

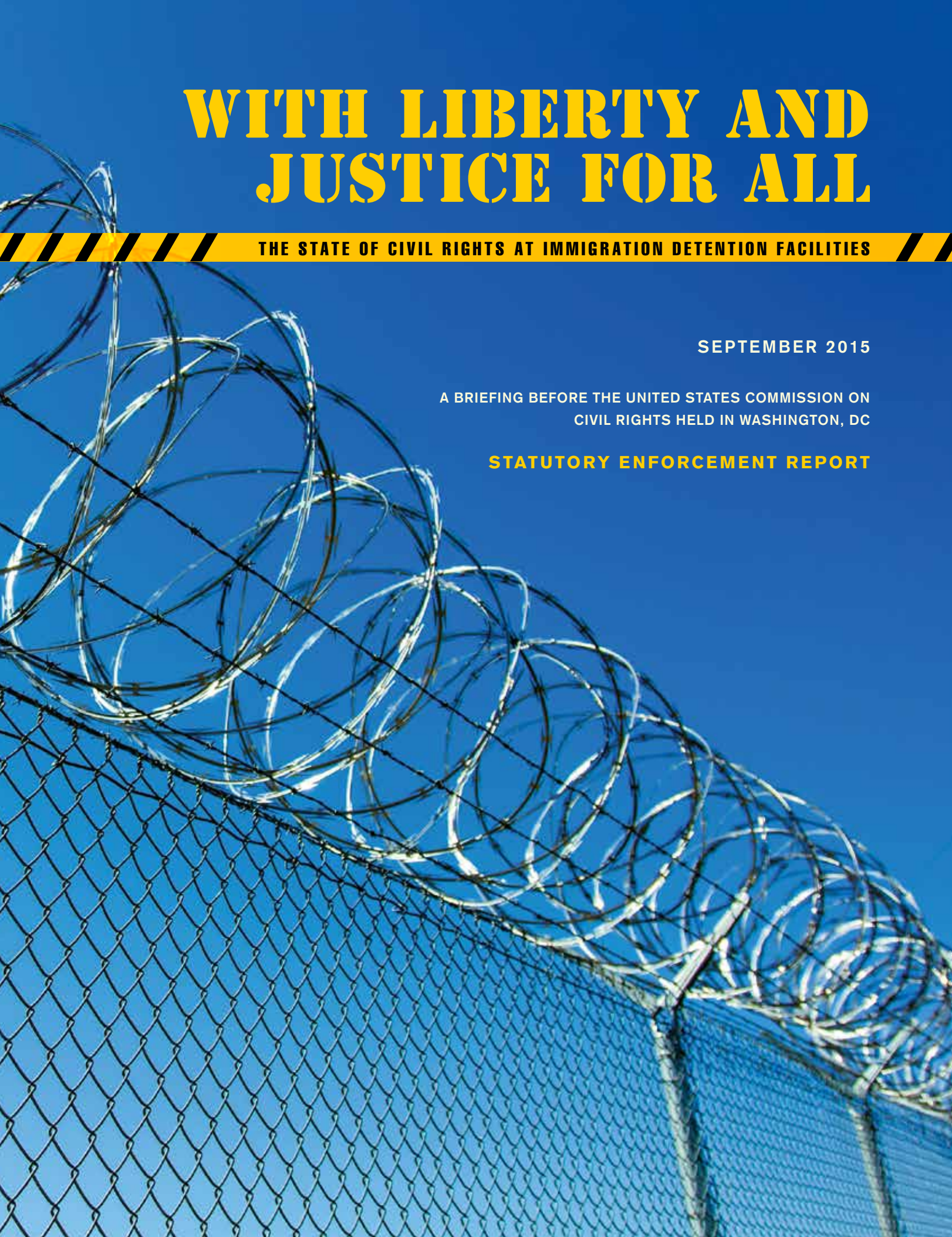
WITH LIBERTY AND JUSTICE FOR ALL

THE STATE OF CIVIL RIGHTS AT IMMIGRATION DETENTION FACILITIES

SEPTEMBER 2015

A BRIEFING BEFORE THE UNITED STATES COMMISSION ON
CIVIL RIGHTS HELD IN WASHINGTON, DC

STATUTORY ENFORCEMENT REPORT



U.S. Commission on Civil Rights

The U.S. Commission on Civil Rights is an independent, bipartisan agency established by Congress in 1957. Congress directed the Commission to:

- Investigate complaints alleging that citizens are being deprived of their right to vote by reason of their race, color, religion, sex, age, disability, or national origin, or by reason of fraudulent practices.
- Study and collect information relating to discrimination or a denial of equal protection of the laws under the Constitution because of race, color, religion, sex, age, disability, or national origin, or in the administration of justice.
- Appraise federal laws and policies with respect to discrimination or denial of equal protection of the laws because of race, color, religion, sex, age, disability, or national origin, or in the administration of justice.
- Serve as a national clearinghouse for information in respect to discrimination or denial of equal protection of the laws because of race, color, religion, sex, age, disability, or national origin.
- Submit reports, findings, and recommendations to the President and Congress.
- Issue public service announcements to discourage discrimination or denial of equal protection of the laws.

Members of the Commission:

Martin R. Castro, Chairman

Hon. Patricia Timmons-Goodson, Vice Chair

Roberta Achtenberg

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Letter of Transmittal

President Barack Obama
Vice President Joe Biden
Speaker of the House John Boehner

On behalf of the United States Commission on Civil Rights (“the Commission”), and pursuant to Public Law 103-419, I am pleased to transmit our 2015 Statutory Enforcement Report, *The State of Civil Rights at Immigration Detention Facilities*. A full version of this report is also available on the Commission’s website at www.usccr.gov.

The purpose of this report is to comprehensively examine the U.S. Government’s compliance with federal immigration laws and detention policies, and also detail evidence regarding possible infringement upon the constitutional rights afforded to detained immigrants. More specifically, this report examines the Department of Homeland Security (DHS) and its component agencies’ treatment of detained immigrants in immigration holding, processing, and detention centers throughout the United States.

Prior to writing this report, the Commission gathered facts and data to analyze whether DHS, its component agencies, and private detention corporations with whom the federal government contracts to detain immigrants were complying with the Performance Based National Detention Standards, Prison Rape Elimination Act Standards, the Flores Settlement Agreement and other related immigrant child detention policies, and the United States Constitution. During the Commission’s January 30, 2015 briefing, the Commission received written and oral testimony from DHS immigration detention officials and advocates detailing the strengths, weaknesses, and constitutional and civil rights implications of the U.S. immigration detention system. In May 2015, the Commission visited Karnes Family Detention Center and Port Isabel Detention Centers – both located in Texas – to corroborate the written and oral evidence the Commission gathered.

Based upon an analysis of data gathered from the Commission’s fact-gathering visit, evidence collected during panelists’ briefing presentations and additional research, the Commission makes numerous findings and recommendations. The Commission’s complete findings and recommendations are contained in the report; however, the following bear special attention:

The Commission recommends that DHS act immediately to release families from detention. The Commission also recommends that Congress should no longer fund family detention and should reduce its funding for immigration detention generally, in favor of alternatives to detention. The Commission found, among other issues, that several DHS immigration detention facilities were not complying with federal mandates and agency policies regarding the treatment of detained immigrants and detained unaccompanied immigrant children. Moreover, the Commission found evidence, both anecdotal and eyewitness, that the U.S. Government was interfering with the constitutional rights afforded to detained immigrants. While the U.S. Government made improvements to the U.S. immigration detention system, the Commission, among other numerous suggestions, recommends that the government convene an intergovernmental compliance task force to investigate, analyze, and strengthen compliance regiments carried out by the U.S. Immigrations and Customs Enforcement's (ICE) Removal Operations' Detention Standards Compliance Unit. Moreover, the Commission recommends that the U.S. Government work harder to ensure detainees' access to due process and the right to assistance of counsel under the Fifth Amendment and the Immigration and Nationality Act.

On August 14, 2015, the Commission approved this report. The vote was as follows: Commissioner Achtenberg, Castro, Kladney, Timmons-Goodson and Yaki supported approval of the report; Commissioners Heriot and Kirsanow opposed approval of the report; and Commissioner Narasaki recused herself from voting on the report.

The Commission believes that this report is both instructive and useful to the U.S. Government and the public at large as a contribution to the public dialogue surrounding civil rights and constitutional issues in the U.S. immigration detention system. The Commission is confident that this report will aid in the ultimate resolution of those issues, and that one day the United States may truly live up to its reputation of being the land of the free.

Commissioner statements and rebuttals contained at the end of the report are the personal views and opinions of individual Commissioners and not a part of the Commission's official findings and recommendation.

For the Commissioners

A handwritten signature in black ink, appearing to read 'Martin R. Castro', with a long horizontal flourish extending to the right.

Martin R. Castro
Chairman

Statutory Enforcement Report:
The State of Civil Rights at
Immigration Detention Facilities
September 2015

The United States Commission on Civil Rights

TABLE OF CONTENTS

TABLE OF CONTENTS..... i

CHAPTER 1. Introduction and Background..... 1

 The Commission and Immigration Detention: Purpose and Focus 1

 Background Information, Relevant Immigration Laws, and Policies..... 2

 Relevant Immigration Laws Contributing to the Rise in Unauthorized Immigration and Subsequently Increasing the Number of Detained Immigrants at Federal Facilities. 3

 Department of Homeland Security and Immigration & Customs Enforcement..... 7

 Detained Immigrants 8

CHAPTER 2. Federal Agencies Responsible for Immigration Detention and Policies..... 12

 Department of Homeland Security 12

 Immigration and Customs Enforcement..... 14

 ICE—Enforcement and Removal Operations 15

 CBP—Customs and Border Protection 18

 USCIS - U.S. Citizenship and Immigration Services 19

 Department of Justice—Executive Office for Immigration Review 21

 U.S. Department of Health and Human Services 23

CHAPTER 3. Immigration Detention Standards..... 25

 Discussion 29

 Are ICE-Owned Facilities Adhering to PBNDS 2011 Medical Care Standards? 30

 Are CDFs Adhering to PBNDS 2011, PBNDS 2008, or NDS 2000 Medical Standards?... 32

 Are ICE-Owned Facilities Adhering to PBNDS 2011 LGBT Accommodation Standards? 36

 Are CDFs Complying with Either PBNDS 2011, PBNDS 2008, or NDS 2000 LGBT Accommodation standards? 39

 Are ICE-Owned Facilities Adhering to PBNDS 2011 Food Service Standards? 39

 Are CDFs Complying with PBNDS 2011, PBNDS 2008, or NDS 2000 Food Service Standards? 40

 Are ICE-Owned Facilities Adhering to PBNDS 2011 Law Library and Legal Material Standards? 42

 Are CDFs Adhering to PBNDS 2011 Law Library and Legal Material Standards?..... 42

Conclusion	44
CHAPTER 4. Federal Treatment of Detained Undocumented Immigrant Children.....	45
Background	46
Federal Policies Surrounding Unaccompanied Alien Children	48
The Flores Settlement Agreement	48
Homeland Security Act of 2002	49
Trafficking Victims Protection Reauthorization Act of 2008	50
Don T. Hutto Settlement Agreement	51
Discussion	52
Compliance with the Flores Settlement Agreement	52
Required Release	52
Required Confinement Standards	56
Compliance with the Trafficking Victims Protection Reauthorization Act - 72 Hour Rule	61
Role of the Office of Refugee Resettlement (ORR)	63
Conclusion	67
CHAPTER 5. Prison Rape Elimination Act: Compliance or Violation	68
Background	68
DHS Application of PREA	70
Discussion	71
Zero tolerance of Sexual Abuse; Prevention of Sexual Assault Coordination.....	71
Are DHS Detention Centers with Government Contracts Adhering to PREA?.....	74
Are DHS CDFs Complying with PREA Inspection Policies?.....	79
Do DHS Detention Facilities Adhere to PREA Regulations Regarding Child Detention?..	80
Does DHS Adhere to PREA Standards on Interacting with Transgender or Intersex Individuals?	81
Does DHS Comply with PREA Language Requirements?	83
Does DHS Adhere to PREA Requirements to Provide Individuals Information Regarding PREA Policies?	84
Does DHS follow PREA requirements mandating adequate ways to report sexual assault?87	
Conclusion	89

CHAPTER 6. Immigration Detention: Constitutional Issues	91
Placing Discussion in Context; Raising Constitutional Issues	92
The Plenary Power.....	92
Discussion	92
Is The Federal Government Detaining Immigrants in a Manner That Is Inconsistent with the Fifth Amendment’s Due Process Clause?	93
Is The Federal Government Detaining Immigrants in a Manner That Is Inconsistent with the Fifth Amendment’s Due Process Clause?	94
Is the Federal Government Violating a Detained Immigrant’s First Amendment Rights by Interfering with a Detained Immigrant’s Right to Free Exercise of Religion?	116
Conclusion	123
FINDINGS AND RECOMMENDATIONS	124
Findings.....	124
APPENDIX A	131
APPENDIX B	134
APPENDIX C	135
COMMISSIONER STATEMENTS AND REBUTTALS	147
Statement of Chairman Martin R. Castro	147
Statement of Vice Chair Patricia Timmons-Goodson	154
Statement of Commissioner Roberta Achtenberg.....	160
Dissenting Statement of Commissioner Gail Heriot.....	172
Dissenting Statement of Commissioner Peter Kirsanow	219
Statement of Commissioner David Kladney.....	247
Statement of Commissioner Michael Yaki	255

CHAPTER 1. INTRODUCTION AND BACKGROUND

The Commission and Immigration Detention: Purpose and Focus

This Statutory Enforcement Report examines the civil rights and constitutional concerns that the U.S. Commission on Civil Rights (Commission) “raised with the Department of Homeland Security (DHS) and its component [agencies] over the treatment of adult and minor [immigrant] detainees [who are being] held under federal law in detention centers across the country.”¹ Specifically, this report analyzes the constitutional issues surrounding DHS’s treatment of detained immigrants as well as other selected federal agencies’ efforts to comply with established Performance Based National Detention Standards (PBNDS),² the Prison Rape Elimination Act of 2003 (PREA),³ and the federal standards for detaining unaccompanied minor children.

It is within the Commission’s mandate to examine, study, and report upon civil rights violations inconsistent with the federal civil rights laws, the United States Constitution,⁴ and the federal standards applicable to all persons within the United States and its territories.⁵ By statute, the Commission is authorized to examine federal policies and procedures that have a detrimental effect on the equal protection of law guaranteed to all persons under the Constitution.⁶ With regard to immigration, in 1980, the Commission released a report entitled *The Tarnished Golden Door: Civil Rights Issues in Immigration* that examined the civil rights issues surrounding the enforcement of the immigration laws of the United States.⁷ That report identified numerous

¹ Meeting, U.S. Comm’n on Civil Rights, Wash., D.C., Jan. 30, 2015, transcript [hereafter “Briefing Transcript”], (Castro Opening Remarks), p.5.

² See What We Do, 2011 Operations Manual ICE Performance-Based National Detention Standards, U.S. Immigration and Customs Enforcement, *available at* <http://www.ice.gov/detention-standards/2011>.

³ Prison Rape Elimination Act of 2003, PUB. L. No. 108-79, 117 Stat. 972 (2003) (codified at 42 U.S.C) § 15601-15609).

⁴ U.S. Const., amend. 14, § 1.

⁵ See 42 U.S.C. § 1975a(2)(A) (2013) (the Commission has a duty to “study and collect[] information” concerning “discrimination or denials of equal protection of the laws under the Constitution of the United States because of ... national origin ... or in the administration of justice.”). See also 110 CONG. REC. 12714 (1964)(statement of Sen. Hubert H. Humphrey) (explaining that the commission has jurisdiction over, among other things, “denials of equal protection in the administration of justice, whether or not related to [a protected class].”).

⁶ See Civil Rights Act of 1957, PUB. L. No. 85-315. See also U.S. Const. amend. 14.

⁷ U.S. Comm’n on Civil Rights, *The Tarnished Golden Door: Civil Rights Issues in Immigration* (Sept. 1980) ; see also the Commission’s 2008 report, *The Impact of Illegal Immigration on Wages and Employment Opportunities of Black Workers*. Note that the 2008 report described Chicago Harris School of Public Policy scholars and others in our briefing as asserting that immigration was economically beneficial to the U.S. and did not substantially diminish the wages of black workers.

issues surrounding the former Immigration and Naturalization Service (INS) administration and enforcement of U.S. immigration laws. Since the Commission published that 1980 report, however, federal immigration laws and their enforcement practices have undergone numerous, sweeping changes.

On January 30, 2015, the Commission held a day-long briefing examining the possible civil rights violations at immigration detention facilities. Fifteen panelists participated in this briefing. Panels consisted of government officials, academics, attorneys, and advocates. This report encompasses the key elements of the Briefing as well as additional background research and analysis.

Background Information, Relevant Immigration Laws, and Policies

Immigration is an integral component of America's rich history and legacy.⁸ Worldwide, citizens from other nations immigrate to the United States to escape poor economic conditions, political strife, and violence.⁹ While these immigrants migrate to the United States to escape harsh living conditions, once they cross the U.S. border without authorization and proper documentation, the federal government apprehends and detains these individuals in conditions that are similar, if not worse, than the conditions they faced from their home countries. In recent years, advocates for detained immigrants have expressed growing concerns over federal apprehension of immigrants and inhumane detention conditions detained immigrants suffer that are inconsistent with American values.¹⁰ For example, a coalition of 13 bishops voiced concerns regarding the

⁸ See generally, *supra* note 11.

⁹ *Ibid.*

¹⁰ See Geoffrey Heeren, *Pulling Teeth: The State of Mandatory Immigration Detention*, 45 HARV. C.R.-C.L. L. REV. 2 (2010), available at <http://ssrn.com/abstract=1688958> (“During the three years that Mohammad Azam Hussain was in the custody of the Department of Homeland Security [DHS], he lost three teeth. The dentist who pulled those teeth suggested that Hussain would keep losing teeth until he received periodontal surgery.”), p. 91. (“Hussain had developed gum disease while in DHS custody—a condition he blamed on poor nutrition and a lack of real toothbrushes in one of the jails at which he was housed. But the Division of Immigrant Health Services would not pay for surgery to address the underlying gum disease—it would only pay for extraction. DHS may have preferred a stopgap measure like pulling teeth to dental surgery because it considers immigration detention to be short-term—a form of preventative, not punitive, custody designed to assure the appearance of immigrants who might otherwise fail to show up for their supposedly fast-track removal proceedings. In fact, an increasing number of immigrants are subject to “mandatory detention,” meaning that they are ineligible for bond because they are subject to removal on certain grounds.”) *Id.*, p. 93. See also Dora Schiro, *Improving Conditions of Confinement for Criminal Inmates and Immigrant Detainees*, 47 AM. CRIM. L. REV. 1441, 1442 (2011), (“Immigration Detention and Criminal Incarceration detainees tend to be seen by the public as comparable, and both confined populations are typically managed in similar ways. They are represented as a threat to public safety, locked behind barbed wire, often in remote facilities, and subjected to the detailed control emblematic of all secure environments. Often, they are held alongside their criminal counterparts. People serving time as a sanction for engaging in criminal activity are housed in the same facilities as people waiting to receive an immigration court’s decision about which country will become their next residence.”). See also Sean Becker, “Immigration Reform 2013: Catholic Clergy Plea for Action” *Policy.Mic*, Dec. 3, 2013 <http://mic.com/articles/75333/immigration-reform-2013-catholic-clergy-plead-for-action>.

frequent separation of families, mothers, and children during detention.¹¹ Reports also indicate that the federal government is not giving detained immigrants the fundamental due process or constitutional rights to which they are entitled.¹² Additionally, there have been reports that DHS and its component agencies are not fully complying with PBNDS and PREA.¹³

Relevant Immigration Laws Contributing to the Rise in Unauthorized Immigration and Subsequently Increasing the Number of Detained Immigrants at Federal Facilities.

The Immigration Reform and Control Act of 1986 (IRCA)¹⁴ was enacted to amend and reform U.S. immigration policies by including:

- provisions addressing employer sanctions for hiring undocumented workers,
- increasing enforcement of existing immigration laws, and
- encouraging legal immigration.¹⁵

IRCA provided an opportunity for undocumented immigrants to apply for and attain legal status, upon meeting certain requirements including: proof of residency in the United States since January 1986; a clean criminal record; registration within the Selective Service System; and a basic knowledge of U.S. history, government, and the English language.¹⁶ The law also prohibited businesses from hiring unauthorized immigrants and provided for reinforcements along the Mexican border.¹⁷ IRCA is often considered a failure because the number of undocumented immigrants in the United States increased from an estimated 3–5 million in 1986

¹¹ Sean Becker, “Immigration Reform 2013: Catholic Clergy Plea for Action” *Policy.Mic*, 3 Dec 2013, available at <http://mic.com/articles/75333/immigration-reform-2013-catholic-clergy-plea-for-action>.

¹² See generally, Heeren, Geoffrey, Pulling Teeth: The State of Mandatory Immigration Detention, 45 HARV. C.R.-C.L. L. REV. 2 (2010), available at <http://ssrn.com/abstract=1688958>.

¹³ 42 U.S.C. §15601-09 (2003); See generally, Dora Schriro, *Improving Conditions of Confinement for Criminal Inmates and Immigrant Detainees*, 47 AM. CRIM. L. REV. 1441, 1442 (2011).

¹⁴ The Immigration Reform and Control Act of 1986, PUB. L. 99-603, 100 stat. 3359 (1986) (Codified at 8 U.S.C. §1342a); See also *Hoffman Plastic Compounds, Inc. v. N.L.R.B.*, 535 U.S. 137, 122 S. Ct. 1275, 152 L. ED. 2d 271 (2002); *INS v. National Center for Immigrants’ Rights, Inc.*, 502 U.S. 183 (1991); See generally, Robert C. Rice, Alien Employment Control and Employer Compliance Under the Immigration Reform and Control Act of 1986, 29 S. TEX. L. REV. 313 (1988); Shahid Haque, Beyond Hoffman Plastic: Reforming National Labor Relations Policy to Conform to the Immigration Reform and Control Act, 79 CHI.-KENT L. REV. 1357 (2004); Maurice A. Roberts, Employers As Junior Immigration Inspectors: The Impact of the 1986 Immigration Reform and Control Act, 21 INT’L LAW. 1013 (1987). Karon O. Bowdre, Immigration Law: What You Do Not Know Can Hurt You-and Your Client, 50 ALA. LAW. 234 (1989).

¹⁵ 22 Weekly Comp. Pres. Doc. 1534 (October 19, 2015).

¹⁶ Ibid.

¹⁷ Ibid.

to more than 11 million today.¹⁸ Some blame IRCA for its failure to provide a reasonable process for immigrants to lawfully work in the United States.¹⁹ Despite calling for stricter control of the Mexican–U.S. border, legislators who voted for the bill in 1986 found that the provisions promising amnesty to undocumented immigrants only attracted more unauthorized immigration.²⁰

In 1996, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA).²¹ According to President Bill Clinton, IIRIRA “strengthens the rule of law by cracking down on illegal immigration at the border, in the work place, and in the criminal justice system – without punishing those living in the United States legally.”²² Congress also granted INS an additional \$15 million to support the detention and removal of undocumented immigrants with ties to terrorist organizations and to enhance their intelligence gathering ability.²³

In 2004, Congress passed the Intelligence Reform and Terrorism Prevention Act (IRTPA).²⁴ While the Act’s primary purpose was to improve the nation’s intelligence gathering activities, Section 5204 appropriated funds directing DHS to keep, at minimum, 8,000 available beds at immigration detention facilities between fiscal years 2006 and 2010.²⁵ However, in 2014,

¹⁸ See generally, Patrick S. Cunningham, *The Legal Arizona Worker's Act: A Threat to Federal Supremacy over Immigration?*, 42 ARIZ. ST. L.J. 411 (2010). Jeffrey Klamut, *The Invisible Fence: De Facto Exclusion of Undocumented Workers from State Workers' Compensation Systems*, KAN. J.L. & PUB. POL'Y, Winter 2006-2007; Cecelia M. Espenosa, *The Illusory Provisions of Sanctions: The Immigration Reform and Control Act of 1986*, 8 GEO. IMMIGR. L.J. 343 (1994); Sarah M. Kendall, *America's Minorities Are Shown the "Back Door" . . . Again: The Discriminatory Impact of the Immigration Reform and Control Act*, 18 HOUS. J. INT'L L. 899 (1996); Suzanne E. Cevasco, *Nation of Immigrants, Nation of Laws: Agriculture As the Achilles Heel of Enforcement-Only Immigration Legislation*, 37 SETON HALL LEGIS. J. 175 (2012). Michael J. Larson, *The Right U.S. Immigration Enforcement Solution: "Make Haste Slowly,"* 66 U. MIAMI L. REV. 807, 808 (2012).

¹⁹ “Built to Last: How Immigration Reform Can Deter Unauthorized Immigration.” Built to Last: How Immigration Reform Can Deter Unauthorized Immigration. Accessed July 14, 2015. <http://www.immigrationpolicy.org/just-facts/built-last-how-immigration-reform-can-deter-unauthorized-immigration>.

²⁰ See generally María Pabón López & Natasha Ann Lacoste, *Immigration Reform in 2013-14: An Essay on the Senate's Bipartisan Plan, the House's Standards for Immigration Reform, Interest Convergence and Political Realities*, 17 HARV. LATINO L. REV. 121, 123 (2014). See also Robert Pear, “‘86 Law Looms Over Immigration Fight,” *New York Times*, June 12, 2007, available at <http://www.nytimes.com/2007/06/12/washington/12immig.html>; Jeb Bush & Clint Bolick, *A Republican Case for Immigration Reform*, *Wall St. J.* (June 30, 2013), available at <http://online.wsj.com/article/SB10001424127887324328204578571641599272>.

²¹ Omnibus Consolidated Appropriations Act, 1997, PL 104–208, September 30, 1996, 110 Stat 3009.

²² 32 Weekly Comp. Pres. Doc. 1935 (Oct. 7, 1996).

²³ *Supra* Note 20.

²⁴ Intelligence Reform and Terrorism Prevention Act of 2004, PL 108–458, Dec. 17, 2004, 118 Stat 3638.

²⁵ *Ibid.*

through an appropriations act, Congress mandated that DHS maintain 34,000 immigrant detention beds per day.²⁶

On June 15, 2012, President Barack Obama issued an Executive Order (EO) creating the Deferred Action for Childhood Arrivals (DACA) program to defer the deportation of certain undocumented persons who came to the United States as children and to provide them with work authorization.²⁷ DACA took effect on August 15, 2012, and since its inception approximately 665,000 young persons have received DACA approval.²⁸ Recently, the National Immigration Law Center and Tom K. Wong of the University of California, San Diego conducted a survey of DACA recipients.²⁹ The survey found that:

- 96% of respondents were either in school or had employment;
- 57% earned money to help their families;
- DACA recipients had an average wage increase of 45%; and
- 92% of respondents pursued educational opportunities they were unable to access before DACA.³⁰

On November 20, 2014, President Obama announced several EOs attempting to fix the U.S. immigration system.³¹ While the President did not actually issue any executive orders, Department of Homeland Security Secretary Jeh Johnson issued a memorandum expanding deferred action.³² The memorandum expanded the class of people covered by DACA,³³ extended

²⁶ This mandate exponentially increased the amount of money the U.S. spent on detaining immigrants rather than directing resources towards intelligence gathering as IRTPA intended. *See Consolidated Appropriations Act of 2014*, PUB. L. No. 113-76, 128 Stat. 5, 251 (directing ICE to maintain 34,000 beds per fiscal year).

²⁷ *See White House, Office of the Press Secretary, "Remarks by the President on Immigration," available at <https://www.whitehouse.gov/the-press-office/2012/06/15/remarks-president-immigration>.*

²⁸ "Results from a Nationwide Survey of DACA Recipients Illustrate the Program's Impact," Center for American Progress, *available at <https://www.americanprogress.org/issues/immigration/news/2015/07/09/117054/results-from-a-nationwide-survey-of-daca-recipients-illustrate-the-programs-impact/>.*

²⁹ *Ibid.*

³⁰ *Ibid.*

³¹ White House, Briefing Room, "Fixing the System: President Obama is Taking Action on Immigration," *available at <https://www.whitehouse.gov/issues/immigration/immigration-action>.*

³² Memorandum from Jeh Johnson, Secretary, Dept. of Homeland Sec., to León Rodríguez, Director, U.S. Citizenship and Immigration Services; Thomas S. Winkowski, Acting Director, U.S. Customs and Immigration Enforcement; R. Gil Kerlikowske, Commissioner, U.S. Customs and Border Patrol (Nov. 20, 2014), *available at http://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf.*

³³ White House, "It's Time to Fix Our Broken Immigration System," accessed June 16, 2015, *available at <https://www.whitehouse.gov/issues/immigration/immigration-action>.*

DACA provides that those who were under the age of 31 on June 15, 2012, who entered the United States before June 15, 2007 (5 years prior) as children under the age of 16, and who meet specific educational and public safety criteria, are eligible for deferred action on a case-by-case basis. The initial DACA announcement of June 15, 2012.

DACA's duration,³⁴ and also expanded deferred action beyond the limits of DACA to cover a new group of people – undocumented immigrant parents of U.S. citizens or legal permanent residents.³⁵

On November 21, 2014, the Commission commended President Obama on his issuance of the executive action. The Commission publicly stated that:

[W]e understand the outlined actions are not comprehensive, and in order to fully modernize our system of immigration, Congress *will* need to act. Nevertheless, the actions taken by the President today allow immigrants to come out of the shadows, expand DACA (Deferred Action for Childhood Arrivals) to protect more “DREAMers” (Development, Relief, and Education for Alien Minors), allow families to remain together as they forge ahead toward the American Dream, and protect victims of human trafficking.

provided deferred action for a period of two years. On June 5, 2014, U.S. Citizenship and Immigration Services (USCIS) announced that DACA recipients could request to renew their deferred action for an additional two years.

In order to further effectuate this program, I hereby direct USCIS to expand DACA as follows:

Remove the age cap. DACA will apply to all otherwise eligible immigrants who entered the United States by the requisite adjusted entry date before the age of sixteen (16), regardless of how old they were in June 2012 or are today. The current age restriction excludes those who were older than 31 on the date of announcement (i.e., those who were born before June 15, 1981). That restriction will no longer apply. . . .

Adjust the date-of-entry requirement. In order to align the DACA program more closely with the other deferred action authorization outlined below, the eligibility cut-off date by which a DACA applicant must have been in the United States should be adjusted from June 15, 2007 to January 1, 2010.

³⁴ *Id.*

Extend DACA renewal and work authorization to three-years. The period for which DACA and the accompanying employment authorization is granted will be extended to three-year increments, rather than the current two-year increments. This change shall apply to all first-time applications as well as all applications for renewal effective November 24, 2014. Beginning on that date, USCIS should issue all work authorization documents valid for three years, including to those individuals who have applied and are awaiting two-year work authorization documents based on the renewal of their DACA grants. USCIS should also consider means to extend those two-year renewals already issued to three years.

³⁵ *Id.*

I hereby direct USCIS to establish a process, similar to DACA, for exercising prosecutorial discretion through the use of deferred action, on a case-by-case basis, to those individuals who:

- have, on the date of this memorandum, a son or daughter who is a U.S. citizen or lawful permanent resident;
- have continuously resided in the United States since before January 1, 2010;
- are physically present in the United States on the date of this memorandum, and at the time of making a request for consideration of deferred action with USCIS;
- have no lawful status on the date of this memorandum; are not an enforcement priority as reflected in the November 20, 2014 Policies for the Apprehension, Detention and Removal of Undocumented Immigrants Memorandum; and
- present no other factors that, in the exercise of discretion, make the grant of deferred action inappropriate.

Department of Homeland Security and Immigration & Customs Enforcement

Prior to September 11, 2001, the Attorney General had sole authority to administer and enforce U.S. immigration law.³⁶ After 9/11, Congress passed the Homeland Security Act of 2002³⁷ (HSA). The HSA created DHS, which took over many immigration service and enforcement functions from the Immigration and Naturalization Service (INS). Under HSA §477(c)(2)(F), the Secretary of DHS was granted the authority to administer immigration enforcement and policy:

The Secretary of Homeland Security shall be charged with the administration and enforcement of this chapter and all other laws relating to the immigration and naturalization of aliens, except in so far as this chapter or such laws relate to the powers, function, and duties conferred upon the President, Attorney General, the Secretary of State, the officers of the Department of State, or diplomatic or consular officers: Provided, however, that determination and ruling by the Attorney General with respect to all questions of law shall be controlling.³⁸

Using the authority of the language above, the Secretary of DHS issued a Final Rule³⁹ on March 6, 2003, defining his authority to administer and enforce immigration laws.⁴⁰ The Final Rule stated:

All authorities and functions of the Department of Homeland Security to administer and enforce the immigration laws are vested in the Secretary of the Homeland Security. The Secretary of Homeland Security may, in the Secretary's discretion, delegate any such authority or function to any official, officer, or employee of the Department of Homeland Security⁴¹

Currently, DHS has the primary responsibility for securing U.S. borders and managing the immigration process.

³⁶ 8 U.S.C. §1101(a)(1).

³⁷ Homeland Security Act of 2002, 116 Stat. 2135, PUB. L. 107–296 (Nov. 25, 2002).

³⁸ *Ibid.*

³⁹ Authority of the Secretary of Homeland Security; Delegations of Authority; Immigration Laws, 68 FED. REG. 10922, 10923 (March 6, 2003) (codified at 8 C.F.R. §2.1).

⁴⁰ *Ibid.*

⁴¹ *Ibid.*

Detained Immigrants

Detained immigrants are persons who immigrate to the United States without authorization and proper documentation.⁴² Federal law prohibits individuals from entering the United States without proper documentation, and immigrants who do cross U.S. borders without proper authorization and documentation break federal law.⁴³ Despite breaking federal law, the federal government does not consider detained immigrants criminals until a court of law tries and convicts them.⁴⁴ Instead, detained immigrants are considered civil detainees held in custody for administrative purposes.

IIRIRA⁴⁵ categorizes detained noncitizen immigrants into various priority levels and classes subject to mandatory detention.⁴⁶ Any noncitizen immigrant who is a criminal⁴⁷ or terrorist is removable (deportable)—pending a final removal decision by an immigration judge—and

⁴² Michael Hoefler, Nancy Rytina, and Bryan C. Baker, *Population Estimates: Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2009*. Department of Homeland Security, January 2010, available at https://www.dhs.gov/xlibrary/assets/statistics/publications/ois_ill_pe_2009.pdf.

⁴³ See generally, INA (as amended), IRCA, and IIRIRA. See also, Riddhi Mukhopadhyay, *Death in Detention: Medical and Mental Health Consequences of Indefinite Detention of Immigrants in United States*, 7 SEATTLE J. SOC. JUST. (2) Article 19 (2008), available at <http://digitalcommons.law.seattleu.edu/sjsj/vol7/iss2/19>. (“Among other things, IIRIRA . . . penalized persons who entered the United States illegally and remained in the country, allowed retroactive deportation for relatively minor criminal offenses committed years before the passage of the law, further curtailed waivers from deportation and judicial review, mandated detention of immigrants during their deportation proceedings, and limited immigrants’ access to public benefits.”). pp. 699–700.

⁴⁴ *Id.* at 698. (Although this is technically true, “[m]any asylum seekers are detained and questioned before being able to initiate this process due to their method of entry into the United States: by crossing the border, arriving by boat, or through falsified travel documents, if they have any at all. Even when asylum seekers do arrive with proper documentation, its validity is often times called into question by immigration and border inspectors. As a result, the restrictions in immigration law, in combination with the arbitrary discretion given to border inspectors, leave many asylum seekers and immigrants either turned away at the border or immediately detained.”).

⁴⁵ Subtitle C of the Omnibus Consolidated Appropriations Act, 1997, PUB. L. 104-208, signed into law Sept. 30, 1996.

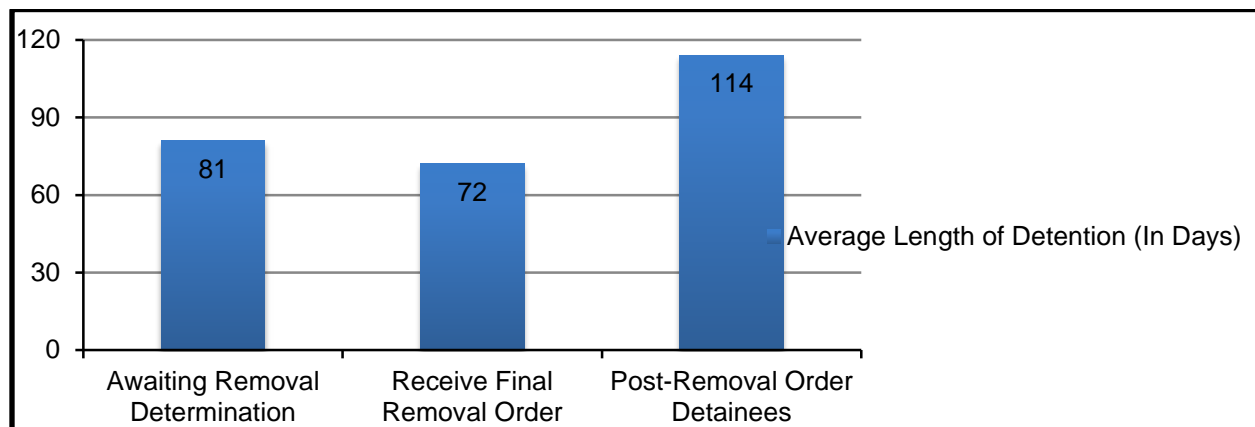
⁴⁶ Memorandum from Michael Pearson, INS Executive Associate Commissioner, Office of Field Operations, to Regional Directors, Detention Guidelines Effective Oct. 9, 1998; Alison Siskin, *Immigration-Related Detention: Current Legislative Issues*. RL32369, Congressional Research Service, Washington, DC: U.S. Government Printing Office, 2012.

⁴⁷ “Criminal aliens include those who are inadmissible on criminal-related grounds as well as those who are deportable due to the commission of certain criminal offenses while in the United States. An alien is inadmissible for (1) crimes of moral turpitude; (2) controlled substance violations; (3) multiple criminal convictions with aggregate sentences of five years or more; (4) drug trafficking; (5) prostitution and commercialized vice; and (6) receipt of immunity from prosecution for serious criminal offenses (INA §212(a)). An alien is deportable for the following offenses: (1) crimes of moral turpitude; (2) aggravated felonies; (3) high speed flight; (4) controlled substance violations; (5) certain firearm offenses; and (6) crimes of domestic violence, stalking, and child abuse (INA §237(a)(2)). Any alien who is found in the United States who is inadmissible is deportable. Only the following groups of criminal aliens who are inadmissible or deportable are not subject to mandatory detention: (1) aliens convicted of a single crime of moral turpitude who were sentenced to less than one year; (2) aliens convicted of high speed flight; and (3) aliens convicted of crimes of domestic violence, stalking, and child abuse or neglect.” See *Ibid.*

subject to mandatory detention.⁴⁸ The federal government may detain, parole, or release on bond all other undocumented immigrants.⁴⁹ Additionally, there is not a specific time frame indicating when the government must release a detained immigrant. Removal proceedings are not formally limited by time constraints, and detention can last for months or even years.⁵⁰

Although records regarding the numbers of immigrants passing through the federal immigration detention system are not entirely accurate, a study conducted by the nonprofit Migration Policy Institute (MPI) provides some insight into the statistics, on average, of time spent in detention.⁵¹

FIGURE 1. Average Length of Detention (Days)



Source: Whitney Chelgren, *Preventive Detention Distorted: Why It Is Unconstitutional to Detain Immigrants Without Procedural Protections*, 44 *LOY. L.A. L. REV.* 1477, 1488-89 (2011).

Figure 1 depicts the average length of stay for detainees at various points in the immigration detention process. MPI found that the average length of detention for detainees who were still awaiting a removal determination (“pre-removal order detainees”) was 81 days. With respect to those who had received a final removal order (“post-removal order detainees”), the average length of detention subsequent to receiving the removal order was 72 days or more. Conversely, Kevin Landy, ICE Assistant Director for the Office of Detention Policy and Planning (ODPP), stated that “[o]fficial ICE data indicates that the average length of stay in ICE detention for FY

⁴⁸ See INA §103(a), as amended; 8 C.F.R. §§236.1(c), 236.1(d), 287.3(d). For more information on this decision See CRS Congressional Distribution Memorandum, *Policy Implications of Department of Justice Ruling on Bond Determinations for Unauthorized Aliens in Detention*, by Alison Siskin. Available from the author.

⁴⁹ 8 C.F.R. § 236.1 et. seq.; *See generally* Farrin R. Anello, *Due Process and Temporal Limits on Mandatory Immigration Detention*, 65 *Hastings L.J.* 363 (2014), Gerard Savarrese, *When Is When?: 8 U.S.C. S 1226(c) and the Requirements of Mandatory Detention*, 82 *Fordham L. Rev.* 285 (2013), Erin B. Corcoran, *Bypassing Civil Gideon: A Legislative Proposal to Address the Rising Costs and Unmet Legal Needs of Unrepresented Immigrants*, 115 *W. VA. L. REV.* 643, 644 (2012).

⁵⁰ *See supra* note 48.

⁵¹ *Ibid.*

2014 was 29.6 days.”⁵² Mr. Landy’s statement directly contradicts MPI’s estimate for post-removal order detainees’ total average amount of time in detention, counting from the first day in detention until the day that MPI collected its data, of 114 days. While it is unclear whether the government had already detained 1,792 persons for over six months,⁵³ more data must be collected or further clarified to provide more accurate estimates.

Immigrants entering the United States without valid documentation or with forged documentation are subject to expedited removal.⁵⁴ Expedited removal is a process in which an undocumented immigrant is ordered removed from the United States without any further hearings, appeals, or reviews.⁵⁵ Undocumented immigrants detained under the expedited removal process:

- are subjected to continuous detention;
- must remain detained until they are removed; and
- may be released only for medical emergencies or for law enforcement purposes.⁶¹

DHS also continues to detain immigrants if the detained immigrant expresses a credible fear of persecution in his or her home country⁵⁶ or intends to apply for asylum until DHS can hold an interview and a hearing.⁵⁷

There are three types of facilities that detain or hold undocumented immigrants: Service Processing Centers (SPCs), Contract Detention Facilities⁵⁸ (CDFs), and Intergovernmental Service Agreement Facilities⁵⁹ (IGSAs).⁶⁰ Many of these detention facilities have a structure and

⁵² Kevin Landy, in his official capacity as ICE Assistant Director for the Office of Detention Policy and Planning (ODPP), sent the Commission additional comments in response to Commission staff inquiry. This information is available at the U.S. Commission on Civil Rights Headquarters located at 1331 Pennsylvania N.W., Washington D.C., 20425.

⁵³ Whitney Chelgren, *Preventive Detention Distorted: Why It Is Unconstitutional to Detain Immigrants Without Procedural Protections*, 44 *LOY. L.A. L. REV.* 1477, 1488-89 (2011).

⁵⁴ INA §235(b)(1)(A)(i).

⁵⁵ *Ibid.*

⁵⁶ Section 235(b)(1)(B)(v) of the INA defines credible fear as: “A significant possibility, taking into account the credibility of the statements made by the alien in support of his or her claim and such other facts as are known to the officer, that the alien could establish eligibility for asylum under [INA] Section 208.”

⁵⁷ See <http://www.uscis.gov/humanitarian/refugees-asylum/asylum/questions-answers-credible-fear-screening>.

⁵⁸ CDF detention facilities “owned by private companies and contracted directly with ICE.” See 79 Fed. Reg. 13100, 13104 (March 7, 2014).

⁵⁹ IGSAs are detention “facilities [that] are provided to ICE by States or local governments through agreements and may be owned by the State or local government, or a private entity. See 79 Fed. Reg. 13100, 13104 (March 7, 2014).

⁶⁰ A description of each can be found in Chapter 2 of this Report.

appearance similar to a criminal detention facility. For example, during its visit to Port Isabel Detention Center, the Commission observed that double barbed wire fences surrounded the facility, the dormitories were locked and guarded, food was distributed in bags, and detainees wore garb similar to prison inmates.⁶¹

⁶¹ The Commission visited Port Isabel Detention Center in Harlingen, TX, on May 5, 2015.

CHAPTER 2. FEDERAL AGENCIES RESPONSIBLE FOR IMMIGRATION DETENTION AND POLICIES

Department of Homeland Security

The U.S. Department of Homeland Security (DHS) is responsible for apprehending and detaining undocumented immigrants in the United States. While DHS's Immigration & Customs Enforcement (ICE) and Customs and Border Protection (CBP) are primarily responsible for carrying out DHS's immigration mandates, other DHS components also play important roles in overseeing compliance with and investigating violations of immigrant civil rights, the Performance Based National Detention Standards (PBNDS), and the Prison Rape Elimination Act of 2003 (PREA). Table 1 identifies DHS's primary components involved in immigration detention and their roles.⁶²

TABLE 1. Primary DHS Immigration Detention Components

DHS Components and Offices	
U.S. Immigration and Customs Enforcement (ICE)	
Enforcement and Removal Operations (ERO)	<ul style="list-style-type: none"> Identifies and apprehends removable aliens, detaining these individuals when it deems necessary and removing them from the United States
Custody Management	<ul style="list-style-type: none"> Contracts with inspectors to conduct routine inspections of certain detention facilities to assess compliance with ICE detention standards, including SAAPI standards, and develops corrective action plans, as necessary Oversees the onsite Detention Monitoring Program, created in 2010, which places ICE detention service managers (DSMs) at select facilities to monitor that conditions of confinement are in accordance with ICE detention standards, including SAAPI standards Administers the ICE Community and Detainee Helpline, which detainees may use to report sexual abuse and assault,

⁶² Government Accountability Office, *Immigration Detention: Additional Actions Could Strengthen DHS Efforts to Address Sexual Abuse*. GAO-14-38. Washington, DC: U.S. Government Printing Office, 2014.

