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In Jail, No Notice, No Hearing . . . No Problem? A Closer Look at Immigration Detention and the Due Process Standards of the International Covenant on Civil and Political Rights

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COMMENTS

IN JAIL, NO NOTICE, NO HEARING . . . NO PROBLEM? A CLOSER LOOK AT IMMIGRATION DETENTION AND THE DUE PROCESS STANDARDS OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

BRIDGET KESSLER*

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INTRODUCTION

Carla¹ is a young woman from Peru who has lived in the United States for about six years. When Immigration and Customs Enforcement (“ICE”) assumed custody of her on March 27, 2008, she had a one-year-old son and was seven months pregnant with her second child. She was also engaged to a U.S. citizen. The couple wanted to get married, but could not work out the logistics because Carla was being held in immigration detention.

Carla’s lawyer promptly filed a bond motion before the Immigration Judge (“IJ”) petitioning for her release while her case was pending. The IJ refused to hear the motion; he claimed that he would not have jurisdiction over her case until the Department of Homeland Security (“DHS”) issued a Notice to Appear (“NTA”).² NTAs are the documents that formally put noncitizens in removal proceedings and state the charges against them.³ NTAs also serve as the basis for Immigration Court jurisdiction.⁴

Carla’s attorney called and faxed DHS several times a week requesting an NTA for his client. He explained that Carla was in a difficult position; she was seven months pregnant and had a toddler son to care for. Nevertheless, after one month, DHS had not responded or issued an NTA. Carla missed her son’s first birthday

1. Name changed by the author. Many thanks to Jason A. Dzubow, Esq., of Mensah, Butler & Dzubow, PLLC for sharing Carla’s story with me.

2. *See* Immigration and Nationality Act (“INA”), 8 C.F.R. § 1003.14 (2008) (stating that the Immigration Court has no jurisdiction in the case without an NTA, except to consider a bond motion).

3. 8 U.S.C.S § 1229 (LexisNexis 2008).

4. *See* Interview with Brittney Nystrom, Legal Director, CAIR Coalition, (Apr. 29, 2008) (noting that there is a debate among IJs about whether they can assume jurisdiction over a bond motion without the NTA being filed with the immigration court). In practice, even if the IJ accepts jurisdiction over the bond motion without the NTA, the noncitizen still faces a dilemma. *Id.* If DHS appeals the motion, the noncitizen remains in detention for the duration of the appeal and the result is the same; the noncitizen is held in detention for an extended period of time without an NTA. *Id.*

and she was still in jail. Frustrated, Carla's lawyer contacted the Office of Inspector General ("OIG"). He also began copying a representative of the House Oversight Committee for ICE detainees on all his communications with DHS. For weeks he received no response to his queries. Finally, with no explanation, DHS issued an NTA and released Carla on May 16, 2008—almost *two months* after first taking her into custody. DHS told Carla then that she could live with her family while waiting for her Immigration Court hearing on February 5, 2009. Carla's experience raises many questions. Why was she held for so long without receiving notice of the charges against her? Why was she not given access to judicial review of her detention? What is the legal framework in place that permitted these types of delays?⁵

Under international law, a state cannot deprive individuals of personal liberty without meeting basic standards of due process.⁶ The International Covenant on Civil and Political Rights ("ICCPR") requires the United States to guarantee that an arrested individual receive "prompt" notice of the charges against him or her⁷ and have the right to challenge the legality of the detention "without delay."⁸ The problem for Carla is that although she has a right to an NTA eventually, the law does not establish a timeframe within which DHS must issue one.⁹ The custody procedures regulation states only that

5. Aside from a report about a group of men detained just after the 9/11 attacks, *see infra* note 82, there is no other readily available empirical data about the issue of delayed NTAs in immigration detention. As a result, one can only speculate about the extent of the problem. According to a local non-governmental organization, the CAIR Coalition that regularly visits immigration detention centers in Virginia the problem is pervasive. Interview with Brittney Nystrom, Legal Director, CAIR Coalition (Apr. 14, 2009) (on file with author).

6. *See* International Covenant on Civil and Political Rights art. 9, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]; *see also* Vienna Convention on the Law of Treaties, art. 26, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention] (affirming the principle of *Pacta sunt servanda*, that "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith").

7. ICCPR, *supra* note 6, art. 9(2).

8. *Id.* art. 9(4).

9. *See* INS Custody Procedures, 66 Fed. Reg. 48,334 (Sept. 20, 2001) (noting that the U.S. Constitution does not mandate that DHS serve notice of charges on the detained noncitizen within twenty-four hours). *But cf.* County of Riverside v. McLaughlin, 500 U.S. 44, 56 (1991) (holding that notice of charges within forty-eight hours would usually, but not always, be constitutionally sufficient in a

DHS must decide within forty-eight hours of assuming custody whether it *will* issue an NTA.¹⁰ The regulation does not, however, specify when DHS must issue the NTA or serve it on the detained individual or the Immigration Court. Since the former Immigration and Naturalization Service (“INS”)¹¹ amended the custody procedures regulation several days after the 9/11 attacks,¹² scholars and advocates have advanced strong arguments that it violates both domestic and international standards of due process.¹³ In spite of the

criminal law enforcement context).

10. 8 C.F.R. § 287.3 (LexisNexis 2008).

11. See Homeland Security Act of 2002, 6 U.S.C. § 441, §§ 441-478 (2002) (designating the Department of Homeland Security (“DHS”) to take over the functions of INS). In 2003, the DHS absorbed the INS’s former responsibilities into the Customs and Border Protection (“CBP”) and Immigration and Customs Enforcement (“ICE”) to handle enforcement activities and the Bureau of Citizenship and Immigration Services (“BCIS”) to process visa and citizenship applications. See Department of Homeland Security Organizational Chart (Apr. 1, 2007), http://www.dhs.gov/xlibrary/assets/DHS_OrgChart.pdf. This comment identifies INS when referring to actions taken before 2003 and DHS or ICE when referring actions taken from 2003 to present.

12. See INS Custody Procedures, 66 Fed. Reg. at 48,334; see also 8 U.S.C. § 1357(a)(2) (2006) (granting immigration officers the power to arrest aliens without a warrant based on a “reasonable belief” that the alien is in the United States in violation of immigration laws). Most immigration arrests are “warrantless” because the INA does not require immigration enforcement officials to have a written warrant or probable cause before arresting and detaining a noncitizen. *Id.*

13. See, e.g., HUMAN RIGHTS WATCH, PRESUMPTION OF GUILT: HUMAN RIGHTS ABUSES OF POST-SEPTEMBER 11 DETAINEES 47 (2002), available at <http://www.hrw.org/reports/2002/us911/USA0802.pdf> (asserting that much post-9/11 immigration detention was arbitrary, including prolonged detention without charges and continued detention in spite of a release order or a final order of removal); Shirley Huey et al., Comment, *Indefinite Detention Without Probable Cause: A Comment on INS Interim Rule 8 C.F.R. § 287.3*, 26 N.Y.U. REV. L. & SOC. CHANGE 397, 398 (2001) (arguing that the regulation violates the Fourth Amendment both in criminal and immigration law enforcement contexts, results in indefinite detention without probable cause, and exceeds the power granted by the authorizing provision of the INA); *Background Paper for the U.N. Working Group on Arbitrary Detention Concerning the U.S. Detention of Arabs and South Asians Post-September 11*, at 2 (Apr. 1, 2002) (unpublished Background Paper) (on file with author) [hereinafter *Background Paper*] (contending that the custody procedures regulation violates principles of due process enshrined in international law); Cyrus D. Mehta, *Letter to Immigration and Naturalization Service, Re: INS No. 2171-01 Custody Procedures*, 66 Fed. Reg. 48334 (September 20 2001), Comm. on Immigration & Nationality Law, 57 THE RECORD 32, 33 (2002) (asserting that the regulation violates the INA implementing provision, the Patriot

harsh criticism, the custody procedures regulation remains in force today and influences the lives of the hundreds of thousands of people, like Carla, who pass through immigration detention each year.¹⁴

This Comment focuses on whether the custody procedures regulation accords with the basic principles of due process of Article 9 of the ICCPR.¹⁵ Part I.A discusses the history of the ICCPR and relevant Article 9 jurisprudence. Part I.B provides an overview of custody procedures in immigration detention. Part II argues that the regulation governing custody procedures is inconsistent with due process standards set forth in Article 9 of the ICCPR. Part III recommends several actions that the DHS and Congress should take to bring the custody procedures regulation into conformity with Article 9 of the ICCPR.

I. BACKGROUND

A. THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS AND THE UNITED STATES

On December 10, 1948, the United Nations drafted the Universal Declaration of Human Rights, which codified the minimum standards for the protection of human rights in the world.¹⁶ Soon thereafter, the Human Rights Commission composed two binding treaties to memorialize the non-binding principles of the Universal

Act's requirement that the government charge a certified terrorist within seven days, and possibly the Constitution).

14. *See generally* Memorandum from Asa Hutchinson, Border and Transportation Secretary, on Guidance on ICE Implementation of Policy and Practice Changes Recommended by the Department of Justice Inspector General to Michael J. Garcia, U.S. Immigration & Customs Enforcement, and Robert Bonner, U.S. Customs & Border Prot. (Mar. 30, 2004), *available at* <http://www.immigrationforum.org/documents/TheDebate/DueProcessPost911/ICEGuidance.pdf> [hereinafter Hutchinson Memorandum].

15. ICCPR, *supra* note 6, art. 9.

16. Universal Declaration of Human Rights, G.A. Res. 217A, U.N. Doc. A/810 (Dec. 12, 1948); *see also* MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY at XX (2d ed. 2005) (observing that the Universal Declaration gave real meaning to the term "human rights" in the U.N. Charter).

Declaration.¹⁷ The first, the ICCPR, embodied the more “classic” civil and political rights, such as the rights to life, a fair trial, and an effective remedy.¹⁸ The ICCPR protects these rights for “all members of the human family,”¹⁹ regardless of their immigration status.²⁰

The United States became a party to the ICCPR in 1992.²¹ Upon ratification, however, the U.S. Senate issued “Reservations, Understandings and Declarations” that limited and modified the application of certain provisions of the treaty.²² The Senate also determined that the ICCPR is not self-executing and creates no private cause of action in U.S. courts.²³ In spite of its non-self-

17. See SARAH JOSEPH ET AL., *THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS* 8 (2d ed. 2004) (detailing that the General Assembly adopted the ICCPR in 1966 and, after garnering 35 ratifications, the Covenant came into force in 1976).

18. See NOWAK, *supra* note 16, at XIX-XX (discussing the relationship between the ICCPR and the traditional rights protected by the constitutional law that grew out of national revolutions in the West during the 18th and 19th centuries). The second treaty, the International Covenant on Economic, Social, and Cultural Rights, protected other social liberties. See generally International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI), U.N. Doc. A/6316 (Dec. 16, 1966) (protecting, for example, the principle of self-determination, non-discrimination, right to work in safe and healthy conditions, and the right to unionize).

19. ICCPR, *supra* note 6, pmb. (stating that the ideals of the Universal Declaration of Human Rights “can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights”).

