%).

121. N.C. Aizenman, *Conflicting Accounts of an ICE Raid in MD*, THE WASH. POST, Feb. 18, 2009, http://articles.washingtonpost.com/2009-02-18/news/36818457_1_fugitive-immigrants-fugitive-aliens-criminal-immigrants; *see also* Mike Meno/WYPR, *Immigration Officials Sued for '07 Fells Point Raid*, CASA DE MD (Jan. 30, 2009), <http://www.casademaryland.org/news-archive/645-01302009>.

were due to the “limited enforcement resources the agency has available” and that “ICE must prioritize the use of its enforcement personnel, detention space, and removal resources” to ensure ICE promotes its highest enforcement priorities.¹²² Although the language explains that the notion of limited resources is the purpose behind the guidelines, that language is couched in more humanitarian meaning. The bed mandate is causing some ICE agents to resort to violating those principles that can guarantee every person within the United States equal protection of the law and due process rights.¹²³ Though the Appropriations Committee is directing ICE in the upcoming year to expand alternatives to detention,¹²⁴ its continued support for the bed mandate discourages ICE agents from making use of these alternatives.

IV. WHY CONGRESS MUST ELIMINATE THE BED MANDATE

The release of over two thousand noncitizen detainees caused outrage, and until Director Morton testified before the House Committee on the Judiciary, many believed dangerous criminals were lurking the streets.¹²⁵ Whether the release was a tactic to scare Congress into realizing what a \$300 million budget cut can do, is unclear; however, the majority of those who were released were low-risk noncitizens who were placed on an alternative form of ICE supervision.¹²⁶ The call to end this mandate is not new. Former DHS Secretary Janet Napolitano has voiced the same concerns. At a House Appropriations Subcommittee hearing, Napolitano testified that ICE needs to be at a point where its agents’ decisionmaking about the use of detention is “based only on consistent, reviewable, risk-based criteria, and that ICE has full discretion and available funding to use

122. See Morton 2011 Enforcement Memo, *supra* note 50, at 1; see generally Morton 2011 Discretion Memo *supra* note 60.

123. Mahwish Khan, *ICE Director Morton’s Prosecutorial Discretion Memo Offered Hope, Yet to be Realized*, AMERICA’S VOICE (Apr. 17, 2012, 10:26 A.M.), <http://americasvoiceonline.org/blog/ice-director-mortons-prosecutorial-discretion-memo-offered-hope-yet-to-be-realized/> (explaining that the Morton memo has given hope to many who rely on prosecutorial discretion as a lifeline, even though the process has been slow).

124. See H.R. 2217, *supra* note 105 (The Committee recommends a \$24 million increase for ICE ATD programs and “directs ICE . . . to continue to expand the Fast Track pilot programs through which ATD cases were prioritized in the non-detained docket and brief the Committee quarterly on the Fast Track pilots . . .”).

125. *Id.*; see generally Morton 2013 Oral Statement *supra* note 14.

126. See H.R. 2217, *supra* note 105 (“We took careful steps to ensure that national security and public safety were not compromised by the releases. All release decisions were made by career law enforcement officials following a careful examination of the individual’s criminal and immigration history ensuring that the focus remains on detaining serious criminal offenders and others who pose a threat to the national security or public safety.”).

less costly supervision methods, and alternative to detention when risk is low.”¹²⁷ If ICE relies solely on risk-based criteria, then there would be no purpose in requiring a bed mandate. ICE agents have a duty to enforce existing immigration laws; they do not need a mandate as an incentive to do what they are supposed to do.

Former Secretary Napolitano also pressed the need to rely on alternatives to detention.¹²⁸ The budget for alternatives is only about 3% of the federal budget for detention.¹²⁹ If Congress allocates more funding toward alternatives, ICE would then be able to process more unlawful people present in the United States. This allows Congress to be more fiscally responsible with taxpayer’s money without ignoring everyone’s concern about the unlawful presence of people who should be deported.

Former ICE Director Morton outlined a set of guidelines for ICE agents to follow when deciding whom to apprehend and detain. Those guidelines provided hope for many noncitizens without criminal records who have been detained for purposes not mandated by law and who have been targeted by ICE agents. The mandate created the problem of over-detention, and as Former Secretary Napolitano said, “we ought to be managing the actual detention population to risk, not to an arbitrary number.”¹³⁰ ICE should be detaining noncitizens according to its priorities, to public safety threats, and level of offense. It should not place noncitizens in detention because it has to fill a quota. Director Morton said that the amount of noncitizens detained “go up and down[;] [s]ometimes [they] are above 34,000; sometimes [they] are below.”¹³¹ ICE agents cannot risk being in violation of a congressional mandate every time they fall short of the number.