TABLE 1. Primary DHS Immigration Detention Components

DHS Components and Offices	
	among other grievances
Field Operations	<ul style="list-style-type: none"> • Ensures that the appropriate components have been notified following an alleged sexual abuse or assault and documents these notifications • Ensures that facilities are aware of response, intervention, and investigation mandates established by relevant detention standards following alleged sexual abuse or assault through personnel located at 24 field offices • Reviews annual self-assessments conducted by select facilities
Office of Detention Policy and Planning (ODPP)	<ul style="list-style-type: none"> • Leads efforts to design detention standards, including SAAPI standards; charged with designing a new civil detention system • Houses an agency-wide prevention of Sexual Assault coordinator to develop, implement, and oversee ICE’s SAAPI efforts
Office of Professional Responsibility (OPR)	<ul style="list-style-type: none"> • Investigates select allegations of sexual abuse and assault • Documents allegations of sexual abuse and assault in the Joint Integrity Case Management System, a system to log, track, and manage cases for all OPR functions including investigations • Coordinates sexual abuse and assault investigations with federal, state, or local law enforcement or facility incident review personnel
Office of Detention Oversight (ODO)	<ul style="list-style-type: none"> • Inspects facility compliance with detention standards, including SAAPI standards, using a risk-based methodology
Joint Intake Center	<ul style="list-style-type: none"> • Receives, processes, and assigns for review or investigation all misconduct allegations involving ICE and CBP employees, including those pertaining to sexual abuse and

TABLE 1. Primary DHS Immigration Detention Components

DHS Components and Offices	
	assault in detention facilities
ICE Health Service Corps	<ul style="list-style-type: none"> Provides direct detainee care in some facilities, where corps members may serve as first responders in instances of sexual abuse and assault, and oversees care administered by non-ICE Health Services Corps providers in other facilities
Office of Acquisition Management (OAQ)	<ul style="list-style-type: none"> Negotiates and manages ICE contracts and agreements for detainee housing at detention facilities
Office of Inspector General	<ul style="list-style-type: none"> Operates hotline to which detainees can report sexual abuse and assault allegations Has investigative primacy for all sexual abuse and assault allegations against DHS or contractor staff members regardless of how they are reported

Source: Government Accountability Office. SAAPI- Sexual abuse and assault prevention and intervention standards.

Immigration and Customs Enforcement

In 2003, the U.S. Customs Service and Immigration and Naturalization Services' investigative and interior enforcement elements merged to create ICE, the principal DHS investigative arm.⁶³ ICE's primary mission is to promote homeland security and public safety through the criminal and civil enforcement of federal laws governing border control, customs, trade, and immigration.⁶⁴ ICE enforces its mission through the work of several component offices: the Enforcement and Removal Operations (ERO), Homeland Security Investigations (HSI), and Management & Administration (MA). This portion of the Report focuses specifically on ERO.

⁶³ U.S. Immigration & Customs Enforcement, *Who We Are*, available at <http://www.ice.gov/about>.

⁶⁴ U.S. Immigration & Customs Enforcement, *What We Do*, available at <http://www.ice.gov/overview>.

ICE—Enforcement and Removal Operations

ICE's ERO office is the principal component for enforcing U.S. immigration laws.⁶⁵ ERO enforces these laws by "identifying and apprehending removable aliens, detaining these individuals when necessary, and removing them from the United States."⁶⁶ However, ERO prioritizes who to apprehend, arrest, and remove based on criminal record, level of threat the individual poses to national security, the detained individual's fugitive status, and how recently an immigrant entered the United States.⁶⁷

ERO is prohibited from detaining a child unless the child is detained with his/her family and is housed at a family detention center.⁶⁸ If an immigrant child is unaccompanied, ERO must transfer him/her to the U.S. Department of Health and Human Services (HHS) Office of Refugee Resettlement within 72 hours.⁶⁹ However, ERO detains men and women from various countries seeking to gain entrance to the United States each year.⁷⁰

Some political groups assert that undocumented immigrants are mostly criminals.⁷¹ However, statistical research indicates that their allegations are unfounded. According to

⁶⁵ Kevin Landy, Assistant Director, ICE Office of Detention Policy and Planning, Written Statement. Available at the U.S. Commission on Civil Rights National Headquarters, 1331 Pennsylvania Avenue, NW, Suite 1150, Washington, D.C., 20425.

⁶⁶ *Ibid.*

⁶⁷ "Enforcement and Removal Operations." Enforcement and Removal Operations. 2015, available at <http://www.ice.gov/ero>.

⁶⁸ See 8 U.S.C. § 1232(b)(3). Family detention centers are detention centers that detain mothers and their children within the same facility.

⁶⁹ *Id.*

⁷⁰ Government Accountability Office. *Immigration Detention: Additional Actions Needed to Strengthen Management and Oversight of Facility Costs and Standards*. GAO-15-153. Washington, DC: U.S. Government Printing Office, 2014.

⁷¹ Vaughan, Jessica. "ICE Document Details 36,000 Criminal Alien Releases in 2013." Center for Immigration Studies, accessed June 15, 2015, available at <http://cis.org/ICE-Document-Details-36000-Criminal-Aliens-Release-in-2013>. See, e.g., Jim Garrett, *Illegal Immigrants Are Criminals*, *Asbury Park Press*, July 22, 2010, (on file, U. PA. J. CONST. L.) (Equating immigration violators and criminals); *Illegal Immigrants Are Criminals*, *Chicago Tribune*, March 19, 2010, available at http://articles.chicagotribune.com/2010-03-19/news/chi-100319loeffler_briefs_1_criminals-reign-alien. ("I cannot find 'undocumented' in my dictionary. This is [a] euphemism for illegal alien. In my dictionary, illegal means criminal."); Jaynee Germond, *Illegal Means Criminal*, Jaynee Germond for US Congress (Sept. 27, 2009), available at <http://jayneegermondforcongress.blogspot.com/2009/09/illegal-means-criminal.html>. ("What is so difficult about the concept of illegal immigration[?] Illegal means criminal....Why aren't these known criminals deported immediately?"); *Illegal Immigration Is a Crime*, Fed'n for Am. Immigr. Reform (Mar.2005), available at http://www.fairus.org/site/News2?page=NewsArticle&id=16663&security=1601&news_iv_ctrl=1007. (labeling "aliens who flagrantly violate our nation's laws by unlawfully crossing U.S. borders and visa 'over stayers' as 'illegal immigrants' and noting that '[b]oth types of illegal immigrants are deportable under [the] Immigration and Nationality Act Section 237(a)(1)(B)'"). See generally, M. Kathleen

the PEW Research Center data set, there were 11.2 million undocumented immigrants living in the United States in 2013.⁷² Of those 11.2 million immigrants, only 88,000 were convicted criminals.⁷³ More recent DHS statistics also indicate that a majority of undocumented immigrants are not convicted criminals.⁷⁴ According to ICE, ICE removed 177,960 people who had criminal convictions in 2014 – which is the only known statistic of undocumented immigrants with previous criminal convictions.⁷⁵ When comparing the known statistic of undocumented immigrants removed from the United States to the estimated overall population of undocumented immigrants living in the United States, the percentage rate of undocumented immigrants with criminal records is approximately 1.5 percent.⁷⁶

When admitting immigrants to ICE detention facilities, ERO uses a classification system that separates detainees by threat risk and assigns special vulnerability classifications.⁷⁷ According to a 2014 Government Accountability Office (GAO) report, “[f]rom fiscal years 2010 through 2013, about 44 percent of ICE detainees were . . . low custody, 41 percent were of a medium custody level, and 15 percent were of a high custody level.”⁷⁸ Furthermore, a recent study by the American Immigration Council entitled, “The

Dingerman & Rubén G. Rumbaut, *The Immigration-Crime Nexus and Post-Deportation Experiences: En/Countering Stereotypes in Southern California and El Salvador*, 31 U. La Verne L. Rev. 363, 367 (2010) (“[Immigrants] who are detained and deported from the United States are perceived as not only ‘undocumented laborers’ but ‘criminal aliens.’”).

⁷² Krogstad, Jens, and Jeffrey Passel. "5 Facts about Illegal Immigration in the U.S." Pew Research Center RSS. November 18, 2014, *available at* <http://www.pewresearch.org/fact-tank/2014/11/18/5-facts-about-illegal-immigration-in-the-u-s/>.

⁷³ Vaughan, Jessica. "ICE Document Details 36,000 Criminal Alien Releases in 2013." Center for Immigration Studies, *available at* <http://cis.org/ICE-Document-Details-36000-Criminal-Aliens-Release-in-2013>.

⁷⁴ See FY 2014 Ice Immigration Removals Statistics and Overview, *available at* <http://www.ice.gov/removal-statistics>.

⁷⁵ Ibid.

⁷⁶ This number was taken by dividing the number of undocumented immigrants ICE had detained who were previously convicted of a crime (177,960) by the total number of the undocumented immigrant population in the United States (11.2 million).

Because of the nature of undocumented immigration, it is equally important to note that it is nearly impossible to calculate what percentages of the 11.2 million undocumented immigrants living in the United States have criminal records. Therefore, this report takes a known estimate of known ICE removals of people with criminal records and divides that number with the overall estimate of undocumented immigrants as shown above.

⁷⁷ Ibid.

⁷⁸ Government Accountability Office. *Immigration Detention: Additional Actions Needed to Strengthen Management and Oversight of Facility Costs and Standards*. GAO-15-153. Washington, DC: U.S. Government Printing Office, 2014.

Criminalization of Immigration in the United States,” concludes that immigrants are less likely to commit crimes than are native-born Americans, and higher immigration rates equate with lower crime rates.⁷⁹

As of August 2013, 166 of the 250 facilities overseen by ERO were authorized to detain immigrants for over 72 hours. According to a GAO report:

Over 90 percent of the facilities are operated under agreements with state and local governments and house about half of ICE’s total detention population, together with, or separately from, other confined populations. The remaining facilities house exclusively ICE detainees and are operated by a mixture of private and ICE, state, and local government employees.⁸⁰

On June 24, 2015, DHS Secretary Jeh Johnson released a statement regarding Family Residential Immigration Centers. After his visit to the Karnes Family Detention Center near San Antonio, Texas, Secretary Johnson stated, “I have reached the conclusion that we must make substantial changes in our detention practices with respect to families with children. In short, once a family has established eligibility for asylum or other relief under our laws, long-term detention is an inefficient use of our resources and should be discontinued.”⁸¹

Additionally, according to Secretary Johnson, ICE began implementing reforms in May 2015. For example, DHS ICE:

- began reviewing the cases of any families detained beyond 90 days to evaluate whether detention during the pendency of their immigration case is still appropriate. ICE gives priority to review of the cases of families who have been in these residential centers the longest;
- discontinued invoking general deterrence as a factor in custody determinations in all cases involving families;
- appointed a Federal Advisory Committee of outside experts to advise Director Saldaña and Secretary Johnson concerning family residential centers; and

⁷⁹ Ewing, Walter, Daniel Martinez, and Ruben Rumbout. "The Criminalization of Immigration in the United States." Special Report, 2015, *available at* http://immigrationpolicy.org/sites/default/files/docs/the_criminalization_of_immigration_in_the_united_states_final.pdf.

⁸⁰ Ibid.

⁸¹ Statement by DHS Secretary Jeh C. Johnson on Family Residential Centers, accessed June 24, 2015, *available at* <http://www.dhs.gov/news/2015/06/24/statement-secretary-jeh-c-johnson-family-residential-centers>.

- undertook additional measures to ensure access to counsel, attorney-client meeting rooms, social workers, educational services, comprehensive medical care, and continuous monitoring of the overall conditions at these centers.⁸²

On June 24, 2015, Secretary Johnson announced additional reforms.⁸³ He cited a plan to release detained immigrants who express a case of credible fear or reasonable fear of persecution on “appropriate monetary bond or other condition of release.”⁸⁴ Secretary Johnson stated that the appropriate level of bond amount would be “realistic” and take into account a detained immigrant’s ability to pay the bond, “while also encompassing risk of flight and public safety.”⁸⁵ Furthermore, the Secretary directed USCIS to “conduct credible fear and reasonable fear interviews within a reasonable timeframe,” which would still allow the agency to secure accurate personal and sponsorship information and a chance to receive “education about their rights and responsibilities.”⁸⁶ As of the writing of this report, however, it is unclear to the Commission whether these announced changes will be implemented and if so, how effective their operation will be.

CBP—Customs and Border Protection

U.S. Customs and Border Protection’s (CBP’s) primary mission is to detect and prevent the entry of terrorists, weapons of mass destruction, and unauthorized immigrants into the country and to intercept drug smugglers and other criminals along the border, and to facilitate international commerce and travel.⁸⁷ CPB operates three main components: the Office of Field Operations (OFO), Border Patrol (BP), and the Office of Air and Marine (OAM).⁸⁸ To accomplish this aim, CPB patrols 6,000 miles of American borders shared with Mexico and Canada as well as coastal waters around Florida and Puerto Rico.⁸⁹ These components have a field structure spanning the United States and its Territories.⁹⁰ There are currently 20 OFO offices, 20 BP sectors, and 3 OAM regions.⁹¹ CPB’s oversight structure is very complex. A 2014 GAO report stated:

⁸² Ibid.

⁸³ Statement by DHS Secretary Jeh C. Johnson on Family Residential Centers, Appendix A.

⁸⁴ Ibid.

⁸⁵ Ibid.

⁸⁶ Ibid.

⁸⁷ See <http://www.cbp.gov/about>.

⁸⁸ Ibid.

⁸⁹ See ICE overview at <http://www.cbp.gov/border-security/along-us-borders/overview>; See also Chad Haddal, Congressional Research Service. *Border Security: The Role of the U.S. Border Patrol*. GAO 7-7500. Washington, DC: U.S. Government Printing Office, 2011.

⁹⁰ Ibid.

Within this field structure, each component also manages individual locations; OFO field offices provide oversight of POEs [ports of entry], Border Patrol sectors oversee stations, and OAM regions oversee branches. For example, OAM’s Southwest Border Region provides oversight of individual air and marine branches across the southwest border⁹²

On May 15, 2015, the DHS Office of the Inspector General (OIG) issued a report criticizing its DHS component agency, U.S. Customs and Border Protection (CBP).⁹³ The report focused heavily on the accuracy of CBP’s metrics used to examine the effect of its “Operation Streamline” program. However, while not the primary basis for the report, OIG identified an additional issue regarding CBP’s guidance on using “Streamline for aliens who express fear of persecution or return to their home countries,” because they found that CBP’s “use of Streamline with such aliens is inconsistent and may violate U.S. treaty obligations.”⁹⁴ Moreover, DHS has raised concerns regarding certain CBP “Use of Force” practices when dealing with undocumented immigrants.⁹⁵

USCIS - U.S. Citizenship and Immigration Services

U.S. Citizenship and Immigration Services (USCIS) received responsibility for overseeing the federal government’s immigration service functions on March 1, 2003.⁹⁶ The Homeland Security Act of 2002 (HSA) requires USCIS to enhance the national immigration service’s security and efficiency by focusing on the administration of benefit applications.⁹⁷

Additionally, USCIS is responsible for the initial adjudication of asylum applications for immigrant children.⁹⁸ USCIS takes jurisdiction over asylum applications after CPB or

⁹¹ Ibid.

⁹² Available at <http://www.gao.gov/assets/670/664480.txt>.

⁹³ Department of Homeland Security – Office of the Inspector General. *Streamline: Measuring Its Effect on Illegal Border Crossing*. OIG-15-95. May 15, 2015, available at https://www.oig.dhs.gov/assets/Mgmt/2015/OIG_15-95_May15.pdf.

⁹⁴ Ibid.

⁹⁵ Homeland Security Advisory Council: Interim Report of the CBP Integrity Advisory Panel. June 29, 2015, available at http://soboco.org/wp-content/uploads/2015/06/HSAC-CBP-IAP-Interim-Report_FINAL_062915.pdf.

⁹⁶ U.S. Citizenship and Immigration Services, available at <http://www.uscis.gov>.

⁹⁷ Ibid.

⁹⁸ Lisa Seghetti, Alison Siskin, and Ruth Ellen Wasem, *Unaccompanied Alien Children: An Overview*. R43599. Washington, DC: U.S. Government Printing Office, 2014. Under the William Wilberforce

ICE determines if a child is an unaccompanied minor and transfers the minor to the HHS Office of Refugee Resettlement (ORR). Additionally, USCIS has jurisdiction over unaccompanied minor asylum applications pending in immigration court, the Board of Immigration Appeals, or in federal court, if applicable.⁹⁹

On April 11, 2013, USCIS Deputy Director Lori Scialabba issued a memorandum responding to concerns regarding the treatment of unaccompanied, detained children and USCIS compliance with the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2007 (TVPRA).¹⁰⁰ In particular, USCIS provided a series of five recommendations to ensure the effectiveness and fairness of the asylum process for unaccompanied children. The recommendations were as follows:

1. Accept jurisdiction of unaccompanied alien children cases as referred by the Executive Office of Immigration Review (EOIR).
2. Accept jurisdiction of cases filed by children under federal custody under HHS.
3. Follow established unaccompanied alien children-specific protocols, expand implementation of certain best practices, and enlist clinical experts for quality assurance and training. More specifically, USCIS should:
 - a. Establish points of contact for the public to improve communication, coordination, and problem-solving;
 - b. Pre-assign unaccompanied alien children cases to officers with specialized knowledge and skills; and
 - c. Contract with clinical experts adept at interviewing vulnerable children as part of an ongoing quality assurance and training component of the unaccompanied alien children asylum program.
4. Limit Headquarters review to a process that can be managed in 30 days.

Trafficking Victim Protection Reauthorization Act of 2008 (TVPRA, P.L. 110-457, 122 Stat. 5074, USCIS) has initial jurisdiction over an asylum application filed by an individual determined to be UNACCOMPANIED ALIEN CHILDREN.

⁹⁹ Ibid.

¹⁰⁰ USCIS, Memorandum from Lori Scialabba to Maria Odum: Responses to Citizenship and Immigration Services Ombudsman Recommendations, Ensuring a Fair and Effective Asylum Process for UNACCOMPANIED ALIEN CHILDREN, April 11, 2013, *available at* <http://www.uscis.gov/sites/default/files/USCIS/Resources/Ombudsman%20Liaison/Responses%20to%20Formal%20Recommendations/CISOMB%20UNACCOMPANIED%20ALIEN%20CHILDREN%20Recommendations%20.pdf>.

5. Issue as soon as possible regulations regarding the unaccompanied alien children asylum process.¹⁰¹

In response, USCIS highlighted changes it made to ensure a smooth adjudication process for unaccompanied alien children. For example, USCIS adopted the determinations made by DHS components (ICE and CBP) for custody purposes.¹⁰² Previously, the unaccompanied alien children asylum officer made an independent determination of whether a potential asylum seeker was an unaccompanied alien child separately from the determinations already made by ICE and CPB.¹⁰³ The new standards avoided duplicative work and unnecessary delay to proceedings.

In addition, the USCIS Asylum Division issued nationwide standards for customer (immigrant) access, including dedicated email addresses and phone numbers at each asylum office for customer service inquiries.¹⁰⁴ Through these efforts, USCIS endeavors to improve the efficiency of adjudication proceedings and its customer service.

Department of Justice—Executive Office for Immigration Review

EOIR is a Department of Justice (DOJ) component agency created on January 9, 1983, by combining the Board of Immigration Appeals and INS.¹⁰⁵ EOIR's primary mission is to adjudicate immigration cases in a fair, expedient, and uniform manner.¹⁰⁶ EOIR conducts immigration court proceedings, appellate reviews, and administrative hearings under the Attorney General's authority.¹⁰⁷

EOIR plays a vital role in adjudicating petitions for asylum for detained immigrants. According to the table below, asylum seekers fared worse between FY 2010 and FY 2014. Between FY 2010 and FY 2014, the agency received 203,044 petitions for asylum. Of those petitions, the agency only granted asylum to 23 percent of applicants compared to denying 21 percent – an overall increase in denials between FY 2010 and FY 2014.

¹⁰¹ Ibid.

¹⁰² Ibid.

¹⁰³ Memorandum from Lori Scialabba to Maria Odum: Responses to Citizenship and Immigration Services Ombudsman Recommendations, Ensuring a Fair and Effective Asylum Process for Unaccompanied Children, April 11, 2013, *available at* [http://www.uscis.gov/sites/default/files/USCIS/Resources/Ombudsman%20Liaison/Responses%20to%20Formal%20Recommendations/CISOMB%20UNACCOMPANIED ALIEN CHILDREN%20Recommendations%20.pdf](http://www.uscis.gov/sites/default/files/USCIS/Resources/Ombudsman%20Liaison/Responses%20to%20Formal%20Recommendations/CISOMB%20UNACCOMPANIED%20ALIEN%20CHILDREN%20Recommendations%20.pdf).

¹⁰⁴ Ibid.

¹⁰⁵ Executive Office for Immigration Review (EOIR), DOJ, About the Office, *available at* <http://www.justice.gov/eoir/about-office>.

¹⁰⁶ Executive Office for Immigration Review, DOJ, *available at* <http://www.justice.gov/eoir>.

¹⁰⁷ Ibid.

TABLE 2. Adjudications of Asylum Petitions

FY	Received	Granted	Denied
2010	32,830	8,519	8,336
2011	42,810	10,137	9,280
2012	45,555	10,715	8,503
2013	39,929	9,945	8,826
2014	41,920	8,775	9,222

Source: U.S. Department of Justice

EIOR also has specific policies for conducting undocumented children’s removal hearings.¹⁰⁸ EIOR policies dictate that undocumented children understand the nature of immigration proceedings and all the rights and guidelines in their adjudication process.¹⁰⁹

On July 7, 2015, the Commission released a letter to EOIR asking whether news reports of deportations of thousands of immigrant children due to missing or late hearing notices are true, and if so, concluding that there is potentially a significant due process concern.

The Commission raised questions to EOIR, including evidentiary sufficiency, methods of sending notices to affected children, methods of ascertaining accuracy of addresses, coordination measures to assist unaccompanied minors, sufficiency of time allowed for responses, statistics concerning numbers of asylum denials and those persons awaiting hearings, and adherence to official methods of service of process and court procedure.

Commission Chairman Martin Castro publicly stated:

If these reports are true, then this conduct is a gross denial by our government of due process to the most vulnerable of immigrants: children—and must be immediately rectified. This, on top of the

¹⁰⁸ See Memorandum from David L. Neal, Chief Immigration Judge, U.S. Dept. of Justice, to all Immigration Judges, Court Administrators, Judicial Law Clerks, and Immigration Court Staff (May 22, 2007), available at <http://www.justice.gov/sites/default/files/eoir/legacy/2007/05/22/07-01.pdf>.

¹⁰⁹ Ibid.

prolonged detention of so many women and children awaiting hearings, makes illusory any promise of fair treatment to those families seeking refuge and protection from violence and instability in their home countries.

As of the writing of this report, the Commission has not received a response from EOIR regarding this inquiry.

U.S. Department of Health and Human Services

On March 1, 2003, the Homeland Security Act (HSA), Section (§) 462 transferred responsibilities for the care and placement of unaccompanied children from the Commissioner of the INS to the Director of the HHS Office of Refugee Resettlement (ORR).¹¹⁰ Since then, ORR has cared for more than 150,000 children, incorporating child welfare values as well as the principles and provisions established by the 1997 Flores Agreement,¹¹¹ the Trafficking Victims Protection Act of 2000¹¹² and its reauthorization acts, TVPRA of 2005 and 2008.¹¹³

ORR is responsible for providing care and custody for unaccompanied alien children who are transferred to ORR by other federal agencies.¹¹⁴ The child is kept in ORR care until the agency finds a suitable sponsor to care for the child's well-being while awaiting his or her immigration proceeding.¹¹⁵ ORR specialists must make a placement determination for each child when a child is transferred to its custody.¹¹⁶ Children are placed in the least restrictive setting that is in the best interest of the child.¹¹⁷ ORR also identifies any special needs that a child may have in order to determine best and appropriate placement.¹¹⁸

ORR also gives children an initial medical examination and provides medical, dental, and mental health services.¹¹⁹ Additionally, ORR provides children with a "Know Your

¹¹⁰ Pub. L. No. 107-296, § 462, 116 Stat. 2135.

¹¹¹ Flores, Stipulated Settlement Agreement (C.D. Cal., 1997).

¹¹² Pub. L. 106-386, 114 Stat. 1464 (2000).

¹¹³ Pub. L. No. 110-457, 122 Stat. 5044 (2008) (as amended by Pub. L. No. 113-4, §1201, 127 Stat. 54 (2013)).

¹¹⁴ Anna Marie Bena, Written Testimony, U.S. Commission on Civil Rights, p. 2.

¹¹⁵ *Ibid.*

¹¹⁶ *Ibid.*

¹¹⁷ *Ibid.*

¹¹⁸ Anna Marie Bena, Written Testimony, U.S. Commission on Civil Rights, p. 2.

¹¹⁹ *Ibid.*

Rights” presentation, legal screenings, access to legal services, access to religious services, regular telephone calls to family members, case management services, individual service planning assistance, and weekly individual and group counseling.¹²⁰

¹²⁰ Ibid.

CHAPTER 3. IMMIGRATION DETENTION STANDARDS

Both a lack of binding regulations and standards create confusion and a lack of clarity in the application of detention standards in the immigration detention system.¹²¹ The National Detention Standards (NDS) 2000¹²² and Performance-Based National Detention Standards (PBNDS) 2008¹²³ and 2011¹²⁴ are intended to be “contractually binding upon detention facilities used by [DHS] through their incorporation into individual facility contract agreements.”¹²⁵ Different standards also apply to different facilities depending on when they created their respective contracts with ICE.¹²⁶ Additionally, because these standards do not have enforcement mechanisms, facilities are not held accountable when they fail to maintain or meet these standards - at times with tragic results.¹²⁷ Kevin Landy, ICE Assistant Director for Office of Detention Policy and Planning (ODPP), on the other hand, stated that “ICE has multiple options and available mechanisms for enforcing compliance with those standards.”¹²⁸

¹²¹ Whitney Chelgren, *Preventive Detention Distorted: Why It Is Unconstitutional to Detain Immigrants Without Procedural Protections*, 44 LOY. L.A. L. REV. 1477, 1498 (2011). Rebeca M. López, *Codifying the Flores Settlement Agreement: Seeking to Protect Immigrant Children in U.S. Custody*, 95 MARQ. L. REV. 1635, 1647 (2012); Corynn Neevel, *At the Intersection of Immigration and Health Care Law: The Lack of Clear Standards Governing Medical Repatriation and Suggestions for Future Oversight*, 45 GONZ. L. REV. 821 (2010); Christina P. Greer, *Safeguards for Mentally Disabled Respondents in Removal Proceedings*, 23 HEALTH MATRIX 279 (2013).

¹²² “2000 Detention Operations Manual.” 2000 Detention Operations Manual. Accessed June 1, 2015, available at <http://www.ice.gov/detention-standards/2000>.

¹²³ “2008 Detention Operations Manual.” 2008 Detention Operations Manual. Accessed June 1, 2015, available at <http://www.ice.gov/detention-standards/2008>.

¹²⁴ “2011 Detention Operations Manual.” 2011 Detention Operations Manual. Accessed June 1 2015, available at <http://www.ice.gov/detention-standards/2011>.

¹²⁵ Kevin Landy, in his official capacity as ICE Assistant Director for the Office of Detention Policy and Planning (ODPP), sent the Commission additional comments in response to Commission staff inquiry. This information is available at the U.S. Commission on Civil Rights Headquarters located at 1331 Pennsylvania N.W., Washington D.C., 20425. See generally, *Orantes-Hernandez v. Gonzales*, 504 F.Supp.2d 825, 861-63 (C.D. Cal. 2007) (Detention Operations Manuals are not binding); Lisa A. Cahan, *Constitutional Protections of Aliens: A Call for Action to Provide Adequate Health Care for Immigration Detainees*, 3 J. HEALTH & BIOMEDICAL L. 343 (2007).

¹²⁶ See ICE PBNDS Standards, available at <http://www.ice.gov/factsheets/facilities-pbnds>.

¹²⁷ Karen Tumlin et al., *Nat'l Immigration Law Ctr., A Broken System* vi, 1 (2009), available at <http://www.nilc.org/immlawpolicy/arrestdet/A-Broken-System-2009-07.pdf>; See also See DHS Sec., *Operations Manual ICE Performance Based National Detention Standards (2008)*, available at <http://www.ice.gov/detention-standards/2008/>, to review the PBNDS.

¹²⁸ Kevin Landy, in his official capacity as ICE Assistant Director for the Office of Detention Policy and Planning (ODPP), sent the Commission additional comments in response to Commission staff inquiry. This information is available at the U.S. Commission on Civil Rights Headquarters located at 1331 Pennsylvania N.W., Washington D.C., 20425. ICE, among other things, can “impose monetary sanctions on facilities that fail to comply with applicable standards, draw down the number of ICE detainees used at non-compliant

Story of Victoria Arellano: When ICE Fails to Abide by the PBNDS

Victoria Arellano was a transgendered woman who attempted to unlawfully enter the United States on two separate occasions.¹²⁹ ICE captured and detained Victoria on her second attempt.¹³⁰ ICE placed Victoria in an all-male detention facility in San Pedro, California.¹³¹ Prior to her detention, Victoria was diagnosed with AIDS and was prescribed dapasone—an antibiotic used to protect the immune system.¹³² According to several corroborating reports,¹³³ ICE neglected to give Victoria her necessary medication.¹³⁴ Victoria became very ill. She complained of nausea, headaches, back pain, and cramping.¹³⁵

Her fellow detainees cared for her to the best of their abilities. They soaked towels in water to help with the fever, placed a box next to her as she vomited blood, and assisted her to the bathroom when she was too weak to walk. Many detainees requested help for Arellano from the guards, and dozens signed a petition to get her to a hospital. Finally, a week before her death, Arrellano was taken to the infirmary and given amoxicillin, a drug not generally used to treat AIDS-related illnesses.

After officials returned her to the detention cell, her fellow detainees staged a protest, urging ICE officials to provide care for the weak and ill Arellano. After several more days of vomiting and diarrhea and after the detainees began chanting “hospital” to get the guards’ attention, she was taken to a hospital, only to be returned once more to the detention facility within 24 hours. After finally realizing her condition was critical, officials rushed Arellano to another hospital, where she died two days later, shackled to her hospital bed.¹³⁶

facilities, or terminate its usage of such facilities...” Moreover, according to Mr. Landy, “ERO requires detention facilities, in conjunction with their corresponding ERO Field Office, to develop, report, and implement corrective action plans for all identified standards violations...”

¹²⁹ Darryl Fears, “3 Jailed Immigrants Die in a Month,” *Washington Post*, Aug. 15, 2007, Nation. available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/08/14/AR2007081401690.html>.

¹³⁰ Ibid.

¹³¹ Ibid.

¹³² Kelsey E. Papst, *Protecting the Voiceless: Ensuring Ice’s Compliance with Standards That Protect Immigration Detainees*, 40 MCGEORGE L. REV. 261 (2009).

¹³³ After conducting fact checking research, several news articles, including the *Washington Post* article cited above, all contained consistent accounts of the events surrounding Victoria Arrellano’s death.

¹³⁴ Ibid. This is also a violation of the ICE 2000 National Detention Standards (*see* 2000 National Detention Standards).

¹³⁵ Ibid.

¹³⁶ Ibid.

Background

Since 2000, ICE has implemented three sets of detention standards throughout all ICE detention facilities—including privately contracted detention facilities¹³⁷ (CDFs) and intergovernmental service agreement detention facilities¹³⁸ (IGSAs).¹³⁹ The NDS 2000 and PBNDS 2008 and 2011, respectively, contain 38, 41, and 43 standards pertaining to detainee care, services, and facility operations.¹⁴⁰ Additionally, ICE has a specified standard for Family Detention Centers (FDCs).¹⁴¹

Although standards generally dictate uniformity, CDFs and IGSAs follow the detention standards stated in their contract.¹⁴² For example, if ICE contracted with a CDF prior to 2008, that CDF would only be required to implement the NDS 2000. According to a 2014 GAO report, ICE officials have stated that “they were in the process of requesting that additional facilities authorized to hold detainees for 72 hours or longer implement the most recent 2011 PBNDS, and documenting that change in facility contracts.”¹⁴³ Mr. Kevin Landy, ICE Assistant Director for ODPP, however, stated that:

The date of contract execution does not solely govern which version of detention standards will apply to a facility. On an ongoing basis, as ICE promulgates new versions of its standards, ICE requests facilities adopt the updated editions. ICE has pursued implementation of PBNDS 2011 pursuant to a structured and

¹³⁷ CDF detention facilities “owned by private companies and contracted directly with ICE.” See 79 Fed. Reg. 13100, 13104 (March 7, 2014).

¹³⁸ IGSAs are detention “facilities [that] are provided to ICE by States or local governments through agreements and may be owned by the State or local government, or a private entity. See 79 Fed. Reg. 13100, 13104 (March 7, 2014).

¹³⁹ Carl Kenneth Lipscombe, *Tylenol and an Ice Pack: An Inadequate Prescription for HIV/aids in Immigration Detention Centers*, 11 *Cardozo Pub. L. Pol’y & Ethics J.* 529 (2013), Joseph Summerill, *Immigration and Customs Enforcement Introduces “Friendly” Federal Detention Standards and New, Softer Detention Facilities*, Fed. Law., September 2012; See generally, Noah Nehemiah Gillespie, *Positive Law : Providing Adequate Medical Care for HIV-Positive Immigration Detainees*, 81 *GEO. WASH. L. REV.* 1329 (2013), Government Accountability Office, *Immigration Detention: Additional Actions Needed to Strengthen Management and Oversight of Facility Costs and Standards*. GAO-15-153. Washington, DC: U.S. Government Printing Office, 2014, Human Rights First, *U.S. Detention of Asylum Seekers: Seeking Protection, Finding Prison 25* (2009), available at www.humanrightsfirst.org/pdf/090429-RP-hrf-asylum-detention-report.pdf (noting that these detention centers have been described as “mega-jails.”).

¹⁴⁰ *Supra* note. 122-24.

¹⁴¹ “Family Residential Standards.” Family Residential Standards, accessed June 1, 2015, available at <http://www.ice.gov/detention-standards/family-residential>.

¹⁴² E.g., Inter-governmental Service Agreement between DHS ICE, Office of Detention and Removal, and Collier County, Naples, FL, available at http://www.ice.gov/doclib/foia/isa/r_droigsa070024colliercountyfl.pdf.

¹⁴³ GAO, *Immigration Detention: Additional Actions Needed to Strengthen Management and Oversight of Facility Costs and Standards*. GAO-15-153. Washington, DC: U.S. Government Printing Office, 2014.

deliberate plan. ICE first requested implementation at dedicated facilities, as they house the greatest populations of ICE detainees. ICE has additionally been pursuing PBNDS 2011 implementation at non-dedicated facilities throughout this period and on an ongoing basis as contracting opportunities arose, with initial priority given to those facilities housing larger numbers of ICE detainees – for example, whenever an IGSA might request renegotiation of its contract to increase its per diem rate. PBNDS is currently applicable at all dedicated detention facilities, including all SPCs, CDFs, and dedicated IGSA (DIGSAs) (facilities utilized by ICE pursuant to an Intergovernmental Service Agreement, which exclusively house ICE detainees), and covers approximately 60% of ICE’s average daily detainee population.¹⁴⁴

Regardless of the standards an immigration detention facility may be required to abide by, the Commission has received reports that DHS may be violating detainee civil rights and liberties.¹⁴⁵

Evidence suggests that DHS is not fully implementing select portions of the standards to the detriment of immigrant detainees.¹⁴⁶ Table 3 briefly describes each of these standards.

TABLE 3. U.S. Immigration and Customs Enforcement (ICE) Detention Standards

2000 National Detention Standards (NDS)	From American Correctional Association, <i>Standards for Adult Local Detention Facilities</i> , 3 rd ed., and developed by the former INS within the Department of Justice (DOJ) in consultation with various stakeholders, including American Bar Association and organizations involved in pro bono representation and advocacy for immigration detainees. Following its creation in 2002, DHS became responsible for immigration detention and began operating the detention system under 2000 NDS.
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¹⁴⁴ Kevin Landy, in his official capacity as ICE Assistant Director for the Office of Detention Policy and Planning (ODPP), sent the Commission additional comments in response to Commission staff inquiry. This information is available at the U.S. Commission on Civil Rights Headquarters located at 1331 Pennsylvania N.W., Washington D.C., 20425.

¹⁴⁵ See generally, Panelist Statements and Briefing Transcript.

¹⁴⁶ Ibid.

**2008
Performance
- Based
National
Detention
Standards
(PBNDS)**

ICE revised the 2000 NDS to integrate changes included in, and moved to a performance-based format more in line with the American Correctional Association's *Performance-Based Standards for Adult Local Detention Facilities*, Fourth Edition. The 2008 PBNDS, which ICE developed in coordination with agency stakeholders to apply to adult detention populations, prescribe the expected outcomes of each detention standard and the expected practices required to achieve them. The 2008 PBNDS also include more detailed requirements for service processing centers and contract detention facilities.

2011 PBNDS

ICE revised the 2008 PBNDS to improve conditions of confinement in various ways, including medical and mental health services, access to legal services and religious opportunities, communication with detainees with no or limited English proficiency, the process for reporting and responding to complaints, and recreation and visitation. The 2011 PBNDS also expanded the more detailed requirements for service processing centers and contract detention facilities included in the 2008 PBNDS to dedicated intergovernmental service agreement facilities or, in some cases, to all facilities.

Source: GAO analysis of ICE information, GAO-15-153.

Discussion

The Commission has received complaints from civil and human rights organizations such as the American Civil Liberties Union (ACLU), the American Bar Association (ABA), the American Immigration Lawyers Association (AILA), the Grassroots Leadership, the Mexican-American Legal Defense Fund (MALDEF), and the Human Rights Campaign (HRC) concerning how ICE-owned facilities and CDFs treat immigrant detainees while in custody.

ICE published PBNDS 2011 in an effort to “improve medical and mental health services, increase access to legal services and religious opportunities, improve communication with detainees with limited English proficiency, and improve the process for reporting and responding to complaints, and increase recreation and visitation.”¹⁴⁷ Currently, all ICE-owned facilities are required to comply with the PBNDS 2011 standards.¹⁴⁸ However, certain CDFs depending when they began their contract with ICE, may not be complying with the NDS, PBNDS 2008, and/or PBNDS 2011.¹⁴⁹

¹⁴⁷ Performance Based National Detention Standards 2011, *available at* <http://www.ice.gov/detention-standards/2011> .

¹⁴⁸ *Ibid.*

¹⁴⁹ “It is important to note that PBNDS is currently applicable at all dedicated detention facilities, including all SPCs, CDFs, and DIGSAs, and covers approximately 60% of ICE’s average daily detainee population. All CDFs and DIGSAs are operated by private contractors. ICE requested that these facilities update their

The discussion below examines whether ICE owned detention facilities and CDFs are complying with their respective NDS or PBNDS Medical Standards, LGBT Treatment Standards, Food Service Standards, and Legal Library and Materials standards.

Are ICE-Owned Facilities Adhering to PBNDS 2011 Medical Care Standards?

PBNDS 2011—Medical Care

PBNDS 2011 sets forth medical standards for providing care to detainees in ICE-owned facilities. It provides the following, in relevant part:

- Detainees shall be able to request health services on a daily basis and shall receive timely follow up.
- A detainee who is determined to require health care beyond facility resources shall be transferred in a timely manner to an appropriate facility.
- 24-hour emergency medical and mental health services shall be available to all detainees.
- Detainees with chronic conditions shall receive care and treatment as needed, that includes monitoring of medications, diagnostic testing, and chronic care clinics.
- Prescriptions and medications shall be ordered, dispensed, and administered in a timely manner and as prescribed by a licensed healthcare professional.

While it is clear that PBNDS 2011 provides written policy standards for providing adequate medical care to detainees, the Commission questions whether ICE completely complies with these standards.

According to Kevin Landy, Assistant Director of ICE's Office of Detention Policy and Planning (ODPP), ICE facilities have taken measures to provide detainees with adequate medical and mental health care.¹⁵⁰ ICE's website indicates that the agency uses an electronic health records (EHR) system at all detention facilities staffed by the ICE Health Service Corps.¹⁵¹ DHS designed the EHR to improve the distribution of health care to detainees, increase a detainee's ability to receive continuous care when needed,

contracts to adopt PBNDS 2011." Kevin Landy, in his official capacity as ICE Assistant Director for the Office of Detention Policy and Planning (ODPP), sent the Commission additional comments in response to Commission staff inquiry. This information is available at the U.S. Commission on Civil Rights Headquarters located at 1331 Pennsylvania N.W., Washington D.C., 20425.

¹⁵⁰ See Landy, Briefing Transcript.

¹⁵¹ "Detention Reform." Detention Reform. Accessed June 3, 2015, *available at* <https://www.ice.gov/detention-reform#tab2>.

and to enhance communication among facilities.¹⁵² ICE also opened its first mental health transitional unit, Krome Service Processing Center (KSPC).¹⁵³ DHS created KSPC to address the mental health needs of detainees without need of full hospitalization.¹⁵⁴

In 2013, the University of Arizona conducted a study by interviewing 1,113 recent deportees and found that: 37 percent of the respondents who requested medical attention reported that ICE was denying them medical attention while in ICE custody.¹⁵⁵ An ABA representative testified at the Commission briefing about receiving complaints regarding inadequate health care at ICE facilities.¹⁵⁶ For example, the ABA stated that ICE did not accommodate blind detainees and did not give disabled detainees necessary wheelchair accommodations.¹⁵⁷ Another pressing issue regarding detainee medical care is the lack of continued medical treatment of pre-diagnosed medical conditions due to poor transference of detainee medical records.¹⁵⁸ The failure to transfer complete medical records creates a lag in ongoing treatment, which one detainee reported led to the loss of sight in one eye.¹⁵⁹

Nonetheless, while the Commission received statements indicating that medical care at ICE-owned facilities can be inadequate, they did not identify specific ICE-owned facilities. There is no documentation supporting the claims that ICE-owned facilities have failed to comply with PBNDS standards.

¹⁵² Ibid.

¹⁵³ USCIS, Detention Facilities, Krome Service Processing Center, *available at* <https://www.ice.gov/detention-facility/krome-service-processing-center>.

¹⁵⁴ ABA Delegation to KSPC to Victore Cerda, Acting Director, Office of Detention and Removal Operations, July 20, 2004, Observational Tour of the Krome Service Processing Center, Miami, FL, *available at* <http://www.ice.gov/doclib/foia/dfra/2004/kromeserviceprocessingcentermiamifl162004.pdf>.

¹⁵⁵ *In the Shadow of the Wall: Family Separation, Immigration Enforcement and Security*, 2013, University of Arizona, p 26. (The statistical data contained in this report are unclear, however, the Commission used this statistic to show the possible severity of the problem.), *available at* http://las.arizona.edu/sites/las.arizona.edu/files/UA_Immigration_Report2013web.pdf.

¹⁵⁶ Statement of Karen Grisez, Esq., submitted to U.S. Commission on Civil Rights [hereinafter *Grisez Statement*], *available at* U.S. Commission on Civil Rights Headquarters: 1331 Pennsylvania Ave., NW, Suite 1150, Washington, D.C. 20425.

¹⁵⁷ Ibid.

¹⁵⁸ Ibid. *See also* “US: Immigration Detention Neglects Health,” US: Immigration Detention Neglects Health, *available at* <http://www.hrw.org/news/2009/03/17/us-immigration-detention-neglects-health>.

¹⁵⁹ *See supra* note 154-158.

Based on evidence cited above, the Commission finds that additional research needs to be conducted to determine whether certain ICE facilities are fully complying with PBNDS 2011 medical care standards.

Are CDFs Adhering to PBNDS 2011, PBNDS 2008, or NDS 2000 Medical Standards?

PBNDS 2008—Medical Standards

The 2008 PBDNS medical standards afford certain rights to detained individuals, including:

- The right to initiate requests for health services on a daily basis.
- The right to timely follow up to their healthcare requests.
- Continuity of care from admission to transfer, discharge, or removal, including referral to community-based providers when indicated.
- A detainee who needs health care beyond facility resources will be transferred in a timely manner to an appropriate facility where care is available. A written list of referral sources, including emergency and routine care, will be maintained as necessary and updated at minimum annually.
- A detainee who requires close, chronic or convalescent medical supervision will be treated in accordance with a written plan approved by licensed physician, dentist, or mental health practitioner that includes directions to healthcare providers and other involved medical personnel.
- Detainees will have access to specified 24-hour emergency medical, dental, and mental health services.
- Detainees with chronic conditions will receive care and treatment for conditions where non-treatment would result in negative outcomes or permanent disability as determined by the clinical medical authority.

NDS 2000— Medical Standards

Similarly, the 2000 NDS Medical Standards sought to establish basic medical standards of care for newly arrived detainees:

Medical screening (new arrivals). All new arrivals shall receive initial medical and mental health screening immediately upon their arrival by a healthcare provider or an officer trained to perform this function. This screening shall include observation and interview items related to the detainee's potential suicide risk and possible mental disabilities, including mental illness and mental retardation.

Sick call. Each facility will have a mechanism that allows detainees the opportunity to request healthcare services provided by a physician or other qualified medical officer in a clinical setting.

24-hour emergency medical treatment. Each facility will have a written plan for the delivery of 24-hour emergency health care when no medical personnel are on duty at the facility or when immediate outside medical attention is required.

First aid and medical emergencies. In each detention facility, the designated health authority and the office in charge (OIC) will determine availability and placement of first-aid kits consistent with the American Correctional Association requirements.

Detention staff will be trained to respond to health-related emergencies within a four-minute response time. A responsible medical authority, in cooperation with the OIC, will provide training which will include the following:

- Recognition of signs of potential health emergencies and the required response;
- Administration of first aid and cardiopulmonary resuscitation (CPR);
- Facility plan and its required methods of obtaining emergency medical assistance;
- Recognition of signs and symptoms of mental illness (including suicide risk), retardation, and chemical dependency; and
- Facility's established plan and procedures for providing emergency medical care including, when required, safe and secure transfer of detainees for appropriate hospital or other medical services.

Private companies became involved in federal immigration detention in the 1980s, when widespread public sentiment believed that private operations were inherently more efficient than government agencies.¹⁶⁰ Two of the largest corporations that run private detention facilities are the GEO Group (GEO) and Corrections Corporations of America (CCA), which built the first private prison in 1984 in Houston.¹⁶¹ A few years later, a series of well publicized riots within immigration detention facilities concerning detainee

¹⁶⁰ Mukhopadhyay, Riddhi (2008) "Death in Detention: Medical and Mental Health Consequences of Indefinite Detention of Immigrants in United States," 7 SEATTLE JOURNAL FOR SOCIAL JUSTICE (2);art 19, p. 702, available at: <http://digitalcommons.law.seattleu.edu/sjsj/vol7/iss2/19>;; See generally, Anil Kalhan, Rethinking Immigration Detention, 110 COLUM. L. REV. Sidebar 42 (2010), Lisa A. Cahan, Constitutional Protections of Aliens: A Call for Action to Provide Adequate Health Care for Immigration Detainees, 3 J. HEALTH & BIOMEDICAL L. 343 (2007), Brian L. Aust, Fifty Years Later: Examining Expedited Removal and the Detention of Asylum Seekers Through the Lens of the Universal Declaration of Human Rights, 20 HAMLINE J. PUB. L. & POL'Y 107 (1998).