20. See NOWAK, *supra* note 16, at XXV (explaining that the ICCPR protects human rights in three respects: (1) unlike basic constitutional rights in domestic law, *international law* gave rise to the rights protected by the Covenant; (2) except Article 25, the rights apply to *all persons*; and, (3) except Article 1, the remaining articles give rights to *individuals*).

21. See S. Comm. on Foreign Relations, Rep. on the International Covenant on Civil and Political Rights, S. Exec. Rep. 102, sec. IV (1992), *reprinted in* 31 I.L.M. 645, 649 (1992) [hereinafter Senate Report] (recognizing that the rights guaranteed by the Covenant are “cornerstones of a democratic society”).

22. See *id.* at 651 (expressing reservations to the ICCPR involving, in part, the right to free speech, capital punishment, the meaning of “cruel, inhuman and degrading treatment or punishment,” and the treatment of juveniles as adults for criminal law enforcement purposes); William A. Schabas, *Invalid Reservations to the International Covenant on Civil and Political Rights: Is the United States Still a Party?*, 21 BROOK. J. INT’L L. 277, 316-17 (1995) (analyzing the repercussions of the Committee finding that the U.S. reservations to Article 6 and Article 7 of the ICCPR are illegal and invalid under international law).

23. See Senate Report, *supra* note 21, at 652 (declaring the ICCPR to be non-

executing status, the ICCPR is a binding treaty obligation²⁴ and requires the United States to adopt measures to protect the rights it enumerates.²⁵ Article 2 is the “umbrella provision” that requires State parties to provide a remedy for the violation of *any* of the rights guaranteed by the ICCPR.²⁶

Although the State parties are the primary guarantors of the rights enumerated in the ICCPR,²⁷ the Human Rights Committee²⁸ (“Committee”) also monitors compliance through review of country reports, country visits, and the adjudication of individual claims.²⁹ The decisions of the Committee are not binding on State parties, but qualify as highly persuasive authority.³⁰ The United States does not recognize the competence of the Committee to accept individual complaints.³¹ It does, however, submit yearly reports to the

self-executing, which means that without separate implementing legislation it does not create a private cause of action in the U.S. courts); *cf.* John Shattuck, *Works in Progress: Human Rights and Domestic Law After the Cold War*, 9 EMORY INT'L L. REV. 377, 384-85 (1995) (noting that non-executing status “does not prevent U.S. courts from interpreting and taking guidance from the Covenant”).

24. *See* U.S. CONST. art. VI, § 2 (“All treaties made . . . under the authority of the United States, shall be the *supreme law of the land*; and the Judges, in every State, shall be bound thereby; any thing in the constitution or laws of any State to the contrary notwithstanding”) (emphasis added).

25. ICCPR, *supra* note 6, art. 2. A state party violates Article 2 in three instances: (1) when it discriminates against an individual exercising a right; (2) when it fails to enact laws to guarantee the rights protected by the ICCPR; or, (3) when it does not offer adequate remedies for rights violations. *See id.*

26. *See* NOWAK, *supra* note 16, at 34 (commenting that Article 2 alone imposes duties on States, but does not establish independent rights); *see also* Lubicon Lake Band v. Canada, Hum. Rts. Comm., No. 167/1984, ¶ 33, U.N. Doc. Supp. No. 40 (A/45/40) (1990) (finding that the State could rectify a violation of Article 27 by providing the victim with a remedy sufficient to satisfy Article 2).

27. *See* ICCPR, *supra* note 6, pmb., art. 2 (concluding that both individuals and states are responsible for promoting and respecting the rights embodied in the ICCPR).

28. *See* JOSEPH ET AL., *supra* note 17, at 16 (stating that the Human Rights Committee is a panel of eighteen human rights experts who act in their individual capacity).

29. *See* Optional Protocol to the International Covenant on Civil and Political Rights, art. 2, Dec. 16, 1966, 999 U.N.T.S. 302 [hereinafter Optional Protocol] (requiring exhaustion of domestic remedies for individual complainants).

30. *Cf.* JOSEPH ET AL., *supra* note 17, at 17 (affirming that the Committee strives to make all decisions unanimously because majority decisions carry less weight).

31. *See* Optional Protocol, *supra* note 29, arts. 1-2 (granting jurisdiction to the Human Rights Committee over claims of violations of the ICCPR only by

Committee as mandated by Article 40 of the ICCPR.³² The decisions of the Committee are therefore relevant to the interpretation and application of the ICCPR in the United States.

The Committee is not the only international body that contributes to ICCPR jurisprudence. In 1991, the U.N. Commission on Human Rights created the Working Group on Arbitrary Detention (“Working Group”) to investigate cases of arbitrary detention in violation of international human rights instruments.³³ The Working Group’s mandate is broad and encompasses both criminal and administrative detention.³⁴ Since its jurisdiction is not treaty-based like the

individuals from ratifying States).

32. See ICCPR, *supra* note 6, art. 40 (requiring States parties to submit reports “on the measures they have adopted which give effect to the rights recognized . . .” by the ICCPR and the progress made in the promotion of the rights). The United States sporadically submits reports to the Committee. See, e.g., UNITED STATES OF AMERICA, SECOND AND THIRD PERIODIC REPORT OF THE UNITED STATES OF AMERICA TO THE UN TO THE UN COMMITTEE ON HUMAN RIGHTS CONCERNING THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, intro. (Oct. 21, 2005), available at <http://www.state.gov/g/drl/rls/55504.htm> (acknowledging that the United States and the Committee disagree about the scope and importance of certain provisions of the ICCPR). Nonetheless, non-governmental organizations criticize the United States for not candidly reporting to the Human Rights Commission the abuses and shortcomings under the ICCPR. See AMERICAN CIVIL LIBERTIES UNION, DIMMING THE BEACON OF FREEDOM: U.S. VIOLATIONS OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 18 (June 2006), available at <http://www.aclu.org/pdfs/iccprreport20060620.pdf> (noting that the U.S. report fails to mention many violations).

33. See Working Group on Arbitrary Detention, *Fact Sheet No. 26*, (Off. of the High Comm’r for Hum. Rts., Geneva, Switz.), sec. I, <http://www.unhcr.ch/html/menu6/2/fs26.htm> (last visited Nov. 24, 2008) [hereinafter Working Group Fact Sheet] (describing the United Nations system of appointing a “Special Rapporteur” or a “Working Group” to investigate a specific theme or situation).

34. See U.N. ECON. & SOC. COUNCIL [ECOSOC], Comm’n on Hum. Rts., Working Group on Arbitrary Detention, *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment regarding the situation of immigrants and asylum seekers*, intro., U.N. Doc. E/CN.4/2000/4/Annex 2 (Dec. 28, 1999) (recognizing that the Working Group’s mandate covers the administrative detention of immigrants and asylum seekers); see also ECOSOC, Comm’n on Hum. Rts., Working Group on Arbitrary Detention, Report, Civil and Political Rights, Including the Question of Torture and Detention, ¶ 65, U.N. Doc. E/CN.4/2005/6 (Dec. 1, 2004) (expressing disapproval of the growing trend to hold noncitizens in immigration detention and the tendency to equate “terrorism and aliens”).

Committee,³⁵ the Working Group accepts individual complaints against the United States.³⁶

1. The Prohibition Against Arbitrary Detention of Article 9(1)

Although Western civilizations have valued personal liberty as a human right for centuries,³⁷ the right of personal liberty has never been absolute.³⁸ Instead, it obligates states to provide procedural protections for individuals during arrests and detentions.³⁹ Therefore, Article 9(1) of the ICCPR does not aim to prohibit all deprivations of personal liberty by the State, just those that are arbitrary and unlawful.⁴⁰

The meaning of the word “arbitrary” is somewhat vague.⁴¹ In the context of Article 9(1), it encompasses not just unlawful detentions, but also all those that are unjust, unpredictable, unreasonable, capricious, and disproportional.⁴² For example, a lawful and non-arbitrary detention may become arbitrary after the passage of a certain amount of time, if the detention continues without

35. See Working Group Fact Sheet, *supra* note 33, sec. III (requiring that the Working Group submit yearly reports to the Human Rights Commission).

36. See *id.* secs. III, V (specifying that the exhaustion of local remedies is not required and that the Working Group may consider cases on its own initiative); see also *Ahmed Ali v. United States of America*, Working Group on Arbitrary Detention, ¶ 17, U.N. Doc. E/CN.4/2006/7/Add.1 (May 27, 2005) (finding the detention by the United States of an asylum seeker pending legal appeals to be arbitrary when the government failed to consider substantial evidence that he was neither a flight risk nor a danger to society).

37. See NOWAK, *supra* note 16, at 211 (citing the Magna Carta Libertatum in 1215 as an example of one of the many instances in which society values individual liberty as a basic human right). Personal liberty is narrow; it deals with the “*freedom of bodily movement* in the narrowest sense.” *Id.* at 212.

38. See *id.* at 211 (explaining that States often validly use deprivation of liberty to fight crime and maintain security).

39. See *id.* at 211-12 (contrasting the human right of personal liberty as a procedural guarantee with the prohibitions of slavery and torture which strive towards absolute abolition).

40. See ICCPR, *supra* note 6, art. 9(1).

41. See NOWAK, *supra* note 16, at 218 (citing Human Rights Committee draft of Article 9, which was approved, without change, with seventy votes in favor). The United Kingdom abstained because of objections to the imprecision of the word “arbitrary.” *Id.*

42. See *id.* at 224-25 (asserting that an examination of the historical background indicates that the prohibition against arbitrary detention is broad).

justification.”⁴³ Also, although Article 9 does not specifically require a written arrest warrant, lack of a warrant may provide evidence of arbitrariness.⁴⁴

Article 9(1)’s prohibition of arbitrary detention applies to *all* deprivations of liberty, regardless of the label.⁴⁵ Thus, according to the Committee, an apparently lawful arrest may be arbitrary if it violates other due process provisions of the ICCPR.⁴⁶ Similarly, the Working Group sets out three categories of arbitrary detention and a Category III violation arises from either a complete or partial failure of the State to observe international due process norms, such as Article 9(2) and Article 9(4) of the ICCPR.⁴⁷

2. The “Promptly Inform” Notice Standard of Article 9(2)

Article 9(2) requires the State party to inform an individual, at the time of arrest, of the reasons for the arrest and to promptly inform the arrested individual of the charges against him or her.⁴⁸ The notification of charges must be specific so that the arrested individual may act immediately to challenge the detention and petition for release if the charges are unfounded.⁴⁹

43. *See* A. v. Australia, Hum. Rts. Comm., No. 560/1993, ¶¶ 9.3-9.4, U.N. Doc. CCPR/C/59/D/560/1993 (Apr. 30, 1997) (declaring the over four year detention of an asylum seeker arbitrary).

44. *See* NOWAK, *supra* note 16, at 229 (specifying that a clear majority of the Committee defeated Liberia’s motion to require a written arrest warrant in the ICCPR).

45. *See id.* at 225-26 (clarifying that the detention of noncitizens in relation to asylum and deportation is not per se arbitrary, but may be arbitrary depending on the particular circumstances).