Representatives Ted Deutch (D-FL) and Bill Foster (D-IL) introduced an amendment to the DHS Appropriations Bill for the fiscal year 2014 to strike down the bed mandate.¹³² The amendment did receive vocal support and votes from 190 members, but the amendment did not pass.¹³³

127. Transcript of House Appropriations Subcommittee on Homeland Security Hearing on President Obama’s Fiscal 2014 Budget Proposal for the Homeland Security, 5 (2013).

128. *Id.* at 14 (stating that they “are proposing to make greater uses of alternatives to detention which are cheaper.”).

129. See Robbins, *supra* note 89, at 4.

130. See Transcript *supra* note 127, at 14 (adding that “of those released, there were very few, a handful of so called ‘level one offenders.’ But when you dig down into those cases, you’ll find, for example, a 68-year-old who had—10—plus years after he committed an offense and was living with his family in New Mexico. So some of those cases on a case-by-case basis, clearly understandable.”).

131. See Morton 2013 Oral Statement *supra* note 14, at 36.

132. Katharina Obser, *The Outdated Immigrant Detention System*, THE HILL (Oct. 18, 2013, 6:00 P.M.), <http://thehill.com/blogs/congress-blog/judicial/329325-the-outdated-immigrant-detention-system>.

133. *Id.*; see also IMMIGRANT JUSTICE, IMMIGRATION BED MANDATE 101 1 (2013).

Although President Obama has not specifically asked for the removal of the bed mandate, he did request a decrease in the bed allotment from 34,000 to 31,800 so that Congress and ICE can use their resources more efficiently.¹³⁴

Striking the bed mandate does not put an end to detention of noncitizens. ICE has the obligation to detain those it needs to detain based on whether the particular noncitizen is found guilty on certain grounds of deportability or inadmissibility and based on the priorities. Additionally, the focus is not whether or not striking the bed mandate would lead to a decrease in detention; ICE's priority in enforcing immigration laws should be detaining the *right* noncitizen without the undue pressure of having to abide by a bed quota.

CONCLUSION

Congress must recognize the effects of the bed mandate and should completely remove it from the immigration reform bills. The United States prides itself on the vast inalienable rights it provides for its people. Congress and the Executive Branch, as echoed by Supreme Court decisions, have the sole authority over immigration law and have flexibility and discretion when dealing with immigration cases. With this vast power, the federal government has complete authority over its noncitizens and their removal proceedings.

By imposing a bed mandate on how many people should be detained in detention facilities, ICE agents lose sight of the priorities of apprehension and detention that are based on public safety and national security. ICE agents should be able to abide by the stated enforcement regulations without the extra pressure brought on by the bed mandate to guarantee everyone equal protection of the law and not resort to stereotyping and racial profiling. Implementing binding detention standards and apprehension regulations will create a greater sense of accountability.

The United States Constitution guarantees equal protection of the law and due process rights for noncitizens; it is all-inclusive. The bed mandate is placing low-risk, non-dangerous, and non-criminal noncitizens in detention, separating them from their families while wasting taxpayers' money. The exercise of prosecutorial discretion in many instances to

134. See DHS, BUDGET-IN-BRIEF FISCAL YEAR 2014 130 (2013) (adding that with the reduced number of beds there will be increases to the ATD budget ensuring the most cost-effective use of federal dollars, "focusing the more-costly detention capabilities on priority and mandatory detainees, while placing low-risk, non-mandatory detainees in lower cost alternatives to detention programs"); see also Stephen Dinan, *Obama's Budget a Blow to Immigrant Enforcers; Funding Cut for Detentions, States*, WASH. TIMES, Apr. 11, 2013, <http://www.washingtontimes.com/news/2013/apr/11/obamas-budget-a-blow-to-immigrant-enforcers/?page=all>.

reduce enforcement of immigration law is a relief many detainees depend on. The need to not violate a congressional mandate forces DHS and ICE employees to forego that relief and deny many people who need it.

Alternatives to detention are equally effective as and less costly than detention. Congress should reconsider its allocation of resources and funding. It should decrease the amount of funding for detention and reallocate it to the alternative programs already in place. Because the alternatives are the less costly option of the two, the Agency will be able to process more noncitizens who violate the law than it could have done had the noncitizens been detained. The argument that the bed mandate forces ICE to enforce existing immigration laws is counterintuitive because even if that mandate does not exist, ICE's main role is to enforce immigration laws whether or not the bed mandate exists.