¹⁶¹ Ibid.

treatment, prisoner escape, and state legislation refusing to privatize its entire prison system led to a spate of negative publicity for these businesses.¹⁶²

Nonetheless, Steve Conry, Vice President for Facility Operations at CCA, stated that every CCA facility operates according to PBNDS standards and that PBNDS standards are essential for “protecting the welfare, dignity and rights of the individuals entrusted to [CCA] care.”¹⁶³ However, CCA facilities have not provided the Commission with specific PBNDS standards applied at each of their facilities.¹⁶⁴

The Grassroots Leadership, a nonprofit organization, stated that detainees reported that Polk County Secure Adult Detention Facility did not provide them with adequate medical care.¹⁶⁵ For example, a 7-year-old girl who was battling brain cancer did not receive treatment for her condition while detained at Karnes County Residential Center.¹⁶⁶ Three U.S. medical doctors sent ICE a report expressing concern that the young girl’s life was in danger and warned that she needed immediate treatment for her malignant brain tumor.¹⁶⁷ Instead of sending the young girl to receive medical treatment, ICE, “kept the family locked up at Karnes until Texas United for Families began a grassroots campaign to free the family and the media became involved.”¹⁶⁸

Moreover, in April 2012, a 46-year-old man detained at the GEO-operated¹⁶⁹ Denver Contract Detention Facility died of a heart attack.¹⁷⁰ The ICE Office of Detention

¹⁶² Statement of Steven Conry, Vice President for Facility Operations at CCA, submitted to U.S. Commission on Civil Rights, *available at* U.S. Commission on Civil Rights Headquarters: 1331 Pennsylvania Ave., NW, Suite 1150, Washington, D.C. 20425.

¹⁶³ *Ibid.*

¹⁶⁴ Conry, Briefing Testimony, p. 95.

¹⁶⁵ Statement of Bob Libal, Executive Director for Grassroots Leadership, submitted to the U.S. Commission on Civil Rights, *available at* U.S. Commission on Civil Rights Headquarters: 1331 Pennsylvania Ave., NW, Suite 1150, Washington, D.C. 20425. *See also* Contreras, Guillermo. "Feds Release 7-year-old Immigrant Girl with Cancer for Treatment." *Houston Chronicle*. Sept. 3, 2014, accessed June 2, 2015, *available at* <http://www.houstonchronicle.com/news/article/Feds-release-7-year-old-immigrant-girl-with-5732146.php>.

¹⁶⁶ *Libal Statement*, p. 11.

¹⁶⁷ *Ibid.* *See also* Warren, Lydia. "Seven-year-old Salvadoran Girl with Brain Tumor Is Released from Immigrant Detention Center so That She Can Get Treatment after Uproar." *Mail Online*. Sept. 4, 2014, accessed June 2, 2015, *available at* <http://www.dailymail.co.uk/news/article-2743531/Seven-year-old-Salvadoran-girl-brain-tumor-released-immigrant-detention-center-treatment-uproar.html>.

¹⁶⁸ *Ibid.*

¹⁶⁹ The GEO Group, Inc. (GEO) is the world's leading provider of correctional, detention, and community reentry services with 106 facilities, approximately 85,500 beds, and 20,000 employees around the globe. *See* <http://geogroup.com/>. The Federal government contracts with private companies like GEO group to house detainees. These facilities are known as Contracted Detention Facilities (CDF).

¹⁷⁰ Takei, Written Statement, p. 9.

Oversight (ODO) concluded that the detention facility had “failed to provide [the detainee] access to emergent, urgent, or non-emergent medical care.”¹⁷¹ The investigation revealed that GEO failed to properly train its nursing staff on the use and maintenance of medical equipment and waited for approximately one hour to contact 911 after initially announcing an emergency.¹⁷² The ODO investigation expert “concluded that the staff’s unfamiliarity with the relevant protocol, failure to administer appropriate cardiac medication, and delays in transporting the patient to a higher level care facility all may have been contributing factors to his death.”¹⁷³ GEO Group, Inc., was invited to the Commission’s briefing; however, the privately run corrections company refused to attend.¹⁷⁴

Maria Hinojosa, a national journalist with Futuro Media Group, provided written testimony stating that DHS was over medicating detainees who were suffering from mental illness.¹⁷⁵ One example was of a man who suffers from bipolar disorder.¹⁷⁶ He had subsequently been over medicated and remained asleep for 36 hours.¹⁷⁷ Sometime during this period, the man fell off the top bunk and landed on the concrete floor.¹⁷⁸ Consequently, he suffered a broken eye socket bone and a ruptured testicle.¹⁷⁹

Although each medical standard provides a protocol for the treating detainees who display symptoms of a medical condition, there were instances where ICE delayed medical care for detainees with visible medical needs.¹⁸⁰ One example is that of a man who was on a hunger strike at GEO Northwest Detention Center.¹⁸¹ The man experienced

¹⁷¹ Statement of Carl Takei, Staff Attorney, National Prison Project, American Civil Liberties Union. Submitted to U.S. Commission on Civil Rights *available at* U.S. Commission on Civil Rights Headquarters: 1331 Pennsylvania Ave., NW, Suite 1150, Washington, D.C. 20425.

¹⁷² *Ibid.*

¹⁷³ *Ibid.*

¹⁷⁴ Chairman Castro, Briefing Transcript, p. 116.

¹⁷⁵ Statement of Maria Hinojosa, Futuro Media Group. Submitted to the U.S. Commission on Civil Rights [hereinafter *Hinojosa Statement*], *available at* U.S. Commission on Civil Rights Headquarters: 1331 Pennsylvania Ave., NW, Suite 1150, Washington, D.C. 20425.

¹⁷⁶ *Ibid.*

¹⁷⁷ *Ibid.*

¹⁷⁸ Hinojosa, Written Statement. *See supra* note 174.

¹⁷⁹ *Ibid.*

¹⁸⁰ Lewis, Renee. "Immigrant Detainees on Hunger Strike Allege Threats by Guards, *Al Jazeera America*, March 20, 2014, *available at* <http://america.aljazeera.com/articles/2014/3/20/immigration-detaineesonhungerstrikecitethreatsinhumanetreatment.html>.

¹⁸¹ *Ibid.*

a severe nose bleed and did not receive medical attention until more than 24 hours later.¹⁸² The man claimed to have almost drowned in his own blood while sleeping.¹⁸³ Detainees have also died from inadequate medical care.¹⁸⁴ A detainee at a GEO facility in Adelanto, California, died three days after a hospital had admitted him and diagnosed him with cancer.¹⁸⁵ The man displayed warning signs for three weeks before his death, but medical staff never treated him.¹⁸⁶ An advocacy group stated that it received phone calls from detainees for three weeks leading to the man's death. Callers reported "about a man who was suffering from diarrhea, severe abdominal pain, and uncontrollable leakage of urine."¹⁸⁷ Additionally, "when [the] man asked for a catheter, medical staff at Adelanto denied him."¹⁸⁸ Lastly, detainees rioted at Willacy County Corrections Facility due to inadequate medical care.¹⁸⁹

The Commission finds that certain privately owned detention centers are not complying with DHS detention standards. However, a deeper examination must be done to determine the extent to which the federally contracted facilities deviate from federally mandated standards for medical care of detainees.

Are ICE-Owned Facilities Adhering to PBNDS 2011 LGBT Accommodation Standards?

2011 PBNDS enhanced medical standards related to preservation of LGBT detainees' rights and, in particular, the dignity of LGBT immigrant detainees.

¹⁸² Ibid.

¹⁸³ Ibid.

¹⁸⁴ Downs, Ray. "Immigrant Dies in GEO Group Facility After Three Weeks of Ignored Symptoms, Says Attorney, *New Times Broward-Palm Beach*, April 13, 2015, accessed June 3, 2015, available at <http://www.browardpalmbeach.com/news/immigrant-dies-in-geo-group-facility-after-three-weeks-of-ignored-symptoms-says-attorney-6930614>.

¹⁸⁵ Ibid.

¹⁸⁶ Ibid.

¹⁸⁷ Ibid.

¹⁸⁸ Immigrant Dies in GEO Group Facility After Three Weeks of Ignored Symptoms, Says Attorney, *New Times Broward-Palm Beach*. April 13, 2015, accessed June 3, 2015, available at <http://www.browardpalmbeach.com/news/immigrant-dies-in-geo-group-facility-after-three-weeks-of-ignored-symptoms-says-attorney-6930614>.

¹⁸⁹ Blue Tyx, Daniel. A South Texas Prison Riot Puts a Town on the Brink, *Texas Observer*, March 26, 2015, accessed June 4, 2015, available at <http://www.texasobserver.org/south-texas-prison-riot-willacy-county-economic-future/>.

PBND 2011—LGBT Custody Classification

When making classification and housing decisions for a transgender detainee, staff must consider the detainee's gender self-identification and an assessment of placement effects on the detainee's mental health and well-being. Staff must consult with a medical or mental health professional as soon as practicable on this assessment. Placement decisions should not be based solely on the identity documents or physical anatomy of the detainee, and a detainee's self-identification of his /her gender shall always be taken into consideration as well. Placement must be consistent with the safety and security considerations of the facility.

PBND 2011—LGBT Body Cavity Search

Whenever possible, transgender detainees shall be permitted to choose the gender of the staff member conducting a body-cavity search.

PBND 2011—Medical and Mental Health Screening of New LGBT Arrivals

When a detainee self-identifies as transgender, inquire into the detainee's gender self-identification and history of transition-related care.

PBND 2011—LGBT Medical Care

Transgender detainees who were already receiving hormone therapy when taken into ICE custody must have continued access to treatment. All transgender detainees shall have access to mental health care, and other transgender-related health care and medication based on medical need. Treatment must follow accepted guidelines regarding medically necessary transition-related care.

ICE states that it provides segregated management units for transgender detainees and other members of the LGBT community for safety reasons.¹⁹⁰ The agency decides whether to transfer transgendered detainees on an individual basis and takes into account safety and welfare factors.¹⁹¹ ICE representatives state that these units have the same accommodations as provided in regular detainee housing units.¹⁹² However, the record

¹⁹⁰ Landy, Briefing Transcript, p. 81. According to Landy, his testimony was referring to a housing unit located in Santa Ana, California. He states that this housing facility does not detain transgendered detainees in a manner that is consistent with administrative detention.

¹⁹¹ Landy, in his official capacity as ICE Assistant Director for the Office of Detention Policy and Planning (ODPP), sent the Commission additional comments in response to Commission staff inquiry. This information is available at the U.S. Commission on Civil Rights Headquarters located at 1331 Pennsylvania N.W., Washington D.C., 20425.

¹⁹² Landy, Briefing Transcript, p. 81 - 82.

does not provide details about the amount of recreational hours LGBT detainees located at the segregated management unit receive.¹⁹³

In contrast to ICE's claims, the Heartland Alliance's National Immigrant Justice Center provided written testimony indicating that "ICE continues to house transgender individuals according to their birth gender or holds them in solitary confinement, rather than releasing them on alternatives to detention (ATDs) or housing them with others with the same gender identity."¹⁹⁴

Furthermore, the Center for American Progress reported complaints that DHS was housing transgender detainees in facilities with the opposite gender. For example, DHS housed transgender females with men.¹⁹⁵ Transgender women have also reported that DHS forced them to shower with males.¹⁹⁶ Additionally, guards at ICE's Eloy Detention Center have verbally and physically abused LGBT detainees. This is particularly problematic because ICE constructed the Eloy Detention to provide LGBT detainees with a safe environment.¹⁹⁷ LGBT males housed at ICE's Eloy Detention Center have reported that guards taunted and humiliated them.¹⁹⁸ Detainees at Eloy were told to "walk like a

¹⁹³ "It is rare for transgendered detainees to be placed in administrative segregation for their own protection, and ICE policy states that the use of segregated housing to protect vulnerable population[s] must be restricted to those instances where reasonable efforts have been made to provide appropriate alternative housing, and no other viable housing options exist." Kevin Landy, in his official capacity as ICE Assistant Director for the Office of Detention Policy and Planning (ODPP), sent the Commission additional comments in response to Commission staff inquiry. This information is available at the U.S. Commission on Civil Rights Headquarters located at 1331 Pennsylvania N.W., Washington D.C., 20425.

¹⁹⁴ Statement of Mary Meg McCarthy, Executive Director of Heartland Alliance's National Immigrant Justice Center (NIJC). Submitted to U.S. Commission on Civil Rights [hereinafter *McCarthy Statement*], available at U.S. Commission on Civil Rights Headquarters: 1331 Pennsylvania Ave., NW, Suite 1150, Washington, D.C. 20425. ICE has recently released a memorandum entitled "Further Guidance Regarding the Care of Transgender Detainees." available at <https://www.ice.gov/sites/default/files/documents/Document/2015/TransgenderCareMemorandum.pdf>. The memorandum issues guidance on multiple areas pertaining assuring better service to ICE detained transgendered individuals.

¹⁹⁵ Ibid. Echavarrri, Fernanda. "Transgender Woman Held in Male Immigrant Detention Center." Arizona Public Media. February 19, 2015, available at <https://news.azpm.org/p/arizona-news/2015/2/20/57176-transgender-woman-held-in-male-immigration-detention-center/>. Planas, Roque. "Advocates Rally Around Transgender Migrant Woman Detained In All-Male Facility." *Huffington Post*. Jan. 29, 2015. available at http://www.huffingtonpost.com/2015/01/29/transgender-migrant-detention_n_6566604.html.

¹⁹⁶ Ibid. "EXPOSED: The Devastating Experiences That Many Transgender Immigrants Face...." Transgender Law Center, accessed June 3, 2015, available at <http://transgenderlawcenter.org/archives/9858>; Mullins, Dexter, Report: LGBT Immigrant Detainees Face Higher Risk of Sexual Assault, Abuse, *Al Jazeera America*. Feb. 26, 2013, accessed June 3, 2015, available at <http://america.aljazeera.com/articles/2013/11/25/lgbt-immigrant-detaineesfacehigherriskofsexualassaultabuse.html>.

¹⁹⁷ Ibid.

¹⁹⁸ Dignity Denied, Center for American Progress, 2013, pp. 5-10.

man, not a gay man,” “act male,” and “use your male voice” by guards.¹⁹⁹ Lastly, the Center for American Progress has found that transgender asylum seekers who DHS transferred to Eloy Detention Center did not have access to hormone therapy for one to four months.²⁰⁰

The Commission finds that certain ICE facilities may not be fully adhering to PBDS 2011 standards that are specific to the LGBT detainee community.

Are CDFs Complying with Either PBNDS 2011, PBNDS 2008, or NDS 2000 LGBT Accommodation standards?

PBNDS 2011

See page 36 of the report.

PBNDS 2008—Medical and mental health screening of new LGBT arrivals. Inquire into a transgender detainee’s gender self-identification and history of transition-related care when a detainee self-identifies as transgender.

PBNDS 2008— LGBT Medical care. Transgender detainees who were already receiving hormone therapy when taken into ICE custody must have continued access. All transgender detainees shall have access to mental health care, and other transgender related health care and medication based on medical need. Treatment must follow accepted guidelines regarding medically necessary transition-related care.

NDS 2000 (LGBT). NDS 2000 does not afford LGBT accommodations.

Little documentation or testimony exists as to the compliance or lack thereof to LGBT standards by privately owned detention centers. However, LGBT accommodations within privately owned detention centers are an issue that deserves further investigation.

Are ICE-Owned Facilities Adhering to PBNDS 2011 Food Service Standards?

PBNDS 2011—Food Service

- All detainees must be provided nutritionally balanced diets that are reviewed at least quarterly by food service personnel and at least annually by a qualified nutritionist or dietitian.

¹⁹⁹ Ibid.

²⁰⁰ Ibid.

- Detainees, staff, and others shall be protected from harm, and facility order shall be maintained, by the application of sound security practices in all aspects of food service and dining room operations.
- Detainees, staff, and others shall be protected from injury and illness by adequate food service training and the application of sound safety and sanitation practices in all aspects of food service and dining room operations.
- Food service personnel shall provide nutritious and appetizing meals. Nutritional needs are diverse because of differences in age, activity, physical condition, gender, religious preference, and medical considerations. Food service personnel shall accommodate the ethnic and religious diversity of the facility's detainee population when developing menu cycles. While each facility must meet all ICE/ERO standards and follow required procedures, individuality in menu planning is encouraged.

Remarks regarding food service issues were not discussed during Briefing testimony, and outside sources have not rendered complaints pertaining to inadequate food service at ICE-owned facilities.

Are CDFs Complying with PBNDS 2011, PBNDS 2008, or NDS 2000 Food Service Standards?

PBNDS 2011—Food Service

See above.

PBNDS 2008—Food Service

Expected outcomes. The expected outcomes of this Detention Standard are:

1. All detainees will be provided nutritionally balanced diets that are reviewed at least quarterly by food service personnel and at least annually by a qualified nutritionist or dietitian.
2. Detainees, staff, and others will be protected from harm, and facility order will be maintained by application of sound security practices in all aspects of food service and dining room operations.
3. Detainees, staff, and others will be protected from injury and illness by adequate food service training and application of sound safety and sanitation practices in all aspects of food service and dining room operations.

NDS 2000—Food Service

Policy. It is INS policy to provide detainees with nutritious, attractively presented meals prepared in a sanitary manner while identifying, developing, and managing resources to meet the operational needs of the food service program.

Display and service. The following procedures apply to the display, service, and transportation of food to mainline and satellite food service areas. Before and during the meal, the CS in charge shall inspect the line to ensure:

1. All menu items are fit for consumption.
2. Food is appropriately presented.
3. Sanitary guidelines are observed, with hot foods maintained at a temperature of at least 140°F and foods that require refrigeration maintained at 41°F or below.

According to CCA’s Steve Conry, neither the media nor other visitors have complained about the food service at CCA facilities.²⁰¹ However, an investigation of Willacy County Correctional Facility exposed complaints stating that food was “cold and often spoiled.”²⁰² Furthermore, the Commission notes testimony that all detainees at Willacy had lost an average of 10 pounds.²⁰³ One individual testified to having seen maggots in food while visiting Willacy.²⁰⁴ There have also been riots and hunger strikes protesting rotten and insufficient food at Etowah County Detention Center. Another hunger strike took place at Stewart, located in Lumpkin, GA, after detainees asserted that they were being served maggot-filled food.²⁰⁵

When the Commission visited the Karnes Detention Center, a detainee told Commission Chairman Castro in Spanish that the food improved in the cafeteria whenever there were outside visitors, such as the Commission’s delegation, to the detention center.

²⁰¹ Conry, Briefing Transcript, p. 132.

²⁰² Hinojosa, Briefing Transcript, Hinojosa, p. 103 McLaughlin, Michael. “10 Worst Immigrant Detention Centers Should Be Closed, Detention Watch Network Report Says,” *Huffington Post*. Nov. 16, 2012. Accessed June 1, 2015, available at http://www.huffingtonpost.com/2012/11/16/worst-detention-centers-detention-watch-network_n_2138999.html McLaughlin, Michael. “10 Worst Immigrant Detention Centers Should Be Closed, Detention Watch Network Report Says.” *Huffington Post*. Nov. 16, 2012. (Discussing Detention Watch Network, *One Year Later: Expose & Close*, p. 8), available at http://www.detentionwatchnetwork.org/sites/detentionwatchnetwork.org/files/expose_and_close_one_year_later.pdf). http://www.huffingtonpost.com/2012/11/16/worst-detention-centers-detention-watch-network_n_2138999.html.

²⁰³ Ibid.

²⁰⁴ Ibid., p. 104.

²⁰⁵ See supra note 207.

The Commission finds that certain CDFs are not fully adhering to contractually set standards and are not providing detainees with nutritious food in sufficient quantities.

Are ICE-Owned Facilities Adhering to PBNDS 2011 Law Library and Legal Material Standards?

PBNDS 2011—Law Library and Legal Material

1. Detainees shall have access to a properly equipped law library, legal materials, and equipment.
2. Detainees shall have meaningful access (no less than five hours per week) to law libraries, legal materials, and equipment.
3. **When requested and where resources permit, facilities shall provide detainees meaningful access to law libraries, legal materials, and related materials on a regular schedule and no less than 15 hours per week.

During testimony, ICE officials stated that ICE is increasing detainee opportunities for communication with legal representatives through telephone access and visitation. Notably, ICE’s website states that the agency has “[d]istributed to all detention facilities a ‘Know Your Rights’ video, which was developed by the American Bar Association, and self-help legal materials, which were developed by various Legal Orientation Programs, to enhance availability of accessible legal resources for detainees.”²⁰⁶ There have not been any claims of ICE-owned facilities violating PBNDS 2011 standards.

Are CDFs Adhering to PBNDS 2011 Law Library and Legal Material Standards?

PBNDS 2011 Law Library and Legal Material

See above.

PBNDS 2008—Law Library and Legal Material

1. Detainees will have regular access (no less than five hours per week) to law libraries, legal materials, and related materials.
2. Detainees will not be forced to forgo recreation time to use the law library, and requests for additional time to use the law library shall be accommodated to the extent possible, including accommodations of work schedules when practicable, consistent with the orderly and secure operation of the facility.

²⁰⁶ “Detention Reform,” ICE, What We Do, available at <https://www.ice.gov/detention-reform>.

3. Detainees will have access to courts and counsel.

Hours of access. Each facility administrator shall devise a flexible schedule that:

- Permits all detainees, regardless of housing or classification, to use the law library on a regular basis.
- Enables the maximum use possible, without interfering with the orderly operation of the facility. Generally, law library hours of operation are to be scheduled between official counts, meals and other official detention functions.
- Determines the number of detainees permitted to use the law library at any given time.

NDS 2000 – Access to Legal Material

Law library. The facility shall provide a law library in a designated room with sufficient space to facilitate detainees’ legal research and writing. The law library shall be large enough to provide reasonable access to all detainees who request its use. It shall contain a sufficient number of tables and chairs in a well-lit room, reasonably isolated from noisy areas.

Hours of access. The facility shall devise a flexible schedule to permit all detainees, regardless of housing or classification, to use the law library on a regular basis. Each detainee shall be permitted to use the law library for a minimum of five hours per week. Detainees may not be forced to forgo their minimal recreation time, as provided in “Detainee Recreation” standards to use the law library. Detainee requests for additional time in the law library shall be accommodated to the extent possible, consistent with the orderly and secure operation of the facility. Special priority should be given to requests for additional library time when a detainee is facing a court deadline.

Testimony revealed that CDFs may not be providing detainees with access to legal services in general.²⁰⁷ Many detainees claim that CDFs have continuously failed to notify detained immigrants of the existence of a legal library while at privately owned facilities.²⁰⁸ Detainees at Stewart and NGDC complained that DHS failed to inform them about pro bono services, and many detainees complained about delays in gaining access

²⁰⁷ Libal, Written Statement, p. 7.

²⁰⁸ Cristina Parker, Attorneys sound the alarm as ICE continues to detain immigrants in sub-standard Waco facility, June 9, 2014, Grassroots Leadership, *available at* <http://grassrootsleadership.org/blog/2014/06/attorneys-sound-alarm-ice-continues-detain-immigrants-sub-standard-waco-facility>.

to the legal library.²⁰⁹ Furthermore, when the Commission delegation visited the Karnes and Port Isabel detention centers, it appeared that DHS informed detainees about the potential for possible pro bono legal assistance; however, DHS did not sufficiently advise detainees about how to enforce their rights and to easily access possible pro bono representation.

The Commission finds that certain ICE-owned detention facilities are not providing adequate legal information or presentations about detainee rights for their detained population.

Conclusion

Based on the testimony provided by expert witnesses, independent reports, civil rights organizations, clergy, Commission fact-finding visits, and news articles gathered during this study, the Commission finds that:

- Certain ICE facilities are not fully complying with PBNDS 2011 medical care standards.
- Certain ICE facilities are not adhering to the PBDS 2011 standards that are specific to the LGBT detainee community.
- Certain ICE-owned detention facilities are not providing adequate legal information or presentations about detainee rights for their detained population.
- Further study needs to be conducted on the food services offered at ICE-owned detention facilities.
- Certain privately owned detention centers are not complying with DHS detention standards. However, a deeper examination must be done to determine the extent that the federally contracted facilities deviate from federally mandated standards for medical care of detainees.
- Certain privately owned detention facilities are not adhering to any set standard and are not providing detainees with nutritious food.
- Deeper examination is required regarding ICE privately contracted detention facility compliance with their respective contract provision's mandated detention standard.

²⁰⁹ Ibid.

CHAPTER 4. FEDERAL TREATMENT OF DETAINED UNDOCUMENTED IMMIGRANT CHILDREN

Mirabel: A Teenager from Honduras

Mirabel (16 years old) was from San Pedro Sula, Honduras—considered the murder capital of the world. Prior to coming to the United States, Mirabel, her sisters, and her mother were consistently abused by her father, who was an alcoholic and stole from their mother’s earnings to feed his addiction. Mirabel decided to come to the United States because she could no longer handle being around her father, and because she was almost killed by her father who attacked her with a machete.

When an uncle offered to pay for a smuggler to take Mirabel to the United States, her mother begged her not to go. “We all know the stories of women who get raped or die in the desert,” Mirabel told me. “But I couldn’t stay. I had no life there.” She told her mother she loved her, boarded a bus with her teenage cousin, and headed north, hoping for a better education and a better life in “El Norte.”

Mirabel successfully arrived to the United States but was soon apprehended by the U.S. Border Patrol (CBP) in the Texas Rio Grande Valley.²¹⁰

Professor Susan Terrio, a professor of anthropology at Georgetown University, interviewed Mirabel for an article in *Politico* magazine. In the interview, Mirabel and Professor Terrio had a conversation about Mirabel’s experience with CBP:

“They were questioning me, and I was crying,” she recalled to me. “I said, ‘I can’t go back.’ I was 16, the only under-aged girl and little, but those officers put handcuffs on me just like I was a criminal.” After spending a few days in jail, she was taken into federal custody at a shelter for unaccompanied minors in Los Fresnos, Texas. It was clean, Mirabel says, and had a nice enough living room, but she soon realized she couldn’t leave. “There was no life—life ended there,” she says. “The shelter was near the main road, and I could see cars going by, and I wanted to be in that car.” It would be six months before an immigration judge in Texas

²¹⁰ Terrio, Susan. "Life Ended There: Rare Interviews with the Children of America's Border Disaster." *Politico*, July 10, 2014.

granted her asylum petition and released her from federal custody to a foster family in Virginia.²¹¹

Mirabel's experience is similar to many unaccompanied immigrant children who cross the U.S. border to seek refuge and safety.²¹² Here, the Report examines the background and causes of the influx of unaccompanied immigrant children who cross the U.S. border, the experiences they face, and whether the federal government is complying with standards related to their care.

Background

The large influx of unaccompanied alien children²¹³ who immigrated to the United States between 2011 and 2014 has been considered a humanitarian crisis²¹⁴ that left the several agencies responsible for immigration apprehension and detention unprepared.²¹⁵ A majority of these children immigrated to the United States from El Salvador, Guatemala, Honduras, and Mexico to find economic opportunities, to be reunited with their families, or—most notably—to escape violence.²¹⁶ A majority of the unaccompanied children enter the United States through ports of entry or along the U.S. and Mexican border where, like Mirabel, CPB apprehends them.²¹⁷ Most unaccompanied children are

²¹¹ Susan Terrio. "Life Ended There: Rare Interviews with the Children of America's Border Disaster." *Politico*, July 10, 2014.

²¹² See American Immigration Council. *Children in Danger: A Guide to the Humanitarian Challenge at the Border*. 2014, accessed May 28, 2015, *available at* http://www.immigrationpolicy.org/sites/default/files/docs/children_in_danger_a_guide_to_the_humanitarian_challenge_at_the_border_final.pdf; See also Susan Carroll, *Crossing Alone: Children Feeling to U.S. Land in Shadowy System*, *Houston Chronicle*, May 24, 2014, accessed May 28, 2015, *available at* <http://www.houstonchronicle.com/news/investigations/article/Crossing-alone-Children-fleeing-to-U-S-land-in-5503127.php>; Pamela Brown and Steve Almasy, *Sexual Abuse of Minors Alleged at Border as Kids Flock into U.S.*, CNN, June 12, 2014, accessed May 28, 2015, *available at* <http://www.cnn.com/2014/06/11/us/undocumented-children-immigrants-abuse-complaint/>.

²¹³ Unaccompanied alien children is the statutory term given to those children who are under the age of 18, without a parent or legal guardian, and who lack lawful immigration status in the United States. See 6 U.S.C. § 279(g)(2).

²¹⁴ See Senate Judiciary Committee hearing on *Oversight of the Department of Homeland Security*, June 11, 2014. [Hereinafter *Senate oversight hearing*].

²¹⁵ Cecilia Muñoz, White House Director of Domestic Policy Council, "Press Call Regarding the Establishment of the Inter-Agency Unified Coordination Group on Unaccompanied Alien Children," Press Release, June 3, 2014.

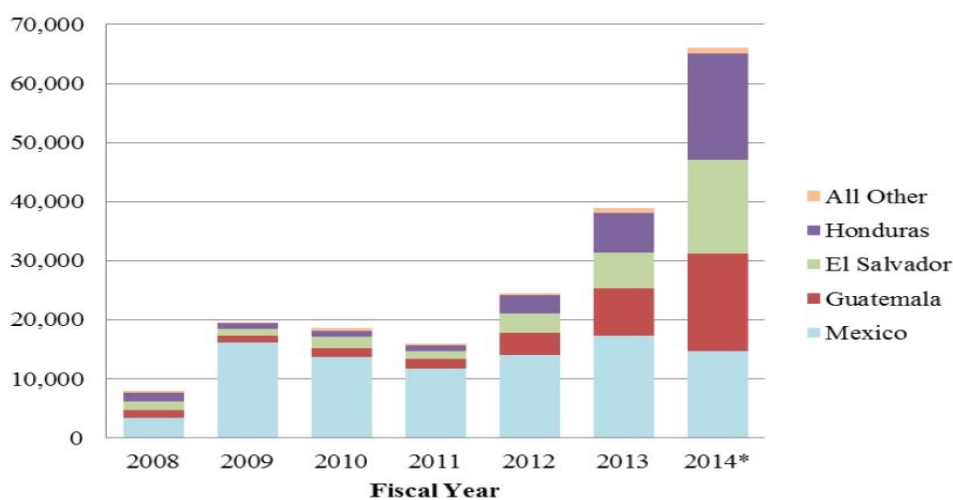
²¹⁶ "Southwest Border Unaccompanied Alien Children." Southwest Border Unaccompanied Alien Children, accessed June 23, 2015, *available at* <http://www.cbp.gov/newsroom/stats/southwest-border-unaccompanied-children>.

²¹⁷ See Jeh Johnson, Secretary for the Department of Homeland Security, "Border Security in the 21st Century" (Presentation discussing DHS in the past, present, and future delivered on October 9, 2014), *available at* <http://www.dhs.gov/unaccompanied-children>.

approximately 14 years of age or older, but, according to one CRS Report,²¹⁸ there has been an increase in children who are under 13 years of age.²¹⁹

Over the past five years, CPB has apprehended increasing numbers of unaccompanied alien children from El Salvador, Guatemala, and Honduras.²²⁰ According to a Congressional Research Service report, by the end of June 2014, CPB had apprehended more unaccompanied children than in any other year. For example, the number of unaccompanied children apprehended more than tripled between 2012 and the end of June 2014.²²¹ The most remarkable increases were in the numbers of young girls and of children under 13 years of age. Figure 3²²² shows the number of unaccompanied alien children apprehensions by country of origin between FY 2008 and 2014.

Figure 3. Unaccompanied Alien Children Apprehensions by Country—2008–2014



Source: For FY2008-FY2013: U.S. Department of Homeland Security, United States Border Patrol, *Juvenile and Adult Apprehensions—Fiscal Year 2013*. For FY2014, Customs and Border Protection, *Southwest Border Unaccompanied Alien Children*, <http://www.cbp.gov/newsroom/stats/southwest-border-unaccompanied-children>.

²¹⁸ Congressional Research Service, *Unaccompanied Alien Children: An Overview*. R43599. By Lisa Seghetti, Alison Siskin, and Ruth Ellen Wasem. Washington, D.C.: United States Government Printing Office, 2014.

²¹⁹ "Children 12 and under Are Fastest Growing Group of Unaccompanied Minors at U.S. Border." Pew Research Center RSS. July 22, 2014, available at <http://www.pewresearch.org/fact-tank/2014/07/22/children-12-and-under-are-fastest-growing-group-of-unaccompanied-minors-at-u-s-border/>.

²²⁰ *Ibid.*

²²¹ *See supra* note 220.

²²² *Ibid.*

Figure 3 above indicates that children from El Salvador, Guatemala, Honduras, and Mexico account for almost 100 percent of unaccompanied children CBP had apprehended since 2008. The number of unaccompanied children from Mexico had increased dramatically in 2009, and has remained unchanged. In 2012, the number of children who CBP apprehended from El Salvador and Guatemala increased dramatically.²²³ According to authors Lisa Seghetti, Alison Siskin and Ruth Ellen Wasem in the report, *Unaccompanied Alien Children: An Overview*, “[b]y August 31, 2014, when observing apprehensions along the southwest border, the proportion of unaccompanied alien children from El Salvador, Guatemala, and Honduras had almost reversed - with unaccompanied alien children from Mexico comprising only 22 percent of the 66,127 child apprehensions and children from the three Central American countries comprising 76 percent.”²²⁴

Federal Policies Surrounding Unaccompanied Alien Children

The Flores Settlement Agreement of 1997 (FSA),²²⁵ The Homeland Security Act of 2002 (HAS),²²⁶ and the Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA)²²⁷ are the primary policies and procedures governing how the United States treats unaccompanied alien children.

The Flores Settlement Agreement

FSA was the direct result of a class action filed against the Immigration and Naturalization Services (INS).²²⁸ The complainants were specifically challenging INS policies pertinent to undocumented immigrant children processing, detention and release.²²⁹ While the case was never litigated, the settlement agreement binds all immigration detention centers, excluding family residential detention centers, with compliance.²³⁰

²²³ Ibid.

²²⁴ Lisa Seghetti, Alison Siskin, and Ruth Ellen Wasem, *Unaccompanied Alien Children: An Overview*. R43599. Washington, DC: U.S. Government Printing Office, 2014.

²²⁵ *Flores v. Reno*, No. 85-4544, Stipulated Settlement Agreement (C.D. Cal., 1997).

²²⁶ Home Land Security Act of 2002, PUB. L. 107-296 (2002).

²²⁷ William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, PUB. L. 110-457 (2008), 122 Stat. 5044, 5077 (codified at 22 U.S.C. § 7101 *et seq.*).

²²⁸ “Unaccompanied Juveniles in INS Custody.” Unaccompanied Juveniles in INS Custody, *available at* <https://oig.justice.gov/reports/INS/e0109/exec.htm>.

²²⁹ Ibid.

²³⁰ Flores, Stipulated Settlement Agreement (C.D. Cal., 1997).

FSA established the first guidelines detailing how immigrant children should be treated in the immigration detention system. It required that detained immigrant children are to be given food and drinking water, medical assistance, access to toilets and sinks, adequate temperature controls and ventilation, proper security, and protections to insure that all unrelated children are separated from unrelated adults whenever possible.²³¹ FSA also required INS to release detained immigrant children as soon as possible, place children in the least restrictive settings, and implement standards of care and treatment for all children who are in the U.S. immigration detention system.²³² There is still debate as to whether these standards have been properly implemented.

Homeland Security Act of 2002

Congress passed HSA in response to the 9/11 terrorist attacks, believing that the country's national security system needed enhanced coordination and structure.²³³ The HSA reorganized several government agencies and also created the Department of Homeland Security (DHS).²³⁴ Additionally, Congress moved the Immigration and Naturalization Services (INS) from the Department of Justice to DHS under Immigration and Customs Enforcement (ICE).²³⁵ HSA also gave DHS and the Department of Health and Human Services' (HHS) Office of Refugee Resettlement (ORR) shared responsibility for processing and treating unaccompanied alien children.²³⁶

Under HSA, ICE is responsible for apprehending, transferring, and repatriating²³⁷ immigrants who unlawfully come to the United States.²³⁸ HSA gave ORR responsibility

²³¹ DHS Office of the Inspector General, CBP's Handling of Unaccompanied Alien Children, OIG-10-117, September 2010, *available at* https://www.oig.dhs.gov/assets/Mgmt/OIG_10-117_Sep10.pdf.

²³² *See supra* note 227.

²³³ 38 Weekly Comp. Pres. Doc. 2090 (Nov, 25, 2002).

²³⁴ Homeland Security" Act, accessed June 1, 2015, *available at* <http://www.dhs.gov/homeland-security-act-section-452-citizenship-and-immigration-services-ombudsman>. "About Unaccompanied Children's Services." About Unaccompanied Children's Services. accessed June 1, 2015, *available at* <http://www.acf.hhs.gov/programs/orr/programs/ucs/about>, *available at* <http://www.acf.hhs.gov/programs/orr/resource/unaccompanied-childrens-services>. "About Unaccompanied Children's Services," accessed June 1, 2015, *available at* <http://www.acf.hhs.gov/programs/orr/programs/ucs/about>. HHS-ORR was created by the Refugee Act of 1980 (codified at 8 U.S.C. § 1521 *et seq.*).

²³⁵ *Ibid.* See also Lopez, Codifying the Flores Settlement Agreement: Seeking to Protect Immigrant Children in U.S. Custody, 95 Marq. L. Rev. 1635, 1651 (2012).

²³⁶ *Supra* note 233.

²³⁷ Repatriation is a term describing returning unaccompanied alien children to their country of origin. *See* HSA, 116 Stat. 2135, 2192.

²³⁸ Lisa Seghetti, Alison Siskin, and Ruth Ellen Wasem, Homeland Security Act of 2002, Pub. L. No 107-296. Unaccompanied Alien Children: An Overview, Congressional Research Service R43599. Washington, DC. U.S. Government Printing Office, 2014.

for coordinating and implementing policies and standards for the care and placement of unaccompanied alien children.²³⁹ In addition to creating DHS and ORR, HSA also specifically defined Undocumented Alien Children as “unauthorized minors without the accompaniment of a parent or legal guardian.”²⁴⁰

ORR was directed to create a national plan for the coordination of care and placement of unaccompanied alien children and to create a plan “to ensure that qualified and independent legal counsel” would be appointed to represent the children. HSA also required ORR to ensure that the interests of the child are considered in decisions and actions relating to the care and custody of the child. Finally, ORR was charged with making and implementing placement determinations, overseeing the facilities where the children are residing, “reuniting unaccompanied alien children with a parent abroad in appropriate cases” and developing statistical data on unaccompanied minors who are processed through ORR.²⁴¹

Trafficking Victims Protection Reauthorization Act of 2008

In 2008, Congress passed the William Wilberforce Trafficking Victims Protection Reauthorization Act (TVPRA), which codified many portions of the FSA.²⁴² Although TVPRA’s main purpose was to prevent and protect against human trafficking, the Act contained several provisions regarding the treatment of unaccompanied alien children under federal custody—specifically, unaccompanied alien children under ORR care.²⁴³ TVPRA mandates that ORR place each child in the least restrictive setting “that is in the best interests of the child.”²⁴⁴ Additionally, in order to “effectively advocate for the best interests of the child,” ORR is allowed to appoint independent advocates for each child under their custody.²⁴⁵ TVPRA also requires DHS to transfer unaccompanied alien children, absent extenuating circumstances, to ORR within 72 hours after being taken into DHS custody.²⁴⁶

²³⁹ *Ibid.*

²⁴⁰ Lisa Seghetti, Alison Siskin, and Ruth Ellen Wasem, *Unaccompanied Alien Children: An Overview*. R43599. Washington, DC: U.S. Government Printing Office, 2014.

²⁴¹ Lopez, *Codifying the Flores Settlement Agreement: Seeking to Protect Immigrant Children in U.S. Custody*, 95 MARQ. L. REV. 1635, 1651 (2012).

²⁴² The Trafficking Victims Protection Reauthorization Act of 2008, PUB. L. 110-457, 122 Stat. 5044 (2008).

²⁴³ *See, Id.*

²⁴⁴ *Id.*, § 235(c)(2).

²⁴⁵ *Id.*, § 235(c)(6).

²⁴⁶ *Id.*, § 235(b)(3), 122 Stat. at 5077.

Under TVPRA, DHS cannot directly deport unaccompanied alien children if they are from countries other than Canada and Mexico.²⁴⁷ These children are not subject to expedited removal proceedings and are always permitted to appear before an immigration judge to petition for humanitarian relief or removal.²⁴⁸ However, TVPRA requires CBP to determine whether unaccompanied alien children from Canada or Mexico have been victims of human trafficking, have an asylum claim, and are willing to voluntarily return to Canada or Mexico.²⁴⁹ They are subject to expedited removal.

FIGURE 4. Proper Process For Handling Unaccompanied Alien Children Cases Under TVPRA.



Source: MPI Report²⁵⁰

Don T. Hutto Settlement Agreement

The Don T. Hutto Facility (Hutto) was a family detention center holding undocumented immigrants who migrated as a family and were captured and detained by ICE.²⁵¹ Hutto was not a DHS facility, but instead run by Correctional Centers for America (CCA)—a

²⁴⁷ See, PUB. L.110-457, 122 Stat. 5044 (2008) (TVPRA establishes different procedures for unaccompanied Canadian and Mexican minors).

²⁴⁸ See, *Id.*

²⁴⁹ See, *Id.*

²⁵⁰ Marc R. Rosenblum, April 2015, Unaccompanied Child Migration to the United States: The Tension Between Protection and Prevention, MPI.

²⁵¹ See *Bunikyte, ex rel. Bunikiene v. Chertoff*, No. A-07-CA-164-SS, 2007 WL 1074070, at *1 (W.D. Tex. Apr. 9, 2007).

for-profit corporation.²⁵² In 2007, the American Civil Liberties Union (ACLU) and the University of Texas School of Law, on behalf of 10 immigrant children and their families (Plaintiffs), brought a lawsuit against DHS.²⁵³ The plaintiffs alleged that DHS violated the FSA²⁵⁴ while they were detained at Hutto. While U.S. District Judge Sam Sparks agreed that the conditions the families faced at Hutto violated FSA, he did not believe that detaining children in Hutto itself violated FSA.²⁵⁵ Judge Sparks opined that the FSA did not prohibit DHS from detaining children; instead, FSA set the standards in which detained children were to be treated and held.²⁵⁶ Judge Sparks ultimately asked the parties to enter into voluntary mediation.²⁵⁷ Afterwards, the Don T. Hutto Settlement Agreement was created.

The Hutto Settlement Agreement added to the FSA by requiring that the federal government give children more educational programs and outdoor time. Hutto required a plethora of other services. This Report does not discuss the Hutto Settlement Agreement further because the agreement applies only to the Hutto Facility.

Discussion

This portion of the Report discusses whether DHS and ORR are complying with FSA and TVPRA of 2008. Although FSA mandated the former INS to comply with the provisions contained within, the FSA also binds DHS and HHS- ORR.²⁵⁸

Compliance with the Flores Settlement Agreement

Required Release

Under FSA, DHS may detain unaccompanied alien children only to secure their timely appearance before a DHS, HHS, or Immigration Court, or to ensure their safety or the safety of others.²⁵⁹ If detaining an unaccompanied alien child is not required, then that child must be released to a parent, legal guardian, adult relative (brother, sister, aunt, uncle, or grandparent), an adult individual or entity designated by the parent or legal

²⁵² See T. Don Hutto Residential Center, Hutto, accessed June 24, 2015, *available at* <http://www.ice.gov/factsheets/facilities-hutto>.

²⁵³ *Supra*, Note 253.

²⁵⁴ *Flores v. Meese*, No. 85-cv-4544 (C.D. Cal., Sept. 16, 1996).

²⁵⁵ *Supra*, Note 253.

²⁵⁶ *Ibid*.

²⁵⁷ *Ibid*.

²⁵⁸ See generally, *Ibid*.

²⁵⁹ See *Flores v. Meese*—Stipulated Settlement Agreement (C.D. Cal., 1997).

guardian as capable and willing to care for the minor's well-being through a declaration or other documentation, a licensed program willing to accept legal custody, or an individual or entity willing to accept legal custody after a suitability statement has been conducted and an affidavit of support has been created.²⁶⁰

There is serious doubt whether DHS should detain unaccompanied alien children at all. Mary Meg McCarthy, executive director of Heartland Alliance's National Immigrant Justice Center (NIJC), finds that the federal government:

...must stop using incarceration as a default immigration enforcement tool, and discontinue policy making that relies on the misguided perception that expanding detention deters migration. It doesn't. Our clients have come back after being detained because they could not live safely in their home countries. The primary means to responsibly reduce the U.S. immigration detention system's dependence on incarceration is to expand alternatives to detention programs, also known as ATDs. The U.S. government must take a hard look at the population it detains. According to the UN High Commissioner for Refugees, detention should only be used as a measure of last resort for the shortest appropriate period of time. According to a study conducted by the Vera Institute of Justice, detained immigrants who participated in an alternative to detention (ATD) program had a 91 percent appearance at all required hearings and a 93 percent appearance rate for asylum seekers.²⁶¹ Additionally, a more recent study suggests that a majority of migrant children who were released from detention had a high appearance rate as well. According to the American Bar Association (ABA), immigrants who are seeking asylum have a strong incentive to comply with court orders because they have a strong interest in securing protection.²⁶²

DHS implemented ATD programs to cope with the influx of people migrating across the border.²⁶³ The DHS Office of Enforcement and Removal Operations (ERO) is responsible for processing, detaining, and deporting detained immigrants. DHS does not

²⁶⁰ See, *Ibid.* Some portions of FSA have been codified: 8 C.F.R. § 263.3.

²⁶¹ *Accord* Rebeca M. López, Codifying the Flores Settlement Agreement: Seeking to Protect Immigrant Children in U.S. Custody, 95 MARQ. L. REV. 1635, 1677 (2012) (stating that, "ATD have also been proven as effective means of ensuring that undocumented immigrants appear for their court hearings. Immigrants in the ATD program have more than a 90% compliance rate among immigrants in U.S. custody.").

²⁶² McCarthy, Briefing Transcript, pp. 251-252.

²⁶³ DHS, OIG, U.S. Immigration and Customs Enforcement's Alternative to Detention (Revised), OIG-15-22 (Feb. 4, 2015), available at https://www.oig.dhs.gov/assets/Mgmt/2015/OIG_15-22_Feb15.pdf.

have the capacity to detain all the immigrants which it apprehends each month.²⁶⁴ To address the under-capacity issue, ERO uses Congressionally-appropriated funds to provide the option of supervised release.²⁶⁵ Some ATD initiatives include providing detained immigrants with “electronic monitoring services for both programs, either through use of an ankle bracelet that enables Global Positioning System (GPS) monitoring or voice recognition software for telephonic reporting.”²⁶⁶ These types of programs are utilized for detained immigrants in general, and can be specifically tailored to serve detained immigrant children.