46. *See, e.g.*, Hugo van Alphen v. The Netherlands, Hum. Rts. Comm., No. 305/1988, ¶ 5.8, U.N. Doc. CCPR/C/39/D/305/1988 (Aug. 15, 1990) (finding detention arbitrary even though Dutch authorities detained van Alphen pursuant to pre-trial detention rules in the Netherlands and that arbitrariness is not the same as “against the law”).

47. *See* Working Group Fact Sheet, *supra* note 33, sec. IV pt. B (observing that international human rights instruments do not clarify the definition of arbitrary detention but stating that the Working Group will not simply declare a deprivation of liberty “unfair”).

48. ICCPR, *supra* note 6, art. 9(2).

49. *See* Adolfo Drescher Caldas v. Uruguay, Hum. Rts. Comm., No. 43/1979, ¶ 13.2, U.N. Doc. CCPR/C/19/D/43/1979 (1983) (finding a violation of Article 9(2) of the ICCPR when the Navy officials informed Drescher Caldas that they were detaining him pursuant to “prompt security measures” without giving a

Unlike Article 9(1), it is unclear whether Article 9(2) applies only to criminal arrests and detentions or to *all* deprivations of liberty by the state.⁵⁰ The Committee has held that the second clause requiring prompt notice of charges applies only in the criminal context.⁵¹ The Working Group, however, indicates that the “prompt notice” of charges requirement applies both to criminal and administrative detention.⁵²

3. *The Right to Judicial Review “Without Delay” of Article 9(4)*

Article 9(4) of the ICCPR gives an individual deprived of his or her liberty the right to “take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.”⁵³ The Committee has not established a bright-line rule, but generally finds that any detention longer than forty-eight hours, without access to judicial or other review, violates Article 9(4).⁵⁴ Unlike Article 9(2),

specific explanation of the charges against him). In the context of the ICCPR, promptly generally means “as soon as the charge is first made by a competent authority.” See ECOSOC, Human Rts. Comm., CCPR Gen. Comment 13, *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, ¶ 8, U.N. Doc. HRI/GEN/1/Rev.1, (1994) (describing the definition of promptly within the context of notice of charges pursuant to Article 14(3) of the ICCPR); see also GENERAL ASSEMBLY, Hum. Rts. Comm., *Report of the Human Rights Committee*, ¶ 79(12), U.N. Doc. A/56/40 (2001) [hereinafter *Uzbekistan Report*] (finding that detention for seventy-two hours before notice of charges violated Article 9(2) of the ICCPR in the criminal context).

50. See NOWAK, *supra* note 16, at 228 n.105 (noting that part of 9(2) and all of 9(3) only apply to persons against whom the state brings criminal charges).

51. See PIETER BOELES, FAIR IMMIGRATION PROCEEDINGS IN EUROPE 117 (1997). The first clause requiring the State to inform the individual of the reasons for arrest applies to all deprivations of liberty, regardless of label. *Id.* Article 9(2) of the ICCPR requires that officials inform the individual of the reasons for arrest and promptly notify him of the charges thereafter, without mentioning the word criminal, while Article 9(3) requires States to bring those arrested on *criminal* charges before a judicial officer and ensure a trial within a reasonable time). See ICCPR, *supra* note 6, art. 9(2)-(3).

52. See ECOSOC, Hum. Rts. Comm., Working Group on Arbitrary Detention, *Question of the Human Rights of All Persons Subjected to Any Form of Detention or Imprisonment*, annex 1, princs. A(3), (A)(15), U.N. Doc E/CN.4/1992/20 (1992) [hereinafter Working Group Principles] (voicing concern about “[c]ases in which a person suffers administrative detention for an obviously abusive period of time”).

53. ICCPR, *supra* note 5, art. 9(4).

54. See *Uzbekistan Report*, *supra* note 49, ¶ 82(12) (finding that three days and

the requirement of Article 9(4) is likened to the right to habeas corpus and applies to all deprivations of liberty, including both criminal and administrative detention.⁵⁵

B. CUSTODY PROCEDURES IN IMMIGRATION DETENTION

While noncitizens are entitled to certain due process protections, the government retains wide authority to detain them during immigration proceedings.⁵⁶ In the past decade, the government has drastically expanded detention and removal operations, exercising this power of administrative detention more than ever before.⁵⁷

fifteen hours before a judicial review does not satisfy the “prompt” requirement of the ICCPR in the criminal context); GENERAL ASSEMBLY, Hum. Rts. Comm., *Report of the Human Rights Committee*, ¶¶ 100-11, U.N. Doc. A/52/40 (1997) [hereinafter *Switzerland Report*] (finding a ninety-six hour requirement for judicial review of administrative immigration detention “excessive” and “discriminatory,” especially since the penal system mandates review within periods of either twenty-four or forty-eight hours).

55. See GENERAL ASSEMBLY, Hum. Rts. Comm., *Report of the Human Rights Committee*, ¶ 84(11), U.N. Doc. A/57/40 (2002) [hereinafter *Moldova Report*] (noting that pursuant to article 9(4) of the ICCPR those in administrative detention have the right to initiate proceedings to challenge their detention).

56. See *Wong Wing v. United States*, 163 U.S. 228, 235 (1896) (stating that detention is valid as long as it is used as a means to “give effect to the provisions for the exclusion or expulsion of aliens”).

57. See U.S. Immigration and Customs Enforcement, *Fact Sheet: Executive Summary of ICE Accomplishments in Fiscal Year 2006*, May 15, 2007, <http://www.ice.gov/pi/news/factsheets/2006accomplishments.htm> (reporting the creation of three times the number of fugitive operations teams to locate and apprehend noncitizens and a 6,300 increase for funded beds in immigration detention, bringing the total to 27,500). The rapid expansion is due to many factors, including provisions of laws passed in 1996 requiring mandatory detention of certain categories of noncitizens. See generally MARK DOW, *AMERICAN GULAG: INSIDE U.S. IMMIGRATION PRISONS* 9 (2004) (noting that from 1994 to 2001 the average number of immigration detainees tripled largely due to the passage of the Antiterrorism and Effective Death Penalty Act (“AEDPA”) and the Illegal Immigration Reform and Immigrant Responsibility Act (“IIRIRA”) in 1996); MICHAEL WELCH, *DETAINED: IMMIGRATION LAWS AND THE EXPANDING I.N.S. JAIL COMPLEX* 2 (2002) (discussing the consequences of the power that the 1996 laws conferred to INS to detain and deport noncitizens who had been convicted of drug and other offenses); David Cole, *In Aid of Removal: Due Process Limits on Immigration Detention*, 51 EMORY L.J. 1003, 1030 (2002) (discussing extended detention of noncitizens pending ICE appeal of a decision to release to the Board of Immigration Appeals); Lee Hall, *Nomads Under the Tent of Blue: Migrants Fuel the U.S. Prison Industry*, 6 RUTGERS RACE & L. REV. 265, 303-16 (2004) (suggesting a connection between post-9/11 detention policies and commercial

Immigration custody procedures are complex.⁵⁸ In practice, there are a variety of ways that DHS may take an individual into custody. For instance, immigration officials may arrest an individual without a warrant⁵⁹ based on a “reasonable suspicion” or “belief” that the individual is in the country in violation of civil immigration laws.⁶⁰ DHS may also take custody over an individual who is already in jail after he or she has completed his or her criminal sentence.⁶¹ Also, local governments can make an agreement with DHS allowing local law enforcement officials to make immigration arrests.⁶²

After assuming custody of the individual, DHS then determines whether it will issue an NTA, which is the charging document that places the individual in formal removal proceedings.⁶³ The five basic

profits for state and private detention facilities).

58. See Shoba Sivaprasad Whadia, *Under Arrest: Immigrants' Rights and the Rule of Law*, 38 U. MEM. L. REV. 853, 876 (2008) (commenting on the lack of data showing monetary or policy benefits from immigration detention).

59. See 8 C.F.R. § 287.5(c) (2008) (granting the power to conduct warrantless arrests to all employees authorized by Agency regulations).

60. See *id.* § 287.8(b)(2), (c)(2)(ii) (obliging the arresting officer to have a reason to believe that the noncitizen is likely to escape before the officer can obtain an arrest warrant).

61. See *id.* § 287.7 (providing that any authorized immigration officer may inform any law enforcement agency that DHS seeks custody of a noncitizen to arrest and remove him or her). A “detainer” then allows the jail to temporarily maintain a noncitizen in custody for forty-eight hours before DHS assumes custody. *Id.* § 287.7(d). DHS assumes custody by issuing a Form I-200, Warrant of Arrest. See *id.* § 236.1 (noting that a respondent may be taken into custody pursuant to an arrest warrant when DHS issues the NTA or anytime thereafter). The regulation does not reference detention pursuant to a Form I-200, Warrant of Arrest, before the issuance of the NTA or the placement of the individual in removal proceedings. Interview with Brittney Nystrom, *supra* note 2 (noting two separate problems in Virginia jails, one in which an individual falls to an immigration detainer, DHS fails to assume custody, and the jail refuses to release him or her; the second, and more relevant to the issue addressed by this comment, is a situation in which a person falls to an immigration detainer, DHS assumes custody within forty-eight hours by issuing a Form I-200, but fails to issue an NTA to formally place the individual in removal proceedings).

62. Immigration and Nationality Act 287(g), 8 U.S.C. 1357(g) (LexisNexis 2008); see also U.S. Immigration and Customs Enforcement, *Fact Sheet: Section 287(g) Immigration and Nationality Act*, Aug. 16, 2006, <http://www.ice.gov/doclib/pi/news/factsheets/060816dc287gfactsheet.pdf>.

63. See Immigration and Nationality Act, 8 U.S.C. § 1229 (LexisNexis 2008) (requiring service of the NTA on the noncitizen). The NTA must include information about: (1) the specific nature of the charges against the alien; (2) the alien may obtain counsel to represent him in the removal proceedings, or may

post-arrest steps include: (1) DHS's determination to keep the individual in custody;⁶⁴ (2) DHS's determination to charge the individual with a ground of inadmissibility or deportability;⁶⁵ (3) the issuance of the NTA;⁶⁶ (4) service of the NTA on the individual in custody;⁶⁷ and, (5) service of the NTA on the Immigration Court.⁶⁸

DHS has revised the regulation delineating these custody procedures only once—just nine days after 9/11.⁶⁹ After the attacks, Congress passed many laws in the name of protecting national security.⁷⁰ Like much of the post-9/11 congressional legislation, the

request time to secure counsel; and other requirements. *See id.* The sequence of events is slightly different in the case of a noncitizen that DHS transfers from criminal to immigration custody. *See* discussion *supra* note 60.

64. *See* 8 C.F.R. § 287.3(c)-(d) (2008) (providing that unless the noncitizen is subject to expedited removal, the examining officer must tell the alien of the reasons for his or her arrest). Certain classes of noncitizens are subject to mandatory detention, including noncitizens that are inadmissible on crime or terrorism related grounds. *See generally* Shalini Bhargava, *Detaining Due Process: The Need for Procedural Reform in "Joseph" Hearings After Denmore v. Kim*, 31 N.Y.U. REV. L. & SOC. CHANGE 51, 53 (2006) (criticizing the reasoning of the Supreme Court's decision upholding mandatory detention).

65. *See* 8 C.F.R. § 287.3(d) (noting that the officer makes neither a custody nor a charging determination if he grants voluntary departure to the noncitizen).

66. *See* Interview with Brittney Nystrom, *supra* note 2 (explaining that in Virginia-area jails DHS will often make the custody determination, in effect determining that it will issue the NTA, but not actually issue the NTA until a later date).

67. *See* 8 U.S.C. § 1229 (LexisNexis 2008) (mandating that DHS give a written NTA to the noncitizen, but if personal service is not "practicable," service by mail is sufficient).

68. *See* Letter from Local and National Advocacy Groups to Asa Hutchinson, U.S. Dept. Of Homeland Sec. (Sept. 10, 2004), *available at* <http://www.immigrationforum.org/DesktopDefault.aspx?tabid=657> [hereinafter Letter Concerning Guidance on ICE Implementation] (criticizing that neither the INA nor the custody procedures regulation require ICE to serve the NTA on the immigration court within a specific period of time).

69. *See* INS Custody Procedures, 66 Fed. Reg. 48,334 (Sept. 20, 2001) (requiring the immediate implementation of the rule as an interim rule without public comment based on the foreign affairs exception to the Administrative Procedure Act). As an administrative agency, the INS had the power to issue its own regulations, subject to the procedures of the Administrative Procedure Act. *See generally* JEFFREY S. LUBBERS, A GUIDE TO FEDERAL AGENCY RULEMAKING 4 (4th ed. 2006) (commenting on the notice and comment rulemaking process of the Federal Administrative Procedure Act).

70. *See, e.g.*, Enhanced Border Security and Visa Entry Reform Act, Pub. L. No. 107-173, § 302-03, 501, 116 Stat. 543 (2002) (creating a system for entry-exit control and monitoring of foreign students); Homeland Security Act of 2002

amended DHS custody procedures regulation aimed to promote cooperation between law enforcement and immigration enforcement agencies in terrorism investigations.⁷¹ To this end, the unilateral amendment extended the time period within which DHS must make a charging determination and created an open-ended exception in the case of an “emergency or extraordinary circumstance.”⁷² The following sections examine the standards set by the custody procedures regulation, the manner in which the government applied the regulation post-9/11, and finally, policy guidance enacted in response to its shortcomings.

1. The “Forty-Eight-Hour” Standard

The pre-9/11 custody procedures regulation required the former INS to determine within twenty-four hours of arrest whether to retain custody over the individual.⁷³ The regulation now requires that DHS

(HSA), Pub. L. No. 107-296, §§ 442, 451, 116 Stat. 2135 (2002) (creating the Department of Homeland Security to centralize a range of functions, including information analysis, transportation security, and immigration enforcement); Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot Act), Pub. L. No. 107-56, 115 Stat. 272 (2001) (expanding terrorism inadmissibility provisions and giving immigration officials access to the criminal database of the Federal Bureau of Investigation); see also Cong. Research Serv., *Immigration Legislation and Issues in the 107th Congress*, ISSUE BRIEF FOR CONGRESS 1 (2002), available at <http://digital.library.unt.edu/govdocs/crs/permalink/meta-crs-3156:1> (observing a strong emphasis on “security” and “counter-terrorism” in congressional immigration legislation after 9/11).

71. Cf. Lawrence M. Lebowitz & Ira L. Podheiser, *A Summary of the Changes in Immigration Policies and Practices After the Terrorist Attacks of September 11, 2001: The USA Patriot Act and Other Measures*, 63 U. PITT. L. REV. 873, 873 (2002) (making a case for stronger cooperation by noting that some of those who committed the attacks were foreign nationals who had entered illegally or overstayed visas); Teresa Miller, *Blurring the Boundaries Between Immigration and Crime Control After September 11th*, 25 B.C. THIRD WORLD L.J. 81, 85 (2005) (arguing that in response to terrorism the nation used immigration law to assist with crime control, capitalizing on prior laws that enhanced the collateral civil consequences for noncitizens convicted of crimes).

72. See INS Custody Procedures, 66 Fed. Reg. at 48,334 (averring that that the delays associated with the regular notice and comment period would prove “impracticable, unnecessary and contrary to the public interest”).

73. See INS Miscellaneous Amendments, 32 Fed. Reg. 6260, 6260 (Apr. 21, 1967) (requiring INS to determine within twenty-four hours of arrest whether it had enough evidence to issue an arrest warrant and charge the individual with an immigration violation).

make the determination within forty-eight hours of the arrest.⁷⁴ In spite of the longevity of the twenty-four-hour rule,⁷⁵ the former INS claimed and DHS now maintains that it needs the full forty-eight hours to conduct additional criminal and immigration background checks in light of the 9/11 attacks.⁷⁶

2. The “Extraordinary Circumstances” Exception

The pre-9/11 custody procedures regulation did not permit any exceptions to the twenty-four-hour rule for custody determinations.⁷⁷ The amended regulation, however, allows for the exception that, “in the event of an emergency or other extraordinary circumstance,” DHS may make a custody determination within a “reasonable time.”⁷⁸ Critics maintain that the exception allowed INS to detain an individual indefinitely without bringing charges or affording him the opportunity to challenge the legality of the detention.⁷⁹

3. The 9/11 Detainees

Many have questioned the legality of the amended custody procedures regulation.⁸⁰ In particular, critics have expressed concern

74. 8 C.F.R. § 287.3(d) (2008).

75. See Huey et al., *supra* note 13, at 400 (asserting that the “longstanding and consistent” use of a twenty-four hour deadline for over thirty years contradicted the sudden assertion that the additional delays were “necessary”).

76. See Custody Procedures, 66 Fed. Reg. at 48,334 (explaining that the INS might need the additional time to consult international databases and liaise with law enforcement agencies at home and overseas).

77. See Huey et al., *supra* note 13, at 412 (arguing that given the large caseloads of immigration officers, the lack of exceptions deterred officers from surpassing the twenty-four-hour deadline).

78. 8 C.F.R. § 287.3(d).

79. See Huey et al., *supra* note 13, at 398 (suggesting that the new rule creates a policy of arresting thousands of innocent people and spreading fear in immigrant communities).

80. See, e.g., Huey et al., *supra* note 13, at 398-413 (arguing that the custody procedures regulation contradicted the authorizing statute and the USA Patriot Act, violated the Fourth Amendment, and conflated civil and criminal arrests without providing the proper constitutional guarantees); *Background Paper*, *supra* note 13, at 21 (suggesting that post-9/11 practices were not in compliance with international law requiring prompt notice of charges and judicial review without delay); Mehta, *supra* note 13, at 33 (urging INS not to adopt the 8 C.F.R. § 287.3(d) interim rule as a final rule because it violated the Immigration and Nationality Act, the USA Patriot Act, and “undermine[d] [an] essential constitutional balance”).

that the government has taken advantage of the regulation to hold suspected terrorists in administrative immigration detention for the purpose of gathering evidence for criminal law enforcement purposes.⁸¹ Indeed, in the months following 9/11, the U.S. government arrested and held approximately 762 Arab and South Asian men (“9/11 detainees”) in administrative immigration detention for minor immigration violations.⁸²

Prompted by widespread criticism and several lawsuits pertaining to their treatment,⁸³ the Department of Justice (“DOJ”) Office of the Inspector General conducted a review and published a comprehensive report about the experience of the 9/11 detainees (“OIG Report”).⁸⁴ The OIG Report acknowledges that after 9/11 the government was facing an emergency situation that presented legitimate law enforcement concerns. The OIG Report, however, also identifies systemic problems with the application of the custody procedures regulation and the treatment of the 9/11 detainees.⁸⁵

81. Cf. Richard A. Serrano, *Rights Ensnarled in Dragnet; Immigration Statutes Used to Hold Suspects Indefinitely and Detain Material Witnesses*, THE SEATTLE TIMES, Sept. 27, 2001 at A6.

82. See Office of the Inspector General, Dep’t of Justice, THE SEPTEMBER 11 DETAINEES: A REVIEW OF THE TREATMENT OF ALIENS HELD ON IMMIGRATION CHARGES IN CONNECTION WITH THE INVESTIGATION OF THE SEPTEMBER 11 ATTACKS 21, 29 (2003), available at <http://www.usdoj.gov/oig/special/0306/full.pdf> [hereinafter OIG REPORT] (investigating the treatment and experiences of the 9/11 detainees in response to reports and allegations of detentions without charge, incommunicado detention, and physical abuse); Letter from Local and National Advocacy Groups to the Honorable Thomas J. Ridge, Dep’t of Homeland Sec. (Sept. 9, 2003), available at <http://www.immigrationforum.org/DesktopDefault.aspx?tabid=565> (criticizing DHS for using “profiling and immigration law as a ‘proxy’ for [fighting] terrorism”).

83. Cf. Natsu Taylor Saito, *Will Force Trump Legality After September 11? American Jurisprudence Confronts the Rule of Law*, 17 GEO. IMMIGR. L.J. 1, 6-7 (2002) (recording that media reports of individuals “disappearing” prompted civil liberties and human rights organizations to file a request under the Freedom of Information Act for information about the arrested individuals, including their names, locations, and the charges against them). When the Department of Justice denied the FOIA request, eighteen organizations filed a lawsuit demanding the information. *Id.* at 7.

84. See OIG REPORT, *supra* note 82, at 30-34 (examining the reasons for the prolonged detention of the 9/11 detainees and the conditions of their confinement). The OIG report scrutinizes the actions of senior managers at the FBI, the INS, Border and Transportation Security Directorate, and other agencies responsible for instituting the policies for investigation of the 9/11 attacks. See *id.* at 27-29.

85. See *id.* at 1 (explaining that after 9/11 the FBI initiated an investigation

Among these are issues relating to racial profiling of Arabs and South Asians, lack of timely service of immigration charges, incommunicado detention, and the use of civil immigration detention for criminal law enforcement purposes.⁸⁶

4. *The Asa Hutchinson Memorandum*

On March 30, 2004, the Undersecretary for Border and Transportation Security, Asa Hutchinson, issued a policy memorandum (“Hutchinson Memorandum”) outlining “policy and operational” guidance in response to the recommendations and criticisms of the OIG Report.⁸⁷ The Hutchinson Memorandum provides guidance for arresting officers regarding the implementation of the amended custody procedures regulation.⁸⁸ It

called PENTTBOM and strove to coordinate with other federal, state, and local law enforcement agencies).

86. *See id.* at 29 (reporting that the 9/11 detainees received notice of charges on average within fifteen days of arrest). The Department of Justice dismissed the criticism, stressing the emergency circumstances, the novelty of the issues, and the staggering workload of Federal employees. *See id.* app. K (maintaining that the government’s paramount responsibility after 9/11 was keeping American safe from terrorists).

87. Hutchinson Memorandum, *supra* note 14. Members of Congress also responded to the findings of the OIG Report by introducing legislation to correct the procedural shortcomings of the post-9/11 modifications of custody regulations. *See* Civil Liberties Restoration Act of 2005, H.R. 1502, 108th Cong. § 201 (2005) (amending Section 236 of the INA to require that DHS serve an NTA on individuals in immigration custody within forty-eight hours of arrest, and bring that individual before a judge within 72 hours, except for those individuals certified under Section 236A(a)(3) of the INA). The bill imposes a requirement that DHS record when it serves notice upon all individuals in custody and submit a yearly report to the House and Senate Committees on the Judiciary to demonstrate compliance. *Id.* § 201(f).