The Flores District Court Decision

On July 24, 2015, the U.S. District Court for the Central District of California ruled that DHS had not complied with the FSA.²⁶⁷ The principle issues before the court were: 1) whether ICE’s blanket no-release policy of detaining all female-headed families (and accompanied minors) in secure, unlicensed facilities for the duration of immigration proceedings failed to comply with FSA provisions requiring ICE to minimize the detention of children and to consider releasing them to available custodians; 2) whether ICE followed its own standards of confining children in secured, unlicensed facilities; and 3) whether CBP exposed children in its custody to harsh, sub-standard conditions and treatment.²⁶⁸

The court first ruled on whether accompanied minors who are part of a female-headed household are “class members” covered under FSA when DHS apprehends and detains them. The court found that the FSA not only applied to unaccompanied alien children, but also to accompanied minors.²⁶⁹ After determining that the FSA applied to children who immigrated with their mothers, the court ruled that DHS “must release an accompanying parent as long as doing so would not create a flight risk to safety.”²⁷⁰ Accordingly, when DHS releases an unauthorized alien child in compliance with the

²⁶⁴ Ibid.

²⁶⁵ Ibid.

²⁶⁶ Ibid.

²⁶⁷ *Jenny L. Flores, et. al. v. Jeh Johnson, et. at.*, CV 85-4544 DMG (AGRx) (C.D. Cal 2015), (hereinafter referred to as “*Flores*”).

²⁶⁸ Ibid., at 4.

²⁶⁹ Ibid., at 4-7. The Agreement defines a minor as “any person under the age of 18 years who is detained in the legal custody of INS, and INA describes a child as “an unmarried person under 21 years of age.” Ibid., at 4.

²⁷⁰ Ibid., at 9. “‘Secure’ in this context refers to a detention facility where individuals are held in custody and are not free to leave. Conversely, ‘non-secure’ facilities are those where individuals are not held in custody.” Ibid., at 2.

FSA, DHS must also release that unauthorized alien child's parent so long as there is no risk that both the child and parent will flee or present safety risks to themselves or others.

The court next discussed whether DHS violated the FSA by detaining accompanied and unaccompanied alien children in secured, licensed facilities as opposed to unsecured, licensed facilities as the FSA mandates.²⁷¹ The court specifically identified DHS's Karnes Family Residential Center as unlicensed "by the state's Department of Family and Protective Services."²⁷² The court found that detaining unaccompanied alien children in facilities such as Karnes violated provisions of the FSA because said centers are "secure, unlicensed facilities."²⁷³ The court also found that DHS violated the FSA by detaining children in holding cells whose conditions were "egregious," including overly cold and overcrowded environments with inadequate nutrition and access to personal hygiene maintenance.²⁷⁴

While the District Court's decision may change some of the analysis related to whether DHS is complying with FSA and TVPRA of 2008, the Commission reserves applying the findings of this case to its analysis until the Federal Court of Appeals for the 9th Circuit or, if necessary, the U.S. Supreme Court issues a final ruling.

The Commission believes that there is no evidence indicating that ICE or CBP need to detain unaccompanied alien children on a wholesale basis and in the absence of the risk factor analyses cited above. DHS implementation of ATD programs, based on the success rate of those programs, may help DHS to comply fully with the FSA's goals of releasing detained migrant children as soon as possible and into the least restrictive available settings.

²⁷¹ *Ibid.*, at 12-16.

²⁷² *Ibid.*

²⁷³ *Ibid.* The Court noted the plaintiff's proffered evidence regarding the "secure" status at the Karnes City Facility:

The Karnes facility is a large block building, which appeared to have only one entrance. To enter, my colleagues and I were required to deposit our cell phones in a metal locker, exchange our driver's licenses for visitor's badges, pass our personal items through an X-ray machine, and walk through a metal detector. We were then directed to a sally port, which comprised two heavy metal doors with a small room between. We passed through one door, it closed behind us; we were then directed to display visitor's badges behind heavy glass; the second door was opened, we walked through, and we reached the interior of the facility. *Ibid.*, at 15.

²⁷⁴ *Ibid.*, at 16-18.

Required Confinement Standards

FSA mandates all detention facilities that house unaccompanied immigrant children must be safe and sanitary, complete with toilets, sinks, safe drinking water, food, medical assistance for emergencies, adequate temperature control and ventilation, adequate supervision to protect minors, and contact with all family members with whom the child was arrested.²⁷⁵ Additionally, DHS must segregate each minor from unrelated adults, place him/ her in the least restrictive setting possible that is appropriate for the child's age and special needs, and provide notice of his/her rights.²⁷⁶ FSA also mandates that DHS treat each child with dignity, respect, and with special concern for their particular vulnerabilities as children.²⁷⁷

Federal officials have publicly stated their commitment to and compliance with the FSA standards.²⁷⁸ Jeh Johnson, Secretary of Homeland Security, along with Craig Fugate, Federal Emergency Management Agency (FEMA) Administrator, announced a reinforcement of "oversight, direction and guidance, lead and [coordination of] Federal response efforts to ensure that federal agencies are unified in providing relief to the affected children."²⁷⁹ Additionally, Secretary Johnson ensured CBP and ICE's commitment to providing "the proper care of unaccompanied children when they are temporarily in DHS custody."²⁸⁰ For example, Secretary Johnson called for the "immediate deployment of approximately 150 additional Border Patrol agents to the Rio Grande Valley in Texas, where the largest numbers of unaccompanied minors are arriving, [to] help process the influx of children."²⁸¹ With this increase of personnel, CBP Commissioner Kerlikowske maintains that he has seen positive demonstrations of CBP employees' work ethic; stating "I have seen CBP employees respond to these difficulties with professionalism and compassion. . . . They've made heroic efforts with these

²⁷⁵ See *Flores v. Meese*—Stipulated Settlement Agreement (D.C. Cal., 1997).

²⁷⁶ *Ibid.*

²⁷⁷ *Ibid.*

²⁷⁸ The National Immigrant Justice Center, Esperanza Immigration Rights Project, Americans for Immigrant Justice, Florence Immigrant & Refugee Rights Project, and the ACLU, June, 11 2014, Correspondence to Megan H. Mack, Officer for Civil Rights and Civil Liberties, and John Roth, DHS Inspector General.

²⁷⁹ DHS Press Office, Statement by Secretary Johnson on Increased Influx of Unaccompanied Immigrant Children at the Border, accessed May 29, 2015, *available at* <http://www.dhs.gov/news/2014/06/02/statement-secretary-johnson-increased-influx-unaccompanied-immigrant-children-border>.

²⁸⁰ *Ibid.*

²⁸¹ "CBP Addresses Humanitarian Challenges of Unaccompanied Child Migrants." CBP Addresses Humanitarian Challenges of Unaccompanied Child Migrants, accessed June 3, 2015, *available at* <http://www.cbp.gov/border-security/humanitarian-challenges>.

children; rescuing them and caring for them in the most humane and compassionate way. I am extremely proud of their dedication and of how they have risen to this challenge.”²⁸²

However, the Commission has received testimony disputing these claims. For example, Sister Norma Pimentel of the Catholic Charities of the Rio Grande testified that she witnessed the following:

[H]undreds, if not thousands of children, of very young ages, detained in great numbers in small cells. The children’s faces looking through large glass windows, all with tearful eyes. Dirty. Sad. Traumatized. All I could think about was what it must have been like for them to make such a long and difficult journey north without the care and comfort of a family member. And then to imagine how these children feel being detained under these conditions. Packed up like little sardines, with no space to even breathe.”²⁸³

Additionally, the Commission has received reports from the National Immigrant Justice Center (NIJC) that CBP and ICE employees were abusing children in their custody.²⁸⁴ Furthermore, 124 detained unaccompanied immigrant children were interviewed about their detention experience: 85 percent reported that their holding cells were excessively cold; 37 percent did not get enough food (received food less than three times a day); 25 percent were not given or offered water; and 49 percent were not allowed to call their families, consulate, or speak to an attorney.²⁸⁵ For example:

NIJC’s 2014 *Policy Brief* likewise noted the harsh treatment that children often faced while in CBP custody. In interviews with 224 children over a three-week period, the vast majority of children reported being detained in *hieleras*, the Spanish word for “freezers,” used to describe holding rooms maintained at extremely cold temperatures. Many children reported being unable to track the length of time they were held in CBP custody because the lights in their cells were never turned off. At least 29 children were held in CBP custody beyond the

²⁸² Ibid.

²⁸³ Pimentel, Briefing Transcript, pp 1-2.

²⁸⁴ The National Immigrant Justice Center, Esperanza Immigration Rights Project, Americans for Immigrant Justice, Florence Immigrant & Refugee Rights Project, and the ACLU, June, 11 2014, *Correspondence to Megan H. Mack, Officer for Civil Rights and Civil Liberties, and John Roth, DHS Inspector General*.

²⁸⁵ Ibid (citing Florence Immigrant and Refugee Rights Project, *Seeking Protection, Enduring Prosecution: The Treatment and Abuse of Unaccompanied Undocumented Children in Short-term Immigration Detention*, (2009) (hereinafter *Florence Project Seeking Protection, Enduring Prosecution*) available at <http://bit.ly/1prCKx>).

72-hour legal limit. Some of the children reported being hungry in CBP custody, including several who reported that they were “barely fed.” In addition, 56 percent of children said they were placed in three-point shackles, affixed at the wrists, waist, and ankles.²⁸⁶

Moreover, NIJC collected numerous affidavits²⁸⁷ detailing some of the experiences these children face. For example:

D.G. is a 16-year-old Central American girl. Shortly after CBP arrested her, officials mocked her and asked her why she did not ask the Mexicans for help. When they searched her, officials violently spread her legs and touched her genital areas forcefully, making her scream. D.G. was detained with both children and adults. She describes the holding cell as ice-cold and filthy and says the bright fluorescent lights were left on all day and night. D.G. became ill while in CBP custody, but when she asked to see a doctor, officials told her it was “not their fault” that she was sick and ignored her. CBP officials did not return all of D.G.’s personal belongings when she was released.

M.V. is a 16-year-old boy who was apprehended near McAllen, Texas. While in CBP custody, M.V. was taken to a room where officials insulted M.V. and accused him of lying about his age. One official accused M.V. of possessing false documents, and threatened that if M.V. did not tell the truth about his age, he would “become the wife” of a male detainee. That official left the room, leaving M.V. alone with a male CBP official. That official directed M.V. to remove all of his clothes. M.V. remained undressed for approximately 15 minutes while the male official patted him down. The male official continued to interrogate M.V. about his age and laughed at M.V. while he was undressed. After the strip search, M.V. was directed to another waiting room where a third official told M.V. he would “pay” for being a liar. When M.V. was transferred to ORR custody, CBP officials handcuffed him in three-point restraints. M.V. was transported with other children who shared that they had also been strip-searched and questioned about their age.

O.M. is a five-year-old boy who fled his home country with his mother, **Z.M.** When Z.M. attempted to identify herself as an asylum seeker during an initial screening, CBP officials threatened that if she did not reveal who

²⁸⁶ Ibid.

²⁸⁷ Ibid.

helped her to cross the border, they would take away her son and she would never see him again. CBP officials placed Z.M. in three-point shackles even though she was six and a half months pregnant and threw away her prenatal vitamins and the medication she had brought for O.M. In three days in CBP custody, officials gave O.M. juice and a spoiled burrito that he could not eat. O.M. ate only a cookie each day he remained in detention. He slept on the floor without any bedding. Z.M. reports that the cell smelled of urine and that she did not receive enough water. As CBP officials were separating O.M. and Z.M., O.M. began to cry. The official asked O.M. if he knew how to count, and O.M. responded, “Yes.” The official told O.M. to count a week three times because he would not see his mother until that time had passed. In fact, Z.M. and O.M. were not reunited for approximately two months. O.M. describes being terrified and extremely depressed by the separation from his mother and his experience in CBP custody.

J.R., a 14-year-old girl from El Salvador, did not receive water for several hours after being apprehended by immigration officials. She eventually drank water tasting strongly of bleach out of a cup shared by other detainees. While she was detained, CBP only gave J.R. food twice a day: a frozen sandwich and a foul-smelling burrito with rotten beans. She repeatedly vomited after eating, but CBP did not provide any other food. J.R. found a worn and dirty aluminum blanket in her cell that had belonged to another detainee, but it was insufficient to keep her warm in the *hielera*. J.R. was unable to sleep because officials woke the children frequently. When the children spoke to each other, the officials yelled at them and jingled handcuffs in a threatening manner. J.R. describes feeling scared, unsafe, and anxious throughout her time in detention—especially after she and her younger brother were separated. CBP officials confiscated a gold locket with a picture of J.R. and her brother and never returned it.²⁸⁸

During the Commission’s fact-finding visit to Karnes Detention Center on May 4, 2015 some of the detained mothers recounted being held in *hieleras* by CPB just days before the Commissioners met with them at Karnes. Moreover, at the Commission’s briefing, Chairman Castro asked Megan Mack, Chief Officer for Civil Rights and Civil Liberties in DHS, what DHS has done to fix detention standard violations.

²⁸⁸ Ibid.

Ms. Mack answered:

When we receive a complaint from an organization like NIJC, from Ms. McCarthy, or from other organizations, we follow up with the person who has sent the complaint. We ask any questions; we open investigations. So, in the first half of fiscal 2014, for example, about half of the new investigations that we opened, or 71 out of the 149 we opened, pertained to either ICE—pertained to ICE detention—and more than 20 others involved CBP ports of entry and checkpoints, and unaccompanied children.

We have a team of experts that are on contract with my office in a variety of areas, including medical and mental health care, conditions of confinement, environmental health and safety, and other areas. They come with us to the facilities, so our staff facilities really review their medical files. They pull files, if they see a problem, they pull more files.

We went to Artesia, New Mexico, last November and then Karnes Detention Facility in December, so Dilley will be the third major—the large new detention facility we visited. And then the experts submit reports to us, and we work with ICE. We make recommendations and work with ICE to resolve issues that we found there.²⁸⁹

When Chairman Castro further questioned Mack about the corrective procedures that took place to address the issues with those minors in the affidavits above, she responded:

So, I don't believe our recommendations had been finalized. And the process is that those are protected under deliberative privilege until we hear back from ICE or CBP about the complaints. And I can check to be sure, but I don't believe those complaints, we have final recommendations on those. Once we have final recommendations, we report out in our annual report and our quarterly reports to Congress.²⁹⁰

Additionally, Anne Bena, Principal Advisor and Director in ORR at HHS, stated that:

When a child is referred to ORR from DHS, ORR has intake specialists that must make a placement determination for each child within the network that is the least restrictive setting and one that is in the best interest of the child.

²⁸⁹ Mack, Briefing Transcript, pp. 38-39.

²⁹⁰ Ibid.

ORR will identify any special needs that a child may have and determine the best and most appropriate placement for the child. For example, ORR uses transitional foster care to house children under the age of 12, or teens who are pregnant or parenting so that they may receive specialized care and services.

When the Unaccompanied Children's program was transferred from the former U.S. Immigration and Naturalization Service to the Department of Health and Human Services—ORR became bound by the *Flores v. Reno* settlement agreement which set forth minimum standards and services that must be provided to all unaccompanied children. And ORR is tasked with providing the care and custody until a safe and suitable sponsor is found to provide care and physical custody for the child while the child waits for his or her immigration proceedings.

While the child is in ORR care, he or she receives an array of services in accordance with the Flores settlement agreement and state licensing standards. When a child is admitted to ORR care, trained care service providers conduct assessments of the child, including screenings, interviews, interviews with the child's family, interviews with potential sponsors, and then this assessment is used as a first round of screening to determine whether the child has any immediate needs, and whether the child has been a victim of abuse, of a crime, or of trafficking.²⁹¹

The Commission is concerned that federal agencies responsible for detaining children are not fully complying with FSA standards after analyzing the federal government's actions in relation to the testimony, affidavits, Commission fact-finding visits, and reports that the Commission received. Although the affidavits contained above are only a sample of the entire detained migrant children population, they only compound the well-documented evidence of abuse that occurs at certain federal immigration detention facilities.

Compliance with the Trafficking Victims Protection Reauthorization Act - 72 Hour Rule

The Trafficking Victims Protection Reauthorization Act (TVPRA) adopted additional provisions mandating how DHS treats unaccompanied aliens when in their custody.²⁹²

²⁹¹ Bena, Briefing Transcript, pp. 26-27.

²⁹² See The Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. 110-457, 122 Stat. 5044 (2008).

Originally, under the Homeland Security Act of 2002,²⁹³ DHS was required to transfer certain unaccompanied alien children to ORR within 72 hours of custody.²⁹⁴ Six years later, the TVPRA mandated DHS to transfer unaccompanied alien children who were not from Canada or Mexico to ORR within 72 hours (3 days).²⁹⁵

Ms. Mack testified:

Under the Trafficking Victims Protection Reauthorization Act of 2008, when DHS encounters an unaccompanied child from a contiguous country, such as Mexico, the child is screened to identify potential victims of human trafficking, and determine whether the child has a fear of persecution if returned to his or her home country. DHS as a matter of policy conducts the screening on all unaccompanied children regardless of country of origin.²⁹⁶

Additionally, according to ORR's Bena, "Once DHS has identified a minor as an unaccompanied child [(a child not from Canada or Mexico)], they transfer the child to ORR custody by transporting the child to one of ORR's care provider facilities. ORR currently has approximately 124 care provider facilities in 15 states."²⁹⁷

However, a letter addressed to DHS and Megan Mack stated that, ". . . accompanied immigrant children regularly report being held in CBP custody beyond the 72-hour period established by the 2002 HSA and 2008 TVPRA, or even beyond the five days contemplated by the Flores Settlement Agreement in extenuating circumstances."²⁹⁸ Moreover, according to one 2015 GAO report, CBP failed to follow full screening procedures before deporting unaccompanied alien children.²⁹⁹

Based on the evidence presented above and the research conducted, there are not enough facts or evidence to definitively say that DHS and ORR are not complying with the TVPRA. However, the anecdotal information obtained by the Commission causes

²⁹³ See citation above.

²⁹⁴ 22 U.S.C. § 7101 et. seq (122 Stat. 5044 Section 235(b)(3) (2008).

²⁹⁵ Ibid.

²⁹⁶ Mack, Briefing Transcript, p. 18.

²⁹⁷ Bena, Briefing Transcript, p. 24.

²⁹⁸ National Immigrant Justice Center, Esperanza Immigration Rights Project, Americans for Immigrant Justice, Florence Immigrant & Refugee Rights Project, and the ACLU, June, 11 2014, Correspondence to Megan H. Mack, Officer for Civil Rights and Civil Liberties, and John Roth, DHS Inspector General.

²⁹⁹ Government Accountability Office, Unaccompanied Alien Children: Actions needed to Ensure Children Receive Required Care in DHS Custody. GAO-15-521. Washington, DC: U.S. Government Printing Office, 2015.

concern about the potential lack of compliance, and a more in-depth study must be done to fully examine the issue.

DHS is not the only agency responsible for the care of unaccompanied alien children. In addition to the FSA and the TVPRA standards, ORR established its own agency standards detailing the custody and care of unaccompanied immigrant children. ORR compliance is detailed below.

Role of the Office of Refugee Resettlement (ORR)

ORR, at the Commission's request, provided sample assessments of unaccompanied alien children documents and monitoring reports of services depicting examples of routine practices.³⁰⁰ This section of the Commission's Report examines the correlation between the standards of care and the claimed effectiveness of their implementation within various immigration detention locations and whether ORR is complying with standards protecting unaccompanied alien children.

Under the Homeland Security Act of 2002, ORR's Division of Children's Services/Unaccompanied Children's (unaccompanied alien children) program within HHS mandates certain standards of care and custody for unaccompanied children.³⁰¹ ORR responsibilities include medical and mental health; education; legal screenings and presentations; family reunification; and recreational activities.³⁰² The following are issues that the Commission noted after studying the assessments provided by ORR to the Commission.

Medical and mental health services.

ORR standards require that unaccompanied children receive medical and mental health services. ORR states that it is critical for unaccompanied children to receive accurate medical attention. ORR medical and mental health services standards require that *Initial Intake Assessments* to be completed within 24 hours of a child's admission into ORR's care. Additionally, ORR requires that staff conduct an Assessment and Individual Service Plan for unaccompanied children within seven days of each child's admission into custody. This document may be updated up to 15 days after admission.³⁰³

³⁰⁰ HHS Response to U.S. Commission on Civil Rights' Request for Information at 1 [hereinafter HHS Response]. The Commission submitted a request for information to HHS.

³⁰¹ "About Unaccompanied Children's Services." About Unaccompanied Children's Services. Nov. 1, 2014, accessed June 3, 2015.

³⁰² Ibid.

³⁰³ CRS, *Immigration-Related Detention: Current Legislative Issues* (RL32369; Jan. 12, 2015), by Alison Siskin. Text in: Congressional Research Digital Collection, accessed June 2, 2015. See letter from Ken Tota

The Commission received an ORR assessment reporting about a 15-year-old male unaccompanied alien child who arrived in ORR custody on January 29, 2015. The child's *Initial Intake Assessment* showed that ORR completed his intake interview, assessment, and medical exam within their respective allotted time periods.³⁰⁴ In this case, even though the forms were completed in a timely manner, staff misconduct may have compromised the effectiveness of "approaching the assessment"³⁰⁵ and interview assessments as evidenced below.

According to the assessment discussed above, ORR analyzed the Southwest Key Programs, Inc. (SWK) locations at Casa Esperanza³⁰⁶ and Brownsville "Staff Secure Report through FY2014." ORR discovered that a handful of staff members made unaccompanied alien children feel uncomfortable by the way staff spoke to them.³⁰⁷ At this same location, in 2012, ORR reported that three out of 15 randomly reviewed *Initial Intake Assessments* were missing from the ORR ETO database.³⁰⁸ ORR states that these reports have been found, but should have been documented in ORR's database.

ORR recommended that programs provide youth care workers with additional training on communicating with unaccompanied alien children to provide for and nurture positive interactions.³⁰⁹ ORR's Corrective Action Plan also recommended entering required data into the ORR efforts to outcome (ETO) database in a timely manner to prevent the loss of additional *Initial Intake Assessments*.³¹⁰

Educational Services

Children's detention centers are required to provide classroom education taught by teachers with a minimum four-year college degree. ORR also recommends that each

to Angela French-Bell before U.S. Commission on Civil Rights, Feb. 12, 2015, ORR, Administration for Children and Families, HHS, 5.

³⁰⁴ *Ibid.*, See also UNACCOMPANIED ALIEN CHILDREN: Basic Information and Initial Intake Assessment.

³⁰⁵ This is a term of art used by ORR to describe the process with which ORR assesses a child.

³⁰⁶ See Intake Assessments ORR provided to the Commission, *available at* U.S. Commission on Civil Rights National Headquarters: 1331 Pennsylvania Ave., NW, Washington D.C., 20425.

³⁰⁷ Alison Siskin, *Immigration-Related Detention: Current Legislative Issues* (Jan. 12, 2015), CRS RL32369; Text in: Congressional Research Digital Collection, accessed June 2, 2015. See UNACCOMPANIED ALIEN CHILDREN Basic Information and Initial Intakes Assessment. See FY2014 SWK Casa Esperanza and SWK Brownsville Staff Secure Monitoring Report, ORR, Division of Children's Services-UNACCOMPANIED ALIEN CHILDREN Program (90zU0049), Jan. 27-31, 2014. 4-5.

³⁰⁸ *Ibid.*, 6-7.

³⁰⁹ *Ibid.*, 4-5.

³¹⁰ *Ibid.*, 6-7.

teacher obtains a certification by the U.S. Department of Education (ED).³¹¹ When studying the SWK Casa Esperanza and SWK Brownsville “Staff Secure FY2014 Report,” the Commission notes that certain staff members who teach shelter education programs did not hold a four-year college degree.³¹² ORR recommends confirming whether teachers have four-year degree before hiring them.³¹³ Proper education is a vital part of a child’s development; education for unaccompanied alien children helps give these children an advantage in the job market if they plan to seek work in the United States. Therefore, the Commission is concerned that ORR is not complying with its staff educational requirements or providing detained children with adequate education.

Religious Services

ORR offers unaccompanied children, among other things, the opportunity to participate in religious services upon request.³¹⁴ When studying the “FY2014 SWK Campbell Monitoring Report” the Commission notes that some unaccompanied children were not aware of the availability of religious services upon request; did not know that religious services were optional, and were not given a response by staff upon request for a religious service.³¹⁵ ORR implemented corrective action policies which ensure that children understand grievance procedures and their rights to religious participation through clarification presentations.³¹⁶

Legal access.

ORR is required to provide children with information regarding legal rights and services. It fulfills this mission through the Legal Access Project (LAP).³¹⁷ Without comprehension of their legal rights, children may have difficulties maneuvering through the immigration detention system, including discharge procedures, family reunification, or issues of harassment.

³¹¹ Ibid., 7.

³¹² Ibid., 7.

³¹³ Ibid. See FY 2014 SWK Casa Esperanza and SWK Brownsville Staff Secure Monitoring Report, Office of Refugee Resettlement, Division of Children’s Services-UNACCOMPANIED ALIEN CHILDREN Program (90zU0049), January 27-31, 2014. 7.

³¹⁴ Ibid., Text in: Congressional Research Digital Collection, Accessed June 2, 2015.

³¹⁵ Ibid., See FY2014 SWK *Campbell* Monitoring Report, Office of Refugee Resettlement, Division of Children’s Services-UNACCOMPANIED ALIEN CHILDREN Program (90ZU0049), April 8–11, 2014.

³¹⁶ Ibid., p. 7.

³¹⁷ "About Unaccompanied Children's Services." About Unaccompanied Children's Services. Nov. 1, 2014. Accessed June 3, 2015.

Within ORR's LAP, all children receive presentations explaining their rights, individualized legal screenings, and information regarding the availability of pro bono legal representation.³¹⁸ HHS provided the Commission with a sample LAP document related to legal access involving a child from Central America. It was unclear whether HHS provided the 15-year-old unaccompanied male alien child with these materials when he arrived from Guatemala on Jan. 29, 2015.³¹⁹ On the first page of the LAP document under the column labeled "mandatory services," HHS was supposed to present this child with the "Know Your Rights" (KYR) presentation and legal screening at the same time. The start and end dates of the presentation and screening were stated to have been completed from Jan. 29–Feb. 28, 2015.³²⁰ However, the child answered negatively when questioned whether HHS had provided him with the KYR Presentation or the legal screening.³²¹ This discrepancy raises concerns regarding the accuracy of these reports.

Overall, ORR reports, sample assessments, and other information provide examples of ORR staff members, such as teachers and youth-care workers, neglecting to uphold quality care and custody policy standards. The summation of the issues is as follows:

- Interaction between staff and unaccompanied alien children which produced an uncomfortable environment for the unaccompanied alien children.
- *Initial Intake Assessments* which were allegedly found and supposedly incorrectly entered into the ORR database.
- Lack of the minimum certification of a 4-year college degree among the teaching staff.
- Incomplete documentation of presentations of religious and legal rights to unaccompanied alien children.³²²

ORR, however, is addressing many of these issues by implementing changes in policies to encourage corrective resolutions. Corrective measures that being implemented include:

³¹⁸ Ibid.

³¹⁹ Congressional Research Service. *Immigration-Related Detention: Current Legislative Issues* (RL32369; Jan. 12, 2015), by Alison Siskin. Text in: Congressional Research Digital Collection, Accessed June 2, 2015. See UNACCOMPANIED ALIEN CHILDREN Basic Information and *Initial Intake Assessment*, at 1.

³²⁰ Ibid.

³²¹ Ibid., p. 5.

³²² Congressional Research Service. *Immigration-Related Detention: Current Legislative Issues* (RL32369; Jan. 12, 2015), by Alison Siskin. Text in: Congressional Research Digital Collection, Accessed June 2, 2015.

- Additional training for staff members
- Necessary confirmations of staff requirements
- Entering information into databases in a timely fashion
- Increased accountability for presenting unaccompanied alien children with required information on legal and religious rights.³²³

The “HHS Response” states little about discrimination based on race, ethnicity, or nationality. The Commission finds that additional research must be conducted analyzing ORR’s compliance with their respective standards.

Conclusion

Based on the research and evidence stated above, the Commission finds that:

- Certain DHS and its agency’s component offices are not fully complying with the Flores Settlement Agreement Standards;
- Additional studies must be conducted regarding ORR staff treatment and interactions with unaccompanied alien children.
- Additional studies must be conducted regarding ORR’s corrective action plans.

³²³ Ibid.

CHAPTER 5. PRISON RAPE ELIMINATION ACT: COMPLIANCE OR VIOLATION

Background

The Prison Rape Elimination Act of 2003 (PREA)³²⁴ protects prisoners/detainees against sexual abuse and assault while in prison or detention.³²⁵ PREA also protects those detained at immigration detention centers.³²⁶ PREA also established the National Prison Rape Elimination Commission (NPREC) to study the impacts of rape in U.S. prisons.³²⁷ In its report, NPREC found that “[a] large number of detained immigrants are at [high] risk of sexual abuse.”³²⁸ NPREC further found that detained immigrants are especially vulnerable to sexual abuse and assault by detention staff because they are detained by the same agency which has the power to deport them.³²⁹ NPREC reported that detainees are less likely to report such abuse because they fear the possibility of being deported for retaliatory reasons.³³⁰

PREA requires the Attorney General, through the Department of Justice (DOJ), to publish a final rule adopting national standards for detecting, preventing, reducing, and punishing prison rape.³³¹ Pursuant to PREA, the Attorney General’s final rule “shall be based upon the independent judgment of the Attorney General, after giving due consideration to the recommended standards provided by [NPREC] ... and being informed by such data, opinions, and proposals that the Attorney General determines to be appropriate to consider.”³³² After NPREC released its report above, DOJ issued an advanced notice for proposed rulemaking (ANPRM)³³³ on March 10, 2010. DOJ’s ANPRM solicited public comment on NPREC’s proposed standards that it listed in its

³²⁴ Prison Rape Elimination Act of 2013, Pub. L. No 108-79, 117 Stat 972 (codified as 42 U.S.C. §§ 15601 *et seq.*).

³²⁵ 39 Weekly Comp. Pres. Doc. 1148 (September 4, 2003). See also National Prison Rape Elimination Commission, June 2009 Report, *available at* http://static.nicic.gov/UserShared/2013-03-29_nprec_execsummary.pdf.

³²⁶ National Prison Rape Elimination Commission, June 2009 Report, *available at* http://static.nicic.gov/UserShared/2013-03-29_nprec_execsummary.pdf.

³²⁷ *Ibid.*

³²⁸ *Ibid.*

³²⁹ *Ibid.*

³³⁰ See http://static.nicic.gov/UserShared/2013-03-29_nprec_execsummary.pdf.

³³¹ 42 U.S.C. § 15607(a)(1)-(2).

³³² 42 U.S.C. § 15607(a)(2).

³³³ *National Standards to Prevent, Detect, and Respond to Prison Rape*, Advanced Notice For Proposed Rule Making, 75 Fed. Reg. 11077 (March 10, 2010).

report to receive information that would be useful in publishing a final rule detailing PREA national standards.³³⁴

After reviewing the ANPRM, DOJ issued a Notice of Proposed Rule Making (NPRM) on February 3, 2011, soliciting comments on DOJ's proposed standards.³³⁵ The NPRM interpreted that PREA only binds the Bureau of Prisons and U.S. Marshall Services.³³⁶ This meant that PREA standards would not apply to DHS or its component agencies responsible for detaining undocumented immigrants. This interpretation received a number of criticisms.³³⁷ After re-examining the statute and accounting for the criticisms, DOJ stated in its Final Rule that PREA applies to all correctional facilities including prisons, jails, juvenile facilities, military and Indian country facilities, and *U.S. Department of Homeland Security (DHS) immigration detention facilities*.³³⁸ Furthermore, DOJ concluded that each federal agency responsible for incarcerating or detaining individuals "is accountable for, and has statutory authority to regulate, the operations of its own facilities and, therefore, is best positioned to determine how to implement the Federal laws and rules that govern its own operations, the conduct of its own employees, and the safety of persons in its custody."³³⁹

On the same day that DOJ issued its Final Rule, President Barack Obama released a memorandum affirming DOJ's Final Rule with regard to PREA's application to non-DOJ federal agencies. According to the memorandum, "each agency is responsible for, and must be accountable for, the operation of its own confinement facilities, and each agency has extensive expertise regarding its own facilities, particularly those housing unique populations."³⁴⁰ Moreover, the memorandum stated "each agency is best positioned to determine how to implement the Federal laws and rules that govern its own operations, the conduct of its own employees and the safety of persons in its custody."³⁴¹

³³⁴ Ibid.

³³⁵ *National Standards to Prevent, Detect, and Respond to Prison Rape*, Notice of Proposed Rule Making, 76 Fed. Reg. 6248 (February 23, 2011).

³³⁶ 76 Fed. Reg. 6248, 6256 (February 23, 2011).

³³⁷ Ibid.

³³⁸ *National Standards to Prevent, Detect, and Respond to Prison Rape*, Final Rule, 77 Fed. Reg. 37105 (June 20, 2012).

³³⁹ Ibid. at 37113.

³⁴⁰ White House, Memorandum on Implementing the Prison Rape Elimination Act, May 17, 2012, available at <https://www.whitehouse.gov/the-press-office/2012/05/17/presidential-memorandum-implementing-prison-rape-elimination-act>.

³⁴¹ Ibid.

DHS Application of PREA

In light of DOJ's Final Rule, the President's memorandum, and a provision in the Violence Against Women Reauthorization Act of 2013 (VAWA),³⁴² DHS issued an NPRM proposing "regulations setting standards to prevent, detect, and respond to sexual abuse in [DHS] confinement facilities."³⁴³ The NPRM listed and detailed all provisions relating to PREA that DHS and its component agencies would be responsible to follow.³⁴⁴ After receiving and reviewing comments, DHS issued a Final Rule on March 7, 2014.³⁴⁵ The Final Rule provided "provisions spann[ing] eleven categories that were originally used by the NPREC to discuss and evaluate prison rape elimination standards; prevention planning, responsive planning, training and education, assessment for risk of sexual victimization and abusiveness, reporting, official response following a detainee report, investigations discipline, medical and mental care ... [etc.]."³⁴⁶

DHS divided its PREA provisions into three separate subsections - Subsection A, B, and C.³⁴⁷ This report specifically focuses on Subsections A and B. Subsection A and its provisions are only applicable to DHS immigration detention facilities.³⁴⁸ An immigration detention facility is defined as any facility, whether DHS-owned or contracted through an Intergovernmental Service Agreement (IGSA)³⁴⁹ or serving as a Contract[ed] Detention Facility (CDF),³⁵⁰ that "routinely holds persons for over 24 hours pending resolution or completion of immigration operations or processes, including facilities that are operated by U.S. Immigration and Customs Enforcement (ICE), and

³⁴² Violence Against Women Reauthorization Act of 2013, Pub. L. 113-4 (March 2013) (Codified at 42 U.S.C. § 301 et seq.). This Act required DHS to promulgate its own PREA regulations.

³⁴³ *Standards to Prevent, Detect, and Respond to Sexual Abuse and Assault in Confinement Facilities*, Proposed Rule, 77 Fed. Reg. 75301 (December 19, 2012).

³⁴⁴ 77 Fed. Reg. 75301 (December 19, 2012) lists all proposed rules.

³⁴⁵ Final Rule, *Standards to Prevent, Detect, and Respond to Sexual Abuse and Assault in Confinement Facilities*, 79 Fed. Reg. 13100 (March 7, 2014) (Codified under 6 C.F.R. § 115 et seq.).

³⁴⁶ Ibid. at 13100.

³⁴⁷ See 6 C.F.R. § 115 et seq.

³⁴⁸ 6 C.F.R. § 115.10.

³⁴⁹ IGSA's are detention "facilities [that] are provided to ICE by States or local governments through agreements and may be owned by the State or local government, or a private entity. See 79 Fed. Reg. 13100, 13104 (March 7, 2014).

³⁵⁰ CDF are detention facilities "owned by private companies and contracted directly with ICE." See 79 Fed. Reg. 13100, 13104 (March 7, 2014).

facilities used by ICE pursuant to an [IGSA].”³⁵¹ ICE is the only DHS component that falls under Subsection A.³⁵²

Subsection B and its provisions apply to DHS holding facilities.³⁵³ A holding facility is defined as a facility containing “holding cells, cell blocks, or other secure enclosures that are: (1) [u]nder the control of the agency; and (2) [p]rimarily used for the short-term confinement of individuals who have recently been detained, or are being transferred to or from a court, jail, prison, other agency, or other unit of the facility or agency.”³⁵⁴ ICE, U.S. Customs and Border Protection (CBP), or other DHS components generally operate these facilities.³⁵⁵

This chapter of the Report discusses whether ICE and CBP are complying under their respective DHS-promulgated PREA subsection standards.

Discussion

The Commission received complaints from civil and human rights organizations such as the American Civil Liberties Union (ACLU), the American Bar Association (ABA), the American Immigration Lawyers Association (AILA), the Grassroots Leadership, the Mexican-American Legal Defense Fund (MALDEF), and the Human Rights Campaign (HRC) concerning the federal government’s unsatisfactory compliance with PREA standards. The following are specific questions examining whether DHS and its component agencies are complying with their relevant DHS PREA Subsections.

Is the Federal Government Complying with PREA at Immigration Detention Facilities?

*Zero tolerance of Sexual Abuse; Prevention of Sexual Assault Coordination*³⁵⁶

While it is clear that federal agencies provide written policies mandating zero tolerance for all forms of sexual abuse and harassment, it is less obvious whether DHS implements these policies or if these policies simply serve as platitudes.

³⁵¹ 6 C.F.R. § 115.5.

³⁵² 79 Fed. Reg. 13100, 13104 (March 7, 2014).

³⁵³ 6 C.F.R. § 115.5.

³⁵⁴ Ibid.

³⁵⁵ 79 Fed. Reg. 13100, 13104 (March 7, 2014).

³⁵⁶ 6 C.F.R. § 115.11; 6 C.F.R. § 115.111.

According to DHS PREA regulations for ICE (codified at 6 CFR Pt. 115, Subpart A), Section 115.11 mandates that:

- a) The agency shall have a written policy mandating zero tolerance toward all forms of sexual abuse and outlining the agency's approach to preventing, detecting, and responding to such conduct.
- (b) The agency shall employ or designate an upper-level, agency-wide Prevention of Sexual Assault Coordinator (PSA Coordinator) with sufficient time and authority to develop, implement, and oversee agency efforts to comply with these standards in all of its immigration detention facilities.
- (c) Each facility shall have a written policy mandating zero tolerance toward all forms of sexual abuse and outlining the facility's approach to preventing, detecting, and responding to such conduct. The agency shall review and approve each facility's written policy.³⁵⁷

In May 2014, ICE issued a revised Directive on Sexual Abuse and Assault Prevention and Intervention that was built from the requirements of the 2011 Performance Based National Detention Standards on Sexual Abuse and Assault Prevention (PBNDS).³⁵⁸ The combination of these regulations along with other ICE policies regarding staff responsibilities is supposed to “ensure an integrated and comprehensive system of preventing and responding to sexual abuse or assault of individuals in ICE.”³⁵⁹ Consistent with PREA requirements, ICE’s policies, specifically PBNDS 2011 and the 2014 Directive, mandate zero tolerance for all forms of sexual abuse and assault. Furthermore, ICE provides for a Prevention of Sexual Assault (PSA) Coordinator; however, the Commission could not find the contact information for the PSA coordinator during its initial study. Kevin Landy, Assistant Director, Office of Detention and Policy Planning (ODPP), later provided the Commission with this information and stated that ICE regularly releases this information to stakeholders.³⁶⁰ Because such knowledge is not

³⁵⁷ 6 C.F.R. § 115.11.

³⁵⁸ See ICE, *Performance-Based National Detention Standards* (2011), available at <http://www.icce.gov/doclib/detention-standards/2011/pbnds2011.pdf>; ICE, *Directive No. 11062.1: Sexual Abuse and Assault Prevention and Intervention* (2012). Available at http://www.ice.gov/doclib/foia/dro_policy_memos/sexual-abuse-assault-prevention-intervention-policy.pdf.

³⁵⁹ “U.S. Immigration and Customs Enforcement 11062.2: Sexual Abuse and Assault Prevention and Intervention”, May 22, 2014, available at <http://www.ice.gov/doclib/detention-reform/pdf/saapi2.pdf>.

³⁶⁰ Kevin Landy, in his official capacity as ICE Assistant Director for the Office of Detention Policy and Planning (ODPP), sent the Commission additional comments in response to Commission staff inquiry. This

readily available to the public, it is difficult for outside organizations to ensure that ICE is adhering to DHS's PREA standards outlined under Subpart A, Section 115.11.³⁶¹

According to DHS PREA regulations for CBP and other DHS facilities or DHS contracted facilities that hold detainees for less than 24 hours (codified at 6 CFR Pt. 115, Subpart B), Section 115.111 mandates that:

(a) The agency shall have a written policy mandating zero tolerance toward all forms of sexual abuse and outlining the agency's approach to preventing, detecting, and responding to such conduct.

(b) The agency shall employ or designate an upper-level, agency-wide PSA Coordinator with sufficient time and authority to develop, implement, and oversee agency efforts to comply with these standards in all of its holding facilities.³⁶²

U.S. Customs and Border Patrol's (CBP's) website states that they adopted a revised CBP Policy on Zero Tolerance of Sexual Abuse and Assault on March 11, 2015. The policy details the agency's approach to preventing, detecting, and responding to sexual abuse and harassment, citing:

- Staff training;
- Timely reporting of allegations of sexual abuse;
- Protection of victims through custodial arrangements;
- Assurance of adequate medical care and services;
- Protocols for investigation of claims; and
- Ongoing monitoring of data related to sexual abuse.

CBP also complies with PREA requirements by making contact information for an upper-level Prevention of Sexual Assault (PSA) Coordinator available. The Commission received the contact information for CBP's PSA Coordinator and a "Zero Tolerance Policy" flyer³⁶³ from the newly hired CBP PSA Coordinator. Offering such evidence is

information is available at the U.S. Commission on Civil Rights Headquarters located at 1331 Pennsylvania N.W., Washington D.C., 20425.

³⁶¹ 6 C.F.R. § 115.11.

³⁶² 6 C.F.R § 115.111.

³⁶³ See CBP Zero Tolerance Policy poster- Appendix B.

not required under DHS PREA.³⁶⁴ However, the PSA Coordinator notified Commission staff that CBP holds weekly coordination meetings analyzing CPB's PREA compliance.³⁶⁵ Furthermore, the PSA Coordinator notified Commission staff that her office is finalizing a PREA Audit Toolkit.³⁶⁶ According to the PSA Coordinator, the PREA Audit Tool Kit is a DHS-wide initiative with DHS's Civil Rights and Civil Liberties Office (CRCL) leading the project.³⁶⁷ The PSA Coordinator advised Commission staff that CBP, as well as ICE, are working closely with CRCL.³⁶⁸

Are DHS Detention Centers with Government Contracts Adhering to PREA?

According to DHS PREA regulations for ICE (codified at 6 CFR 115, Subpart A), Section 115.12 mandates that:

- (a) When contracting for the confinement of detainees in immigration detention facilities operated by non-DHS private or public agencies or other entities, including other government agencies, the agency shall include in any new contracts, contract renewals, or substantive contract modifications the entity's obligation to adopt and comply with these standards.
- (b) Any new contracts, contract renewals, or substantive contract modifications shall provide for agency contract monitoring to ensure that the contractor is complying with these standards.³⁶⁹

Comparatively, according to DHS PREA regulations for CBP and other DHS facilities or DHS contracted facilities that hold detainees for less than 24 hours (codified at 6 CFR Pt. 115, Subpart B), Section 115.111 mandates that:

- (a) An agency that contracts for the confinement of detainees in holding facilities operated by non-DHS private or public agencies or other entities, including other government agencies, shall include in any new contracts, contract renewals, or substantive contract modifications the entity's obligation to adopt and comply with these standards.

³⁶⁴ Commission staff met with the CBP PSA Coordinator at CBP Headquarters in Washington, D.C. to further detail how DHS, particularly CPB, applies PREA Standards.

³⁶⁵ Ibid.

³⁶⁶ Ibid.

³⁶⁷ Ibid.

³⁶⁸ Ibid.

³⁶⁹ 6 C.F.R § 115.12.

(b) Any new contracts, contract renewals, or substantive contract modifications shall provide for agency contract monitoring to ensure that the contractor is complying with these standards.

(c) To the extent an agency contracts for confinement of holding facility detainees, all rules in this subpart that apply to the agency shall apply to the contractor, and all rules that apply to staff or employees shall apply to contractor staff.³⁷⁰

Both Subsections require ICE, CBP, and other DHS agencies responsible for either detaining or holding immigrants to adopt the DHS PREA standards in new contracts, renewals, or where there is a substantial contract modification.

Federal agencies show their compliance with PREA by encouraging contracting agencies to implement PREA standards. Federal agencies like ICE even suggest that it goes above and beyond the PREA requirements to ensure and encourage that its CDFs treat detainees with dignity; however, without a legally binding agreement to ensure such policies are enforced, there is speculation as to whether CDFs actually implement PREA's mandates. A representative for ICE stated that:

DHS PREA regulations require that PREA apply when a detention facility contract is either signed, renewed, or substantively modified. That was modeled after DOJ PREA regulations, although it's more aggressive than those, in that the DOJ regulations do not have the clause about requiring PREA to be adopted upon a substantive contract modification. A number of facilities have already been adopting PREA prior to the contract negotiation, but technically, standards are not legally binding on those detention facilities. . . .³⁷¹

Although in some cases ICE finds that some CDFs already incorporate many of PREA's standards, DHS does not have the legal power to coerce facilities into complying with PREA standards without altering existing contractual obligations. (The only CBP contracts to detain individuals are contracts with the U.S. Marshall Services who operate

³⁷⁰ 6 C.F.R. § 115.112.

³⁷¹ Landy, Kevin, Briefing Transcript, pp. 69–70. Mr. Landy requested that the following supplemental information be noted regarding his quote. According to Mr. Landy, despite the fact that not all CDFs had adopted PREA, all dedicated CDFs had contractually adopted PBNDS 2011. According to Mr. Landy, “as of July 13, 2015, DHS PREA standards had been incorporated into contracts at facilities covering approximately 60 [percent] of ICE's average daily population, including all dedicated [CDFs]. Kevin Landy, in his official capacity as ICE Assistant Director for the Office of Detention Policy and Planning (ODPP), sent the Commission additional comments in response to Commission staff inquiry. This information is available at the U.S. Commission on Civil Rights Headquarters located at 1331 Pennsylvania N.W., Washington D.C., 20425.

under DOJ PREA standards.)³⁷² Furthermore, ICE suggests that preemptively encouraging their contractees to adhere to PREA standards before it becomes a legal requirement to do so demonstrates a sufficient effort on the part of DHS to ensure contractees treat detainees under their care respectfully. However, encouraging compliance with PREA standards while under contract with DHS might not be sufficient to ensure proper care is afforded to individual rights. For example, a representative for the DHS Civil Rights and Civil Liberties Division stated that federal agencies are often not “aware about the legal obligations of a contract, but ICE applies their standards across the board to facilities to where they are in place.”³⁷³

In other words, as a representative of ICE stated:

[A]ll of our private contractor facilities adhere to the most recent, most rigorous level of the detention standards, PBNDS, which I mentioned. And those detention standards are intended to apply robust safeguards across the board, but we do consider that federal policy. We consider that agency policy, which is applied to our private contractor facilities through contractual modifications. And that has occurred in all instances for the private With respect to the private contractor facilities, all of them are governed by our most recent detention centers. Not yet—all of them are not yet governed contractually by PREA in that PREA is rolled out gradually. It has to be applied through contract modifications. It is not immediately applicable to our private contract facilities, which is the same for the Department of Justice private contractor facilities, as well. . . . There’s also a commitment that DHS has made in the preamble of the PREA regulations that PREA regulations will be applicable, or that we will endeavor to make PREA regulations applicable at all of our dedicated facilities, within 18 months of the effective date.”³⁷⁴

³⁷² The CBP PSA Coordinator informed Commission staff regarding this point.

³⁷³ Mack, Briefing Transcript, p. 76.

³⁷⁴ Landy, Briefing Transcript, pp. 85–86. In his supplemental information to the Commission, Mr. Landy also stated that:

“ICE employs a multi-layered monitoring and inspection scheme to ensure facility compliance with all applicable detention standards, which includes inspections carried out by both internal and external parties. The agency’s annual facility inspections are carried out by an independent contractor and are conducted by a small team of subject matter experts (led by a lead inspector) over the course of two to three days with limited exception. Once the subject matter experts complete their inspection, they submit their specific portion of the inspection to the lead inspector, who then reviews the information provided by the subject matter experts, certifies the inspection, and sends the information to ICE HQ where it is reviewed by a DSCU officer and catalogued.

It is difficult to determine whether each ICE contractor is complying with PREA standards or even with the appropriately corresponding detention standards specified by its contract even with ICE monitoring and inspection schemes. Based on reporting by nongovernmental organizations (NGOs), evidence suggests that standards are not being met. However, with specific regard to detainee holding contracts, CBP states that, in terms of administrative policy, its zero tolerance sexual assault policy has the same force of law that PREA has.

The Mexican American Legal Defense and Education Fund (MALDEF), a Latino civil rights advocacy group, indicated the disconnect between DHS policies and what is actually happening in detention centers stems from:

. . . the shell game when [regulations and standards are] part of a Federal program, but implementation is occurring through a private contractor. Outside [organizations], like MALDEF and the ACLU, find issue with the private nature of such contractual obligations. Even when progressing through the appropriate channels to find information, “there is actually a quite serious problem with the FOIA loophole for private prisons. [For example,] if a facility is run directly by ICE, then it’s subject to FOIA; [however,] if it is run by a private prison company, it’s not subject to FOIA except to the extent that the records relating to the facility are in ICE’s actual possession.”³⁷⁵

One particularly troubling contracting issue emerged during the Commission’s briefing: the contract for the family detention center in Dilley, Texas. The facility was opened quickly in response to the increase in families crossing the border in

ICE has also established an On-Site Detention Compliance Oversight Program, composed of a corps of federal detention site monitors stationed at large detention facilities, who report directly to ICE Headquarters. These detention site monitors inspect and monitor facility compliance with ICE detention standards, report and respond to problems, and work with local ICE field offices and the detention facilities to address concerns. The Detention Services Manager typically resolves most issues on the spot but, in certain cases, will relay information to the field office and ICE Headquarters when necessary.

ICE’s Office of Detention Oversight (ODO) also has responsibilities for reviewing facility compliance with the agency’s detention standards. In addition to conducting regular inspections of various ICE detention facilities and follow-up inspections for identified deficiencies, ODO conducts targeted inspections and investigations in response to specific allegations of violations or other problems at facilities and based on issues of particular concern to ICE executive management, including all reports of staff misconduct and assaults or deaths of detainees occurring during ICE custody.”

³⁷⁵ Bono, Briefing Transcript, p. 204.

the summer of 2014.³⁷⁶ In order to avoid the lengthy contracting process, the facility was planned through the modification of an existing intergovernmental services agreement.³⁷⁷ Operations of the facility were then subcontracted to the Corrections Corporation of America.³⁷⁸ Panelists identified this facility as one whose contracting process was particularly opaque and convoluted. Panelist Bob Libal explained:

MR. LIBAL: So the way that the contracts flow is that ICE will contract with a local government agency, which then subcontracts with the private prison corporation. In the case of Dilley, ICE didn't want to even go through that process. They subcontract -- they expanded an existing agreement that they had with Eloy, Arizona, their very troubled facility, the facility that's had the most deaths of any immigration detention facility since the creation of the Department of Homeland Security. They expanded that intergovernmental service agreement to create the facility in Dilley, Texas, which is 900 miles away. No one from Eloy ever visited the site, even though they're the legal entity that has the contract with ICE and is supposed to be overseeing it.

COMMISSIONER KLADNEY: Okay, so basically the local government's making money and the contractors are making money.

MR. LIBAL: Yes. Half a million dollars a year is what Eloy, Arizona is making for just shuffling the paperwork to CCA.³⁷⁹

The Dilley contracting process has drawn criticism for the way it shifts responsibility for the conditions at Dilley between various entities. As panelist Mary Meg McCarthy stated, “You can imagine when you've just heard how convoluted this contracting goes, the difficulty of identifying a defendant. . . [a]nd holding a defendant liable.”³⁸⁰

³⁷⁶ Burnett, John. How Will a Small Town in Arizona Manage an ICE Facility in Texas? *NPR*, October 28, 2014, available at <http://www.npr.org/2014/10/28/359411980/how-will-a-small-town-in-arizona-manage-an-ice-facility-in-texas>.

³⁷⁷ Ibid; Harris, Craig. Unique Deal to Detain Migrants Nets Eloy \$438,000, *AZ Central*, January 18, 2015, available at <http://www.azcentral.com/story/news/politics/immigration/2015/01/18/unique-deal-detain-migrants-nets-elyo-money/21969817/>.

³⁷⁸ Statement of Bob Libal.

³⁷⁹ Libal, Briefing Transcript, p. 245.

³⁸⁰ McCarthy, Briefing Transcript, p. 246.

The Commission finds that DHS lacks transparency regarding their contracts with private detention companies. This inhibits the assessment of proper implementation of PREA standards.

Are DHS CDFs Complying with PREA Inspection Policies?

According to DHS PREA Subsection A (codified at 6 C.F.R. 115.13), Section 115.13:

Each facility shall conduct frequent unannounced security inspections to identify and deter sexual abuse of detainees. Such inspections shall be implemented for night as well as day shifts. Each facility shall prohibit staff from alerting others that these security inspections are occurring, unless such announcement is related to the legitimate operational functions of the facility.³⁸¹

ICE has written documentation asserting their compliance with PREA requirements of unannounced inspections of facilities to identify and deter staff sexual abuse and harassment during both night and day shifts. Corrections Corporation of America (CCA) elaborated on the details of such inspections, stating that:

[T]he way the company conducts those audits, and there are many ways in which we audit our facilities on an ongoing basis, first of which is we expect and know for a fact that our individual facilities are . . . self-monitoring themselves of the conditions going on at the facility. That's the first level. And they do that on an ongoing basis. Secondly, we have an internal audit unit comprised of experts that work for the general counsel. They do not work to the operational arm of CCA. They do unannounced audits each year to determine compliance with not only the contract, but with the various standards that each contract covers such as the PBNDS, the PREA standards, ACA standards. So those are very, very detailed audits. Over 1,500 individual indicators are looked at each year when they come through. So we're very proud of those, and those are the things that help us stay in compliance with our contract and with these standards.³⁸²

Despite indicating complete compliance with PREA standards, a CCA representative was unable to immediately release the results of the audits conducted at various facilities to ensure that there is compliance with the various responsibilities enforceable under PREA. Outside organizations, like MALDEF, take issue with the private nature of these documents. This information would prove useful in determining the particular attention

³⁸¹ 6 C.F.R. § 115.13.

³⁸² Conry, Briefing Transcript, pp. 134–135.

paid to sexual assault and harassment in ICE CDFs; as well as providing insight into the frequency of inspection, accuracy of the reporting of allegations of sexual assault, and the overall effectiveness of the audits. Representatives from NGOs and advocacy groups find that this lack of transparency hinders the ability to assure CDFs' compliance of PREA's standards. Many outside organizations support making the audit results public in order to maintain accountability.

The Commission finds that ICE CDFs lack accountability in complying with PREA inspection policies because such reports are not made publicly available.

Do DHS Detention Facilities Adhere to PREA Regulations Regarding Child Detention?

Both Subsection A 115.14 and Subsection B 115.114 state that:

Juveniles shall be detained in the least restrictive setting appropriate to the juvenile's age and special needs, provided that such setting is consistent with the need to protect the juvenile's well-being and that of others, as well as with any other laws, regulations, or legal requirements.³⁸³

While this section mostly applies to ICE, both regulations specify that ICE detains and CBP holds juveniles separately from adults, unless that adult is a proven family member. However, DHS PREA Subpart B, which binds CBP, also allows for juveniles to temporarily remain with a non-parental adult family member where:

- (1) The family relationship has been vetted to the extent feasible, and
- (2) The agency determines that remaining with the non-parental adult family member is appropriate, under the totality of the circumstances.³⁸⁴

There is currently insufficient evidence indicating that ICE detains and CBP holds children with adult detainees at DHS facilities with the exception of ICE family detention centers where such detention is allowed.

Moreover, while not applicable to CBP, ICE has made efforts to avoid housing detainees in isolation. The ACLU found that the solitary confinement policy directive that ICE issued in 2013 satisfactorily complies with PREA standards. ACLU also determined that the ICE directive on solitary confinement has great potential if implemented properly. An ACLU representative referenced the policy's intent, stating "It is a policy that if it is

³⁸³ 6 C.F.R. § 115.14; 6 C.F.R. § 115.114.

³⁸⁴ 6 C.F.R. § 115.114.

being faithfully implemented across the board, [it] should be reducing both the number of people who are in solitary and the length of time that they spend in solitary.”³⁸⁵

Under the solitary confinement policy directive, “there is supposed to be a very clear reporting change about how long people are in solitary confinement. And especially the longer that somebody stays in solitary confinement, the more that the field office has to report that to headquarters and justify it.”³⁸⁶ Without the proper access to resources and documentation, organizations like the ACLU are unable to determine if DHS is meeting these standards. With regard to compliance under DHS PREA Subpart A, ICE stated that, “segregated housing [when used] is typically, for one of two reasons, as a form of discipline for people who have committed serious disciplinary infractions after there’s been an adjudication by the facility, and that person has been found guilty of that infraction, or for the safety and security of either other detainees, staff, or the individual himself or herself.”³⁸⁷

The Commission finds that further research must be conducted to determine whether ICE is complying with PREA solitary confinement policies for children.

Does DHS Adhere to PREA Standards on Interacting with Transgender or Intersex Individuals?

According to DHS PREA regulations for ICE, Section 115.42 mandates that:

- (a) When making assessment and housing decisions for a transgender or intersex detainee, the facility shall consider the detainee's gender self-identification and an assessment of the effects of placement on the detainee's health and safety. The facility shall consult a medical or mental health professional as soon as practicable on this assessment. The facility should not base placement decisions of transgender or intersex detainees solely on the identity documents or physical anatomy of the detainee; a detainee's self-identification of his/her gender and self-assessment of safety needs shall always be taken into consideration as well. The facility's placement of a transgender or intersex detainee shall be consistent with the safety and security considerations of the facility, and placement and programming assignments for each transgender or intersex detainee shall be reassessed at least twice each year to review any threats to safety experienced by the detainee.

³⁸⁵ Takei, Briefing Transcript, p. 275.

³⁸⁶ Ibid.

³⁸⁷ Landy, Briefing Transcript, pp. 94–95.

- (b) When operationally feasible, transgender and intersex detainees shall be given the opportunity to shower separately from other detainees³⁸⁸

Comparatively, regulations for CBP state in Section 115.141 that when making housing assignments, “whether the detainee has self-identified as gay, lesbian, bisexual, transgender, intersex, or gender nonconforming” shall be considered.³⁸⁹

In an invigorated effort to ensure the safety of lesbian, gay, bisexual and transgender (LGBT) individuals, the Human Rights Campaign (HRC) finds that DOJ PREA standards “are more desirable and better than the standards that DHS uses because giving serious consideration to the detainee’s own sense of their perceived risk” is an important aspect of providing LGBT individuals with safe detention facilities.³⁹⁰

DHS has very specific policies regarding the treatment of transgender or intersex detainees with regard to determining gender. An ICE representative confirmed that the agency does not “ask people their sexual orientation or gender identity unless they wish to come forward and indicate that they—indicate it for some reason . . . [as] up until now it’s felt that it should be up to the individual to volunteer it, if they have a particular need. And that might be a medical need, or it might be a concern about one’s own protection.”³⁹¹

Furthermore, if an individual wishes to conceal his or her gender identity or sexual orientation for any particular purpose, ICE would respect those wishes. While the policy implemented adheres to PREA regulations, representatives from HRC suggest that cultural competency in dealing with the LGBT community, particularly transgender detainees, should be addressed because it is a serious issue. These organizations have raised concerns regarding the proper attitude or intent held when detaining LGBT individuals as “there’s certainly bias that creeps in, sometimes not even subtly, but sometimes more subtly.”³⁹² A combination of speculation regarding the policies surrounding LGBT rights in detention centers, as well as a general ignorance or cultural incompetency, leaves outside organizations to question whether enough is being done to ensure that the government is close to acquiring the depth and breadth it needs to ensure the safety and comfort of individuals under its care.

³⁸⁸ 6 C.F.R. § 115.42.

³⁸⁹ 6 C.F.R. § 115.14.

³⁹⁰ Stacy, Briefing Transcript, p. 195.

³⁹¹ Landy, Briefing Transcript, pp. 90–92.

³⁹² Stacy, Briefing Transcript, pp. 205–206.

The Commission finds that further research must be conducted to determine whether ICE and CBP are complying with PREA standards concerning the treatment of transgender and intersex individuals.

Does DHS Comply with PREA Language Requirements?

Both DHS PREA regulations for ICE and CBP mandate, in Section 115.16(b) and Section 115.16(c) respectively, that:

b) The agency and each facility shall take steps to ensure meaningful access to all aspects of the agency's and facility's efforts to prevent, detect, and respond to sexual abuse to detainees who are limited English proficient, including steps to provide in-person or telephonic interpretive services that enable effective, accurate, and impartial interpretation, both receptively and expressively, using any necessary specialized vocabulary.

(c) In matters relating to allegations of sexual abuse, the agency and each facility shall provide in-person or telephonic interpretation services that enable effective, accurate, and impartial interpretation, by someone other than another detainee, unless the detainee expresses a preference for another detainee to provide interpretation and the agency determines that such interpretation is appropriate and consistent with DHS policy. The provision of interpreter services by minors, alleged abusers, detainees who witnessed the alleged abuse, and detainees who have a significant relationship with the alleged abuser is not appropriate in matters relating to allegations of sexual abuse.³⁹³

Representatives from DHS component agencies such as CBP ensure that efforts have been made to provide all limited English proficient detainees access to all aspects of the agency. Specifically, CBP states that all Border Patrol agents speak Spanish; 50 percent are of Hispanic descent and many individuals join the Border Patrol already speaking Spanish.³⁹⁴ Despite proficiency in Spanish, there is no indication that individual agents are qualified to determine the cultural, geographic, and human context of which detainees express to a government they are unfamiliar with; essentially, language is only one aspect of complete cultural understanding. Comprehending political, socioeconomic, and cultural differences is an important intersectional factor and indicator of deciphering intent and urgency of a detainee's specific situation. DHS has made an effort to ensure an understanding of detainees who speak Spanish; however, the issues that persist include understanding those who may be illiterate, speak a dialect or indigenous language, or are

³⁹³ 6 C.F.R. § 115.16; 6 C.F.R. § 115.116.

³⁹⁴ Yaki, Briefing Transcript, p. 60.

too frightened or uncertain to make a claim of sexual assault or harassment due to cultural norms and/or conditions of detention. Organizations like the American Immigrant Lawyers Association (AILA) are specifically concerned with the access detainees have to individuals who are able to address them in their native languages. The issue, raised in relation to sexual abuse, is grounded in the failure to provide adequate translators or personnel.

The Commission finds that the evidence indicates that there are insufficient numbers of federal government employees that interact with detained immigrants who are sufficiently trained to handle and interact with the various political, cultural, and socioeconomic differences between detained immigrants from various countries. The Commission further finds that a lack of sufficient training inhibits the federal government from fully complying with PREA language requirements.

***Does DHS Adhere to PREA Requirements to Provide Individuals Information
Regarding PREA Policies?***

PREA requirements for ICE, state in Section 115.33 that:

- (a) During the intake process, each facility shall ensure that the detainee orientation program notifies and informs detainees about the agency's and the facility's zero-tolerance policies for all forms of sexual abuse and includes (at a minimum) instruction on:
 - (1) Prevention and intervention strategies;
 - (2) Definitions and examples of detainee-on-detainee sexual abuse, staff-on-detainee sexual abuse and coercive sexual activity;
 - (3) Explanation of methods for reporting sexual abuse, including to any staff member, including a staff member other than an immediate point-of-contact line officer (e.g., the compliance manager or a mental health specialist), the DHS Office of Inspector General, and the Joint Intake Center;
 - (4) Information about self-protection and indicators of sexual abuse;
 - (5) Prohibition against retaliation, including an explanation that reporting sexual abuse shall not negatively impact the detainee's immigration proceedings; and
 - (6) The right of a detainee who has been subjected to sexual abuse to receive treatment and counseling.

- (b) Each facility shall provide the detainee notification, orientation, and instruction in formats accessible to all detainees, including those who are limited English proficient, deaf, visually impaired or otherwise disabled, as well as to detainees who have limited reading skills.
- (c) The facility shall maintain documentation of detainee participation in the intake process orientation.
- (d) Each facility shall post on all housing unit bulletin boards the following notices:
 - (1) The DHS-prescribed sexual assault awareness notice;
 - (2) The name of the Prevention of Sexual Abuse Compliance Manager;
 - (3) The name of local organizations that can assist detainees who have been victims of sexual abuse;
 - (4) The facility shall make available and distribute the DHS-prescribed “Sexual Assault Awareness Information” pamphlet; and
 - (5) Information about reporting sexual abuse shall be included in the agency Detainee Handbook made available to all immigration detention facility detainees.³⁹⁵

Comparatively, CBP’s DHS PREA regulations state that:

The agency shall make public its zero-tolerance policy regarding sexual abuse and ensure that key information regarding the agency's zero-tolerance policy is visible or continuously and readily available to detainees, for example, through posters, detainee handbooks, or other written formats.³⁹⁶

While DHS has made efforts to comply with PREA standards and make the detaining process understandable, outside organizations suggest that the federal government needs to do more to fully inform detained immigrants about their rights. Presently, NGOs find that simply providing detainees with information does not facilitate understanding. The current issue concerns detainee literacy. As more children who speak indigenous languages enter the detention system, outside organizations find that agencies “can’t just hand a child from Guatemala a Spanish “Know Your Rights” booklet. That is

³⁹⁵ 6 C.F.R. § 115.33.

³⁹⁶ 6 C.F.R. § 115.132.

insufficient. And a child's going to have a very hard time understanding . . . It's got to be more than just handing them a piece of paper."³⁹⁷

Additionally, there have been allegations that staff threatens retaliation against detainees who report sexual assault or abuse. This indicates that DHS is not enforcing PREA's standards. This lack of decorum suggests a policy and practice disconnect — or at least between expectations and execution of policy.

Potential miscommunication also exacerbates the issue of whether detainees fully comprehend their rights, current policies, implementation practices, and general applicability. DHS does not currently read undocumented immigrants Miranda rights. As Maria Hinojosa, a contributor for Futuro Media Group, explained during the Commission Briefing:

There is no process right now through which immigration agents come to their door and say, 'Let me explain to you exactly who I am and what I'm doing'—let alone these are the rights you have, how you can ensure these rights are being protected, and that you are not being taken advantage of.³⁹⁸

PREA Subpart A, which is specific to ICE, mandates that ICE provide detainees, within 30 days of the intake process, comprehensive education that explains PREA and how to report sexual abuse and harassment. ICE must relate the information in a manner that accommodates the detainee's language barriers. Despite these precautions, NGOs find these processes insufficient. Additionally, NGOs advocate that "legal orientation programs for everyone in detention and appointed counsel, particularly for vulnerable populations, children and the mentally ill," would reinforce and solidify this

³⁹⁷ Libel, Bob, Briefing Transcript, p. 259. Moreover, "DHS has developed a Language Access Plan outlining existing language access practices across all DHS components and future planned priorities in this area. Among other things, ICE makes available to all detention facilities a telephonic interpretation line, written translations of the ICE National Detainee Handbook and other critical materials and information (including information on reporting sexual abuse and rights of sexual abuse victims), and offers "I-Speak" materials to facility medical clinics to assist in identifying a detainee's primary language for health care-related interactions. ICE detention standards also require facilities to ensure that information about detainee rights and responsibilities are communicated to detainees in a language or manner they can understand." Kevin Landy, in his official capacity as ICE Assistant Director for the Office of Detention Policy and Planning (ODPP), sent the Commission additional comments in response to Commission staff inquiry. This information is available at the U.S. Commission on Civil Rights Headquarters located at 1331 Pennsylvania N.W., Washington D.C., 20425.

³⁹⁸ Hinojosa, Briefing Transcript, p. 171.

information.³⁹⁹ Organizations like MALDEF and AILA fully support the implementation of legal orientation programs.⁴⁰⁰

The Commission finds ICE's distribution and content of detainee "Know your Rights" materials do not sufficiently provide or inform all detained immigrants concerning their rights because the materials are not available or explained in indigenous languages under DHS PREA Subpart A (6 C.F.R. § 115.32). The Commission further finds that CBP must ensure any documents applicable to DHS PREA Subpart B (6 C.F.R. § 115.132) be available in indigenous languages. The Commission further finds that this inhibits DHS from fully complying with PREA language requirements.

Does DHS follow PREA requirements mandating adequate ways to report sexual assault?

According to Section 115.51 of DHS's PREA requirements for ICE:

- (a) The agency and each facility shall develop policies and procedures to ensure that detainees have multiple ways to privately report sexual abuse, retaliation for reporting sexual abuse, or staff neglect or violations of responsibilities that may have contributed to such incidents. The agency and each facility shall also provide instructions on how detainees may contact their consular official, the DHS Office of the Inspector General or, as appropriate, another designated office, to confidentially and, if desired, anonymously, report these incidents.
- (b) The agency shall also provide, and the facility shall inform the detainees of at least one way for detainees to report sexual abuse to a public or private entity or office that is not part of the agency, and that is able to receive and immediately forward detainee reports of sexual abuse to agency officials, allowing the detainee to remain anonymous upon request.
- (c) Facility policies and procedures shall include provisions for staff to accept reports made verbally, in writing, anonymously, and from third parties and to promptly document any verbal reports⁴⁰¹

Similarly, Section 115.151 of DHS's PREA regulations for CBP states that:

- (a) The agency shall develop policies and procedures to ensure that the detainees have multiple ways to privately report sexual abuse, retaliation for reporting

³⁹⁹ Grisez, Briefing Transcript, p. 173.

⁴⁰⁰ Lucas, Briefing Transcript, p. 208.

⁴⁰¹ 6 C.F.R. § 115.51.

- sexual abuse, or staff neglect or violations of responsibilities that may have contributed to such incidents, and shall provide instructions on how detainees may contact the DHS Office of the Inspector General or, as appropriate, another designated office, to confidentially and, if desired, anonymously, report these incidents.
- (b) The agency shall also provide, and shall inform the detainees of at least one way for detainees to report sexual abuse to a public or private entity or office that is not part of the agency, and that is able to receive and immediately forward detainee reports of sexual abuse to agency officials, allowing the detainee to remain anonymous upon request.
- (c) Agency policies and procedures shall include provisions for staff to accept reports made verbally, in writing, anonymously, and from third parties and to promptly document any verbal reports.⁴⁰²

Despite written CBP documents stating compliance with PREA standards, the ACLU found that detainees in CBP holding centers are:

. . . typically [placed in] congregate cells, [where] they very rarely have a telephone that is immediately accessible to the detainees, which causes problems with even telephoning some sort of legal help line. And also, if they are facing any sort of sexual abuse situation, to be able to contact anybody without the assistance of a guard.⁴⁰³

With regard to child detainees, HHS's Office of Refugee Resettlement (ORR), which is not bound by DHS PREA, has gone through significant measures to ensure the safety of children as "facilities are run by social workers, clinicians and trained staff."⁴⁰⁴ Additionally, ORR is "working on a number of different ways for reporting the sexual abuse, [including] developing a new 800 number that's easier for the children to access without anyone knowing that they're doing the call."⁴⁰⁵

PREA prescribes varied disciplinary standards for agency staff, and volunteers. PREA's presumptive disciplinary standard for staff involved in sexual abuse or harassment is termination. However, PREA allows the agency to prescribe sanctions against a staff member that are commensurate with the nature and circumstances of the acts, the staff member's disciplinary history, and comparable sanctions against other staff members.

⁴⁰² 6 C.F.R. § 115.151.

⁴⁰³ Takei, Briefing Transcript, p. 260.

⁴⁰⁴ Bena, Briefing Transcript, pp. 78–82.

⁴⁰⁵ *Ibid.*

PREA prohibits staff or volunteers who are involved in sexual abuse or harassment from further contact with detainees and mandates that the agency reports the abuse to a law enforcement agency.

In complying with PREA, CBP finds that it has a similar rate of misconduct as would be found in any general workforce. Within CBP, the Office of Internal Affairs is charged with “investigating serious allegations of misconduct and inappropriate behavior.” And in all instances, all allegations are investigated, and if proven, then corrective action is taken.”⁴⁰⁶

With regard to ICE, however, a PBS *Frontline* report found that, despite ICE’s termination of a contract with Management and Training Corp. (MTC) for alleged sexual abuse and assault of women detainees, other federal agencies, like the Bureau of Prisons, are still permitted to keep contracts.⁴⁰⁷

The Commission finds that DHS may not be providing detainees with adequate avenues to report sexual assault or abuse. Moreover, the Commission finds that DHS may be inadequately addressing staff misconduct with regards to sexual assault and abuse.

Conclusion

The Prison Rape Elimination Act of 2003 (PREA) is comprehensive and provides strong protections for the detained population. However, there is no mechanism to enforce the Act and to hold violators accountable. Additionally, there is a lack of transparency during the investigation or punishment phases when a PREA violation is reported. Data collection remains spotty and inconsistent. Therefore, based on analysis of the evidence and research above, the Commission finds that:

- ICE’s lack of transparency regarding their contracts with private detention companies inhibits the assurance that PREA standards are being properly implemented.
- ICE CDFs lack accountability in complying with PREA inspection policies because such reports are not made publicly available.
- Further research must be conducted to determine whether ICE is complying with PREA solitary confinement policies for children.

⁴⁰⁶ Jones, Briefing Transcript, p. 65.

⁴⁰⁷ Childress, Sarah, “Predictable Riot at Texas Prison Followed Years of Complaints”, PBS: Frontline, 25 Feb 2015, available at <http://www.pbs.org/wgbh/pages/frontline/race-multicultural/lost-in-detention/predictable-riot-texas-prison-willacy-years-complaints/>.

- Further research must be conducted to determine whether DHS is complying with PREA standards concerning the treatment of transgender and intersex individuals.
- DHS employees who interact with detained immigrants may not be insufficiently trained to handle and interact with the various political, cultural, and socioeconomic differences between detained immigrants from various countries. The Commission further finds that this insufficient training inhibits DHS from fully complying with PREA language requirements.
- DHS's current practice surrounding the distribution and content of detainee "Know your Rights" materials may not be sufficiently providing or informing all detained immigrants concerning their rights because the materials are not available or explained in indigenous languages under DHS PREA Subpart A (6 C.F.R. § 115.32).
- The Commission further finds that CBP must ensure any documents applicable to DHS PREA Subpart B (6 C.F.R. § 115.132) be available in indigenous languages.
- The Commission finds that DHS may not be providing detainees with adequate avenues to report sexual assault or abuse. Moreover, the Commission finds that DHS may be inadequately addressing staff misconduct with regards to sexual assault and abuse.
- A more detailed study must be done studying DHS detention and holding facility compliance with PREA standards.

CHAPTER 6. IMMIGRATION DETENTION: CONSTITUTIONAL ISSUES

The U.S. immigration detention system raises various constitutional issues in terms of the procedural mechanisms used to detain undocumented immigrants, conditions of confinement, and the interference with fundamental rights.⁴⁰⁸ Immigration detention procedures were never meant to be criminal in nature.⁴⁰⁹ However, based upon the Commission’s visit to two Texas-based federally owned and contracted immigration detention facilities,⁴¹⁰ the testimony from the Commission’s January briefing,⁴¹¹ and other reports, immigration detention centers treat and detain undocumented immigrants in a manner inconsistent with protections afforded by the U.S. Constitution.

This chapter details the rights afforded to detained immigrants, the constitutional amendments applicable to immigration detention, and discusses issues with the current state of immigration detention in the United States. While the Commission’s purview does not extend to issuing judicial findings regarding constitutional violations,⁴¹² the Commission may examine and report upon evidence indicating constitutional violations.⁴¹³

Therefore, Chapter 6 serves as the Commission’s appraisal of federal immigration practices that violate the Equal Protection Clause of the Fifth Amendment, discriminate on the basis of national origin in the administration of justice afforded to detained immigrants, and violate First Amendment rights.⁴¹⁴

⁴⁰⁸ Whitney Chelgren, *Preventive Detention Distorted: Why It Is Unconstitutional to Detain Immigrants Without Procedural Protections*, 44 LOY. L.A. L. REV. 1477 (2011).

⁴⁰⁹ Government Accountability Office. *Immigration Detention: Additional Actions Needed to Strengthen Management and Oversight of Facility Costs and Standards*. GAO-15-153. Washington, DC: U.S. Government Printing Office, 2014.

⁴¹⁰ The Commission visited one federally operated (Port Isabel Detention Center) and one federally contracted (Karnes Family Detention Center) detention facility in Texas on May 4-5, 2015.

⁴¹¹ The Commission held a Briefing on the constitutional issues and conditions of Immigration Detention.

⁴¹² According to Article III of the Constitution, it is the Judiciary Branch’s function to make findings in law and equity, arising under the Constitution, and not that of the Executive Branch.

⁴¹³ See 42 U.S.C. § 1975a(a)(2) (2013) (The Commission has a duty to “study and collect information” regarding “discrimination or denials of equal protection of the laws under the Constitution of the United States because of . . . national origin . . .”).

⁴¹⁴ *Ibid.*

Placing Discussion in Context; Raising Constitutional Issues

The Plenary Power

The plenary power doctrine grants Congress and the Executive Branch authority to admit, exclude, or deport non-citizens.⁴¹⁵ Congress's power over immigration policy is derived from nineteenth century U.S. Supreme Court cases⁴¹⁶ upholding various provisions of the Chinese Exclusion Act of 1882 (CEA).⁴¹⁷ The CEA suspended the immigration of Chinese laborers to the United States for 10 years, with the exception of those in the U.S. prior to Nov. 17, 1880.⁴¹⁸ The Act not only prohibited Chinese immigrants from obtaining U.S. citizenship, but also subjected to deportation Chinese immigrants who were not lawfully present in the United States.⁴¹⁹ However, despite the draconian reasoning behind the Supreme Court's ruling, the plenary power solidified Congress's power to regulate immigration policies and laws—so long as they are compliant with the U.S. Constitution.

Discussion

The Commission examined several constitutional issues raised by a myriad of social and political advocacy groups, news outlets, and public reports. This portion of the report will first address whether the federal government is detaining immigrants in a manner that is inconsistent with the Fifth Amendment. More specifically:

- Is the federal government detaining immigrants in a manner comparable to punitive incarceration?
- Is the federal government affording detained immigrants the ability to obtain counsel?
- Is the federal government actively inducing an ineffective assistance of counsel by stonewalling a detained immigrant's ability to meet with counsel?

⁴¹⁵ See generally *Zadvydas v. Davis*, 533 U.S. 678 (2001), *Miller v. Albright*, 532 U.S. 420 (1998) (O'Connor, J., concurring), *Kleindienst v. Mandel*, 408 U.S. 753 (1972), *Carlson v. Landon*, 342 U.S. 524 (1952).

⁴¹⁶ *Chae Chan Ping v. United States* (The Chinese Exclusion Case), 130 U.S. 581 (1889); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

⁴¹⁷ Ch. 126, 22 Stat. 58 (1882).

⁴¹⁸ *Ibid.*

⁴¹⁹ See e.g. *Chae Chan Ping v. United States*, 130 U.S. 581 (1889).

- Is the federal government, pursuant to the Fifth Amendment’s Due Process Clause, prohibited by the Eighth Amendment from requiring excessive bail amounts?

Next, this portion of the report will analyze if the federal government is violating a detained immigrant’s First Amendment rights by interfering with a detained immigrant’s right to freely exercise religion.

Is The Federal Government Detaining Immigrants in a Manner That Is Inconsistent with the Fifth Amendment’s Due Process Clause?

The Fifth Amendment to the U.S. Constitution provides that “no person shall be deprived of life, liberty, or property without the due process of law.”⁴²⁰ It binds the federal government to “a number of other express provisions in the Bill of Rights, guaranteeing fair procedure and non-arbitrary action, such as jury trials, grand jury indictments, and non-excessive bail and fines”⁴²¹ These protections apply to all persons within the United States and its territories, including undocumented immigrants.⁴²² Therefore, the federal government violates detained immigrants’ Fifth Amendment rights if the federal government:

- detains immigrants in a manner that is inconsistent with the Fifth Amendment;
- detains immigrants in a manner comparable to punitive incarceration;
- fails to afford detained immigrants the ability to obtain counsel; and
- impairs the ability of detainees to meet with counsel.

⁴²⁰ “No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.”. U.S. Const. Amend. V.

⁴²¹ See *INTEL CORPORATION, a Delaware corporation, Plaintiff (“Intel”), v. ECONINTEL TREASURY SYSTEMS, INC. a Delaware corporation, Trevor Underwood, an individual, Defendants (“Econintel”),* 2007 WL 5079193 (S.D.Fla.); *Lin v. The United States*, 2006 WL 655065 (U.S.), 15; *Janice HALGREN, Appellant/ Pro Se, v. Bristol MYERS-SQUIBB, et al., Appellees*, 2002 WL 32168210 (C.A.11), v-vi; See generally *Wong Wing v. United States*, 163 U.S. 228, 238 (1896); See also *Yick Wo v. Hopkins*, 118 U.S. 369 (1886), *Ex parte Wilson*, 114 U.S. 417 (1885).

⁴²² *Ibid.*

Is The Federal Government Detaining Immigrants in a Manner That Is Inconsistent with the Fifth Amendment's Due Process Clause?

Under the Due Process Clause, “a [civil] detainee may not be punished prior to an adjudication of guilt in accordance with due process of law.”⁴²³ Additionally, a detained immigrant⁴²⁴ has not been “adjudged” guilty of a crime.⁴²⁵ Instead, a detained immigrant has only had a “judicial determination of probable cause as a prerequisite to [the] restraint of [his] liberty following [apprehension].”⁴²⁶ The U.S. Supreme Court states that “[d]eportation is not a criminal proceeding and has never been held to be punishment. No jury sits. No judicial review is guaranteed by the Constitution.”⁴²⁷ Moreover, the federal government may only detain an undocumented immigrant “to ensure his presence at trial and may subject him to the restrictions and conditions of the detention facility so long as those conditions and restrictions do not amount to punishment, or otherwise violate the Constitution.”⁴²⁸

According to *Youngberg v. Romeo*, 457 U.S. 307, 315-316 (1982), detained immigrants, at a minimum, have a right to be free from bodily restraint⁴²⁹ and from unsafe detention

⁴²³ See *Bell v. Wolfish*, 441 U.S. 520 (1979). *Bell v. Wolfish* examined the constitutional rights of pretrial detainees who were charged with a crime, but had not been formally convicted. The detainees in this case were placed in “Pre-Trial Detention,” a form of administrative detention to ensure their presence at trial. The basis of the decision was to determine what rights do pre-trial detainees have when being detained prior to trial. The fact that they have not been convicted of a crime deems them civil detainees in administrative detention - as opposed to punitive detention. Although this case stems from criminal charges, these detainees, like detained immigrants, were placed in administrative detention - a form of civil detention. Therefore, this case is very applicable to detained immigrants who are administratively, or in other words civilly, detained. Moreover, detained immigrants are very similar to the detainees in this case because if detained immigrants are found to have violated U.S. Immigration laws they are considered criminals.; See *Ingraham v. Wright*, 430 U.S. 651, 671-672 (1977); *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963). *Ingraham v. Wright* examined the constitutional issues surrounding schools’ use of corporal punishment to punish students. While this case involved the rights of students, it is applicable to detained immigrants because detained immigrants are being punished in a civil setting as opposed to punitive setting where criminals are punished. Therefore, this case is applicable for the sole purpose of providing a context of the civil rights entitled to people who are being punished in a punitive fashion; *Wong Wing v. United States*, 163 U.S. 228 (1896). *Wong Wing v. United States* is applicable because it is one of the first cases examining a statute affecting those people who are unlawfully residing in the United States.

⁴²⁴ Detained immigrants are considered civil detainees. See generally *Denmore v. Kim*, 538 U.S. 510 (2003); *Zadvydas v. Davis*, 533 U.S. 678 (2001).

⁴²⁵ See generally, *Zadvydas v. Davis*, 533 U.S. 678 (2001).

⁴²⁶ See *Geerstein v. Pugh*, 420 U.S. 103, 113-14 (1975).

⁴²⁷ *Carlson v. Landon*, 342 U.S. 524, 537 (1952).

⁴²⁸ *Wolfish*, 441 U.S. at 536-37 (1979) (Marshall, J., Dissenting)

⁴²⁹ *Youngberg v. Romeo*, 457 U.S. 307, 315-316 (1982) (citing *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1 (1979)). This case involved the involuntary commitment of a mentally ill individual - a form of

conditions.⁴³⁰ Additionally, according to *Youngberg*, the Court balances a civil detainee's right to be free from bodily restraint and unsafe conditions against the government's legitimate interest in maintaining order and security at detention facilities. Furthermore, the Court entitles detention officials "to a presumption of correctness."⁴³¹

More recent case law states that "when a [detained immigrant] is confined in conditions identical to, similar to, or more restrictive than, those in which his criminal counterparts are held, we presume that the detainee is being subject to 'punishment.'" ⁴³² Therefore, the federal government has violated a detained immigrant's Fifth Amendment rights if the federal government detains an immigrant in a manner comparable to criminal incarceration.

During the Commission's briefing, federal officials testified that detained immigrants are not confined in a manner comparable to criminal incarceration.⁴³³ However, the Commission, based on research and testimony, questions the veracity of their claims. Several panelists stated that numerous changes are necessary to create true civil detention settings.⁴³⁴ The American Bar Association has developed civil immigration detention standards which detail how such facilities would be structured and run to distinguish them from criminal incarceration.⁴³⁵

The Commission visited Port Isabel Detention Center on May 5, 2015, to corroborate testimony collected during the Commission's hearing on Jan. 31, 2015. Port Isabel Detention Center (PIDC) is a federally owned immigration detention center located near Harlingen, Texas. During the Commission's visit, it was apparent that immigration

administrative detention. Therefore, this case is applicable to detained immigrants because it discusses the rights of those involuntarily committed.

⁴³⁰ *Ibid.* (Citing *Ingraham v. Wright*, 430 U.S. 651, 673 (1977)).

⁴³¹ *Ibid.* at 324.

⁴³² *Jones v. Blanas*, 393 F.3d 918, 932 (9th Cir. 2004). This case involved the administrative detention of a Sexually Violent Predator Act (SVPA) detainee - a form of civil detention. While this case involved criminal matters, the 9th Circuit examined and ruled upon the due process of people detained under the SVPA, who are considered civil detainees until they are convicted. Moreover, the 9th Circuit definitively and consistently refer to SVPA detainees as civil detainees. Therefore, because SVPA detainees are classified as civil detainees, detained immigrants, who are all civil detainees, are afforded the same rights.

⁴³³ *See generally*, U.S. Commission on Civil Rights, Briefing Testimony.

⁴³⁴ *See*, e.g. Grisez, Karen, Briefing Transcript, p. 157 (describing the detention system as using a "correctional model.").

⁴³⁵ For example, detainees would be permitted to wear civilian clothing, secure their own belongings, and move freely throughout the facility. ABA Civil Immigration Detention Standards, *American Bar Association*, 2012, available at <http://www.americanbar.org/content/dam/aba/administrative/immigration/abaimmdetstds.authcheckdam.pdf>.

detention centers were built, house detainees, and operate like criminal penitentiaries (Figure 5).⁴³⁶

FIGURE 5. Entrance at Port Isabel Detention Center⁴³⁷



All DHS-owned and contracted detention facilities are identically built. For example, detention facilities are surrounded by two 12-foot double fences that circumscribe the compound's exterior and housing units. Additionally, fences are surrounded and lined with barbed wire. Figure 6 depicts the fence line from Polk County Detention Center (PCDC) in eastern Texas, which is identical to the fence line at PIDC.

⁴³⁶ See García Hernández, César Cuauhtémoc, *Immigration Detention as Punishment* (August 22, 2013). *UCLA LAW REVIEW*, Vol. 61, No. 5, 2014, Forthcoming; U Denver Legal Studies Research Paper No. 13-41, available at <http://ssrn.com/abstract=2321219>. (“...[W]ith only a few exceptions, the facilities that ICE uses to detain aliens were originally built, and currently operate, as jails and prisons to confine pretrial and sentenced felons. Their design, construction, staffing plans, and population management strategies are based largely on the principles of command and control. Likewise, ICE adopted standards that are based on corrections law and promulgated by correctional organizations to guide the operation of jails and prisons. Immigration detention centers, in effect, are built and managed on the premise that immigration detainees are just as dangerous as penal detainees.”), p.234.

⁴³⁷ http://www.snipview.com/q/Port_Isabel_Detention_Center.

FIGURE 6. Polk County Detention Center⁴³⁸**FIGURE 7.** Marion State Prison⁴³⁹

⁴³⁸ <http://www.motherjones.com/mojo/2012/11/10-worst-immigration-detention-centers-america>.

⁴³⁹ <http://www.10tv.com/content/stories/2012/01/01/marion-private-prisons.html>.

The fence lines are identical to the fence lines at criminal penitentiaries. Figure 7 depicts the fence line at Marion Federal Prison, a criminal facility.

Despite the similarity, a detention facility's appearance has little impact when analyzing whether detention centers are punitive in nature. Simply examining a detention center's physiognomy alone is not enough to constitute a punishment under a Fifth Amendment analysis.⁴⁴⁰ The Supreme Court stated that there must be more.⁴⁴¹ Detained immigrants must also be treated like criminal inmates.⁴⁴²

Immigration detention facilities house detainees in dormitories that are identical to criminal penitentiaries. At PIDC, Commission staff observed that dormitories house between 50 and 75 people, were lined with beds, and had open bathrooms and shower areas. Comparably, criminal facilities house inmates in large units lined with beds, open bathrooms, shower areas, and house a large number of inmates. Additionally, the dormitories were electronically locked by heavy doors and were guarded. Figures 8-14 depicts the similarity between the dormitories at immigration detention facilities and criminal penitentiaries.

It should be noted that at both Karnes and Port Isabel, the Commission delegation was prohibited by detention facility officials from taking photographs. The Port Isabel detention staff had a photographer documenting the Commission delegation's visit without providing the Commission with copies of the photographs.

⁴⁴⁰ See *Wolfish*, 441 U.S. 520 (1979).

⁴⁴¹ *Ibid.*

⁴⁴² *Jonas v. Blanas*, 393 F.3d 918, 932 (9th Cir. 2004).

FIGURE 8. Detention Facility in California⁴⁴³**ICE Holds Immigrants At Adelanto Detention Facility**

A guard sits in the 'segregation block' at the Adelanto Detention Facility on November 15, 2013 in Adelanto, California. Most detainees in segregation cells are sent there for fighting with other immigrants, according to guards. The facility, the largest and newest Immigration and Customs Enforcement (ICE), detention center in California, houses an average of 1,100 immigrants in custody pending a decision in their immigration cases or awaiting deportation. The average stay for a detainee is 29 days. The facility is managed by the private GEO Group. ICE detains an average of 33,000 undocumented immigrants in more than 400 facilities nationwide.

(Nov. 14, 2013 - Source: John Moore/Getty Images North America)

⁴⁴³ <http://www.zimbio.com/pictures/jRKI3eYta86/ICE+Holds+Immigrants+Adelanto+Detention+Facility/hugg9vyIZdO>.

FIGURE 9. Nogales Border Patrol Station—Children’s Housing Unit⁴⁴⁴

⁴⁴⁴ <http://www.autostraddle.com/kids-detained-in-az-provides-window-into-totally-fcked-us-immigration-system-240979/>.

FIGURE 10. High Security Penitentiary in Coleman, Florida.⁴⁴⁵



Immigration detention centers are also operated like criminal penitentiaries. During the Commission's visit to PIDC, Commission staff observed that detained immigrants were given uniforms identical those given to prison inmates. Additionally, detained immigrants, like criminal inmates, were marched with their hands behind their backs and escorted to various locations within the facility. The pictures below depict procedures that are similar between immigration detention centers and criminal penitentiaries.

⁴⁴⁵ <http://www.govexec.com/defense/2012/01/inmate-assaults-on-federal-prison-officers-underscore-staffing-budget-shortfalls/35816/>.

FIGURE 11. Department of Corrections and Rehabilitation in North Dakota⁴⁴⁶



Moreover, evidence suggests that detained immigrants are being abused at a level constituting punishment. Maria Hinojosa, a reporter with Futuro Media Group, testified that detained immigrants were held in

[dormitories that were either] cold or too hot. The [dormitories] had no windows, no way to look outside. The one window that there was, it was kind of like a circus tent structure. The one window it—that there was there was a red line around it so you couldn't get close to the window and you were punished if you did.⁴⁴⁷

Additionally, Hinojosa testified that:

We spoke to a former guard who said that she had witnessed another guard and a supervisor beating a detainee who had answered back to an insulting guard. She was told to take the badly injured man and put him on the first plane back to— deported to Guatemala. She soon quit afterwards because of an unsafe work environment.⁴⁴⁸

⁴⁴⁶ <https://sayanythingblog.com/entry/left-north-dakota-need-sentencing-reform/>.