88. The Hutchinson Memorandum specifies that the officer make a custody and initial charging determination and serve a Form I-286, Notice of Custody Determination, on the noncitizen within 48 hours of arrest. *See* Hutchinson Memorandum, *supra* note 14, sec. I pt. A (instructing ICE officers to handwrite on the form, “[d]ate and time of the custody determination” and “[p]robable charges of removability,” until ICE can reformat the form). The I-286 is *not* the same as the Notice to Appear, Form I-862, by which DHS formally charges the noncitizen and places him in removal proceedings. *Cf.* 8 U.S.C. § 1229 (2008). The Memorandum requires the officer to keep a copy of the I-286, notice of custody determination, in the alien’s file. *See* Hutchinson Memorandum, *supra* note 14, sec. I pt. A. If the Officer does not meet the deadline, the Memorandum instructs him to “note an explanation” of the delay on the I-286 *file* copy. *Id.* (implying that

requires DHS to *serve* the NTA on the detained noncitizen within seventy-two hours of the initial arrest.⁸⁹

The Hutchinson Memorandum also affirms that if DHS invokes the “emergency or other extraordinary circumstance” exception, neither the forty-eight hour deadline for custody determination nor the seventy-two hour guideline for NTA service apply.⁹⁰ It defines the terms “emergency” and “extraordinary circumstance” to include acts of terrorism, a compelling law enforcement need, or facts and circumstances particular to the individual noncitizen.⁹¹ The Hutchinson Memorandum does not create any enforceable legal right, but simply provides the definitions as internal policy guidance for DHS.⁹²

II. ANALYSIS

National security concerns do not excuse the United States from its obligation to guarantee the due process protections required by the ICCPR.⁹³ Nonetheless, the Executive branch has repeatedly maintained that the terrorist attacks justify restriction of civil liberties

the noncitizen does not see a copy of the explanation of the delay; alien files are not public records).

89. *See* Hutchinson Memorandum, *supra* note 14, sec. I pt. D (indicating certain flexibility to the 72-hour deadline when issues arise due to logistical problems, the need to obtain criminal records, or other information relating to the immigration charges or law enforcement needs).

90. *See id.* sec. I pts. B, D (explaining instead that officers should make a custody determination and charging decision “as soon as practicable”).

91. *See id.* sec. I pt. C (defining “emergency or other extraordinary circumstance” as: (1) “a significant infrastructure or logistical disruption,” including but not limited to, an act of terrorism, weather, or serious civil disturbance; (2) “a compelling law enforcement need, including, but not limited to, an immigration emergency resulting in the influx of large numbers of detained aliens;” or, (3) facts or circumstances related to an individual noncitizen, including, but not limited to, “a particularized compelling law enforcement need”).

92. *See id.* secs. III, IV (requiring an individual assessment of cases involving national security concerns).

93. *See* ICCPR, *supra* note 6, art. 4(1) (allowing State parties to take measures derogating from their obligation under the treaty only to the “extent strictly required by the exigencies of the situation”). The derogation may not involve discrimination based solely on race, color, sex, language, religion, or social origin. *Id.* Moreover, a state choosing to derogate from the ICCPR must immediately notify the State parties of the decision. *Id.* art. 4(3).

in the interest of national security.⁹⁴ In particular, the former INS unilaterally altered its custody procedures regulation, and Congress has not conducted oversight to ensure that the new procedures provide the requisite due process protections.⁹⁵

On its face, the custody procedures regulation raises some unsettling possibilities.⁹⁶ The lack of requirement of NTA service means that an individual may languish for weeks or months in immigration detention without notice of the charges against him or her.⁹⁷ The open-ended “extraordinary circumstances” exception allowing DHS to serve an NTA within a “reasonable time,” introduces the possibility that DHS will take advantage of the regulation to arbitrarily and indefinitely detain noncitizens for criminal law enforcement purposes.⁹⁸ The ambiguities in the custody procedures regulation facilitate violations of the United States’ obligations under the ICCPR.⁹⁹ Although the Hutchinson Memorandum clarifies some of the standards, it remains a statement of policy and does not impose a binding legal obligation on DHS to

94. See Shoba Sivaprasad Wadhia, *The Policy and Politics of Immigrant Rights*, 16 TEMP. POL. & CIV. RTS. L. REV. 387, 419-20 (2007) (suggesting that after 9/11, law enforcement officials have used immigration law as a tool to arrest, detain, and interrogate suspected terrorists); cf. Jennifer M. Chacon, *Unsecured Borders: Immigration Restrictions, Crime Control and National Security*, 39 CONN. L. REV. 1827, 1856-57 (2007) (commenting that after 9/11, ICE has used national security as a rhetorical tool to justify its deportation initiatives, even though DHS has not in practice utilized immigration law to address national security threats).

95. See *Immigration Removal Procedures Implemented in the Aftermath of the September 11, 2001 Attacks: Hearing Before the Subcomm. on Immigration, Border Security, & Claims of the H. Comm. on the Judiciary*, 109th Cong. 11 (2005) [hereinafter *Immigration Hearings*] (statement of Rep. Howard L. Berman, Member, Subcomm. on Immigr., Border Sec., & Claims) (emphasizing that Congress must strike a balance between providing the Government with the resources and the authority to protect the American people and setting unambiguous legal standards to safeguard civil liberties).

96. See Letter Concerning Guidance on ICE Implementation, *supra* note 68, at 3 (noting that the regulation, even after the clarifications of the policy guidelines, allows for indefinite detention).

97. *Id.*

98. Cf. 8 C.F.R. § 287.3(d); OIG REPORT, *supra* note 82, pt. C.

99. Vienna Convention, *supra* note 6, art. 27 (providing that States parties to a treaty may not use domestic law as a reason for not performing treaty obligations).

respect the due process rights of individuals in immigration detention.¹⁰⁰

A. THE AMBIGUOUS LANGUAGE OF THE REGULATION PERMITS
INDEFINITE AND ARBITRARY DETENTION IN VIOLATION OF
ARTICLE 9(1)

The custody procedures regulation fails to adequately guard against arbitrary detention as required by Article 9(1) of the ICCPR.¹⁰¹ Although not every detention of a noncitizen pursuant to the regulation is arbitrary,¹⁰² the ambiguous language permits DHS to detain individuals for an extended period without proper justification under Article 9(1).¹⁰³ The extended detention of the 9/11 detainees without charges is an example of how DHS abided by the standards of the regulation and still detained individuals without affording them basic due process protection.¹⁰⁴

The custody procedures regulation permits deprivations of liberty bearing signature marks of arbitrary detention.¹⁰⁵ The regulation permits warrantless immigration arrests, which may be arbitrary as

100. See Letter Concerning Guidance on ICE Implementation, *supra* note 68, para. 1 (commending Asa Hutchinson for the policy memorandum as providing much needed, though not sufficient, clarification of the ambiguous language of the amended regulation).

101. See HUMAN RIGHTS WATCH, *supra* note 13, at 8 (recommending that the INS not continue to detain an individual for an immigration violation without showing evidence that the individual is a danger to society or a flight risk).

102. Cf. *A v. Australia*, No. 560/1993, ¶ 9.3, U.N. Doc. CCPR/C/59/D/560/1993 (Apr. 30, 1997) (holding that the administrative detention of an asylum seeker is not per se arbitrary).

103. See *id.* ¶ 9.4 (declaring that a State should not continue to hold an individual in administrative detention if it cannot find an “appropriate” justification).

104. See *Hugo van Alphen v. The Netherlands*, No. 305/1988, ¶ 5.8, U.N. Doc. CCPR/C/39/D/305/1988 (Aug. 15, 1990) (stating that a State may only use preventative detention when “reasonable” and “necessary” to, for example, prevent destruction of evidence, flight, or future crime).

105. See, e.g., AMERICAN CIVIL LIBERTIES UNION FOUND., PETITION TO THE U.N. WORKING GROUP ON ARBITRARY DETENTION ON BEHALF OF CERTAIN IMMIGRANTS DETAINED BY THE UNITED STATES IN CONNECTION WITH THE EVENTS OF SEPTEMBER 11, 2001 at 8-10 (2004) (alleging Category III arbitrary detention because the U.S. government failed to promptly notify the thirteen complainants of the charges against them and failed to bring them promptly before a judicial authority).

the lack of an arrest warrant introduces the possibility that DHS might not have sufficient evidence to justify the deprivation of liberty.¹⁰⁶ Warrantless immigration arrests in particular carry the risk that immigration officers may arbitrarily or wrongly arrest an individual because the INA authorizes them to make the arrest based only on a “reasonable suspicion” that the individual is present in the United States in violation of immigration laws.¹⁰⁷

Moreover, a lawful and non-arbitrary detention may become arbitrary with the passage of time.¹⁰⁸ Therefore, a lawful and non-arbitrary detention of an individual based on a reasonable suspicion may become arbitrary if an unreasonable amount of time lapses before DHS issues and serves the NTA.¹⁰⁹ For example, the detention for weeks and sometimes months of many of the 9/11 detainees pursuant to the custody procedures regulation fits the definition of arbitrary because the government failed to justify those detentions by issuing an NTA with specific charges of removability or by filing criminal charges.

The Hutchinson Memorandum’s policy guidance in response to the issues highlighted in the OIG Report does not adequately protect

106. Cf. INS Custody Procedures, 66 Fed. Reg. 48,334 (Sept. 20, 2001).

107. See, e.g., *Problems with ICE Interrogation, Detention, and Removal Procedures: Hearing Before the Subcomm. on Immigr., Border Sec., & Int’l L. of the H. Comm. on the Judiciary*, 109th Cong. 3, at 8 (2008) [hereinafter *Hearings 2008*] (Written Testimony, Kara Hartzler, Esq., Florence Immigrant and Refugee Rights Project), available at http://www.bc.edu/centers/humanrights/meta-elements/pdf/Kara_Hartzler_-_written_testimony.pdf (recounting examples of the erroneous detention of citizens and individuals who are not deportable to demonstrate the prevalence of racial profiling, inefficiency, and injustice in ICE detention and removal procedures). In Virginia, recent implementation of agreements, pursuant to Section 287(g) of the Immigration and Nationality Act, allow local law enforcement officials to enforce immigration laws increasing the risk of the wrongful detention of legal permanent residents or citizens because non-immigration officials are less familiar with complex immigration laws and legal standards. See Interview with Brittney Nystrom, *supra* note 2.

108. Cf. *A v. Australia*, No. 560/1993, ¶ 9.4, U.N. Doc. CCPR/C/59/D/560/1993 (Apr. 30, 1997) (proposing that detention decisions be reviewed periodically to ensure continuing justification for detaining an individual).