⁴⁴⁷ Hinojosa, Briefing Transcript, p.105.

⁴⁴⁸ *Ibid.*, p. 107.

FIGURE 12. U.S. Border Patrol Agents Watch Over Undocumented Immigrants—Nogales, AZ



Source: Reuters News⁴⁴⁹

Hinojosa also recounted that three separate women who were detained at immigration were:

held in a place that's commonly called (foreign language spoken), which means "the ice box" or "the freezer." She said that they were hold—held wet and cold with no blankets that the guards joked with them to not ask for any more air-conditioning, taunting them about the very cold conditions. They said they got three microwaved burritos. Often, they are still frozen and that the water tasted like sulfur.⁴⁵⁰

In addition to Hinojosa's testimony, the Commission heard personal accounts regarding detainee treatment at federal processing centers. On May 4, 2015, the Commission visited Karnes Family Detention Center near San Antonio, Texas.⁴⁵¹ During the visit, the Commission held a meeting with a group of women detainees. The Commission questioned the detainees about how they were being treated at the Karnes facility. The detainees responded that their experience at Karnes was much better than what they had experienced at CBP processing centers. The detainees told the Commission that CBP had

⁴⁴⁹ <http://www.reuters.com/article/2009/08/06/us-usa-immigration-idUSTRE5750MW20090806>.

⁴⁵⁰ Hinojosa, *Briefing Transcript*, p.107. See also Bale, Rachael. "Border Crossers Face 'freezer' Detention." U-T San Diego. Nov. 20, 2013, accessed June 3, 2015, available at <http://www.utsandiego.com/news/2013/nov/20/cir-border-detainees-freezers/>.

⁴⁵¹ Karnes Family Detention Center is an ICE-contracted facility owned by GEO Group.

placed them in overly crowded, freezing cells that they referred to as “hieleras” or “ice boxes.” The detainees stated that they were given cold wet blankets and that their children were not being given proper medical care when sick. CBP did not give detainees the ability to a shower, to have clean clothes, or even an area to wash their hands before eating. The detainees stated that they were forced to drink unclean water that tasted like oil. Some detained children even suffered dehydration because they refused to drink the water at the CBP facility. Additionally, the detainees articulated that they were only given one meal for the day, which consisted of an old bologna sandwich. Moreover, the detainees complained that the guards taunted them by calling them derogatory, racial words and even threatened them with guard dogs.

The *Los Angeles Times* reported similar issues:

In Arizona, most were corralled behind chain-link fences topped with razor wire, huddling for warmth on plastic mats under flimsy metallic Mylar blankets. A television was suspended from the ceiling. Banks of portable toilets served as sanitary facilities. Beside a recreation area, a camouflage tarp had been strung up to shield temporary showers.⁴⁵²

In addition, some female detainees with their children approached the Chair during a tour of the grounds at Karnes and told him that a child attempted suicide by jumping from a second floor balcony because he could not stand being in detention any longer; that mothers taking part in a hunger strike over prolonged detention were threatened by detention facility staff with having their children taken from them if they did not break the hunger strike; at times they are verbally abused by the detention center staff; and that the detention center is cleaned up or re-painted when an outside delegation visits the detention center.

⁴⁵² Hennessy-Fiske, Molly, and Cindy Carcamo. “Overcrowded, unsanitary conditions seen at immigration detention centers.” *Los Angeles Times*. June 18, 2014, available at <http://www.latimes.com/nation/nationnow/la-na-nn-texas-immigrant-children-20140618-story.html#page=1>.

FIGURE 13. Immigrant Children Held at CBP Nogales Placement Center

Source: Arizona Central Newspaper.⁴⁵³ Photo: Ross D. Franklin/Associated Press.

Even Congressional leaders have voiced concerns about the punitive nature of immigration detention facilities. One hundred thirty-six Members of Congress signed a letter to DHS Secretary Jeh Johnson which stated:

[W]e are disturbed by the fact that many mothers and children remain in family detention despite serious medical needs. In the past year, we have learned of the detention of children with intellectual disabilities, a child with brain cancer, a mother with a congenital heart disorder, a 14- day-old baby, and a 12-year-old child who has not eaten solid food for two months, among many others. Recently, we learned of a three-year-old child at the Berks County Residential Center who was throwing up for three days and was apparently offered water as a form of medical treatment. It was only after the child began throwing up blood on the fourth day that the facility finally transferred her to a hospital. This is

⁴⁵³ Michael Kiefer, *First peek: Immigrant children flood detention center*, AZCentral, Arizona Republic, June 19, 2014, available at <http://www.azcentral.com/story/news/politics/immigration/2014/06/18/arizona-immigrant-children-holding-area-tour/10780449/>.

simply unacceptable.⁴⁵⁴

The Commission agrees with the concerns raised by members of Congress. While the letter from Congress addressed conditions in family detention centers, the Commission has received reports of unacceptable conditions in border patrol facilities, adult facilities, and family facilities. As detailed above, conditions of extreme cold, overcrowding and inadequate food persist in CBP facilities. The Commission observed detainees held in conditions similar to incarceration at Port Isabel Detention Center. The Commission recognizes that some detainees at Port Isabel have been convicted of crimes, some have been charged with crimes, others have failed to appear for immigration hearings, and finally others are held on civil immigration matters. While the government uses various colors of prison attire to differentiate levels of detention, it fails to treat the different levels of detainees distinctly from each other in its day-to-day operations. As discussed in Chapter 4, a federal judge has concluded that family detention does not comply with the government's obligations under the Flores Settlement Agreement. Taken together, these conditions are inconsistent with a system of civil detention that should not seek to punish immigrant detainees. Therefore, the Commission finds evidence indicating that DHS and its component agencies and contractees detain undocumented immigrants in a manner inconsistent with civil detention and instead detain many undocumented immigrants like their criminal counterparts in violation of a detained immigrant's Fifth Amendment Rights.

The Right To Seek Counsel: Is the Federal Government Affording Detained Immigrants the Ability to Obtain Counsel?

The Fifth Amendment to the U.S. Constitution mandates that “no person ... shall be deprived of life, liberty, or property...” without due process of law.⁴⁵⁵ According to *Reno v. Flores*, 507 U.S. 292, 306 (1993), “[i]t is well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings.” Additionally, federal courts have held that the removal process implicates an undocumented immigrants’ liberty interest.⁴⁵⁶ Therefore, federal courts have considered access to counsel, at one’s own expense, a requirement that assures fundamental fairness during removal proceedings.⁴⁵⁷ For example, in *United States v. Charleswell*, 456 F.3d 347, 360 (3d Cir.

⁴⁵⁴ See Congressional Letter -Appendix C.

⁴⁵⁵ U.S. Const., Amend. V.

⁴⁵⁶ A detained immigrant’s liberty interest is implicated because federal statute mandates that captured undocumented immigrants be detained. See e.g., *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001).

⁴⁵⁷ *Biwot v. Gonzales*, 403 F.3d 1094, 1098 (9th Cir. 2005) (“The right to counsel in immigration proceedings is rooted in the Due Process Clause.”); *Dakane v. U.S. Attorney General*, 399 F.3d 1269, 1273 (11th Cir. 2005) (“It is well established in this Circuit that an alien in civil deportation proceedings ... has the constitutional right under the Fifth Amendment Due Process Clause ... to a fundamentally fair

2006), the Third Circuit characterized a detained immigrant's right to counsel during removal proceedings as "so fundamental to the proceeding's fairness" that denying this right "rise[s] to the level of fundamental unfairness." Furthermore, the Fifth Amendment is not the only law that grants undocumented immigrants the right to counsel at their own expense. The Immigration and Nationality Act (INA) guarantees undocumented immigrants with access to counsel at their own expense.⁴⁵⁸

Several provisions of the INA provide undocumented immigrants with a right to counsel at their own expense. INA Section 292 directly governs a detained immigrant's right to counsel. Section 292 states that, "[i]n any removal proceedings before an immigration judge and in any appeal proceedings before the Attorney General from any such removal proceedings, the person concerned shall have the privilege of being represented (at no expense to the Government) by such counsel ... as he shall choose."⁴⁵⁹ Additionally, INA provides detained immigrants other rights in removal proceedings. For example, the INA:

- promulgates rules that grant detained immigrants ample opportunity to obtain counsel by placing restrictions on the removal proceeding's timing;⁴⁶⁰
- mandates that undocumented immigrants are furnished with a list of pro bono attorneys when removal proceedings have begun;⁴⁶¹ and
- establishes additional protections for unaccompanied minors, mentally incompetent individuals, and others.⁴⁶²

Although the INA describes these provisions as a "privilege," several courts construed INA as establishing a statutory right to counsel at a detained immigrant's own expense.⁴⁶³ Therefore, the federal government violates a detained immigrant's Fifth Amendment and statutory rights when it does not afford a detained immigrant the ability to seek legal counsel or providing them with resources to obtain legal counsel.

hearing."); *Borges v. Gonzales*, 402 F.3d 398, 408 (3d Cir. 2005) ("The Fifth Amendment entitles aliens to due process of law in deportation proceedings."); *Rosales v. Bureau of Immigration & Customs Enforcement*, 426 F.3d 733, 736 (5th Cir. 2005) ("[D]ue process requires that deportation hearings be fundamentally fair."); *Brown v. Ashcroft*, 360 F.3d 346, 350 (2d Cir. 2004) ("The right ... under the Fifth Amendment to due process of law in deportation proceedings is well established.").

⁴⁵⁸ The Immigration and Nationality Act, as amended, PUB. L. 104-208, 66 Stat. 235 (Sept. 30, 1996) (codified as 8 U.S.C. § 1362).

⁴⁵⁹ *Ibid.*

⁴⁶⁰ See INA §239(b)(1) (Codified at 8 U.S.C. §1229(b)(1)).

⁴⁶¹ See INA §239(b)(2), 8 U.S.C. §1229(b)(2); 8 C.F.R. §238.1(b)(2)(iv).

⁴⁶² See 6 U.S.C. §279(b)(1)(A).

⁴⁶³ See *Castro-O'Ryan*, 847 F.2d at 1312 (indicating Section 292 of the INA, as well as its legislative history, "confirms that Congress intended to confer a right").

DHS and ORR state that they furnish detained immigrants with legal materials that provide information detailing the immigration process and how to obtain legal representation.⁴⁶⁴ These flyers are available in both English and Spanish.⁴⁶⁵ Additionally, DHS displays a “Know Your Rights” video⁴⁶⁶ during immigrant processing.⁴⁶⁷ The Commission commends DHS and ORR for providing detained immigrants with legal material; however, evidence suggests that these practices are facial and do not have their intended effect.

Legal representation is crucial for detained immigrants seeking asylum or entry into the United States.⁴⁶⁸ Statistics show that detained immigrants who obtain counsel are more successful in their asylum claims, and therefore released from detention more often, than those without counsel.⁴⁶⁹ According to Figure 14, detained immigrants who had obtained counsel were six times more likely to succeed in removal proceedings.

FIGURE 14. Effect of Counsel on Case Success for Detained Non-Citizens—2005–2012



Source: National Immigration Justice Center Report.⁴⁷⁰ Numbers obtained from Katzmann Study Group, 2011.

⁴⁶⁴ The Commission learned that detained immigrants are given flyers dictating the immigration process and contact information for legal services during the Commission’s visit to Karnes Family Detention Facility and PIDC. See also Briefing Transcript, U.S. Commission on Civil Rights.

⁴⁶⁵ The Commission received a copy of the flyers during the Commissions visit to Karnes Family Detention Facility and PIDC. See also Briefing Transcript, U.S. Commission on Civil Rights.

⁴⁶⁶ Video prepared by American Bar Association. ICE officials state the video is shown in both Spanish and English.

⁴⁶⁷ See notes concerning Commission visits to Karnes Family Detention Center and Port Isabel Detention Center.

⁴⁶⁸ Karen Grisez, Written Statement, p. 4.

⁴⁶⁹ Ibid.

⁴⁷⁰ Charles Roth and Raia Stoicheva, Order in the Court: Commonsense Solutions to Improve Efficiency and Fairness in the Immigration Court, NIJC, October 2014, available at

The success rate of detained immigrants with counsel is strongly linked to an immigrant's ability to comprehend complex immigration law. Overall, detained immigrants are not fluent or literate in English.⁴⁷¹ While detention facilities are required to provide access to legal materials and research tools to detainees, a majority of immigration jurisprudence is not available in Spanish or indigenous languages. Therefore, expecting detained immigrants to understand the complex and intricate immigration system without the assistance of counsel is fundamentally unfair.

While the INA mandates that the federal government furnish detained immigrants with legal materials and attorney contact information, the actual procedures ICE uses to process detained immigrants is not conducive to affording them adequate opportunity to obtain counsel.⁴⁷² For example, ICE initially detains an undocumented immigrant in a facility where that immigrant was apprehended.⁴⁷³ However, ICE transfers these detainees to remote detention centers within hours of their apprehension. This immediate transfer affects a detained immigrant's ability to secure legal representation because his/her transfer location is generally unknown.⁴⁷⁴ Additionally, a detained immigrant may be transferred to a facility located over 100 miles away from where he/she was initially apprehended. During the Commission's briefing, Karen Grisez, on behalf of the American Bar Association (ABA), Governmental Affairs Office, stated:

Immigration detention is particularly important to the ABA for two reasons: One is that it impedes the access to counsel, and without the right to appointed counsel, as was mentioned earlier this morning, the fact of generally remote detention locations, much less the conditions that pertain in those facilities, makes it extremely difficult for people to access pro bono representation.

<http://immigrantjustice.org/sites/immigrantjustice.org/files/Order%20in%20the%20Courts%20-%20Immigration%20Court%20Reform%20White%20Paper%20October%202014%20FINAL2.pdf> .

⁴⁷¹ Commission observed that a majority of detained population did not speak or understand English at Karnes Family Detention Facility and Port Isabel Detention Center.

⁴⁷² The Commission visited RAICES Immigration Services. The Commission was apprised of various issues detained immigrants face during the removal process.

⁴⁷³ Geoffrey Heeren, Pulling Teeth: The State of Mandatory Immigration Detention, 45 HARV. C.R. C.L. L. REV. 601, 614 (2010).

⁴⁷⁴ The Commission learned that immigrants detained at Port Isabel Detention Facility and Karnes Family Detention Facility were apprehended from various places near the Rio Grande Valley and throughout Texas.

Additionally, the federal government's policies and procedures adversely affect detained immigrants who are subject to expedited removal. According to Karen Lucas, Associate Director of Advocacy for the American Immigration Lawyers Association (AILA):

Every day at Artesia, AILA member attorneys saw that the pressure to rush women and children through the deportation process was resulting in the denial of many legitimate asylum claims—both by asylum officers and by judges—without legal foundation. Officers interviewed families for their credible fear claims less than three days after their arrival. The speed with which asylum officers were making credible fear decisions was also very fast: 6.4 days on average. Moreover, some asylum officers would ask questions during the credible fear interviews using legal and statutory language that the detainees could not understand. Notice to attorneys of their clients' credible fear interviews was often inadequate, and some clients were even encouraged to go forward with their interviews without their attorneys.⁴⁷⁵

The INA states that a detained immigrant must be given ample time to obtain legal counsel before removal proceeding begins.⁴⁷⁶ Detained immigrants who are subjected to expedited removal are forced to find counsel in a matter of hours because of the speed of the expedited removal process.⁴⁷⁷ This relatively short time frame is inadequate for detained immigrant to obtain counsel.⁴⁷⁸ Additionally, detained immigrants are usually bombarded with complex legal information detailing their rights that are often times not in Spanish or indigenous languages.⁴⁷⁹ Consequently, detained immigrants may not understand their rights – including their ability to obtain counsel - or they may not understand their rights because DHS presented them with a large amount of complex information and expected them to digest the information within a short time frame.⁴⁸⁰ Therefore, the expedited removal process creates a fundamentally unfair process by not affording detained immigrants the proper ability to obtain counsel.

Moreover, DHS employees may be proactively discouraging detained immigrants from accessing and obtaining legal services. For example, Ellen Miller from CARA Pro Bono

⁴⁷⁵ Karen Lucas, Written Testimony, p. 12.

⁴⁷⁶ See INA §239(b)(1) (Codified at 8 U.S.C. § 1229(b)).

⁴⁷⁷ RAICES and CARA Pro Bono Legal Services told the Commission that detained immigrants who are subject to the expedited removal process often times do not have representation.

⁴⁷⁸ *Ibid.*

⁴⁷⁹ *Ibid.*

⁴⁸⁰ *Ibid.*

Project recounted an event where ICE banned a nun who announced the availability of legal services to detained immigrants after a religious service.⁴⁸¹ Miller also stated that many women are not aware of their ability to obtain pro bono legal services and appear pro se⁴⁸² during immigration proceedings.⁴⁸³ Furthermore, the Commission learned that phone services were arbitrarily cut when detained immigrants attempted to dial a number to contact outside legal services. This is significant because ICE monitors all detainee incoming and outgoing phone calls.⁴⁸⁴ Additionally, DHS and its contract facilities require detained immigrants to pay for phone calls.⁴⁸⁵ Many detained immigrants migrate to the United States without money or the ability to contact family members.⁴⁸⁶ Therefore, a detained immigrant who does not have the resources to pay to call an attorney while in detention is left without recourse.

Language barriers may also inhibit a detained immigrant's ability to procure counsel.⁴⁸⁷ For example, ICE is required to distribute a list of legal services and pro bono attorney contact numbers to detained immigrants.⁴⁸⁸ According to an ICE official, these lists were said to have been available in both English and Spanish. The Commission asked for a copy of this list in each available language during the Commission's visit to Karnes Family Detention Center, but the Commission had never received the copies that were promised by one ICE official. Furthermore, although a majority of ICE detainees come from Spanish-speaking countries, many of these immigrants speak indigenous languages that may not be consistent with traditional Spanish linguistic norms.⁴⁸⁹

⁴⁸¹ The Commission visited RAICES Legal Services on May 4, 2015. Ellen Miller, an attorney from CARA Pro Bono Legal Services, attended the meeting. She began detailing various access-to-counsel issues that detained immigrants were facing.

⁴⁸² Pro Se is a term used to describe a person who is appearing at a court hearing on his or her own behalf without the representation of counsel.

⁴⁸³ RAICES and CARA Pro Bono Legal Services told the Commission that detained immigrants who are subject to the expedited removal process often times do not have representation.

⁴⁸⁴ The Commission noted, during the Commission's visit to Karnes Family Detention Center, that detained immigrants were required to pay for any phone call while they were detained.

⁴⁸⁵ Ibid.

⁴⁸⁶ See generally, Commission Briefing Transcript.

⁴⁸⁷ Karen Grisez, Written Statement, p. 4.

⁴⁸⁸ See *supra*, note 449.

⁴⁸⁹ Unaccompanied Alien Children: An Overview. R43599. By Lisa Seghetti, Alison Siskin, and Ruth Ellen Wasem. Washington, DC: U.S. Government Printing Office, 2014.

While the federal government has some commendable practices, many of DHS practices affect detained immigrants' ability to secure and obtain legal counsel at their own expense, despite immigrants' rights under the Fifth Amendment and the INA to do so. Several resources indicate that the federal government and its contract facilities intentionally interfere with a detained immigrant's ability to access and speak with legal counsel.⁴⁹⁰ For example, according to Karen Lucas, immigration judges have "improperly hindered counsel's ability to speak and advocate for their clients during . . . credible fear reviews."⁴⁹¹ Immigration judges were not the only federal government officials who have been reported to impede a detained immigrant's access to counsel. Reports indicate that CBP consistently places barriers obstructing a detained immigrant's access to counsel. The following three statements were taken from an AILA and Penn State Law joint report⁴⁹²:

Statement 1⁴⁹³

During a Boston secondary inspection, I was not only prohibited from entering the room where my client was interviewed, but the CBP officer literally and forcefully pushed me aside when I was walking in with my client and told me I could not come in . . . CBP took my client into custody, charged him as an arriving alien for a crime they said was a CIMT [Crime Involving Moral Turpitude] but was not. They moved him from prison to prison, first Boston then York, PA, then Lumpkin, GA. I finally got a hearing for him in the Atlanta Immigration Court and he was released from custody and admitted into the United States, but the whole thing took 2.5 months and many filings. The entire waste of prison, court, legal, and transportation resources could have been avoided if only I were able to sit in on the interview with my carefully prepared memo explaining why his crime was not a CIMT.

⁴⁹⁰ American Immigration Council and Penn State Law, Behind Closed Doors: An Overview of DHS Restrictions on Access to Counsel. PENN STATE LAW, *available at* https://pennstatelaw.psu.edu/_file/Immigrants/LAC_Right_to_Counsel.pdf.

⁴⁹¹ Karen Lucas, Written Testimony.

⁴⁹² Ibid.

⁴⁹³ Ibid.

Statement 2⁴⁹⁴

My client had entered the United States on an H-1B visa, but had changed employers since his arrival. To extend the period of my client's authorized stay, I accompanied him to the port of entry to assist him in obtaining a new I-94 with an extended validity date based on his new H-1B approval notice. I brought a policy memorandum that had been issued in 2001 by Legacy INS addressing this specific issue. The officer refused to listen to me when I attempted to explain the legal basis for my request and did not even look at the policy memorandum. I asked to speak with the supervisor, who also refused to listen. The officers told me that my client had no right to representation and that they were doing me and my client a favor by allowing me to be there. Ultimately, the CBP officers called USCIS to ask them what to do. USCIS told them that they should let the client in, and that he could be admitted beyond the validity of his original H-1B visa stamp since he had a new approval notice with a longer validity period.

Statement 3⁴⁹⁵

In one particular incident, my client—an H-1B visa holder who had a pending adjustment of status application—was stopped for secondary inspection. He was detained for four hours during which time he was questioned and unable to call me. He was harassed, insulted, and told that he should get a different attorney because I had improperly filed things on his behalf. Four hours later, the CBP officer relented and let my client enter on his valid H-1B visa, but told my client he was “doing him a favor.”

There are also reports that ICE hinders detained immigrants' ability to communicate with counsel. During the Commission's visit to Karnes Family Detention Facility and Port Isabel Detention Center, a CARA representative informed the Commission that ICE and detention officials prohibit immigrant attorneys from bringing basic office equipment when visiting with their clients. Government attorneys, on the other hand, were allowed that privilege. Additionally, ICE and detention officials arbitrarily create rules that interfere with an attorney's ability to meet with their client. For example, during the Commission's meeting with RAICES, the Commission learned that attorneys were being denied entrance to detention facilities because they were carrying cell phones when cell phones previously were allowed. The following is an account was taken from an AILA and Penn State Law joint report⁴⁹⁶:

⁴⁹⁴ Ibid.

⁴⁹⁵ American Immigration Council and Penn State Law, Behind Closed Doors: An Overview of DHS Restrictions on Access to Counsel. PENN STATE LAW, *available at* https://pennstatelaw.psu.edu/_file/Immigrants/LAC_Right_to_Counsel.pdf.

⁴⁹⁶ Ibid.

Earlier this year, I represented numerous students . . . who were instructed to report for interviews at various ICE offices on the East Coast. During interviews that took place in Newark, New Jersey, I was repeatedly prohibited from being present while my clients were questioned. One officer . . . told me I could see my client when he was “good and ready,” and threatened to deny bond if I persisted in my efforts By the time the interview had concluded, the officer had already issued an NTA [Notice to Appear]. According to my client, they joked about my efforts to be present during the interrogation.

The restrictive policy at the Newark office stands in contrast with the policy in place at the ICE offices in Philadelphia and Fairfax, Virginia, where I have been permitted to accompany my clients during questioning. By being present during the interviews, I not only gave my clients peace of mind, but made the process more efficient for the ICE officers themselves by encouraging the students to be more forthcoming.

In addition to the accounts above, DHS and DHS-contracted facilities monitor all incoming and outgoing phone calls.⁴⁹⁷ When Commission staff questioned an ICE official regarding the phone monitoring policy and how that policy affects the “attorney-client privilege,” the ICE official stated that all attorney-client calls were not monitored.⁴⁹⁸ However, the ICE official did not explain the safeguards ensuring that attorney-client calls remained confidential.⁴⁹⁹ Listening to an attorney’s conversation with his/her client would greatly prejudice a detained immigrant because it would give the government insight to privileged information that an attorney may use during proceedings. Therefore, the federal government’s actions substantially give an unfair advantage to the government

Evidence indicates that federal employees are interfering with an attorney’s ability to represent clients.⁵⁰⁰ Federal detention employees actively deny that detained immigrants have a right to counsel or stonewall attorneys from being present during detainee interviews with immigration officials.⁵⁰¹ Generally, an attorney acts on a client’s behalf in all matters pertaining to the scope of representation.⁵⁰² Additionally, the federal government prevents an immigrant’s attorneys from bringing necessary office supplies

⁴⁹⁷ The Commission visited Karnes Family Detention Facility and observed flyers on facility walls explaining that all calls would be monitored.

⁴⁹⁸ Ibid.

⁴⁹⁹ Ibid.

⁵⁰⁰ See American Immigration Council and Penn State Law, Behind Closed Doors: An Overview of DHS Restrictions on Access to Counsel. PENN STATE LAW, *available at* https://pennstatelaw.psu.edu/_file/Immigrants/LAC_Right_to_Counsel.pdf.

⁵⁰¹ Ibid.

⁵⁰² It is generally understood amongst attorney opposing counsel deals directly with a person’s attorney.

that are critical for delivering effective counsel during their visits with clients.⁵⁰³ These prohibitions have consistently hindered immigration attorneys from timely filing necessary documents on their clients' behalf. Federal employees appear to impair the attorney-client relationship when they prohibit counsel from being present during a detainee client's interview or from bringing necessary equipment.⁵⁰⁴

Bail: Is the federal government, pursuant to the Fifth Amendment, required to abide by the Eighth Amendment protection against excessive bail amounts?

The Fifth Amendment to the U.S. Constitution protects against excessive bail amounts.⁵⁰⁵ However, such protections do not apply to immigration detention cases because they are civil in nature.⁵⁰⁶ Additionally, the Supreme Court has stated that the federal executive and legislative branches have the discretion to deny or set bail amounts in immigration deportation proceedings.⁵⁰⁷ Therefore, detained immigrants do not have constitutional recourse to challenge bail amounts.⁵⁰⁸ When bail is indeed set for detained immigrants, the national average is approximately \$5,200. However, it appears to the Commission that the processes by which bond amounts are set and the range of the bond amounts are inconsistent and perhaps punitive.⁵⁰⁹ Concern has also been raised that detention

⁵⁰³ Ibid.

⁵⁰⁵ See generally *U.S. v. Salerno*, 481 U.S. 739 (1987).

⁵⁰⁵ See generally *U.S. v. Salerno*, 481 U.S. 739 (1987).

⁵⁰⁶ *Fong Yue Ting v. United States*, 149 U.S. 698, 13 S.Ct. 1016, 37 L.Ed. 905 (1893) (holding the Eighth Amendment inapplicable to the deportation of aliens on the ground that "deportation is not a punishment for crime.")

⁵⁰⁷ See *Carlson v. Landon*, 342 U.S. 524 (1952).

⁵⁰⁸ See *Fong Yue Ting v. United States*, 149 U.S. 698, 13 S.Ct. 1016, 37 L.Ed. 905 (1893); See also *Bamidele v. Gerson*, 995 F.2d 223 (5th Cir. 1993) (finding that "because a detained immigrants current "imprisonment is a result of a deportation proceeding and not a criminal conviction, the Eight Amendment is inapplicable."); *Avramenkov v. I.N.S.*, 99 F.Supp.2d 210, 218 (D. Conn. 2000) (Finding that mandatory pre-removal detention under a provision of the INA does not violate the Eighth Amendment and noting that "there can be no constitutional violation when a Petitioner's detention is not punitive[,] but instead is incidental to a legitimate purpose.").

⁵⁰⁹ Quote from Karen Lucas' written statement:

Once an individual is found to have a "credible fear" of persecution, Immigration and Customs Enforcement (ICE) is required by the Immigration and Nationality Act §236(a) to assess her individually for release. But in Karnes and Dilley, as in Artesia, ICE is abdicating this responsibility and detaining across the board, with rare exceptions. ICE is refusing to consider bond, release on recognizance, supervised release, or any form of ATD, regardless of individual circumstances. Moreover, when that individual is then able to go before an immigration judge for a bond hearing, ICE uniformly opposes bond or demands an extremely high bond, submitting the same boiler plate legal brief in every case and arguing that every Central American family is a national security risk – ignoring years of legal precedent on the appropriate factors for release and instead relying on a single, factually inapposite case, *Matter of D-J*. At Artesia, this resulted in widely divergent bond amounts from Immigration Judges that could go as high as

determinations may be made, and bond amounts may be set, in order to help keep full the nightly 34,000 beds which Congress has required funded.⁵¹⁰

Is the Federal Government Violating a Detained Immigrant’s First Amendment Rights by Interfering with a Detained Immigrant’s Right to Free Exercise of Religion?

The First Amendment to the U.S. Constitution states that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof[.]”⁵¹¹ Additionally, federal law states, “the government shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability.”⁵¹² Below, the Commission analyzes whether the federal government and federally contracted, privately owned detention facilities inhibit detained immigrants’ ability to freely exercise religion.

Are detainees able to enforce constitutional rights against contract detention facilities?

People who are detained by the federal government retain the right to free exercise of their religion, subject to reasonable restrictions appropriate to the detention context.⁵¹³ Although the free exercise of religion is protected by both the Constitution and federal statute, the Commission received testimony that detainees may not be able to enforce their constitutional rights because of limitations the Supreme Court has imposed on constitutional liability, particularly in contract detention facilities. Panelist Bob Libal stated that there are two Supreme Court decisions “limiting the scope of *Bivens* liability for constitutional violations by private prison employees and private prison companies.”⁵¹⁴ Panelist Carl Takei clarified, “*Malesko* and *Pollard* are the two Supreme Court cases. . . . that make it essentially impossible to subject a private prison company or a private prison employee to *Bivens* constitutional liability.”⁵¹⁵

\$20,000 and \$30,000 – well above the national average of \$5,200 and well out of the reach of most detainees.

⁵¹⁰ “In Texas we’ve observed ICE setting bond determinations for individuals in order to keep detention facilities full, ostensibly to meet the quota.” Quote from Bob Libal, Executive Director, Grassroots Leadership, unedited transcript p. 219.

⁵¹¹ U.S. Const., Amend. I.

⁵¹² See Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq.*

⁵¹³ See *Tarpley v. Allen County, Indiana*, 312 F.3d. 895 (7th Cir. 2002) (Finding that not allowing an inmate to use a personal Bible containing commentary did not violate the free exercise clause.); See generally, *O’Lone v. Estate of Shabazz*, 482 U.S. 342 (1987).

⁵¹⁴ Libal, Bob, *Briefing Transcript*, p. 247 “*Bivens*” refers to actions brought under *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), which permits lawsuits for damages for constitutional harms.

⁵¹⁵ Takei, *Briefing Transcript*, p. 258.

In *Correctional Services Corp. v. Malesko*, 534 U.S. 61 (2001), the Court held that there is no implied private right of action under *Bivens* for damages against private entities that engage in constitutional deprivations while acting under color of federal law. *Minnecci v. Pollard*, 132 S. Ct. 617 (2012) held that there is no *Bivens* claim for an 8th amendment violation against employees of a privately operated federal prison, since state tort law provides adequate alternative remedies. Taken together, these cases limit the ability of detainees to bring a claim for violation of their constitutional rights.⁵¹⁶

Although these precedents make it difficult for detainees to sue a contract detention facilities for a violation of the right to free exercise of their religion,⁵¹⁷ other remedies may be available under the Constitution or Religious Freedom Restoration Act,⁵¹⁸ such as injunctive relief.

Is the Federal Government Infringing on a Detained Immigrant's Right to Exercise Religion?

The First Amendment and federal law prohibit the federal government and its agencies from imposing a substantial burden on religious exercise unless the government demonstrates that imposition of the burden on that person[:] (1) is in furtherance of a compelling government interest; and (2) is the least restrictive means of furthering that compelling government interest.⁵¹⁹ According to *Thomas v. Review Bd. Of Ind. Employment Sec. Div.*, 450 U.S. 707, 718 (1981), a substantial burden is defined as government action that “put[s] substantial pressure on an adherent to modify his behavior

⁵¹⁶ In dissent, Justice Stevens noted that the holding of *Malesko* puts people detained by the federal government at a disadvantage as compared to their state counterparts:

Indeed, it is the *Court's* decision that creates asymmetry—between federal and state prisoners housed in private correctional facilities. Under 42 U.S.C. § 1983, a state prisoner may sue a private prison for deprivation of constitutional rights, see *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936–937, 102 S.Ct. 2744, 73 L.Ed.2d 482 (1982) (permitting suit under *82 § 1983 against private corporations exercising “state action”), yet the Court denies such a remedy to that prisoner's federal counterpart. It is true that we have never expressly held that the contours of *Bivens* and § 1983 are identical. The Court, however, has recognized sound jurisprudential reasons for parallelism, as different standards for claims against state and federal actors “would be incongruous and confusing.” *Butz v. Economou*, 438 U.S. 478, 499, 98 S.Ct. 2894, 57 L.Ed.2d 895 (1978) (internal quotation marks omitted); cf. *Bolling v. Sharpe*, 347 U.S. 497, 500, 74 S.Ct. 693, 98 L.Ed. 884 (1954) (“In view of our decision that the Constitution prohibits the states from maintaining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government”).

Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 81-82 (2001) (Stevens, J., dissenting).

⁵¹⁷ Additionally, the Court has expressed skepticism that a *Bivens* action should ever be available for a free exercise claim, whether or not the defendant is a private contractor. See *Ashcroft v. Iqbal*, 556 U.S. 662, 675 (2009).

⁵¹⁸ 42 U.S.C. § 2000bb et seq.

⁵¹⁹ 42 U.S.C. § 2000bb-1(b).

and to violate his beliefs,” or “one that forces a person to ‘choose between following the precepts of her religion and forfeiting [government] benefits, on the one hand, and abandoning one of the precepts of her religion . . . on the other hand.’”⁵²⁰

Federal officials have stated that all detainees are afforded an opportunity to exercise their religion free from interference.⁵²¹ The Commission questions the assertion based on reports from the American Arab Anti-Discrimination Committee (ADC) that DHS detention facilities are interfering with Muslim detainees’ religious rights. DHS facilities⁵²² provide Muslim detainees with special services for Ramadan. This includes allowing for special prayer times and coordinating meals and meal times in accordance to Ramadan dietary practices. For example, during Ramadan, Muslim detainees are awakened before sunrise to receive their breakfast and then receive their dinner after sundown.⁵²³ However, ADC indicates that Steward Detention Facility, a CCA-owned and federally contracted detention center, is punishing detained immigrants by removing them from the “Ramadan List”⁵²⁴ and interfering with the Muslim prayer traditions.⁵²⁵

The Ramadan List⁵²⁶

On Oct. 8, 2014, ADC emailed a CCA attorney concerning the issues listed above.⁵²⁷ On Nov. 7, 2014, the CCA attorney responded by answering ADC’s concerns. In the email exchange, ADC questioned CCA as to why the detention facility removed several detainees from the Ramadan List for breaking the Ramadan fast on one day. The CCA attorney replied by saying that to understand what actually occurred, it is important to understand the meal procedure for Ramadan participants.

According to CCA, detainees observing the Ramadan fast are served breakfast before sunrise, and a hot dinner tray plus a sack supper after sunset. They are permitted to take the sack supper back to their dormitory. Two of the listed detainees violated the process on at least one occasion that was observed. CCA believes that the process is clearly

⁵²⁰ *Lovelace v. Lee*, 472 F.3d 174, 187 (4th Cir. 2006) (citing *Sherbert v. Verner*, 374 U.S. 398, 404 (1963)). See generally *Hobbs v. Holts*, 135 S.Ct. 853 (2015).

⁵²¹ An ICE official told Commission Staff that detainees were afforded the right to exercise religion freely during the Commission’s visit to PIDC.

⁵²² This includes federally contracted, privately owned detention facilities.

⁵²³ *O’Lone v. Estate of Shabazz*, 482 U.S. 342, 352, 107 S. Ct. 2400, 2406, 96 L. Ed. 2d 282 (1987).

⁵²⁴ List of all detainees wishing to participate in Ramadan.

⁵²⁵ See American Arab Anti-discrimination Committee supplemental report–Steward Detention Facility Document.

⁵²⁶ A list of detainees who wish to participate in Ramadan.

⁵²⁷ Email Correspondence between ADC and CCA. Sent to Commission via email in PDF form.

communicated, detainee participation is voluntary, and that violating the rules in this manner means that these detainees were taking as many as five meals each day. None of the detainees cited as violating the meal procedures assert that there was any religious motive or meaning for these actions, and none have filed grievances as a result of being removed from the Ramadan participant list.⁵²⁸

ADC stated that the current review process with the chaplain, requiring placement of the detainees back on the Ramadan List, is insufficient. The process can take anywhere from a few days to weeks. Thus, inmates are forced to choose either to starve themselves or to violate their religious beliefs by eating with the general population, as they are not allowed to eat with the other Muslim inmates after sunset and before sunrise.⁵²⁹

CCA explained that if detainees violate the rules of the process, they are not placed back on the Ramadan List. The only exception is if there was a mistake and no rule violation occurred. This occurred once this year over a misunderstanding about picking up sack suppers. It was corrected the next day. Again, no grievances have been filed in this regard.⁵³⁰

ADC stated that “Muslim inmates cannot be removed from the Ramadan list based on determination of prison officials that they are not fasting. Fasting is a personal religious decision; a prison official cannot tell inmate[s] how to practice his faith.”⁵³¹

CCA clarified that planning for detainee participation in all aspects of Ramadan (and other religious observances of various types) is a complex process that begins weeks before Ramadan. The chaplain actively advises detainees of the process and solicits feedback from all Muslim detainees as to their intent to participate. If they indicate they wish to participate in the Ramadan meal schedule, they receive follow-up memoranda to verify their intentions and to make sure any additional dietary restrictions such as allergies are considered. Thereafter, the meal schedule, food ordering, and preparation for the entire facility are organized and adjusted. There are not only significant logistical issues in this, but there are also important security issues, as the movement of detainees is carefully restructured during this time so that Ramadan participants can eat and participate in communal prayer at appropriate times. CCA states that, no one instructs

⁵²⁸ Ibid.

⁵²⁹ Ibid.

⁵³⁰ Ibid.

⁵³¹ Ibid.

any Muslim detainee how to practice his faith. Rather, an opportunity to participate in the fast is provided.⁵³²

However, there are constitutional concerns raised in the conversation between ADC and CCA. CCA cannot remove a detained immigrant who is participating in Ramadan from the Ramadan List simply because the detained immigrant failed to fast. Federally contracted, privately owned facilities like CCA's Stewart Detention Facility cannot subject a detained immigrant to "choose between following the precepts of her religion and forfeiting [government] benefits, on the one hand, and abandoning one of the precepts of her religion . . . on the other hand," if that detained immigrant is hungry.⁵³³

This places a substantial burden on the detained immigrant.⁵³⁴ Additionally, CCA neither has a justifiable reason for removing a detained immigrant from the Ramadan List that serves a legitimate government interest nor serves the least restrictive means possible by removing the detained immigrant from the Ramadan List. Removing a detainee from a religious practice list serves no legitimate interest other than punishing a detainee for breaking fast. One less restrictive way for interfering with a detained immigrant's religious practice for breaking a detention regulation would be to reduce the amount of leisure time afforded to that detained immigrant.

Therefore, because a CDF removed a detained immigrant from a list enabling that immigrant to practice his religion without advancing a legitimate government interest in the least restrictive means possible, the federal government may be acting in such a way that a court would find an infringement of a detained immigrant's right to freely exercise religion.

Prayer Practices

ADC also questioned CCA about its alleged interference with detained immigrant prayer practices. ADC specifically addresses a series of questions to the Warden at the CCA-run Stewart Detention Facility (Stewart) in Lumpkin, Georgia.

First, ADC contends that CCA prohibited the free exercise of religion by preventing inmates of the Muslim faith from praying together. The ADC also expressed concerns

⁵³² Ibid.

⁵³³ Email Correspondence between ADC and CCA. Sent to Commission via email in PDF form.

⁵³⁴ *Lovelace v. Lee*, 472 F.3d 174, 187 (4th Cir. 2006) citing *Sherbert v. Verner*, 374 U.S. 398, 404 (1963).

that on Oct. 4, 2014, Stewart made the Muslim inmates sign a contract before allowing them to participate in communal prayer.⁵³⁵

In response, the Stewart detention facility stated that CCA allowed Muslim inmates from all the units to pray together during Ramadan and Eid-ul-Adha.⁵³⁶ CCA stated that in general, detainees of differing security levels are not permitted to mix for prayer or the activities. In addition, separate detainees are not permitted to be in the same communal prayer groups. There are security reasons for this policy. An exception was made on October 4, 2014.⁵³⁷ This was not easy for the facility to arrange, but it was done for that particular day. Stewart also stated that there is no contract for communal prayer participation; however, there is a sign-up sheet. CCA reports that no grievances have been filed regarding this issue.

ADC also expressed concerns that “call-outs” for Muslim detainees were consistently between 30 minutes and two hours late for Jumah Prayer. According to ADC, Stewart engages in call-out of Muslim detainees 10 minutes for scheduled prayer. ADC’s primary concern is that the late call-out does not allow a sufficient time for Muslim inmates to pray at the specific time in accordance with their faith. Requests were made to Stewart to schedule the call-out times earlier, but these issues were not addressed.

CCA says that it is inaccurate to state that there has been “consistent” lateness of 30 minutes to two hours for the beginning of Jumah prayer. It contends that there have been occasions when meals ran late, causing count to run late, resulting in the Jumah prayer beginning late. Stewart is a secure detention center, and the necessity of an accurate count is plain. Stewart posits that this is not a normal occurrence, and there have been no grievances filed regarding this issue.⁵³⁸

ADC also complained about stepping on prayer rugs during prayers. CCA responded there has only been one assertion of this type, regarding one officer. Detainee accounts, and her own, are that she stepped over a rug. CCA states that the officer did not do this with any malice. The officer was counseled and disciplined, and the issue was concluded the day following the incident. The officer is no longer in this same housing unit. The

⁵³⁵ Email Correspondence between ADC and CCA. ADC sent a copy of the emails to the Commission via emailed PDFs.

⁵³⁶ Email Correspondence between ADC and CCA. ADC sent a copy of the emails to the Commission via emailed PDFs.

⁵³⁷ The Commission was not provided with an explanation.

⁵³⁸ Ibid.

core of this issue seems to be a demand by one or more detainees that the officer be terminated.⁵³⁹

Despite the issues raised by ADC, there is insufficient evidence indicating that CCA is violating a detained immigrant's freedom to freely exercise religion by consistently being late in allowing Muslim detainees to conduct their prayers. In *Jihad v. Fabian*, 680 F. Supp 2d. 1021, 1027 (2010), prison officials refused to allow a Muslim prisoner to worship outside, but instead afforded the Muslim prisoner specified worship times at a designated area. The court found that this placed a substantial burden on the inmate. However, the court stated that it agrees with the magistrate judge that the increased movement of prisoners would jeopardize their safety if inmates were allowed to leave their cells five times a day to pray. In addition, MCF-STW's policy of allowing prayer during scheduled worship services or, alternatively, within the confines of an inmate's cell, is the least restrictive means of achieving the defendants' compelling interest in safety and security. See *Singson*, 553 F.3d at 662 ("Prison safety and security are compelling government interests."). Accordingly, *Jihad's* objection has no merit.

Based on the court's ruling in *Fabian*,⁵⁴⁰ evidence does not show that CCA violated detained immigrants' right to freely exercise religion. Although CCA was consistently late with allowing Muslim detainees to conduct their prayer times, evidence suggests that there were legitimate governmental concerns.⁵⁴¹ CCA stated that "there have been occasions when meals ran late, causing count to run late, resulting in the Jumah prayer beginning late. This is a secure detention center, and the necessity of an accurate count is plain. *Fabian* stated that "prison safety and security are compelling government interest." In this instance, CCA had to make sure that their detention facility was secure before affording detained immigrants their prayer time. Although securing the facility caused at most a two-hour delay in Muslim detainee prayer times, CCA had a legitimate government interest to do so. Therefore, evidence indicates CCA did not inhibit their Muslim detainees' freedom to exercise religion.

Therefore, the Commission suggests that there is evidence indicating that the federal government's consistent tardiness in allowing detained immigrants the ability to freely exercise religion did not rise to a level where a court would find an infringement of a detained immigrants First Amendment right to freely exercise religion.

⁵³⁹ Ibid.

⁵⁴⁰ *Jihad v. Fabian*, 680 F. Supp 2d. 1021, 1027 (2010).

⁵⁴¹ See Ibid.

Conclusion

Based on the evidence and the analysis above, the Commission finds:

- The federal government's treatment of detained immigrants may be inconsistent with the Fifth Amendment's right not to be deprived of liberty without due process of law.
- The federal government's policies affecting a detained immigrant's ability to obtain counsel may rise to a level where a court would find such practices to be inconsistent with the Fifth Amendment's Due Process Clause.
- The federal government practices that substantially interfere with a detained immigrant's effective assistance of counsel may rise to a level where a court may find such practices to be inconsistent with the Fifth Amendment's Due Process Clause.
- There is evidence indicating that because a CDF removed a detained immigrant from a list that enables that immigrant to practice his religion without advancing a legitimate government interest in the least restrictive means possible, the federal government may be violating a detained immigrant's right to freely exercise religion.

FINDINGS AND RECOMMENDATIONS

Findings

- 1) Certain ICE facilities are not fully complying with PBNDS 2011 medical care standards.
- 2) Contract detention facilities, including the Polk County Secure Adult Detention Facility, Karnes County Residential Center, Denver Contract Detention Facility, Northwest Detention Center, Adelanto Detention Center, and Willacy County Corrections Facility **have failed** to comply with DHS standards for medical care including ignoring serious medical conditions, overmedicating detainees, failing to administer proper medical protocols and delaying transfer to a hospital setting. ICE facilities are not adhering fully to PBNDS 2011 LGBT standards, including housing of transgender detainees according to their birth genders, preventing harassment of gender non-conforming detainees, and overusing solitary confinement for LGBT detainees.
- 3) Little testimony & documentation were obtained as to compliance with PBNDS LGBT standards by privately owned detention facilities.
- 4) No complaints were found during the Commission's investigation of compliance with food standards at ICE facilities.
- 5) Contract detention facilities, including Willacy County Correctional Facility, Etowah County Detention Center, and Stewart Detention center have not complied with NDS contractual standards to provide detainees with nutritious food.
- 6) Karnes and Port Isabel are among facilities that are not providing their populations with adequate legal information or presentations about detainee rights.
- 7) Certain contract detention facilities, including Stewart Detention Center and North Georgia Detention Center have not complied with the NDS standard regarding detainees' access to legal libraries.
- 8) There is anecdotal evidence that DHS and ORR have violated TVPRA standards, including holding children longer than 72 hours and not conducting sufficient screenings before deportation.
- 9) DHS is not complying with the Flores Settlement Agreement Standards, including but not limited to, treatment and interactions with both unaccompanied children and those detained with family.
- 10) Oversight is necessary for implementation of ORR's corrective action plans.
- 11) There is a lack of transparency regarding private detention facilities because the facilities' records are not subject to FOIA.
- 12) ICE CDF's compliance with PREA inspection standards and policies cannot be determined as inspections are confidential and thus lack transparency.

- 13) The Commission was unable to determine whether ICE is complying with PREA solitary confinement policies concerning children.
- 14) The Commission was unable to determine whether ICE and CBP comply with PREA standards regarding treatment of transgender and intersex individuals. DHS does not sufficiently train employees to interact with detainees who do not speak English or Spanish and who face other communication barriers because of political, cultural, and socioeconomic differences. This lack of training inhibits compliance with PREA's language requirements.
- 15) ICE's distribution of "**Know Your Rights**" materials fails to inform immigrants who speak indigenous languages as required pursuant to DHS PREA Subpart A (6 CFR §115.32).
- 16) DHS does not provide detainees with adequate procedures to report sexual assault and abuse.
- 17) DHS inadequately addresses staff misconduct regarding sexual assault and abuse.
- 18) DHS, its component agencies, and contractors detain undocumented immigrants in a manner inconsistent with civil detention and instead detain undocumented immigrants like their criminal counterparts in violation of detained immigrants' Fifth Amendment Rights. Further, ICE is failing to comply with the Flores agreement by holding children in conditions that are not the "least restrictive setting." Adults are being held in conditions similar to criminal incarceration in violation of standards of civil detention.
- 19) Practices at detention facilities, including requiring detainees to pay for telephone calls to their attorneys, inhibit the detainees' Due Process rights, including access to counsel, assistance of counsel, and allowing working conditions for counsel which allow them to perform their jobs efficiently and thoroughly.
- 20) The federal government's treatment of detained immigrants may be inconsistent with the Fifth Amendment right to be free from punishment without due process of law.
- 21) CDFs acting under federal contracts may be interfering with detained immigrants' First Amendment right to freely exercise religion.
- 22) There is anecdotal evidence that some detainees are being denied their right to the free exercise of religion.
- 23) The process by which bond amounts are set and the range of the bond amounts are inconsistent and perhaps punitive.
- 24) Evidence indicates that federal employees are interfering with an attorney's ability to represent clients.

Recommendations:

- 1) The Department of Homeland Security should convene an intergovernmental compliance task force to investigate, analyze, and strengthen compliance regiments carried out by the ICE Enforcement and Removal Operations' Detention Standards Compliance Unit.
- 2) DHS, ICE Enforcement and Removal Operations, all applicable DHS components, and the Government Accountability Office should undertake an extensive review of all contracts issued to third-party facility management companies and enforce the adoption of, and compliance with, the 2011 PBNDS standards to ensure uniform implementation of medical treatment standards for, and the proper treatment of, LGBT immigrant detainees. The Government Accountability and/or an Inspector General should investigate and research whether, and to what extent, ICE, DHS, and contract facilities are fully complying with PBNDS medical standards.
- 3) Much work needs to be done to ensure detainees' access to Due Process and the right to assistance of counsel under the Fifth Amendment and the INA. DHS, its component agencies, the Department of Justice, and the Government Accountability Office should examine the legal rights education and access to counsel being provided to detainees and the obstacles to that access. These entities should propose, and DHS should implement, best practices for legal education of detainees and their access to counsel. Issues to be examined, and remedied as needed, include but are not limited to: legal rights presentations to detainees of all ages and language competencies; access to information about available, qualified counsel; access to free and private telephone calls to counsel; access to private meetings with counsel; availability of translators – especially in indigenous languages -- to assist detainees in communicating confidentially with attorneys; the ability of counsel to bring basic operating supplies into private meetings with counsel; and access to bond hearings. Congress should pass, and the President should sign, legislation extending the right to counsel in immigration detention proceedings to all indigent detainees. Eligibility for this access to counsel should begin at the time of detainment.
- 4) DHS and ORR should increase resources to ensure compliance with TVPRA, including reducing hold times for children, increasing the accuracy of screenings prior to release or deportation, and ensuring the accuracy of the information shared prior to releasing detainees.
- 5) Given the evidence presented in this Report, and in light of the recent District Court ruling on DHS's compliance with Flores Settlement, the Commission recommends that DHS act immediately to release families from detention.
- 6) The Government Accountability Office and/or an Inspector General should undertake an extensive review of ORR's corrective action plans to be

accompanied with continual monitoring of ORR's efforts. DHS, DOJ and HHS should devise a comprehensive plan and build the infrastructure to ensure compliance as outlined in the subsequent corrective plans and monitoring infrastructure.

- 7) As contract facilities are delegated government duties in the oversight and management of detention facilities, procedures must be put in place to ensure transparency, including access to facility records to ensure compliance with PBNDS and other government regulations.
- 8) DHS and its components involved in the detainment of immigrants must institute extensive and comprehensive staff training to address cultural sensitivity and competency, language barriers, and comprehension of the political climates in which detainees were immersed prior to apprehension.
- 9) The Office of the Inspector General and Homeland Security and the Office of Government Accountability must perform more detailed study and monitoring regarding DHS detention and holding facility compliance with PREA standards.
- 10) DHS and other involved entities, including border patrol, must ensure that individuals who speak indigenous languages or dialects are provided with all necessary information in a language they understand. Because of challenges with obtaining translation services, these individuals are isolated in detention, often unable to communicate with guards or even with the attorneys serving that detention facility. They cannot access the medical, social and legal services they need from detention and cannot meaningfully prepare an asylum case. Therefore, DHS should individually evaluate each detainee who speaks an indigenous language to determine if detention is appropriate.
- 11) DHS must ensure the provision of appropriate education and mental and medical health care for all detained adults, children, and youth. DHS must ensure cultural competency and life skills training for detained adults so that they will be as prepared as possible to function in American society upon release from detention.
- 12) The Commission heard testimony from government expert officials, legal experts and community advocates. The Commission hereby adopts the following recommendations as suggested by briefing panelists:
 - a. DHS should look at alternatives to detaining families, such as releasing the families to custodial agents in the United States;
 - b. Pastoral care should be available at the time of processing for all detainees when they are first checked into immigration detention facilities;
 - c. DHS and its component agencies should adopt policies to grant journalists access to contracted and ICE-operated facilities and to the people detained therein;
 - d. DHS and its component agencies should strengthen due process protections and Know-Your-Rights presentations to immigrants –

- including children and youth – who are released from detention so that they understand that their rights as immigrants and residents in the United States;
- e. DHS, its agency components, and federal agency partners should begin to transform the detention system to one of services provided versus enforcing black letter law;
 - f. DHS and its component agencies should provide legal orientation programs for everyone in detention along with appointed counsel, particularly for vulnerable populations: children and the mentally ill.
 - g. DHS and its component agencies involved in apprehension and detention of immigrants should work to change the statute on mandatory detention for arriving aliens so as to take away ICE's decision making being based on meeting bed quotas;
 - h. DHS and its component agencies involved in apprehension and detention of immigrants should work to detain when absolutely necessary: only under extraordinary circumstances.
 - i. DHS, its component agencies, and any entity contracted to provide detention services should adopt the Civil Immigration Detention Standards published by the American Bar Association in August 2012.
- 13) DHS, its agency components, the Office of Refugee Resettlement, the Department of Justice, and its component agencies should work to implement a program to provide government-funded counsel for detainees.
- 14) The Government Accountability Office and/or an Inspector General should undertake investigation into whether, and if so, how the 34,000 per-night bed requirement put in place by Congressional appropriations language impacts agency decisions to detain or parole immigrants.
- 15) The Government Accountability Office and/or an Inspector General should undertake investigation into the manner in which detained immigrants are given access to bond hearings, the manner in which bonds are set, why vast inconsistencies exist among bonds set for detained families, and why many bonds are set at amount which may be completely out of detainees' reach.
- 16) The Commission also recommends the following as proposed by the American Immigration Lawyers Association:
- a. **ICE must exercise its responsibility to make individualized custody and release determinations in all cases.** ICE should apply longstanding precedent on the factors to be considered – public safety and flight risk – and make determinations that are appropriate to the age and special vulnerabilities of the individual and that comply with the law. In all cases, ICE should choose the least restrictive means necessary to achieve

government's interest in ensuring compliance with immigration proceedings and removal orders.

- b. **DHS and EOIR must improve the credible fear process to ensure that those who fear persecution can exercise their right to seek asylum in the U.S.** This includes ensuring meaningful access to and participation by counsel at every stage of the proceedings. It also includes ensuring that every individual has participated in person in a Legal Orientation Presentation (LOP) and has been given sufficient opportunity and time to speak with an attorney before a credible fear interview.
 - c. **DHS must ensure that all detention settings ensure full and meaningful access to representation by legal counsel.** This must include unlimited free telephone communication (including voicemail) to and from attorneys.
 - d. **ICE must ensure that the conditions of immigration detention comply with existing policies and the Constitution.** This should be accompanied by engaged and robust oversight by Congress, a timely and effective complaint mechanism, and meaningful consequences for officers and for facilities (including contract facilities).
 - e. **Congress should not fund family detention and should reduce its funding for immigration detention generally.** Instead, Congress should increase funding for alternatives to detention (ATDs), including community based support and case management, for individuals who cannot otherwise be released. These ATDs are less costly and more humane than institutional detention.
- 17) **The Commission also recommends the following as proposed by the Human Rights Campaign:**
- a. **DHS must fully implement PREA and its detention standards.** This means DHS should ensure that all facilities comply with the agency's PREA regulations, including private contracting facilities. And that appropriate PREA audits take place at each facility in a timely manner.
 - b. Given the heightened risk of sexual assaults, **using limited resources to detain transgender individuals should not be an ICE priority**, except for cases involving serious public safety concerns.
 - c. **In cases where the statute requires mandatory custody, DHS should categorize all forms of detention, such as home confinement and community-based supervision as detention, even for those subject to mandatory custody.** This would remove non-dangerous LGBT individuals from those dangerous confinement facilities.
 - d. **The Government Accountability Office should specifically investigate reports of sexual assault and violence against LGBT detainees,**

including the number of substantiated, unsubstantiated and unfounded allegations, as well as steps that are being taken to protect LGBT detainees from unique and pervasive harassment.

- e. **DHS should issue a written and publicly-available report on the progress made to implement PREA regulations with special emphasis on provisions related to transgender detainees.** This includes improved training, identifying LGBT detainees and screening and appropriate placement, separate shower access for transgender detainees, and consideration of LGBT status in sexual assault incident reviews.
 - f. **DHS should provide the Commission a written response on the status of implementing each recommendation from the 2004 GAO report on prevention and detection of sexual assault and abuse in DHS confinement facilities.** DHS received a copy of the draft report and concurred with all of the recommendations except one, noting that it would implement them through 2015.
- 18) The Department of Justice and all of the applicable agency components should examine the Legal Orientation program and re-work it to be implemented nationally, including at the first instance of apprehension by border patrol agents so that immigrants not only understand their rights, but their obligations and responsibilities. When reworking the program, the agencies should consider the different languages serviced. The agencies should extend the Legal Orientation program to get non-governmental organizations into border patrol facilities so that detainees can be serviced at short-term detention facilities.

APPENDIX A



Statement by Secretary Jeh C. Johnson on Family Residential Centers

ICE Director Saldaña and I understand the sensitive and unique nature of detaining families, and we are committed to continually evaluating it. We have concluded that we must make substantial changes to our detention practices when it comes to families.

Last summer we faced an unprecedented spike in illegal migration from Central America. A substantial part of that migration was adults who brought their children with them. In order to avoid a situation, after apprehension, in which we simply processed these individuals, escorted them to bus stations and released them, we increased our detention capacity.

We took a number of other steps in response to last summer's spike, working with our government counterparts in Mexico and Central America. This year the number of those apprehended at our southern border – an indicator of total attempts to cross the border illegally – while still high, is down considerably from before. Indeed, if the current trend this fiscal year continues, the annual number of total apprehensions at our southern border will be the lowest since the 1970s.

We continue to be vigilant in watching for any upswings in this migration pattern, and we know we must be prepared to respond in that event. We have also increased our capacity to focus our enforcement resources effectively on those who have recently crossed the border illegally, and on those who represent threats to public safety.

I and other DHS officials have conducted numerous visits to family residential centers. I personally visited the Karnes, Texas facility on Monday of last week. While there, I inspected the facility, the lodging, the dining area and the classrooms for children, and spoke directly and privately with the health providers. Most significant, I spoke with dozens of Central American mothers at the facility who came to this country illegally seeking a better life for their children and themselves.

I have reached the conclusion that we must make substantial changes in our detention practices with respect to families with children. In short, once a family has established eligibility for asylum or other relief under our laws, long-term detention is an inefficient use of our resources and should be discontinued.

In May, ICE announced a first round of reforms which we have already begun to implement; they include:

First, we have begun reviewing the cases of any families detained beyond 90 days to evaluate whether detention during the pendency of their immigration case is still appropriate. Priority is being given to the review of the cases of families who have been in these residential centers the longest.

Second, we have discontinued invoking general deterrence as a factor in custody determinations in all cases involving families.

Third, we are appointing a Federal Advisory Committee of outside experts to advise Director Saldaña and me concerning family residential centers.

Fourth, we are undertaking additional measures to ensure access to counsel, attorney-client meeting rooms, social workers, educational services, comprehensive medical care, and continuous monitoring of the overall conditions at these centers.

Today we are announcing additional important reforms. In the last few days, Director Saldaña and her senior immigration enforcement team have presented me with a plan to offer release with an appropriate monetary bond or other condition of release to families at residential centers who are successful in stating a case of credible or reasonable fear of persecution in their home countries. Further, Director Saldaña has also presented me with criteria for establishing a family's bond amount at a level that is reasonable and realistic, taking into account ability to pay, while also encompassing risk of flight and public safety. I have accepted and approved this plan.

Additionally, I am directing that USCIS conduct credible fear and reasonable fear interviews within a reasonable timeframe. In substance – the detention of families will be short-term in most cases. During that time, we will have the opportunity to confirm accurate address and sponsor information so that ICE can more effectively monitor and ensure compliance with immigration obligations. During that time, families will also receive education about their rights and responsibilities, including attendance at immigration court hearings and other reporting requirements.

Finally, continued use of family residential centers will allow for prompt removal of individuals who have not stated a claim for relief under our laws.

Our larger hope is that Central American families will heed our repeated calls to find a safe and lawful path for the migration of children to the United States. Late last year, we established in-country refugee processing in Guatemala, El Salvador and Honduras, for the children of those lawfully present in the United States. We continue to encourage families to take advantage of that program. I have personally seen enough to know that the path of

illegal migration from Central America to our southern border is a dangerous path and it is not for children.

We also urge Congress to grant President Obama's \$1 billion request for aid to Central America, to finally and firmly address the underlying causes of illegal migration in Guatemala, Honduras and El Salvador – the so-called "push factors."

Border security continues to be one of my top priorities as Secretary of Homeland Security. As I have said before, our borders are not open to illegal migration. I know also that we must enforce our immigration laws in a fair and humane manner, consistent with our values as Americans.

APPENDIX B




**Mantenga la
Detención Segura**

**CBP tiene cero tolerancia al
abuso o asalto sexual**

Rompa el Silencio
Reporte Confidencialmente
Este Seguro y Consigua Ayuda

**¡No Espere! Reporte ahora un
incidente de abuso o asalto sexual:**
Diciéndole a un oficial de CBP ♦ Comuníquese al "hotline"

1-800-323-8603
La Oficina del Inspector General del
Departamento de Seguridad Nacional

 U.S. Customs and
Border Protection

Report Sexual Assault Now
بلغ عن الاعتداء الجنسي الآن
即刻举报性侵犯事件
Rapportez les agressions
sexuelles
Denonse agresyon seksyèl
touswit
Denuncie crimes sexuais agora
Báo cáo c ñg hi p tình
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**Reporte la agresión sexual
ahora**

APPENDIX C

The United States Congress House of Representatives drafted and sent the letter below to DHS Secretary Jeh Johnson.



Congress of the United States
House of Representatives

May 27, 2015

Secretary Jeh Johnson
U.S. Department of Homeland Security
Washington, DC 20528

Dear Secretary Johnson:

We are troubled by the Department of Homeland Security's continued detention of mothers and children in secure, jail-like facilities. For nearly one year we have been closely following the troublesome conditions of confinement, due process issues, and serious developmental and medical concerns of those being detained. Many of us have raised these matters in writing and continue to bring concerns to DHS through individual case examples and systemic complaints. We believe your Department has heard many of our concerns but has not fully grasped the serious harm being inflicted upon mothers and children in custody. We believe the only solution to this problem is to end the use of family detention.

The recent announcement by Immigration and Customs Enforcement on family detention does not acknowledge that even detention for a brief period of time, especially in a secure setting, is detrimental to child development. Based upon his 39 years of clinical experience and interviews with families at the Karnes Residential Center, the Dean of Social Work at the University of Texas, Dr. Luis Zayas, found that the children at Karnes are "facing some of the *most adverse childhood conditions of any children I have ever interviewed or evaluated*."¹ In his affidavit, Dean Zayas concluded that "[d]etention has had serious and long-lasting impacts on the psychological health and well-being" of the families at Karnes and that these impacts were evident in families who were detained for as little as two weeks.

We believe it is undeniable that detention in a secure facility is detrimental to mothers and children and is not reflective of our values as a Nation. Children require special protections and should not be placed in jail-like settings.

We are particularly troubled by the current practice of family detention because the detained population is largely comprised of refugees fleeing violence and persecution in their home countries. We have heard horrific stories of sexual assault, intense physical violence,

¹ Declaration of Luis H. Zayas (December 10, 2014) *available at*:
http://chu.house.gov/sites/chu.house.gov/files/documents/Declaration%20of%20Luis%20Zayas_0.pdf

Letter to Secretary Johnson
 May 27, 2015
 Page 2

kidnapping, and sex trafficking. These stories come not only from adult mothers, but also from young children who have been victims of such abuse. Detaining children who have already been victims of abuse exacerbates past trauma and raises unique and serious problems.

DHS has repeatedly used deterrence as a justification for the existence of family detention, but this theory has not been substantiated with compelling evidence. Moreover, a federal court in the District of Columbia rejected this argument and found that DHS cannot detain asylum-seeking mothers and children from Central America for the purpose of deterring other migrants from entering the country.² We agree and believe that the hypothetical recurrence of a future refugee flow does not justify the very real harm being inflicted upon mothers and children in a secure setting.

Lastly, we are disturbed by the fact that many mothers and children remain in family detention despite serious medical needs. In the past year, we have learned of the detention of children with intellectual disabilities, a child with brain cancer, a mother with a congenital heart disorder, a 14-day-old baby, and a 12-year-old child who has not eaten solid food for two months, among many others. Recently, we learned of a three-year-old child at the Berks County Residential Center who was throwing up for three days and was apparently offered water as a form of medical treatment. It was only after the child began throwing up blood on the fourth day that the facility finally transferred her to a hospital.³ This is simply unacceptable. We cannot continue to hear reports of serious harm to children in custody and do nothing about it.

We must prioritize the health and well-being of mothers and children while also prioritizing our enforcement objectives. Detaining mothers and children in jail-like settings is not the answer. We have an opportunity to do the right thing and are confident that DHS has the capacity to honor our Nation's longstanding commitment both to the protection and well-being of refugee families and to law enforcement and public safety.

Sincerely,


 Hon. Zoe Lofgren


 Hon. Lucille Roybal-Allard


 Hon. Luis V. Gutiérrez

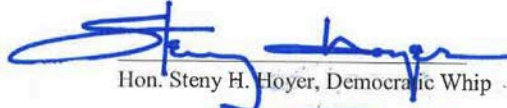
² RILR, *et al.*, v. Johnson, Legal Documents, (updated Feb. 23, 2015) available at: <https://www.aclu.org/cases/rilr-v-johnson?redirect=immigrants-rights/rilr-v-johnson>.

³ Ed Pilkington, *Child immigrant detainees: 'There's an overwhelming sadness among them,'* *The Guardian*, May 12, 2015 available at: <http://www.theguardian.com/us-news/2015/may/12/immigration-detention-centers-children>

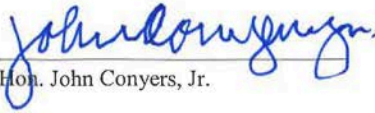
Letter to Secretary Johnson
 May 27, 2015
 Page 3




Hon. Nancy Pelosi, Democratic Leader



Hon. Steny H. Hoyer, Democratic Whip



Hon. John Conyers, Jr.



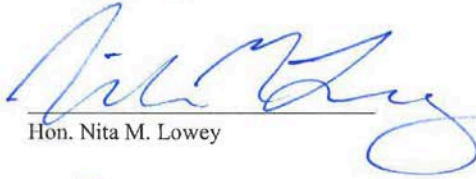
Hon. Charles B. Rangel



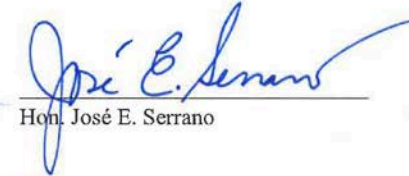
Hon. Marcy Kaptur



Hon. Eliot L. Engel



Hon. Nita M. Lowey



Hon. José E. Serrano



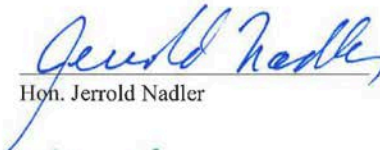
Hon. David E. Price



Hon. Rosa L. DeLauro



Hon. Maxine Waters



Hon. Jerrold Nadler



Hon. Corrine Brown



Hon. Gene Green




Hon. Alcee L. Hastings



Hon. Eddie Bernice Johnson

Letter to Secretary Johnson
May 27, 2015
Page 4


Hon. Carolyn B. Maloney



Hon. Nydia M. Velázquez


Hon. Lloyd Doggett


Hon. Chaka Fattah


Hon. Sheila Jackson Lee

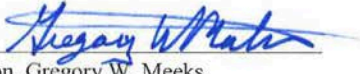

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Hon. Adam Smith


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Hon. Barbara LEE


Hon. Janice D. Schakowsky


Hon. Steve Israel


Hon. Rick Larsen

Letter to Secretary Johnson
 May 27, 2015
 Page 5


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 Hon. Al Green


 Hon. Gwen Moore


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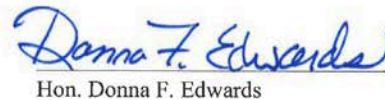

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 Hon. Henry C. "Hank" Johnson, Jr.


 Hon. Terry McNerney


 Hon. Peter Welch


 Hon. Donna F. Edwards

Letter to Secretary Johnson
May 27, 2015
Page 6


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Hon. Ben Ray Lujan


Hon. Chellie Pingree


Hon. Paul Tonko


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Hon. Judy Chu


Hon. John Garamendi

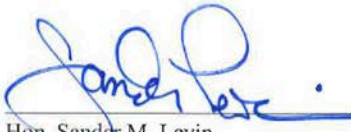

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Hon. David N. Cicilline


Hon. Eleanor Holmes Norton


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Hon. Ruben Gallego


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Hon. Jim McDermott


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Hon. Robert C. "Bobby" Scott

Letter to Secretary Johnson
 May 27, 2015
 Page 7



Hon. Sam Farr



Hon. Earl Blumenauer



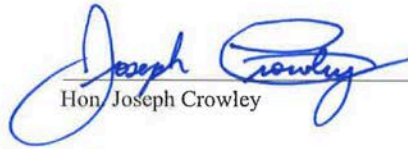
Hon. Ron Kind



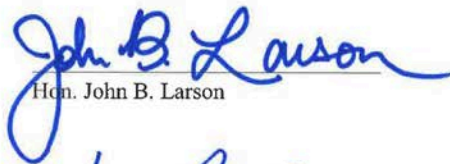
Hon. Loretta Sanchez



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Hon. Michael M. Honda



Hon. Raul M. Grijalva



Hon. Tim Ryan



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Hon. Bill Foster



Hon. Julia Brownley


Letter to Secretary Johnson
May 27, 2015
Page 8



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Hon. Jared Huffman



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Hon. Derek Kilmer



Hon. Grace Meng



Hon. Beto O'Rourke



Hon. Raul Ruiz



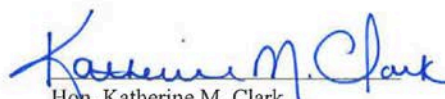
Hon. Mark Takano



Hon. Juan Vargas



Hon. Robin L. Kelly



Hon. Katherine M. Clark



Hon. Donald Norcross



Hon. Pete Aguilar




Hon. John Lewis



Hon. Frank Pallone, Jr.

Letter to Secretary Johnson
 May 27, 2015
 Page 9


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 Hon. Anna G. Eshoo

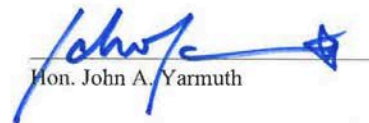

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 Hon. Joaquin Castro

Letter to Secretary Johnson
May 27, 2015
Page 10


Hon. Tammy Duckworth


Hon. Joseph P. Kennedy, III

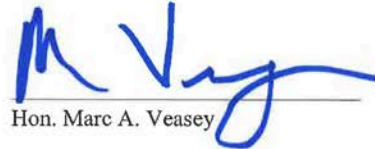

Hon. Daniel T. Kildee

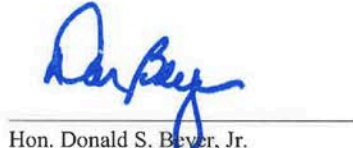

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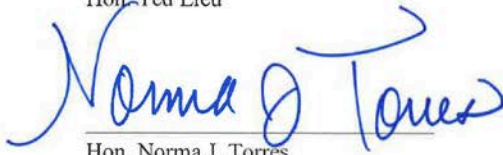

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Hon. Gregorio Kilili Camacho Sablan

Letter to Secretary Johnson
May 27, 2015
Page 11


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Hon. Brenda L. Lawrence


Hon. Debbie Wasserman Schultz


Hon. Brad Sherman


Hon. Filemon Vela

COMMISSIONER STATEMENTS AND REBUTTALS

Statement of Chairman Martin R. Castro

“Nihil humanum a me alienum puto,” said the Roman poet Terence: ‘Nothing human is alien to me.’ The slogan of the old Immigration and Naturalization Service could have been the reverse: To us, no aliens are human.”

— Christopher Hitchens, Hitch-22: A Memoir

“To us, no aliens are human,” should be the motto of the U.S. Immigration and Customs Enforcement (ICE) and Customs and Border Patrol (CBP). From what I have witnessed personally, from the data and testimony we have gathered for this Enforcement Report and from regular press accounts, there is no doubt in my mind that those immigrants being apprehended at our border by CBP and detained by ICE in its own and in for-profit prison company-run facilities are treated as less than human.

This de-humanization of immigrants has been occurring over a long period of time in our country. From calling immigrants “illegal aliens” and “invading hordes,” to the most recent rantings of presidential candidates spewing anti-immigrant, anti-Latino and anti-Mexican vitriol, we have witnessed the creation of an environment which condones the inhumane treatment of immigrants, especially those coming from Latin America. Indeed, as I write this statement, there are news accounts of two Boston men beating a homeless Latino man because they were inspired by the anti-Latino rhetoric of a current Presidential candidate.¹

The impetus for the Commission to vote to examine the state of civil rights at immigration detention centers, at my request, was the arrival in 2014 of the tens of thousands of children fleeing violence and instability in Central America, and making the dangerous trek north, many unaccompanied by their parents. Initial accounts in the media and through advocacy organizations like the National Immigrant Justice Center,² made it clear that these children were also enduring abuse, rape, and extreme conditions while in the custody of the United States government. The Commission’s Enforcement Report corroborates many of these conditions.

¹ *A Trump-Inspired Hate Crime in Boston*, by Russel Berman, August 20, 2015, The Atlantic, <http://www.theatlantic.com/politics/archive/2015/08/a-trump-inspired-hate-crime-in-boston/401906/>, last accessed on August 21, 2015.

² Letter sent to DHS by the National Immigration Justice Center and concerned organizations on June 11, 2014 detailing abuse as recounted to them by unaccompanied minors, *Systemic Abuse of Unaccompanied Immigrant Children by U.S. Customs and Border Protection*, <http://www.immigrantjustice.org/sites/immigrantjustice.org/files/FINAL%20DHS%20Complaint%20re%20CBP%20Abuse%20of%20UICs%202014%2006%2011.pdf>.

Immigration detention³ has become one of the fastest-growing and least-examined types of incarceration in the United States. ICE, along with state and local police enforcement agencies, has placed a heightened focus on removal of unauthorized immigrants nationwide. This heightened focus, coupled with policy changes at the federal and state level, has resulted in increased detention⁴ rates and a greater reliance on state, local and private detention facilities to house the detainees.

Although ICE is authorized to detain immigrants during removal proceedings, ICE does not own or maintain enough facilities to house the number of immigrants that are currently being detained. ICE currently directly owns and operates six secure detention facilities, called Service Processing Centers (SPCs),⁵ which house 13% of the detainee population. The remaining 87% of the detainees are housed in different types of facilities nationwide. Seventeen percent of detainees are housed in seven contract detention facilities (CDFs), which are run solely for ICE by independent contractors. Sixty-seven percent of detainees are housed in detention facilities run by State and local governments through Inter-governmental Service Agreements (IGSAs). The final three percent of detainees are housed through an arrangement with the Federal Bureau of Prisons (BOP) for the Federal Detention Centers.⁶

Each year ICE detains more than 400,000 immigrants and asylum seekers⁷ who are predominantly housed in contracted facilities. This detention outsourcing has resulted in inconsistent treatment of immigrant detainees and a heightened exposure to abusive treatment due to varied levels of training and sensitivity around the detainees' unique needs (social, cultural and language isolation; fear of retaliation; lack of information on their legal rights; and, lack of access to legal counsel).⁸ About half of all detained immigrants do not have a criminal record; they are torture survivors, victims of human trafficking, asylum seekers, or families with small children.⁹ Yet, the ICE detention system continues to be modeled after the punitive criminal detention system, which contradicts the civil and non-punitive nature of the immigration detention system. Although the Department of Homeland Security (DHS) has indicated their intent to overhaul the U.S. immigration

³ Immigration detention is non-criminal custody. Detained immigrants remain in custody while they await deportation or the granting of a right to stay in the United States. See: "Immigration Detention Overview and Recommendations", p. 4, fn. 1-2, at <http://www.ice.gov/doclib/about/offices/odpp/pdf/ice-detention-rpt.pdf>.

⁴ The Department of Homeland Security defines a detention as the seizure and incarceration of an alien in order to hold him/her while awaiting judicial or legal proceedings or return transportation to his/her country of citizenship. See: *Annual Report, August 2010, Immigration Enforcement Actions: 2009*, p. 2, "Box 1" section at http://www.dhs.gov/xlibrary/assets/statistics/publications/enforcement_ar_2009.pdf.

⁵ Department of Homeland Security, Congressional Budget Justification, FY 2012, Departmental Management and Operations, p. 33 at: <http://www.dhs.gov/xlibrary/assets/dhs-congressional-budget-justification-fy2012.pdf>.

⁶ *Id.*

⁷ *The Fiscal Year 2011 Budget for ICE before the House Committee on Appropriations Subcommittee on Homeland Security*, 111th Cong. (2010).

⁸ *National Prison Rape Elimination Commission Report*, 176 (June 2009) at: www.ncjrs.gov/pdffiles1/226680.pdf; National Immigrant Justice Center, "Defending Human Rights and due Process: A Policy Brief," August 2011, p. 2. at: <http://www.immigrantjustice.org/sites/immigrantjustice.org/files/Policy%20brief%20PREA%202011%2008%2030%20FINAL.pdf>

⁹ See: Immigration Detention, at: <http://www.aclu.org/immigrants-rights/detention>.

system in an effort to improve and prioritize health, safety and uniformity across all detention facilities, their efforts appear to be nothing but lip service and have resulted in very little change on the ground. Meanwhile, egregious human rights and constitutional violations continue to occur in detention facilities.

ICE has combined their heavy-handed approach to enforcement with a light-handed approach to the daily responsibilities of detention in their outsourced facilities. This has resulted in inadequate delivery or non-delivery of medical and mental health treatment and increased allegations of sexual abuse of immigrant detainees. Unlike criminal inmates, persons detained by ICE must deal with a dual system of approval for care. They must first try to be seen by the facility's doctor and then they must wait for federal approval in order to receive care within the facility.¹⁰ The Division of Immigration Health Services' (DIHS)¹¹ standard of care for deciding whether to provide or deny medical care is "to keep detained immigrants healthy enough to be deported."¹² This standard has contributed to the death of 138 detainees in ICE custody¹³ and to numerous cases where ICE has either failed to respond to all of the health problems of individual detainees or responded only after considerable delays. In addition, according to government documents, nearly 200 claims of sexual abuse of detainees in detention facilities across the country have been reported to the Department of Homeland Security since 2007 alone.¹⁴ This number fails to take into account the number of allegations that go unreported.

While the Commission did not find that DHS is torturing detained immigrants, I believe that certain DHS-owned facilities and CDFs are subjecting detained immigrants to torture-like conditions. The Torture Victim Protection Act of 1991¹⁵ (TVPA) defines "torture" as:

[A]ny act, directed against an individual in the offender's custody or physical control, by which severe pain or suffering (other than pain or suffering arising only from or inherent in, or incidental to, lawful sanctions), whether physical or mental, is intentionally inflicted on that individual for such purposes as obtaining from that individual or a third person information or a confession, punishing that individual

¹⁰ ACLU, *Detention and Deportation in the Age of ICE: Immigrants and Human Rights in Massachusetts*, ACLU of Massachusetts, December 2008, p. 54 at <https://aclum.org/app/uploads/2015/06/reports-detention-and-deportation-in-the-age-of-ice.pdf>.

¹¹ DIHS acts as the agent and final health authority for ICE on all off-site detainee medical and health related matters. See: *Inter-governmental Service Agreement*, p. 5, Article VI. *Medical Services, G*, at http://www.ice.gov/doclib/foia/isa/r_droigsa070021alleganycountyny.pdf.

¹² See: *System of Neglect*, by Dana Priest and Amy Goldstein, May 2008, The Washington Post, at http://www.washingtonpost.com/wp-srv/nation/specials/immigration/cwc_day1_printer.html.

¹³ List of Detainees in ICE Custody, October 2003 – December 2, 2013, <http://www.ice.gov/doclib/foia/reports/detaineedeaths2003-present.pdf>; See also: ICE news releases announcing detainee deaths,

<http://www.ice.gov/news/releases/index.htm?top25=no&year=all&month=all&state=all&topic=05>. ¹⁴ See: ACLU, *Sexual Abuse in Immigration Detention* at <https://www.aclu.org/node/17141>.

¹⁵ Torture Victim Protection Act of 1991, PL – 102-256, 106 Stat. 73 (March 12, 1992).

for an act that individual or a third person has committed[,] or is suspected of having committed, intimidating or coercing that individual or a third person, or for any reason based on discrimination of any kind.¹⁶

The evidence contained in this entire Report suggests that some DHS-owned facilities and CDFs might be subjecting detained immigrants to torture-like physical and emotional pain. Chapters 3, 4, and 5 of this Report details evidence suggesting that immigration detention facility officials punish detained immigrants for crossing the U.S. Border without proper documentation. For example, detainees are held in unjustifiably cold and overly crowded detention cells, only given one meal during processing, forced to drink unclean and possibly toxic waters, not given proper medical care for legitimate and possibly deadly diseases or ailments, not given an opportunity to shower or cleanse themselves in some instances, and sometimes beaten and sexually abused by guards and detention officials.¹⁷

One of the most profound experiences during my Chairmanship of this Commission occurred on our fact-finding visits to immigration detention centers in Texas in May 2015. At Karnes Family Detention Center, a CDF, run by the GEO Group, Inc. (GEO), we were immediately given a taste of what life can be like in these detention centers. We were not allowed to bring in our phones, cameras or any type of device to document our observations, except pen and paper. Once we were admitted to the detention facility, staff from both ICE and GEO met us. When I asked the detention center staff about a hunger strike we had read about in the news at Karnes,¹⁸ the staff person in charge denied it and said, “You can’t believe everything you read.” Yet, a short time later, I personally spoke to mothers who were part of the hunger strike. They told me in Spanish, over the protests of the detention center officials who were demanding that I not speak to the women and who were pulling at my sleeve to get me to move on, that they had been at Karnes with their children for almost a year; that they were part of the hunger strike until the detention center officials threatened to take away their children unless they gave up the hunger strike. As a parent, I cannot imagine a more terrorizing prospect than having my children torn away from me. Imagine such a threat to a detained immigrant mother, in custody for almost a year, and whose very safety and security depends on the largesse of the detention staff. This is unacceptable conduct and in my estimation is conduct akin to torture.

¹⁶ Ibid Sec. 3(b).

¹⁷ See e.g. The National Immigrant Justice Center, Esperanza Immigration Rights Project, Americans for Immigrant Justice, Florence Immigrant & Refugee Rights Project, and the ACLU, June, 11 2014, Correspondence to Megan H. Mack, Officer for Civil Rights and Civil Liberties, and John Roth, DHS Inspector General. ABA Delegation to KSPC to Victore Cerda, Acting Director, Office of Detention and Removal Operations, July 20, 2004, Observational Tour of the Krome Service Processing Center, Miami, FL, available at <http://www.ice.gov/doclib/foia/dfra/2004/kromeserviceprocessingcentermiamiflApril162004.pdf>; Statement of Karen Grisez, Esq. Submitted to U.S. Commission on Civil Rights [hereinafter *Grisez Statement*], available in the Commission’s “Panelists Statement” section of the *Report*.

¹⁸ See: *Mothers launch a Second Hunger Strike at Karnes Family Detention Center* at http://www.huffingtonpost.com/2015/04/14/detention-center-hunger-strike_n_7064532.html.

In addition to physical pain, some DHS-owned facilities and CDFs subject detainees to torture-like mental pain and suffering.¹⁹

According to the TVPA:

- Mental pain or suffering refers to prolonged mental harm caused by or resulting from:
- a. The intentional infliction or threatened infliction of severe physical pain or suffering;
 - b. The administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality;
 - c. The threat of imminent death; or
 - d. The threat that another individual will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.²⁰

Based on evidence contained in the entire Enforcement Report, I believe that DHS may be subjecting detained immigrants to torture-like mental pain and suffering. There are detention officials and guards that intentionally cause and threaten detainees with physical pain or suffering.²¹ There is evidence showing that some guards are dissuading detainees from reporting unlawful conduct by threatening physical pain, attack from guard dogs, and separation from children.²² Additionally, there have been instances where detention officials and medical staff have given detained immigrants copious amounts of medication to subdue them into prolonged sleep.²³ Imagine you are an asylum seeker fleeing torture and violence in your home country, expecting you've reached safety in the

¹⁹ The evidence providing the basis for these assertions are found earlier in the discussion detailing detainee treatment in the Report.

²⁰ Ibid. Sec. 3(b)(2) et seq.

²¹ See e.g. The National Immigrant Justice Center, Esperanza Immigration Rights Project, Americans for Immigrant Justice, Florence Immigrant & Refugee Rights Project, and the ACLU, June, 11 2014, Correspondence to Megan H. Mack, Officer for Civil Rights and Civil Liberties, and John Roth, DHS Inspector General. ABA Delegation to KSPC to Victore Cerda, Acting Director, Office of Detention and Removal Operations, July 20, 2004, Observational Tour of the Krome Service Processing Center, Miami, FL, available at <http://www.ice.gov/doclib/foia/dfra/2004/kromeserviceprocessingcentermiamifl162004.pdf>; Grisez Statement; Mukhopadhyay, Riddhi (2008) "Death in Detention: Medical and Mental Health Consequences of Indefinite Detention of Immigrants in United States," 7 SEATTLE JOURNAL FOR SOCIAL JUSTICE (2);art 19, p. 702, available at: <http://digitalcommons.law.seattleu.edu/sjsj/vol7/iss2/19>; See generally, Anil Kalhan, Rethinking Immigration Detention, 110 COLUM. L. REV. Sidebar 42 (2010), Lisa A. Cahan, Constitutional Protections of Aliens: A Call for Action to Provide Adequate Health Care for Immigration Detainees, 3 J. HEALTH & BIOMEDICAL L. 343 (2007), Brian L. Aust, Fifty Years Later: Examining Expedited Removal and the Detention of Asylum Seekers Through the Lens of the Universal Declaration of Human Rights, 20 HAMLIN J. PUB. L. & POL'Y 107 (1998).

²² Ibid.

U.S. and then being victimized by the extreme conduct outlined in this Report. You would no doubt find these conditions²⁴ to be akin to torture if they were inflicted upon you.

Again, while it may be argued that these acts inflicted on detained immigrants may not be technical violations of the TVPA, I dare anyone reading this Report to be subjected to the conduct to which these detained immigrants are subjected to and not feel that you were being tortured as a result. This conduct must come to an end. Our country must end the detention of immigrants who pose no threat to this country and for whom less restrictive and less expensive forms of monitoring are easily available.

So, what is driving all of this detention? Is it that the number of undocumented immigrants has increased so dramatically that we must take to incarceration to keep our nation from being “overrun?” *No*. In fact, the amount of undocumented immigration has been relatively stable over the last five years.²⁵ Is it that immigrants who are coming without documentation are more dangerous than in the past and are committing more crimes than past immigrants? *No*. Studies show that communities with immigrant populations are actually safer and have less crime than non-immigrant communities.²⁶ Then what valid reason could exist for this explosion of immigration incarceration? Well, no valid reason. However, the answer to that question is **PROFIT**.

The “incarceration industrial complex” has extended its tentacles from running traditional prisons on a for-profit basis, to their new growth market—immigration detention. Companies such as Corrections Corporation of America and GEO Group have led the way in creating the demand for jailing immigrants. By lobbying Congress, private interests have created a Congressionally mandated “bed quota” which requires that ICE keep an average daily custody number of 34,000 immigrants in detention, increasing dramatically in number and cost (\$2.8 billion) since its inception in 2006.²⁷ This expansive and expensive growth has occurred despite the fact that there are cheaper alternatives to detention, and in the face of direct bars, such as in the case of family detention. Unfortunately, the history of our country is marred by the fact that private interests, with the support of government, have denied human beings their freedom for economic gain. Indeed, immigration detention has recently been called the “largest mass incarceration

²³ Ibid.

²⁴ See *Tortured and Detained: Survivor Stories of Immigration Detention*, at http://www.uusc.org/sites/default/files/report_torturedanddetained_nov2013.pdf.

²⁵ See *5 Facts about Illegal Immigration in the U.S.* at <http://www.pewresearch.org/fact-tank/2015/07/24/5-facts-about-illegal-immigration-in-the-u-s/>.

²⁶ See *The Mythical Connection Between Immigrants and Crime* at <http://www.wsj.com/articles/the-mythical-connection-between-immigrants-and-crime-1436916798>; and *Immigrants and Safer Communities* at <http://www.as-coa.org/sites/default/files/ImmigrantsandSaferCommunitiesFactSheet.pdf>.

²⁷ See *Controversial quota drives immigration detention boom* at https://www.washingtonpost.com/world/controversial-quota-drives-immigration-detention-boom/2013/10/13/09bb689e-214c-11e3-ad1a-1a919f2ed890_story.html; and *Eliminate the Detention Bed Quota* at http://www.immigrantjustice.org/eliminate-detention-bed-quota#.VddZkHhFK_0.

movement in U.S. history."²⁸ It is amazing to me how many Americans are not aware of the for-profit prison industry and its impact on the fabric of our nation. Jailing people for profit is obscene, it has gone on for too long, and it must end now.

I'm proud to have been appointed to this role as Chair of the Commission by President Barack Obama. For me, the first Latino Chair of the Commission, to have been appointed by the first African American President, is a testament to the power of the American Dream. Because of where we come from, and the challenges we had to overcome as people of color and as the children of foreign-born parents, I have almost always been in agreement with the policies of the Obama Administration. I am proud of what he has done on Deferred Action for Childhood Arrivals (known as DACA) and his expansion of this concept in his recent Executive Orders on immigration. Thus, I am sorely disappointed to see that the Administration is not in agreement with a recent U.S. District Court ruling that holds that family detention is illegal and a violation of the 1997 Flores Settlement Agreement, and that unless they pose a danger to national security or are a flight risk, they must be released immediately.²⁹ The President should immediately direct DHS to comply with Judge Dolly Gee's order and release all family detainees, who do not pose the aforementioned risks.

We are better than this.

We must bring humanity back to our immigration system; we must eliminate the profit motive from our incarceration decisions; and we must not imprison children and their mothers who are seeking asylum in our country. We must return to the principles enunciated by George Washington in 1788, which ring true today:

“I had always hoped that this land might become a safe and agreeable asylum to the virtuous and persecuted part of mankind, to whatever nation they might belong.”

To do otherwise makes us less than who we really are as a nation.

²⁸ See *Ending Mass Incarceration, But Not for Immigrants: A Tale of Two Policies* at http://www.huffingtonpost.com/anita-sinha/ending-mass-incarceration-but-not-for-immigrants_b_7874750.html.

²⁹ See Seung Min Kim, “DOJ Fights Family Detention Ruling,” Politico, August 7, 2015, available at <http://www.politico.com/story/2015/08/undocumented-immigrants-detention-ruling-justice-department-121153>; see also Judge Gee's order on *Jenny L. Flores, et. al. v. Jeh Johnson, et. al* issued July 24, 2015 at <http://graphics8.nytimes.com/packages/pdf/us/FloresRuling.pdf>; and *Dems lash out at administration over detained immigrants* at <http://thehill.com/homenews/house/250622-dems-lash-out-at-administration-over-detained-immigrants>.

Statement of Vice Chair Patricia Timmons-Goodson

With the Concurrence of Commissioner Michael Yaki

There's a lot of data and information about how detainees are treated. And even you know, just basic information about when and how they are detained, . . . it would be wonderful if the Commission were to weigh in on that and make the recommendation that those be made public.”

—Karen Lucas, Associate Director of
Advocacy for the American Immigration
Lawyers Association (AILA)

The 2014 news reports of an influx of immigrant children and families arriving at our border after dangerous travels over hundreds of miles brought the problem of immigration to the forefront of America’s consciousness.¹ Among other news, the media reports highlighted the vulnerability of immigrants once they arrive at the border and the necessity for a multifunctioning border patrol system.