109. Cf. HUMAN RIGHTS WATCH, *supra* note 13, at 51-52 (listing several examples of individuals who waited extended periods for charging documents in immigration detention after 9/11). For example, the INS arrested Pakistani Afzal Kham on September 17, 2001 and by February 6, 2002, had not served him with a charging document or brought him before a judge. *Id.* at 52.

against potentially arbitrary detentions permitted by the regulation.¹¹⁰ Immigration officials still have immense discretion to conduct warrantless arrests.¹¹¹ The low “reasonable suspicion” standard facilitates racial profiling.¹¹² It also increases the likelihood that officials will mistakenly arrest U.S. citizens or individuals with lawful immigration status who do not have the proper documentation.¹¹³ The malleable standards of the amended regulation¹¹⁴ and the broad and non-binding guidelines of the Hutchinson Memorandum do not provide sufficient protection for individuals who have been arrested erroneously.¹¹⁵ The concern that the custody procedures regulation leads to arbitrary detention is further compounded by its inconsistency with both Article 9(2) and Article 9(4) of the ICCPR.¹¹⁶

110. See Hutchinson Memorandum, *supra* note 14, intro. (implementing policy and operational changes, but not imposing any new legal obligations on DHS). *But see Immigration Hearings*, *supra* note 95, at 28 (Testimony of Joseph Greene, Dir. of Training and Development, U.S. Immigration and Customs Enforcement, Dept. of Homeland Security) (maintaining that the Hutchinson Memorandum guarantees that DHS promptly notifies noncitizens in immigration detention of the charges against them).

111. See Chacon, *supra* note 94, at 1871-72 (suggesting that the broad discretion to arrest and the decreased procedural protections promotes racial profiling by immigration enforcement agents).

112. See, e.g., See Asli Ü. Bâli, *Scapegoating the Vulnerable: Preventive Detention of Immigrants in America's "War on Terror"*, 38 *STUD. IN L. POL. & SOC'Y* 25, 25-26 (maintaining that the detention of Middle Eastern and South Asians on minor immigration charges has, in effect, become a “system of preventive detention”).

113. See, e.g., *Hearings 2008*, *supra* note 107, at 3 (detailing the story of Thomas Warziniak, who worked in the kitchen of a jail for one dollar a day to earn enough money to buy a replacement birth certificate to prove his citizenship). ICE reportedly detained Mr. Warziniak for deportation because of his “foreign-sounding name.” *Id.*

114. *Cf.* Huey et al., *supra* note 13, at 400 (pointing out that the open-ended “extraordinary circumstances” exception permits prolonged and indefinite detention while the implementing statute only permits necessary and unavoidable delays).

115. See Letter Concerning Guidance on ICE Implementation, *supra* note 68, para. 3 (contending that the “compelling law enforcement need” standard set forth by the Hutchinson Memorandum, although a step in the right direction, is still inconsistent with the Constitution and implementing legislation).

116. *Cf.* Working Group Fact Sheet, *supra* note 33, sec. IV pt. B (defining Category III arbitrary detention as when the state fails to observe international norms such as those set forth in Article 9 of the ICCPR).

B. THE REGULATION IS INCONSISTENT WITH THE “PROMPTLY INFORM” STANDARD OF ARTICLE 9(2) OF THE ICCPR

DHS’s ambiguous custody regulation fails to meet the Article 9(2) “prompt notice” standard because the regulation does not require service of the NTA on the detained individual and the open-ended exceptions permit potentially indefinite delays.¹¹⁷ While the Committee has found that the “prompt notice” requirement of Article 9(2) applies only to criminal detention, the Working Group considers it to apply to all deprivations of liberty.¹¹⁸ Clarifying the distinction between criminal and civil deprivations of liberty is important because U.S. law regards immigration violations as civil and the subsequent detention as administrative and non-punitive.¹¹⁹ In order to proceed with the Article 9(2) analysis, this comment maintains that the “prompt notice” standard set by Article 9(2) applies to U.S. immigration detention either because the standard applies to all deprivations of liberty¹²⁰ or because the U.S. government has expressed a willingness to use the custody procedures regulation to detain individuals for criminal law enforcement purposes in certain circumstances.¹²¹

117. See HUMAN RIGHTS WATCH, *supra* note 13, at 3 (criticizing that by July 2002, the U.S. Government had not charged one of the over 700 9/11 detainees with a terrorism related offense, in spite of the widespread due process abuses evident in their arrests and detention).

118. See Working Group Principles, *supra* note 52, annex I. pt. A (considering that the notice requirement is equally applicable to administrative and judicial detention).

119. See *Jones v. Blanas*, 393 F.3d 918, 933-34 (9th Cir. 2004) (holding that conditions in non-punitive immigration detention must be better than conditions of confinement for convicted prisoners and pre-trial criminal detainees).

120. See generally Working Group Principles, *supra* note 52, at sec. IV(A) (maintaining that both criminal and administrative detention constitute “deprivation of freedom” for the purposes of the Working Group).

121. See, e.g., Custody Procedures, 66 Fed. Reg. 48,334 (Sept. 20, 2001) (expressing, for example, that the additional time pursuant to the custody procedures regulation gives immigration officials time to coordinate with other law enforcement officials).

1. The “Prompt Notice” Requirement of Article 9(2) Applies to Immigration Detention Insofar as it Allows DHS to Detain Individuals for Criminal Law Enforcement Purposes

While Article 9(1) and Article 9(4) of the ICCPR indisputably apply to all deprivations of liberty, regardless of label, the status of Article 9(2) is more uncertain. The Committee maintains that only the first part of Article 9(2) applies to non-criminal arrests, namely the requirement that officials inform the individual of the reasons for his or her arrest.¹²² The Working Group, however, maintains that the “prompt notice” requirement applies to all deprivations of liberty, including administrative immigration detention.¹²³

The language of Article 9(2) is ambiguous; the text of the provision does not specify whether it applies to criminal or non-criminal arrests.¹²⁴ In contrast, Article 9(3) of the ICCPR specifically guarantees certain rights for pretrial *criminal* detainees.¹²⁵ Examining the plain meaning of the text,¹²⁶ Article 9(3) explicitly specifies criminal, while Article 9(2) and 9(4) are similarly silent. This distinction implies that both Articles 9(2) and 9(4) apply to all deprivations of liberty, while Article 9(3) applies only to pre-trial criminal detention.¹²⁷ Contrary to the Committee’s interpretation, the Working Group’s view and the plain statutory language demonstrate that the “prompt notice” requirement of Article 9(2) should apply to all deprivations of liberty.

Assuming *arguendo* that the “prompt notice” requirement of Article 9(2) applies only to criminal detention, U.S. immigration detention should qualify as criminal for Article 9 purposes.¹²⁸

122. See BOELES, *supra* note 51, at 117.

123. See Working Group Principles, *supra* note 52, annex 1 pt. A(3).

124. ICCPR, *supra* note 6, art. 9(2) (mentioning generally arrest and detention). States should resolve such a textual ambiguity in light of the “object and purpose” of the treaty. Vienna Convention, *supra* note 3, art. 31(1).

125. See ICCPR, *supra* note 6, art. 9(3) (specifying requirements for pretrial criminal detention).

126. See Vienna Convention, *supra* note 6, art. 31(1) (expressing a preference for the textual interpretation of international agreements).

127. See ICCPR, *supra* note 6, art. 9(2)-(4).

128. *Cf.* Portorreal v. Dominican Republic, Hum. Rts. Comm., No. 188/1984, ¶ 2.3, U.N. Doc. 40 (A/43/40) (1988) (finding that arbitrary arrest existed in a case where government detained an individual for fifty hours without informing him of the reasons for his arrest and without ultimately charging him with a criminal

Although immigration detention is purportedly non-criminal,¹²⁹ the U.S. Government demonstrates both the intention and willingness to use “civil” immigration provisions for criminal law enforcement purposes.¹³⁰ The government may use the period between arrest and charging to investigate both immigration and criminal offenses.¹³¹ The prompt notice requirement of Article 9(2) applies to U.S. immigration custody procedures either because it pertains to all deprivations of liberty regardless of label¹³² or because the United States is willing to use immigration detention for criminal law enforcement purposes.¹³³

2. *The Regulation Does Not Impose an Obligation on DHS to Serve an NTA on the Noncitizen as Required by Article 9(2)*

The ambiguous language of DHS’s custody procedures regulation is inconsistent with the prompt notice requirement of Article 9(2).¹³⁴ Under Article 9(2), the United States must ensure that DHS provide

offense); *Van Duzen v. Canada*, Hum. Rts. Comm., No. R.12/50, ¶ 10.2, U.N. Doc. Supp. No. 40 (A/37/40) (1982) (noting that the definition of the terms and concepts of the Covenant are separate from any definition that may already exist in the national legal system).

129. *See Wong Wing v. United States*, 163 U.S. 228, 237 (1896) (opining that if Congress wishes to make an immigration violation a criminal offense it must provide for a judicial trial to establish guilt).

130. *See, e.g.,* OIG REPORT, *supra* note 82, at 37-69 (detailing the serious problems with the extended detention of noncitizens arrested in response to 9/11 and the law enforcement motivation for the delay); Hutchinson Memorandum, *supra* note 14, sec. I pt. C (allowing the government to detain individuals under general immigration laws beyond the forty-eight-hour limit in the event of “a particularized compelling law enforcement need”).

131. *See Wadhia, supra* note 94, at 419-20 (discussing how post-9/11, DHS used general immigration detention provisions to detain terrorism suspects during investigations and criminal background checks).

132. *See* Working Group Principles, *supra* note 52, annex I pt. A(3) (noting that principles 10, 13, and 14 of the Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment protect similar rights as Art. 9(2) of the ICCPR).

133. *See, e.g., Bâli, supra* note 112, at 26 (quoting Attorney General John Ashcroft stating that the government will use whatever available pretext to detain individuals suspected of connections with terrorism).

134. *See* HUMAN RIGHTS WATCH, *supra* note 13, at 49 (commenting that the custody procedures regulation did not require that INS provide a justification for its invocation of the exception to the forty-eight-hour rule, nor did it require that INS notify the individual or the Immigration Court of the decision).

notice of charges promptly, before or during the first interrogation.¹³⁵ Although the custody procedures regulation requires that DHS decide whether to *charge* the immigrant within forty-eight hours of arrest, it establishes no timeframe within which DHS must actually issue the NTA and *serve* it on the alien.¹³⁶ There is no requirement that DHS record or report when the officer made the charging determination in relation to the initial arrest or when the officer served the NTA on the detained individual.¹³⁷ The regulation does not specify any remedy for a violation of the “forty-eight-hour” rule.¹³⁸ These ambiguities raise doubts as to whether the regulation effectively assures prompt notice of charges to immigration detainees in accordance with Article 9(2) of the ICCPR.¹³⁹

The policy directive of the Hutchinson memorandum that DHS serve the NTA within seventy-two hours of arrest does not dispel these doubts.¹⁴⁰ The Hutchinson Memorandum fails to impose a binding legal obligation on DHS to serve the NTA within seventy-two hours.¹⁴¹ In fact, DHS concedes that logistical difficulties and law enforcement needs might render timely issuance and service of the NTA impracticable.¹⁴² If DHS fails to serve the NTA within the

135. *See* Hill v. Spain, Hum. Rts. Comm., No. 526/1993, ¶ 12.2, U.N. Doc. CCPR/C/59/D/526/1993 (1997) (finding that a delay of up to eight hours is permissible under Article 9(2)); Grant v. Jamaica, Hum. Rts. Comm., No. 597/1994, ¶ 8.1, U.N. Doc. CCPR/C/56/D/597/1994 (1996) (ruling that a delay of seven days violates Article 9(2)); Griffin v. Spain, Hum. Rts. Comm., No. 493/1992, ¶ 9.2, U.N. Doc. CCPR/C/53/D/493/1992 (1995) (accepting that a delay of several hours does not violate Article 9(2)).

136. *See* 8 C.F.R. § 287.3(d) (2008).

137. *See id.*

138. *Cf.* H.R. 1502, 109th Cong. § 201(f) (2005) (mandating that DHS bring a noncitizen before an Immigration Judge within seventy-two hours in any case in which DHS has not served the NTA on the noncitizen within forty-eight hours of arrest).

139. *See* ICCPR, *supra* note 6, art. 2 (requiring states to ensure all rights enumerated in the ICCPR *and* provide an effective remedy in case of a violation).

140. *See* Letter Concerning Guidance on ICE Implementation, *supra* note 68, para. 1.

141. *See* Hutchinson Memorandum, *supra* note 14, sec. IV.

142. *See, e.g., Immigration Hearings, supra* note 93, at 48-51 (Prepared Statement of William D. West, Retired Supervisory Special Agent, U.S. Dep't of Justice, Immigration & Naturalization Service, Dep't of Homeland Sec., Immigration & Customs Enforcement) (describing the logistical challenges faced by immigration officers while making a charging determination, including cumbersome searches through paper files and multiple databases); *cf.* HUMAN

seventy-two hour deadline, the detained individual detainee has no legal remedy as Article 9(2) requires.¹⁴³ From an oversight perspective, it is also impossible to ascertain whether DHS promptly charges immigrant detainees or informs them of the charges against them because neither the regulation nor the Memorandum impose a reporting requirement on DHS.¹⁴⁴ Lack of timely service of the NTA frustrates the notice requirement's purpose of ". . . allow[ing] [the arrested individual] to take immediate steps to secure his release if he believes that the reasons given are invalid or unfounded."¹⁴⁵ Immigration detainees cannot adequately assess the legality of their detention without knowing the charges against them.¹⁴⁶ The lack of a binding legal obligation to serve the NTA within a certain period of time coupled with the lack of a reporting requirement indicates a failure to ensure timely service of the NTA as required by Article 9(2) of the ICCPR.¹⁴⁷

RIGHTS WATCH, *supra* note 13, at 49 (considering the risk that the government may hold individuals who are not guilty of immigration violations indefinitely without charges due to the INS's own inefficiency and difficulty in coordinating with other government agencies).

143. *Cf.* Hutchinson Memorandum, *supra* note 14, sec. IV ("[This Memorandum] does not, is not intended to, shall not be construed to, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any person in any matter, civil or criminal").

144. *See* OIG REPORT, *supra* note 82, at 28 (noting that "INS does not record the date or time the charging determination is made"). No inquiry since the OIG report has produced statistics indicating when or if individuals in immigration detention receive NTAs. *See* Interview with Brittney Nystrom, *supra* note 2 (noting that, although the problem of delayed NTAs is pervasive in Virginia immigration detention centers, immigration detention is so complex and lacking in transparency that it is often difficult for advocates to ascertain where a person is in the process or whether DHS has in fact issued an NTA).

145. *See* Drescher v. Uruguay, Hum. Rts. Comm., No. 43/1979, ¶ 13.2, U.N. Doc. CCPR/C/19/D/43/1979 (July 21, 1983) (holding that Navy officials violated ICCPR article 9(2) by failing to explain to a detainee the charges against him).

146. *See id.* ¶ 13.2 (holding that insufficient notice of reasons for arrest and charges impedes the ability of the detained individual to challenge the legality of the detention and violates Article 9(2)).

147. *Cf.* Hutchinson Memorandum, *supra* note 14, sec. IV (warning that the Memorandum is not binding since it constitutes "internal guidance" and creates no "enforceable" rights).

3. *The Regulation Provides No Guidance as to the Meaning of “Extraordinary Circumstances” and “Reasonable Period of Time”*

The sweeping exception to the charging requirement in the event of an “emergency or other extraordinary circumstance” gives rise to further doubts that the custody procedures regulation complies with Article 9(2) of the ICCPR.¹⁴⁸ Preventive detention of suspected terrorists is particularly problematic because the regulation provides no guidance as to the meaning of “extraordinary circumstances” and “reasonable period of time.”¹⁴⁹ While the Hutchinson Memorandum provides a more specific definition of “extraordinary circumstances,”¹⁵⁰ its non-binding policies do not satisfy the requirement to ensure the right to prompt notice of charges under Article 9(2) of the ICCPR.¹⁵¹

The definition it provides gives leeway to the government to take advantage of the exception after a terrorist attack, much as it did after 9/11.¹⁵² Although the Hutchinson Memorandum mandates that only certain officials may determine what qualifies as an extraordinary circumstance, it reaffirms the notion that the government may use the exception to conduct criminal investigations.¹⁵³ It also clarifies that the government may determine on a case-by-case basis whether to

148. Cf. 8 C.F.R. § 287.3(d) (2008).

149. See *id.*; see also NOWAK, *supra* note 16, at 226 (reporting the finding of U.N. Working Group on Arbitrary Detention that “in the absence of US derogation in accordance with Article 4 of the CCPR, . . . the preventive detention of suspected terrorists for a prolonged period of time without any criminal charge and judicial review . . . confers an arbitrary character on the detention”).

150. See Hutchinson Memorandum, *supra* note 14, sec. I pts. B-C. (providing that a Special Agent in Charge, a Border Protection Chief, or a Field Office Director must determine whether there is a “compelling law enforcement need” necessitating the invocation of the exception to the forty-eight-hour rule).

151. Cf. *Uzbekistan Report*, *supra* note 49, ¶ 79(12) (stating that the state should comply with Article 9(2) of the ICCPR by reducing the amount of time before the government informs criminal detainees of the charges against them).

152. See, e.g., OIG Report, *supra* note 82, at 62-64 (chronicling the delayed processing of incorrectly categorized “special interest” detainees in the aftermath of the 9/11 attacks).

153. See, e.g., Hutchinson Memorandum, *supra* note 14, sec. I pt. C (affirming that ICE may invoke the extraordinary circumstances due to a “particularized compelling law enforcement need”).

invoke the exception, without notifying the detained individual of the reasons justifying the decision.¹⁵⁴

Furthermore, the Hutchinson Memorandum fails to bring the custody procedures regulation into conformity with Article 9(2) because it does not legally bind DHS to comply with the policy guidance.¹⁵⁵ It does not impose a reporting requirement on DHS, making it impossible to ascertain whether DHS complies with the policy directive.¹⁵⁶ An individual detained without charges pursuant to the “extraordinary circumstances” exception would not be able to rely on the Hutchinson Memorandum to provide a remedy for a detention that violates Article 9(2) of the ICCPR.¹⁵⁷ The definition of “extraordinary circumstances” and other guidelines provided by the Hutchinson Memorandum are far too vague and open-ended to ensure that the Executive does not violate Article 9(2) by using the regulation to detain individuals for prolonged periods without charges.¹⁵⁸

C. THE REGULATION IMPEDES PROMPT REVIEW OF DETENTION FOLLOWING ARREST IN VIOLATION OF THE “WITHOUT DELAY” STANDARD OF ARTICLE 9(4) OF THE ICCPR

Article 9(4) obligates the United States to allow immigration detainees access to a judge to review the legality of their detention “without delay.”¹⁵⁹ Indeed, the Article 9(4) protections “exist

154. *See id.* sec. I pt. B (stating that when ICE invokes the exception, the officer must place a memorandum or “other documentation” explaining the specific reasons for doing so in the noncitizen’s file).

155. *See id.* sec. IV (denying detainees any enforceable remedy against the state for violations of the Memorandum’s policy guidance).

156. *See, e.g.,* OIG Report, *supra* note 82, at 29-30 (providing the only known source of statistics on the 9/11 detainees that is available to the public).

157. *Cf. ICCPR, supra* note 6, art. 2 (requiring the state to provide effective remedies for rights violations).

158. *See* Hutchison Memorandum, *supra* note 14, sec. I pt. C (providing that once ICE invokes the exception, the ICE Office of the Principal Legal Advisor must review the decision in thirty days to determine “whether factors leading to such a determination continue to exist”).

159. *See* Human Rights Comm., Gen. Comment 29/72, ¶ 16, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001) [hereinafter Gen. Comment 29/72] (explaining that Article 9(4) is not derogable because states must respect the fundamental requirements of a fair trial during an emergency); *see also* NOWAK, *supra* note 16, at 218 (observing that the first draft of Article 9 provided “the right to an effective

regardless of whether deprivation of liberty is unlawful.”¹⁶⁰ Therefore, the Article 9(4) requirement applies to immigration detention, whether it is “administrative” or “civil.”¹⁶¹ The extraordinary circumstances exception does not excuse the U.S. government of its obligation to ensure the right of an individual to judicial review of detention. Derogation from the other Article 9 obligations because of a war or emergency does not allow derogation from the Article 9(4) habeas right to have the lawfulness of detention reviewed by a competent court.¹⁶²

Individuals detained pursuant to immigration regulations have the right to petition for habeas relief in Federal Court and file a motion for bond in immigration court.¹⁶³ In practice, however, noncitizens are often unable to access an immigration court for a bond or other type of hearing until DHS has served the NTA on the immigration court.¹⁶⁴ Moreover, it is difficult for a detained individual to challenge the lawfulness of detention without knowledge of the charges against them.¹⁶⁵

remedy in the nature of habeas corpus” but noting that the parties ultimately used an open-ended requirement so that states could formulate proceedings within their own legal systems).

160. NOWAK, *supra* note 16, at 235. Immigration falls squarely within the reasons for which States may deprive a person of liberty besides criminal punishment; others include pretrial detention and mental illness. *See id.* at 216.

161. *See Moldova Report*, *supra* note 55, ¶ 84(11) (noting that article 9(4) applies to administrative detention).

162. *See* Gen. Comment 29/72, *supra* note 161, ¶¶ 3, 11 (explaining that not all disturbances or emergencies are cause for derogation, but only those that “threaten the life of the nation”).

163. *See* Interview with Brittney Nystrom, *supra* note 4 (noting that a federal habeas petition is not an effective remedy in the case of a delayed NTA and that advocates consequently file a bond motion in the immigration court to bring a case to the attention of DHS and hopefully trigger the issuance of the NTA). When DHS has issued an I-200, Warrant to Arrest, a federal court will dismiss a habeas petition because the Immigration Court is the proper forum for review. *Id.* Moreover, the detention is ostensibly lawful—no law or regulation requires that DHS issue an NTA in order to detain the noncitizen; the statute only requires that DHS determine whether it *will* issue the NTA. *Id.*

164. *See* HUMAN RIGHTS WATCH, *supra* note 13, at 53 (arguing that the recourse to habeas corpus is not sufficient because most immigration detainees are unrepresented and unfamiliar with the U.S. legal system).

165. *See id.* at 52-53 (noting that INS does not schedule hearings for detained noncitizens for individualized determinations of probable cause).

The regulation does not provide any guidance as to when DHS must serve the NTA on the Immigration Court, an action that initiates judicial proceedings and formally provides the detained individual access to a judge.¹⁶⁶ Under Article 9(4), the state must decide on a case-by-case basis the time limit within which individuals may challenge the legality of their detention.¹⁶⁷ If DHS has not served the NTA on the Immigration Court, the detained immigrant may not have access to any judicial review for weeks or months, a situation that clearly violates Article 9(4).¹⁶⁸

Article 9(4) requires that the judicial officer order release if the detention is unlawful under domestic or international law.¹⁶⁹ Immigration Judges, however, may not have discretion to order the release of the individual if he or she is subject to mandatory detention.¹⁷⁰ Those individuals subject to mandatory detention should still be entitled to receive prompt notice of charges against them. The delayed service of the NTA pursuant to the custody procedures regulation and the lack of a requirement of service of the NTA on the Immigration Court impede judicial review of detention “without delay” for immigration detainees.¹⁷¹

166. See 8 C.F.R. § 287.3(d) (2008); see also Interview with Megan Mack, American Bar Association Commission on Immigration (Dec. 4, 2007) (on file with author) (explaining that practitioners often complain that they cannot advocate effectively when their clients have to wait weeks for DHS to serve Executive Office for Immigration Review with the NTA).

167. Cf. *Torres v. Finland*, Human Rights Comm., No. 291/1988, ¶¶ 8-9, U.N. Doc. CCPR/C/38/D/291/1988 (Apr. 5, 1990) (finding that the Aliens Act of Finland did not allow review of the detention by a court without delay, in violation of Article 9(4) of the ICCPR).

168. Cf. *Kelly v. Jamaica*, Human Rights Comm., No. 253/1987, ¶ 5.6, U.N. Doc. CCPR/C/41/D/253/1987 (Apr. 10, 1991) (noting that inability of the detained to access a lawyer or communicate with family members exacerbated the Article 9(4) violation).

169. See NOWAK, *supra* note 16, at 236 (suggesting that “mandatory detention” of immigrants and asylum seekers is irreconcilable with the right to petition for relief based on the underlying illegality of the detention).

170. See Interview with Brittney Nystrom, *supra* note 2 (stating that filing a motion for bond in Immigration Court, to trigger the issuance of an NTA, is particularly disingenuous from an ethical perspective if the advocate knows that the client is subject to mandatory detention and thus is not eligible for bond).

171. See *Baban v. Australia*, Human Rights Comm., No. 1014/2001, ¶ 7.2, U.N. Doc. CCPR/C/78/D/1014/2001 (Sept. 18, 2003) (stressing that reviewing officers must order release if the detention is incompatible with the requirements of the Covenant, especially those of article 9(1)). It is important that the “[j]udicial

III. RECOMMENDATIONS

In order to comply with basic international standards of due process and guard against violations of Article 9 of the ICCPR, DHS should amend the ambiguous language of the regulation.¹⁷² This comment enumerates five changes that promote compliance with Article 9 of the ICCPR.

A. DHS SHOULD AMEND THE REGULATION TO REQUIRE SERVICE OF THE NTA ON THE INDIVIDUAL AND THE IMMIGRATION COURT WITHIN FORTY-EIGHT HOURS OF ARREST

Currently, the regulation only requires that DHS make “a charging determination” within the forty-eight-hour period.¹⁷³ The regulation should require that DHS both issue and serve the NTA on the detainee within forty-eight hours of arrest. This change to a forty-eight hour requirement would ensure that custody procedures comport with the “prompt notice” standard of the ICCPR.¹⁷⁴

The regulation should also require that DHS serve the NTA on the Immigration Court within forty-eight hours of the arrest. A requirement of service on the Immigration Court would ensure that the alien has access to judicial review promptly after service of the NTA in accordance with Article 9(4) of the ICCPR, which gives individuals the right to judicial review of the detention “without delay.”¹⁷⁵ This revision prevents immigrants from languishing in detention for weeks or months awaiting consideration of a bond motion or the scheduling of a court date because DHS has not served the NTA on the Immigration Court.¹⁷⁶

review of the lawfulness of detention under [Article 9(4)]” not only consider whether the detention conforms to domestic law standards of habeas corpus but also test whether the detention violates other obligations of the ICCPR. *Id.*

172. See Letter Concerning Guidance on ICE Implementation, *supra* note 66, para. 7 (stressing that any revisions should incorporate “firm requirement[s]”).

173. 8 C.F.R. § 287.3(d) (2008).

174. ICCPR, *supra* note 5, art. 9(2); see, e.g., *Uzbekistan Report*, *supra* note 49, ¶ 79(12) (expressing concern that detention for seventy-two hours without notice of charges violates article 9(2) of the ICCPR in the criminal context).

175. *Cf. Switzerland Report*, *supra* note 54, at ¶¶ 100, 111 (stating that a detention time limit of ninety-six hours is too long).

176. See Letter Concerning Guidance on ICE Implementation, *supra* note 66, para. 6 (noting that failure to serve the NTA on the Immigration Court can prevent

B. DHS SHOULD AMEND THE REGULATION TO INCLUDE AN UNAMBIGUOUS DEFINITION OF “EXTRAORDINARY CIRCUMSTANCES” AND “REASONABLE TIME”

Given legitimate national security concerns, the “extraordinary circumstances” exception written in response to the September 11 attack could be maintained.¹⁷⁷ DHS should, however, clarify the language. The regulation should provide a more specific definition of “extraordinary circumstance,” for example stating that the term indicates a war or a large-scale attack on the territorial United States. The regulation should also indicate that the custody procedures of the Patriot Act apply to *all* suspected terrorists.¹⁷⁸ The “reasonable time” limit is too open-ended and should be amended as well.¹⁷⁹ The regulation should state: “a reasonable time, not to exceed one week.” The seven day limit makes sense because it matches the requirements of the Patriot Act.¹⁸⁰ The consistency ensures that the government will not use administrative immigration detention for criminal law enforcement purposes to take advantage of the “reasonable period of time” exception to detain individuals while law enforcement officials

counsel and family members from being able to locate the detainee within the detention system).

177. See INS Custody Procedures, 66 Fed. Reg. 48,334, 48,334 (Sept. 20, 2001) (justifying change to regulation by describing the legitimate law enforcement and national security concerns that might arise during the detention and removal process).

178. See Hutchinson Memorandum, *supra* note 13, sec. I pt. C (defining an extraordinary circumstance broadly as any situation giving rise to a “compelling law enforcement need”).

179. Cf. HUMAN RIGHTS WATCH, *supra* note 12, at 49 (noting that the government used the “reasonable time” limit to justify holding the 9/11 detainees without the procedural protections afforded pre-trial criminal detainees).

180. See Mehta, *supra* note 12, at 37 (noting inconsistency between the Patriot Act, which requires the government to serve notice of detainees within seven days, and DHS, which has discretion to serve notice on regular immigration detainees within a “reasonable” period of time). *But see* Margaret H. Taylor, *Dangerous By Decree: Detention Without Bond in Immigration Proceedings*, 50 LOY. L. REV. 149, 170 (2004) (concluding that the seven-day deadline of the Patriot Act was irrelevant to the detention of noncitizens post-9/11 because the government found it easier to detain individuals suspected of terrorism pursuant to general detention provisions in immigration law, which allow for detention without bond in normal immigration proceedings); cf. David Cole, *In Aid of Removal: Due Process Limits on Immigration Detention*, 51 EMORY L.J. 1003, 1027 (2002) (arguing that the seven-day detention limit of the Patriot Act violates the 4th Amendment of the Constitution).

gather additional evidence.¹⁸¹ In the wake of a national emergency, the seven-day limit might also lessen criticism that the United States engages in racial profiling and commits egregious due process violations. This could prevent protests echoing those that took place when the government, pursuant to the amended regulation, held the 9/11 detainees in custody without charges.¹⁸²

C. DHS SHOULD ADD A PROVISION SPECIFYING THAT IN THE EVENT OF A DETENTION EXCEEDING FORTY-EIGHT HOURS WITHOUT SERVICE OF THE NTA, THE INDIVIDUAL SHALL HAVE THE RIGHT TO PETITION THE IMMIGRATION JUDGE FOR RELEASE

The regulation should add the following language: “in the event of a time period exceeding forty-eight hours, the alien shall have the right to petition an Immigration Judge for and be granted release on his own recognizance, unless ICE can demonstrate that he is a flight risk or a threat.” Such a provision would ensure that immigration detainees have both the right to judicial review and *release* required by Article 9(4) of the ICCPR.¹⁸³ Moreover, a provision creating an explicit right for an immigrant to petition for release would give DHS an incentive to streamline the immigration detention process.¹⁸⁴

D. DHS SHOULD AMEND THE REGULATION TO IMPOSE A REPORTING REQUIREMENT ON DHS TO FACILITATE OVERSIGHT

The regulation should impose a reporting requirement on DHS because it is currently impossible to ascertain whether DHS comports with its own forty-eight-hour deadline.¹⁸⁵ The regulation

181. See Huey et al., *supra* note 12, at 399-401 (commenting that, under the authorizing statute, the government would have to meet the probable cause standard in order to detain a suspected individual while gathering evidence in a criminal case).

182. Cf. HUMAN RIGHTS WATCH, *supra* note 13, at 4 (alluding to the detention of non-citizens after 9/11 on the basis of national origin, ethnicity, gender, and religion).

183. See ICCPR, *supra* note 5, art. 9(4).

184. Cf. Immigration & Customs Enforcement, Dep't of Homeland Security, *Fact Sheet: Fiscal Year 2007*, Feb. 5, 2006, at 2, available at <http://www.ice.gov/doclib/pi/news/factsheets/2007budgetfactsheet.pdf> (demonstrating that ICE allocated \$1,381,767 to custody operations in fiscal year 2007, creating potential savings for the American taxpayer if such operations were streamlined).

185. Cf. Civil Liberties Restoration Act of 2004, H.R. 4591, 108th Cong.

should require that DHS record and report the period of time between the initial arrest, the charging determination, and service of the NTA on the immigrant and on the Immigration Court.¹⁸⁶ This change would both incentivize respect for the due process rights of immigrants in detention and facilitate effective government oversight.¹⁸⁷

CONCLUSION

The unilateral amendment of DHS's custody procedures regulation reflects post-9/11 national security panic rather than a reasoned effort to improve the efficiency and fairness of immigration detention procedures. The custody procedures regulation permits arbitrary and indefinite detention in violation of international standards of due process enshrined in Article 9 of the ICCPR. With the benefit of hindsight, this comment urges DHS and Congress to take action to bring the U.S. immigration detention custody procedures into compliance with Article 9 of the ICCPR.

§ 201(f)(2) (2004) (proposing a requirement on DHS to provide yearly reports to Congress about compliance with the notice requirement).

186. See Letter Concerning Guidance on ICE Implementation, *supra* note 66, paras. 5-6 (affirming that concerns about DHS compliance with the regulation are broader than just service of notice, including service of the NTA on the Immigration Court).

187. See *Immigration Hearings*, *supra* note 93, at 3 (statement of Rep. Howard L. Berman) (alluding to Congress's responsibility to exercise its oversight of administrative agencies).