As America’s civil rights watchdog, the United States Commission on Civil Rights (the “Commission”) must contribute solutions to this historically unprecedented problem. To that end, the Commission held a briefing and issued a report² that emphasized the federal government’s response to the influx of immigrants and that shed light on solutions offered by different entities. While the Commission’s Report thoroughly presents the complexities of immigration detention and provides recommendations to protect the civil rights of detainees, this statement focuses attention on the need for more transparency of Contract Detention Facilities (CDFs) with whom the federal government contracts to house immigrant detainees.

Immigration Detention Facilities

Immigrations and Customs Enforcement (ICE) was formed pursuant to the Homeland Security Act of 2002 following the events of September 11, 2001. ICE is tasked with “promot[ing] homeland security and public safety through the criminal and civil enforcement of federal laws governing border control, customs, trade, and immigration.”³

¹ El Salvador, Guatemala, and Honduras account for much of the recent surge of unaccompanied child immigrants. Moreover, there have been considerable increases in the numbers of young children and female minors at the U.S. border. While the bulk of the unaccompanied minors that have been apprehended are teenage boys, the proportion of children that are 12 or younger has increased from 9% in FY2013 to 16% in FY 2014, and the proportion that are girls has increased from 19% in FY 2013 to 28% in FY 2014.

² 2015 *Statutory Enforcement Report: The State of Civil Rights at Immigration Detention Facilities*, (“Commission Report”).

³ *Id.* at 14.

The Detention Management Division, part of ICE's Enforcement and Removal Operations (ERO), oversees the civil detention system, which holds a highly transient and diverse detainee population. ERO identifies, apprehends, and removes aliens when it deems necessary, and oversees the confinement of detainees across facilities in accordance with immigration detention standards.⁴

A series of laws authorize ICE to continuously detain a large number of illegal immigrants. The Immigration and Nationality Act authorizes ICE to detain aliens believed to be removable while awaiting a determination of whether they should be removed from the United States as well as aliens ordered removed, and mandates that ICE detain certain categories of aliens.⁵ Both the Illegal Immigration Reform and Immigrant Responsibility Act of 1996⁶ and the Intelligence Reform and Terrorism Prevention Act of 2004⁷ resulted in an increase in the number of detention beds. In 2014, Congress appropriated funding to maintain 34,000 detention beds.⁸

ICE fulfills its responsibility to maintain 34,000 beds by applying various sets of national detention standards at over 250 detention facilities. DHS and ICE oversee the operations of these facilities and ensure that they adhere to detention standards by employing a variety of oversight mechanisms that can include inspections and continuous on-site monitoring.⁹ However, the Commission's Report suggests that CDFs may not be complying with the national detention standards and consequently, may be violating the civil rights that the standards are designed to protect.¹⁰

⁴ U.S. Government Accountability Office, *Immigration Detention: Additional Actions Needed to Strengthen Management and Oversight of Facility Costs and Standards*, GAO 15-153, Oct. 2014, available at <http://www.gao.gov/products/GAO-15-153>, ("GAO Report") (noting 2000 NDS, 2008 PBNDS, 2011 PBNDS).

⁵ Pub. L. 89-236, 79 Stat. 911.

⁶ Pub. L. 104-208, 110 Stat. 3009.

⁷ Pub. L. 108-458, 118 Stat 3734 ("the Secretary of Homeland Security shall increase by not less than 8,000 in each of the fiscal years 2006 through 2010, the number of beds available for detention and removal operations . . .")

⁸ See Consolidated Appropriations Act of 2014, PUB. L. No. 113-76, 128 Stat. 5, 251. ("funding made available under this heading shall maintain a level of not less than 34,000 detention beds through September 30, 2014").

⁹ GAO Report, *supra* note 4, at 2.

¹⁰ *Commission Report*, p. 29 (noting that "the Commission has received complaints from civil and human rights organizations such as the American Civil Liberties Union (ACLU), the American Bar Association (ABA), the American Immigration Lawyers Association (AILA), the Grassroots Leadership, the Mexican-American Legal Defense Fund (MALDEF), and the Human Rights Campaign (HRC) concerning how ICE-owned facilities and CDFs treat immigrant detainees while in custody.")

Role of Contract Detention Facilities (CDFs)

Federal and state governments have a long history of outsourcing government services to private firms.¹¹ During the 1980s, our federal government began a War on Drugs that placed great pressure on local, state, and federal governments to address increased incarceration, overcrowded prisons, and rising costs.¹² Thus, the 1980s marked an escalation in outsourcing.¹³

Proponents of the outsourcing of prison management and services believe that outsourcing is more cost-efficient than public prisons. Legal scholars Alfred Aman and Carol Greenhouse refer to this theory as “the efficiency story” which rests on three premises: “first, that government services are characteristically unduly encumbered with unnecessary costs and so-called red tape; that market competition produces a sort of Darwinian effect of favoring the fittest; and third, that competition is consistently a feature of private sector markets.”¹⁴

On the other hand, opponents of private prison contracts present several arguments against outsourcing. First, opponents of outsourcing believe that the cost differential between private and public prisons is minimal. Second, opponents argue that the profits of corporations have been prioritized ahead of prison conditions and the economic burden on families. Third, there is very limited competition, and in some cases, no competition between private corporations.¹⁵

Two private companies have led the growth in private prisons – Corrections Corporation of America (CCA) and the GEO Group (GEO).¹⁶ According to recent data:

CCA now controls 92,500 beds across 67 prisons; GEO controls more than 61,999 corrections beds in 56 facilities, as well as many community-based and prerelease facilities...the private prison industry houses more than 8% of the nation’s prisoners, nearly 18% of federal prisoners, and nearly half of immigration detainees in the United States. From 2000 to 2011, the number

¹¹ Adrian Smith, *Private vs. Public Facilities: Is it Cost Effective and Safe?*, Corrections.com, June 6, 2012, available at. (noting that the outsourcing of confinement and care of prisoners can be traced back to a time after the American Revolution).

¹² Alfred C. Aman, Jr. & Carol J. Greenhouse, *Prison Privatization and Inmate Labor in the Global Economy: Reframing the Debate Over Private Prisons*, 42 *Fordham L.J.* 355, 377 (2014) (noting the spike in federal incarceration in the decade between the late 1980s and the late 1990s was due to the increase in convictions of non-violent drug offenders. As a result, governments also had to contend with overcrowded prisons and the rising costs of maintaining prisons).

¹³ Smith, *supra* note 11, at 1.

¹⁴ *Id.*, at 374.

¹⁵ *Id.*

¹⁶ Tom Barry, *The Shadow Prison Industry and Its Government Enablers*, Center for International Policy, Jan. 11, 2010, available at <http://www.ciponline.org/research/html/shadow-prison-industry-government-enablers>.

of federal prisoners in private facilities increased almost 150%, while the number of state prisoners in private facilities increased nearly 23%. GEO took in more than \$1.48 billion in revenue in 2012 from various government contracts, 36% of which came from the federal government, and earned more than \$208 million in profit. CCA received nearly \$1.76 billion in revenue in 2012 (43% from the federal government), and earned \$156 million in net profit. Government contracts contribute the vast majority of industry revenue in the form of taxpayer dollars.¹⁷

CCA and GEO run several contract detention facilities. More than half of the immigrant detention beds are in detention centers run by the GEO.¹⁸ Yet, according to Grassroots Leadership, GEO's prisons and detention facilities under contract with the federal government have a record of poor performance and appalling conditions. Such conditions include death in custody, overcrowding, lack of medical care, and extreme isolation.¹⁹

Lack of Transparency in CDFs

A contract acts as the primary governance tool in the relationship between the government and private prison companies. For example, CDFs are only required to follow standards set forth in their individual contracts; they do not uniformly follow national detention standards. Fortunately, ICE provides CDF contracts on its website,²⁰ and in so doing, makes a positive first-step in CDF transparency. Unfortunately, ICE falls short of the kind of transparency the public requires to determine whether immigrant detainees are being treated fairly in CDFs.

Some briefing panelists note that private contractors are not subject to the Freedom of Information Act ("FOIA"). Under FOIA, federal agencies are required to disclose their records upon request, with some exceptions. Anyone can request records about immigration detention facilities as long as the facility is owned and operated by the government.²¹ Thus far, CDFs – not owned and operated by the government – are exempt from FOIA. As an ACLU representative stated:

¹⁷ Mike Tartaglia, *Private Prisons, Private Records*, 94 B.U.L. Rev. 1689, 1695 (2014).

¹⁸ Cristina Parker, Judy Greene, Bob Libal, & Alexis Mazón, *For-Profit Family Detention: Meet the Private Prison Corporations Making Millions By Locking Up Refugee Families*, Grassroots Leadership (2014), available at <http://grassrootsleadership.org/reports/profit-family-detention-meet-private-prison-corporations-making-millions-locking-refugee>.

¹⁹ *Id.*

²⁰ U.S. Immigrations and Custom Enforcement, *FOIA Library*, available at <http://www.ice.gov/foia/library>.

²¹ Alex Park, *Will Private Prisons Finally Be Subject to the Freedom of Information Act?* Mother Jones, Dec. 16, 2014, available at <http://www.motherjones.com/mojo/2014/12/will-private-prisons-ever-be-subject-open-records-laws>.

[T]here is actually a quite serious problem with the FOIA loophole for private prisons. [For example,] if a facility is run directly by ICE, then it's subject to FOIA; [however,] if it is run by a private prison company, it's not subject to FOIA except to the extent that the records relating to the facility are in ICE's actual possession.²²

For example, the Commission's Report notes the difficulties in determining whether private contractors are meeting the Prison Rape Elimination Act of 2003 (PREA) standards and the most recent version of other national detention standards. On the one hand, an ICE representative stated that "all . . . private contractor facilities adhere to the most recent, most rigorous level of detention standards."²³ In addition, ICE requires CDFs to apply PREA and the latest standards when both parties renegotiate their contracts. On the other hand, advocates for detained immigrants note that immigrant detainees in CDFs experience conditions that fall short of the government's current detention standards.²⁴ Subjecting CDFs to FOIA would shine a light on the conditions that immigrant detainees face.

Solutions to CDFs' Lack of Transparency

The Commission's Report found that (1) a lack of transparency exists regarding private detention facilities because the facilities' records are not subject to FOIA, (2) ICE CDF's compliance with PREA inspection standards and policies cannot be determined as inspections are confidential and thus lack transparency, and (3) certain CDFs have failed to comply with standards for medical care, nutritious food, access to legal libraries, and possibly the right to freely exercise religion.

Given the above findings, I commend a number of solutions to improve transparency of CDFs. One promising solution to CDF transparency is proposed by Congresswoman Sheila Jackson-Lee (D-TX 18th District). In May 2015, Congresswoman Jackson-Lee reintroduced legislation known as the Private Prison Information Act (PPIA) which would:

[subject] records relating to the operation of and prisoners in a prison or other correctional or detention facility that is owned or operated by a nongovernmental entity, state, or local government and that incarcerates or detains federal prisoners pursuant to a contract or agreement with a federal agency to the Freedom of Information Act in the same manner as records

²² See *Briefing Transcript, Testimony of Carl Takei, American Civil Liberties Union*, U.S. Commission on Civil Rights, January 30, 2015, p. 258.

²³ Kevin Landy, *Briefing Transcript*, pp. 69–70.

²⁴ *Commission Report*, pp. 32–36.

maintained by a federal agency operating a federal prison or detention facility.²⁵

If the PPIA becomes law, CDFs would be forced to demonstrate unprecedented levels of transparency, and the public would gain access to immigrant detainee data that is not readily-available.

The Briefing produced other solutions that I view as good steps to address the issue of CDF transparency. I strongly urge policy makers to adopt the following solutions so that we can protect the civil rights of immigrant detainees.

- The Department of Homeland Security should convene an intergovernmental compliance task force to investigate, analyze, and strengthen compliance regiments carried out by the ICE Enforcement and Removal Operations' Detention Standards Compliance Unit.
- DHS, ICE Enforcement and Removal Operations, all applicable DHS components and the Government Accountability Office should undertake an extensive review of all contracts issued to third-party facility management companies and enforce the adoption of, and compliance with, the 2011 PBNDS standards to ensure uniform implementation of medical treatment standards for, and the proper treatment of, LGBT immigrant detainees. The Government Accountability and/or an Inspector General should investigate and research whether, and to what extent, ICE, DHS, and contract facilities are fully complying with PBNDS medical standards.
- As contract facilities are delegated government duties in the oversight and management of detention facilities, procedures must be put in place to ensure transparency, including access to facility records to ensure compliance with PBNDS and other government regulations.
- DHS and its component agencies should adopt policies to grant journalists access to contracted and ICE-operated facilities and to the people detained therein.
- DHS, its component agencies, and any entity contracted to provide detention services should adopt the Civil Immigration Detention Standards published by the American Bar Association in August 2012.
- Document the reasons facilities cannot be transitioned to the most recent standards.²⁶

²⁵ H.R. 2470, 114th Cong. (2015).

²⁶ GAO Report, *supra* note 4, at 1.

Statement of Commissioner Roberta Achtenberg

With the Concurrence of Vice Chair Timmons-Goodson
and Commissioner Michael Yaki

I. Introduction

The conditions under which the United States government detains undocumented immigrants present serious, disturbing, and compelling questions. The 2015 Statutory Enforcement Report¹ (“Report”) of the United States Commission on Civil Rights² (“Commission”) presents a strong, comprehensive assessment of the troubling facts of the conditions of immigrant detention. The Report also examines the U.S. government’s compliance, or lack thereof, with the Performance Based National Detention Standards (PBNDS)³ and the Prison Rape Elimination Act (PREA).⁴ The Commission’s assessment is based upon an in-depth investigation which included detailed research, a comprehensive briefing in January 2015, and a visit by most Commissioners and several key staff members to an immigrant family detention center and to an adult detention center in Texas in May 2015.⁵

Alarming, the Commission found that “[t]he federal government’s treatment of detained immigrants may be inconsistent with the Fifth Amendment right to be free from punishment without due process of law.”⁶ The Report makes a wide-ranging and detailed series of findings and recommendations. The Report proposes investigations and improvements in many areas. This Statement seeks to highlight the most important of those findings and recommendations. This Statement also proposes further action to investigate and improve: 1) the conditions under which the U.S. government detains immigrant families; 2) those detainees’ due process right to, and meaningful access to, the counsel who can make a critical difference in the outcome of their cases; 3) the process by which immigrant bond or bail amounts are set when parole is granted, and the vast range of -- and seemingly unrealistic dollar amounts of -- those bonds; and 4) the impact of the

¹ Public Law 103-419 (S.2372), codified at Sec. 3 U.S.C. 1975a(d)(1).

² Public Law 103-419 (S.2372). The Civil Rights Act of 1957 created the U.S. Commission on Civil Rights. As an independent, bipartisan, fact-finding federal agency, our mission is to inform the development of national civil rights policy and enhance enforcement of federal civil rights laws.

³ See, e.g., *What We Do, 2011 Operations Manual ICE Performance-Based National Detention Standards*, U.S. Immigration and Customs Enforcement, available at <http://www.ice.gov/detention-standards/2011>.

⁴ Prison Rape Elimination Act of 2003, Public Law 108-79, 117 Stat. 972 (2003), codified at 42 U.S.C § 15601-15609.

⁵ Commission staff members who worked on all stages of the investigation and the resultant Report are to be commended for their commitment and diligence.

⁶ *Statutory Enforcement Report: The State of Civil Rights at Immigration Detention Facilities*, United States Commission on Civil Rights, Sept. 2015, Finding #20, p. 125, available at usccr.gov, (hereinafter “Report”).

Congressional requirement that the U.S. Department of Homeland Security (“DHS”) maintain and pay for 34,000 immigrant detention beds per night upon decisions about detention in lieu of parole.

II. The U.S. Department of Homeland Security and its private contractors often detain immigrant families in conditions which approximate those of incarceration, notwithstanding the civil nature of immigration proceedings.

A. Conditions of Detention

The Commission found the conditions in which DHS and its contractors keep immigrant detainees to be seriously deficient. Examples include serious failures in provision of nutritious and adequate food, reasonable ambient temperatures,⁷ medical care,⁸ education, and, for unaccompanied migrant children in particular, detention in the least restrictive setting possible.⁹ The lack of transparency which inhibited the Commission from ascertaining DHS’ contract entities’ compliance with PREA inspections and the solitary confinement of children¹⁰ causes particular concern. The Commission also found “anecdotal evidence that DHS and ORR [Office of Refugee Resettlement] have violated TVPRA [Trafficking Victims Protection Reauthorization Act of 2007] standards, including holding children longer than 72 hours and not conducting sufficient screenings before deportation.”¹¹

The net result of these failures by DHS and private contractors is that, effectively, children – including infants and toddlers - are growing up for significant lengths of time under conditions which almost replicate those of adult incarceration. This is horribly traumatic for the children and should be unacceptable to persons of conscience. While at the Karnes Family Detention Center in May 2015, Commissioners met with detainees under the supervision of Center staff. Commissioners observed very young children appearing lethargic and depressed. The children were listless, sitting motionless and silent in their mother’s laps for extended periods during the meeting. Detained mothers reported children losing weight while in the facility and even exhibiting suicidal behaviors.

Also during the visit to Karnes, Commissioners learned that processing cells afford detainees no real privacy when they need to use the toilet. After admission, multiple families are housed together in single rooms. All residents of each individual room must share a single bathroom. Families have no privacy or the ability to have confidential conversations. Families must live under a slew of arbitrary rules, such as a mandatory early lights-out time. After lights-out, mothers are supposed to leave their rooms only to get food

⁷ Id., pp. 57-58.

⁸ Id., Findings #1 and 2, p.124.

⁹ Id., Finding #18, p. 125.

¹⁰ Id., Finding #13, p. 125.

¹¹ Id., Finding #8, p. 124.

if they are hungry. Detained mothers are not allowed to leave their children in anyone else's care. Children have limited access to outside play in a courtyard fully surrounded and enclosed by buildings. Unlike inmates in many prisons with fenced exercise yards, children cannot see the world outside of the courtyard. Playpens for infants and toddlers may be unsafe.

On June 24, 2015, fewer than sixty days before the Commission adopted the Report, DHS Secretary Jeh Johnson issued a statement ("DHS Statement") which implicitly recognized many of DHS' shortcomings and deficiencies. Secretary Johnson reiterated his May 2015 commitment to improving detainees' access to social workers, education, and medical care. The DHS Statement also promised "continuous monitoring of the overall conditions at these [family detention] centers."¹² The Report notes that it is unclear at this time "whether these announced changes will be implemented and if so, how effective their operation will be."¹³

B. Recommendations

The Commission recommended that "DHS must ensure the provision of appropriate education and mental and medical health care for all detained adults, children, and youth. DHS must ensure cultural competency and life skills training for detained adults so that they will be as prepared as possible to function in American society upon release from detention."¹⁴ The Commission also recommended that "DHS and ORR should increase resources to ensure compliance with TVPRA including reducing hold times for children,"¹⁵ and that "[t]he Office of the Inspector General and Homeland Security and the Office of Government Accountability must perform more detailed study and monitoring regarding DHS detention and holding facility compliance with PREA standards."¹⁶

The success or failure of the monitoring efforts which the Commission recommends obviously will turn upon the thoroughness of the approach. The importance of an exhaustive review of living conditions and access to medical, educational, and food services at each and every detention center, whether run by DHS or by a private contractor, cannot be overstated. The investigators must have authority to observe conditions of detention during unannounced visits, and must be allowed private meetings with detainees and staff members who wish to speak to them. DHS should undertake special effort to ensure that facility staff members are advised of federal whistleblower protections. Facility records must be reviewed very thoroughly, also on an unannounced basis. Contracts with

¹² *Statement By Secretary Jeh C. Johnson On Family Residential Centers*, U.S. Department of Homeland Security, June 24, 2015, available at <http://www.dhs.gov/news/2015/06/24/statement-secretary-jeh-c-johnson-family-residential-centers> (hereinafter "DHS Statement").

¹³ Report, p. 18.

¹⁴ *Id.*, Recommendation #11, p. 127.

¹⁵ *Id.*, Recommendation #4, p. 126.

¹⁶ *Id.*, Recommendation #9, p. 127.

private facilities must be reviewed very carefully to ensure that they promote and achieve compliance with all applicable federal laws. DHS should develop and ensure implementation of best practices for the housing, care, and education of detained families and unaccompanied immigrant youth.

III. The U.S. Department of Homeland Security and its private contractors often deprive detained immigrant families of their Fifth Amendment Due Process and statutory rights to counsel in detention and asylum cases.

A. Current Sources of the Right to Counsel

As discussed in the Report,

[t]he Fifth Amendment to the U.S. Constitution mandates that “no person ... shall be deprived of life, liberty, or property...” without due process of law.¹⁷ According to *Reno v. Flores*, 507 U.S. 292, 306 (1993), “[i]t is well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings.” Additionally, federal courts have held that the removal process implicates an undocumented immigrants’ liberty interest.¹⁸ Therefore, federal courts have considered access to counsel, at one’s own expense, a requirement that assures fundamental fairness during removal proceedings.¹⁹ For example, in *United States v. Charleswell*, 456 F.3d 347, 360 (3d Cir. 2006), the Third Circuit characterized a detained immigrant’s right to counsel during removal proceedings as “so fundamental to the proceeding’s fairness” that denying this right “rise[s] to the level of fundamental unfairness.” Furthermore, the Fifth Amendment is not the only law that grants undocumented immigrants the right to counsel at their own expense. The Immigration and Nationality Act (INA) guarantees undocumented immigrants ... access to counsel at their own expense.^{20, 21}

¹⁷ U.S. Const., Amend. V.

¹⁸ A detained immigrant’s liberty interest is implicated because federal statute mandates that captured undocumented immigrants be detained. See e.g., *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001).

¹⁹ *Biwot v. Gonzales*, 403 F.3d 1094, 1098 (9th Cir. 2005) (“The right to counsel in immigration proceedings is rooted in the Due Process Clause.”); *Dakane v. U.S. Attorney General*, 399 F.3d 1269, 1273 (11th Cir. 2005) (“It is well established in this Circuit that an alien in civil deportation proceedings ... has the constitutional right under the Fifth Amendment Due Process Clause ... to a fundamentally fair hearing.”); *Borges v. Gonzales*, 402 F.3d 398, 408 (3d Cir. 2005) (“The Fifth Amendment entitles aliens to due process of law in deportation proceedings.”); *Rosales v. Bureau of Immigration & Customs Enforcement*, 426 F.3d 733, 736 (5th Cir. 2005) (“[D]ue process requires that deportation hearings be fundamentally fair.”); *Brown v. Ashcroft*, 360 F.3d 346, 350 (2d Cir. 2004) (“The right ... under the Fifth Amendment to due process of law in deportation proceedings is well established.”).

²⁰ The Immigration and Nationality Act, as amended, Public Law 104-208, 66 Stat. 235 (Sept. 30, 1996) (codified as 8 U.S.C. § 1362).

²¹ Report, pp. 106 – 107.

Detained immigrants are subjected to difficult, if not inhumane, conditions in secure facilities for unacceptable lengths of time. These environments are akin to those faced by adult criminal defendants and convicts who have been afforded a constitutional right to government-paid counsel. Immigrant detainees do not have a right to government-funded counsel, and the fundamental unfairness of this inequity calls out for remedy. This is true for adult detainees, adults detained with their children, and, astonishingly, for unaccompanied children. The conditions are tantamount to punishment, and the right to counsel should pertain.

B. Consequences of Lack of Access to Counsel

The consequences of lack of access to paid, affordable, or volunteer counsel are real and dramatic. As the Report demonstrates, there is a direct causal relationship between representation by counsel and detained immigrants' success rates in securing parole while their proceedings are in motion.²²

The consequences of the lengthy detentions which most immigrants face are real and dramatically damaging. Because lack of access to counsel prolongs most family detentions, infants and children are living and growing in unacceptable conditions for months on end and, in some cases, a year or more. Stressful conditions of detention compound the traumas which detainees experienced in their home countries, including domestic violence and gang-related violence, and during their difficult journeys to the U.S. border. There is a humanitarian need to shorten detention to the greatest degree possible, especially for detainees with credible asylum claims. These women and children need to be able to establish free lives in the U.S. as quickly as possible in order to recover from their physical and emotional ordeals.

Lack of sufficient counsel also clogs immigration court dockets as continuances are granted so that detainees may have more time to seek counsel. For example,

the Executive Office for Immigration Review ... within [the U.S. Department of] Justice has estimated that there were as many as 4,444 master calendar hearings for unaccompanied children from July 18 [2013] to September 2 [2014]. In that same time frame, EOIR said there were 2147 continuances so the child could seek counsel. And of the 345 cases completed, 323 or more than 90 percent were marked as instances where the child had no legal representation."²³

C. Barriers to the Exercise of the Right to Counsel

²² Id., p. 108. See also Rogers, David, *Child Migrants Without Lawyers Pay A High Price*, Politico, April 27, 2015, available at <http://www.politico.com/story/2015/04/child-migrants-deportation-117402.html>.

²³ Rogers, David, *Counsel for Child Migrants Battle Rages On*, Politico, September 30, 2014, available at <http://www.politico.com/story/2014/09/child-migrants-legal-counsel-111473.html#ixzz3jCjWBXFg>.

Those detainees who may be in a position to exercise their Fifth Amendment and statutory rights to paid or volunteer counsel experience significant barriers to doing so.

The Commission found instances in which detainees were not adequately informed of their right to counsel and other legal rights, as required by law.²⁴ The Commission further found that language barriers, in particular those faced by indigenous language speakers, went unaddressed in the provision of legal rights education to detained immigrants.²⁵ Inadequate access to law libraries²⁶ further complicates detainees' attempts to advance their causes.

Detainees who are able to secure counsel cannot be sure that DHS and/or its private contractors will allow their attorneys to provide zealous representation, unimpaired. In May 2015, in conjunction with the Commission's visit to detention facilities, members of the Commission and its staff met with advocates from the University of Texas law school. Advocates told of being forced by facility staff to wait an hour or more to be cleared for entry to meet with their clients, and of not being able to bring laptop computers, cell phones, or pens into client meetings. The resultant need to handwrite declarations and documents, sometimes in pencil, clearly impedes with representation by requiring multiple visits to complete simple tasks. Detainees' advocates reported to the Commission that the facilities' criteria for admitting counsel sometimes changes on a daily basis. The Commission found, overall, that "[e]vidence indicates federal employees are interfering with an attorney's ability to represent clients."²⁷ More specifically, the Commission found that

[p]ractices at detention facilities, including requiring detainees to pay for telephone calls to their attorneys, inhibit the detainees' Due Process rights, including access to counsel, assistance of counsel, and allowing working conditions for counsel which allow them to perform their jobs efficiently and thoroughly.²⁸

The June 24, 2015 DHS Statement promises that the agency is "undertaking additional measures to ensure access to counsel ... [and] attorney-client meeting rooms."²⁹ These developments will be most welcome if and when implemented.

D. Shortage of Available Counsel for Unaccompanied Immigrant Children

²⁴ Report, Finding 6, p. 124.

²⁵ Id., Finding 15, p. 125.

²⁶ Id., Finding 7, p. 124.

²⁷ Id., p. 125.

²⁸ Id., Finding 19, p. 125.

²⁹ DHS Statement, n. 12 *supra*.

The lack of access to counsel is particularly troubling with regard to unaccompanied immigrant children who are facing deportation proceedings. Data released in early August 2015 by the Executive Office of Immigration Review (EOIR) of the U.S. Department of Justice (“DOJ”) demonstrated that

among the 13,451 cases completed ... [between] July 18, 2014 [and July 28, 2015], barely half the children had legal representation. ... [F]rom July 18 to Dec. 23, 2014, ... EOIR tallied 4,250 case completions, in which just 27 percent of the children had an attorney. By mid-April this year, that share had grown to about 40 percent. Just counting the cases completed from April through July, about 58 percent of the children impacted were assisted by counsel. ... And the record continues to show that those without lawyers are most likely to receive orders of removal or feel pressured to agree to voluntary departure. ... Overwhelmingly, children without attorneys have been most vulnerable, and of the 7,237 deportation orders since last July, 6,315 were issued in absentia.³⁰

E. Expanding Access to Counsel for Unaccompanied Immigrant Children

The U.S. Department of Health and Human Services (“HHS”) has made some money available to procure access to counsel for unaccompanied minors. In 2014, HHS allocated \$4.2 million and awarded contracts to the U.S. Committee for Refugees and Immigrants and to U.S. Conference of Catholic Bishops for direct representation of minors facing deportation hearings. This allocation may serve only approximately one-third of the youth who are in the deportation hearing process. HHS planned to spend up to \$9 million for legal services for immigrant youth during Fiscal Year 2015.³¹ On June 17, 2015, DOJ filed Defendants’ Notice of Proposed Action By the Department of Health and Human Services Concerning New Funding for Representation of Unaccompanied Alien Children in J.E.F.M. v. Lynch. In this Notice, DOJ asserted that HHS determined on June 15, 2015, that “funding is available in its remaining FY 2015 budget to issue Requests for Proposals (RFP) for contracts to provide legal services and direct representation to unaccompanied alien children.”³²

³⁰ Rogers, David, *Obama Plan Leaves Child Migrants Adrift*, Politico, August 15, 2015, available at <http://www.politico.com/story/2015/08/obama-plan-leaves-child-migrants-adrift-121254.html#ixzz3jD7E02Oa>. See also Rogers, David, *Child Migrants Face New Crisis: Uneven Justice*, Politico, March 5, 2015, available at <http://www.politico.com/story/2015/03/child-migrants-face-new-crisis-uneven-justice-115790.html>.

³¹ Rogers, David, *Migrant Children: Out of Sight, Still in Mind*, Politico, October 11, 2014, available at <http://www.politico.com/story/2014/10/child-migrants-111795.html>.

³² J.E.F.M. v. Lynch, discussed *infra* in Sec. IV(A) as J.E.F.M. v. Holder. Notice available at <https://ecf.wawd.uscourts.gov/doc1/19716388860>.

F. Litigation and legislation may improve access to counsel for detained immigrants.

The American Civil Liberties Union and the Northwest Immigrant Rights Project filed the class action suit J.E.F.M., et al. v. Holder in July 2014 in the U.S. District Court for the Western District of Washington at Seattle. Plaintiffs assert that immigrant children have a Fifth Amendment right to government-funded counsel. Judge Thomas R. Zilly kept alive and open the question of a Fifth Amendment Due Process right to government-paid counsel in his April 13, 2015 ruling, despite DOJ's attempt to have the case dismissed outright on jurisdictional grounds.³³

Rep. Hakeem Jeffries (D-NY) introduced H.R. 1700, the Vulnerable Immigrant Voice Act, on March 26, 2015 after H.R. 4936, the same act of 2014, failed to move. H.R. 1700 simply seeks to “amend section 292 of the Immigration and Nationality Act to require the Attorney General to appoint counsel for unaccompanied alien children and aliens with serious mental disabilities, and for other purposes.”³⁴ The bill was referred to the Subcommittee on Immigration and Border Security of the House Committee on the Judiciary on April 29, 2015.³⁵

G. Recommendations

Whether children and youth in detention are accompanied by a parent or not, this reality is the same: young people from infancy through their teen years are spending critical developmental time -- during which socialization, education, and development of life skills are critical -- living in conditions largely reserved for adult criminals.

The Commission recommended that:

[m]uch work needs to be done to ensure detainees' access to Due Process and the right to assistance of counsel under the Fifth Amendment and the INA. DHS, its component agencies, the Department of Justice, and the Government Accountability Office should examine the legal rights

³³ J.E.F.M. v. Holder, et al., No. 2:14-cv-01026, U.S. District Court for the Western District of Washington at Seattle. The docket is *available at* https://ecf.wawd.uscourts.gov/cgi-bin/DktRpt.pl?101538747635567-L_1_0-1. The Amended Complaint is *available at* <https://ecf.wawd.uscourts.gov/doc1/19715954152>. DOJ's Motion to Dismiss as Moot, filed on June 29, 2015 is *available at* <https://ecf.wawd.uscourts.gov/doc1/19716407677>. The April 13, 2015 Order is *available at* <https://ecf.wawd.uscourts.gov/doc1/19716285378>.

³⁴ Vulnerable Immigrant Voice Act, H.R. 1700, *available at* <https://www.congress.gov/114/bills/hr1700/BILLS-114hr1700ih.pdf>.

³⁵ *All Actions*, Vulnerable Immigrant Voice Act, Congress.gov, *available at* [https://www.congress.gov/bill/114th-congress/house-bill/1700/all-actions?q={%22search%22%3A\[%22Vulnerable+Immigrant+Voice+Act+2014%22\]}&resultIndex=1](https://www.congress.gov/bill/114th-congress/house-bill/1700/all-actions?q={%22search%22%3A[%22Vulnerable+Immigrant+Voice+Act+2014%22]}&resultIndex=1).

education and access to counsel being provided to detainees and the obstacles to that access. These entities should propose, and DHS should implement, best practices for legal education of detainees and their access to counsel. Issues to be examined, and remedied as needed, include but are not limited to: legal rights presentations to detainees of all ages and language competencies; access to information about available, qualified counsel; access to free and private telephone calls to counsel; access to private meetings with counsel; availability of translators – especially in indigenous languages -- to assist detainees in communicating confidentially with attorneys; the ability of counsel to bring basic operating supplies into private meetings with counsel; and access to bond hearings. Congress should pass, and the President should sign, legislation extending the right to counsel in immigration detention proceedings to all indigent detainees. Eligibility for this access to counsel should begin at the time of detention.³⁶

In the continued absence of such overarching legislation, Congress should pass, and the President should sign, the Vulnerable Immigrant Voice Act, if only as a stop-gap measure. The relief which enactment would grant to unaccompanied immigrant children and immigrants with significant mental health concerns would be helpful indeed. The ultimate remedy to the lack of counsel for children, however, must go beyond this and provide government-funded counsel for all children who cross our border without documentation, whether they are unaccompanied or not.

Advocates should push and courts should address the question posed in J.E.F.M.: whether there is a Fifth Amendment Due Process right to counsel for detained immigrants. At a minimum, if the conditions of detention for immigrants are akin to those in which criminal defendants and convicts – who are afforded a right to counsel – the right might be drawn by analogy.

HHS should report publicly upon whether it did indeed engage the legal services contractors and spend the money in Fiscal Year 2015 for counsel for unaccompanied minor children that it announced it planned to do in its June 2015 Notice of Proposed Action By the Department of Health and Human Services Concerning New Funding for Representation of Unaccompanied Alien Children in J.E.F.M. v. Lynch.

Congress should appropriate in the nation's Fiscal Year 2016 budget adequate funds to HHS for legal representation of unaccompanied immigrant children.

IV. The bases upon which immigrants' eligibility for release on bond, and the process by which unrealistic bond amounts are set in some cases, cannot be readily ascertained.

³⁶ Report, Recommendation #3, p. 126.

A. Background

The Commission has not heard adequate explanations of the processes by which detainees' eligibility for release on bond and those by which the amounts of such bonds are determined. In these murky areas, the Report credited and quoted Karen Lucas, Associate Director of Advocacy of the American Immigration Lawyers Association. Ms. Lucas stated that

Once an individual is found to have a "credible fear" of persecution, Immigration and Customs Enforcement (ICE) is required by the Immigration and Nationality Act §236(a) to assess her individually for release. But in Karnes and Dilley, as in Artesia, ICE is abdicating this responsibility and detaining across the board, with rare exceptions. ICE is refusing to consider bond, release on recognizance, supervised release, or any form of ATD, regardless of individual circumstances. Moreover, when that individual is then able to go before an immigration judge for a bond hearing, ICE uniformly opposes bond or demands an extremely high bond, submitting the same boiler plate legal brief in every case and arguing that every Central American family is a national security risk – ignoring years of legal precedent on the appropriate factors for release and instead relying on a single, factually inapposite case, *Matter of D-J*. At Artesia, this resulted in widely divergent bond amounts from Immigration Judges that could go as high as \$20,000 and \$30,000 – well above the national average of \$5,200 and well out of the reach of most detainees.³⁷

As the Report references,³⁸ the DHS Statement promises that DHS is working on

a plan to offer release with an appropriate monetary bond or other condition of release to families at residential centers who are successful in stating a case of credible or reasonable fear of persecution in their home countries. Further, [we are also developing] ... criteria for establishing a family's bond amount at a level that is reasonable and realistic, taking into account ability to pay, while also encompassing risk of flight and public safety.³⁹

B. Recommendations

The Commission found that "[t]he process by which bond amounts are set and the range of the bond amounts are inconsistent and perhaps punitive."⁴⁰

The Commission recommended that "[t]he Government Accountability Office and/or an Inspector General should undertake investigation into the manner in which detained immigrants are given access to bond hearings, the manner in which bonds are set, why vast

³⁷ Id., footnote 509, p. 115.

³⁸ Id., p. 18.

³⁹ DHS Statement, *supra* n. 12.

⁴⁰ Report, Finding #23, p. 125.

inconsistencies exist among bonds set for detained families, and why many bonds are set at amount which may be completely out of detainees' reach."⁴¹

DHS must make the bond determination system operate more rationally and produce outcomes consistent with Due Process and Equal Protection principles. DHS should promulgate rules and set policies which standardize both the process by which bond requests are considered and the amounts of any bonds granted are determined. DHS has the benefit of expertise and the ability to review closely what has happened – and continues to happen – to detainees who seek and deserve release. DHS should propose standards which aim to set bonds at the minimum amounts necessary.

V. The existence of a possible link between detainee bed availability and decisions to release or detain immigrants raises concern.

A. Background

The Report notes that “in 2014, through an appropriations act, Congress mandated that DHS maintain 34,000 immigrant detention beds per day.”⁴² The extent to which this requirement may affect the entire detention and release process merits inquiry. For example, Border Patrol has the authority at the time of apprehension to determine if an immigrant will be detained or released.

After an initial decision to detain has been made, as the Report notes, “Concern has also been raised that detention determinations may be made, and bond amounts may be set, in order to help keep full the nightly 34,000 beds which Congress has required funded.”⁴³ Specifically, the Commission was told that, “In Texas we’ve observed ICE setting bond determinations for individuals in order to keep detention facilities full, ostensibly to meet the quota.”⁴⁴

With regard to contract facilities, in particular, it is worth noting the potential for conflicts of interest. Extended detention times help an institution maintain full occupancy. To the extent that unfettered access to counsel contributes to timely disposition, the economic incentive for the institution to spawn policies that constrain attorney/client access and increase time in detention must be closely scrutinized.

B. Recommendations

⁴¹ Id., Recommendation #15, p. 128.

⁴² Id., pp. 4-5.

⁴³ Id., pp. 115-116.

⁴⁴ Id., Statement of Bob Libal, Executive Director, Grassroots Leadership, footnote 510, p. 116.

The Commission recommended that “[t]he Government Accountability Office and/or an Inspector General should undertake investigation into whether, and if so, how the 34,000 per-night bed requirement put in place by Congressional appropriations language impacts agency decisions to detain or parole immigrants.”⁴⁵

The complex circumstances involving immigrant detention and the roles played by various entities render it fair to question whether the existence of the 34,000 per-night bed quota impacts detention decisions at the border and throughout the process. Such an inquiry should examine not only the roles of entities which have a financial stake in the decisions, but also the extent of their pecuniary gain as a result of those choices. DHS should promulgate rules and craft policies which reduce conflicts of interests in detention decisions. If necessary, Congress should pass, and the President should sign, legislation which the per-night bed quota.

VI. Conclusion

Overall, the conditions under which DHS detains immigrants – especially children, whether with their families or on their own – are shocking to the nation’s conscience. As the proverbial nation of immigrants, founded by immigrants, we must do our best to uphold humane and compassionate values. DHS has legal and moral obligations to improve in all regards the conditions under which immigrants are detained. That DHS fails to ensure adequate nutrition for detained immigrant children is reprehensible. That DHS fails to provide standard medical care for serious chronic conditions and in response to accidents begs disbelief. That tiny children are spending significant portions of their lives in conditions approximating those of adult incarceration is shameful.

DHS must improve the process by which detention decisions are made and standardize the manner in which bond decisions are determined. DHS, HHS, Congress, and the President must take all available courses of action to secure and meaningfully implement a Due Process right to counsel for all undocumented immigrants. DHS, Congress, and the President must make every effort to investigate the legitimacy of the 34,000 per-night bed quota. DHS, Congress, and the President must ensure that stakeholders who stand to profit from their work with immigrant detainees not be allowed to put their financial interests ahead of the Due Process and humanitarian interests of such detainees, whether adults or children.

⁴⁵ Id., Recommendation #14, p. 128.

Dissenting Statement of Commissioner Gail Heriot

Long before any evidence was gathered, the Chairman’s proposal to undertake this study had already concluded that “egregious human rights and constitutional violations continue to occur in detention facilities.”¹ That proposal was adopted by the Commission on July 25, 2014.

The Commission thus went into this project intent on uncovering a scandal. Instead of conducting an actual investigation, it structured its initial fact-finding simply to amplify stale rumor and innuendo. No effort was undertaken to establish whether the allegations—all of which were already public—were fact or fancy. The point was simply to give the witnesses an opportunity to make the allegations again at our briefing on January 30, 2015—this time before the C-Span cameras.

Following the testimony of a panel composed largely of activists and advocates, Chairman Castro remarked dramatically before the television audience:

... I am *shocked* to hear the consistency among different facilities we talked about today, the kind of abuse, sexual and otherwise, that’s occurring. Th[is] does not seem to be an isolated incident. What you described, Ms. Hinojosa, is similar, if not identical to what we saw in the complaint from NIJC and the ACLU, what Sister [Norma Pimentel] saw, and what happens in other facilities we’ve gotten reports of. *So, to me that says there’s clearly a culture of this going on.* (Tr. at 127 [italics added].)

But the witnesses were selected precisely because they had earlier made the allegations they were then making before the Commission. Of course their testimony would be uniformly troubling. That is why they were asked to testify. Under the circumstances, no one should be shocked by the consistency.

Moreover, the most significant allegation of sexual abuse made at the briefing had already been found to be without evidentiary foundation after an extensive investigation conducted at the direction of the DHS Inspector General. The results of that investigation were

¹ Martin R. Castro, 2014 Briefing Proposal: The State of Civil Rights at Immigration Detention Facilities at 2 (June 2014). This language re-appears in Chairman Castro’s Statement in this Report. Castro Statement at 149.

Dissenting Statement of Commissioner Heriot

contained in a report issued weeks before our briefing.² For reasons I cannot understand, no reference to those results was included in the body of this report.³

Our job should have been to examine the allegations concerning detention conditions and try to determine whether they were true (as the DHS Inspector General did). This would have involved piecing together what happened the best we could from the records and witnesses. Almost certainly we would have been able to shed light on some of the allegations, but not on others. But the Commission preferred to rely on hearsay-upon-hearsay anecdotes that were told to us by witnesses or written about by media outlets ranging from international news services like Aljazeera and National Public Radio to local “alternative weekly” newspapers like *New Times Broward-Palm Beach*.⁴

It is said that where there is smoke, there is fire. But sometimes where there is smoke, there is only a smoke-making machine, busily stoked by publicists working for activist

² Memorandum to DHS Secretary Jeh C. Johnson from DHS Inspector General John Roth dated January 7, 2015: Investigative Summary—GEO Group Incorporated Detention Facility, Karnes City, Texas at 2-3. See *infra* at Section D.1 at 204-205 (describing DHS Inspector General’s memorandum).

³ Other allegations of a sexual nature have also turned out to be less striking than they originally seemed when brought to the Commission’s attention. In her statement, Maria Hinojosa wrote, “A GAO audit ... found that ICE had received more than 200 allegations of sexual abuse between 2009 and 2013.” Hinojosa Statement at 8. I wish she had also pointed that the 215 allegations were from among 250 facilities, accounting for 1.2 million admissions. Such a rate over the course of several years would not be out of the ordinary for a place of business. Moreover, I believe she should have pointed out that only 7% of these allegations were found to be substantiated (i.e. an investigation determined that the alleged incident took place). Approximately five times that number (38%) were found to be “unfounded” (i.e. an investigation determined that the alleged incident did not occur). The rest (55%) were classified as “unsubstantiated” (i.e. neither proven nor disproven after an investigation). Of the 15 substantiated cases, 11 involved detainee-on-detainee conduct and 4 involved staff-on-detainee conduct. Typical of the accusations were “A male detainee grabbed another male detainee by his genitalia,” and “A male detainee grabbed two other males’ buttocks.” Among the accusations against staff members was “A male guard intimidated and coerced a transgender detainee assigned to protective custody to display the detainee’s breasts and the guard inappropriately touched himself in view of the detainee” and “A female guard attempted sexual intercourse with a male detainee.” The former was prosecuted in state court; the latter was referred for prosecution to the local U.S. Attorney’s Office, but the U.S. Attorney declined to pursue the matter. Note that “unsubstantiated” cases included cases in which the incident was found to have occurred, but was determined not to constitute sexual abuse or assault (8% of unsubstantiated cases). It also included cases in which the alleged victim (who was not necessarily the complainant) chose not to cooperate or recanted or denied the allegation (29% of unsubstantiated cases), and cases where video surveillance footage was available but did not corroborate the allegation (8% of unsubstantiated cases). See Government Accountability Office, *Immigration Detention: Additional Actions Could Strengthen DHS Efforts to Address Sexual Abuse*, GAO-14-38 at 17-18 (November 2013). The GAO stated, “Detainees may also report false allegations—for example, in an attempt to delay deportation—according to officials at the facilities we visited.” *Id.* at 17.

⁴ In his Statement, Chairman Castro states that “accounts in the media and through advocacy organizations ... made it clear that these children were also enduring abuse, rape, and extreme conditions while in custody” and that this report “corroborates many of these conditions.” Castro Statement at 1. I would have to disagree with that. Repeating allegations is not the same as corroborating them. The exception is the allegation that it tends to be cold at the facilities the Border Patrol initially takes illegal entrants that it has picked up near the border. We did generate our own evidence of that. See *infra* at 210.

organizations.⁵ When the Commission fails to take its fact-finding mission seriously, it runs the risk of becoming part of such a smoke-making apparatus. That is very far from the Commission's intended function.⁶

Only after the report was mostly finished did we finally manage to visit two immigration detention facilities—the Karnes County Residential Center and the Port Isabel Processing Center. Members of the Commission worried that we would look foolish if we released a report on immigration detention centers that depended entirely on allegations by immigrant advocates and journalists. And, of course, they were right to worry.

But a funny thing happened on the way to exposing “egregious human rights and constitutional violations.” The detention centers weren't nearly as bad as we had been led to believe.⁷ Indeed, the Karnes facility was surprisingly attractive for a detention center.

Some of our Commission members and staff appeared to be quite surprised at the quality of treatment they saw. When we were led to a room at the Karnes facility that contained rows and rows of brand new brand-name clothing and told that new arrivals were permitted to select six outfits for themselves and each of their children, the looks on the faces of my colleagues were of astonishment. Questions were asked: “These clothes aren't new, are they?” Yes, they are new, the tour guide explained. “I guess they are donated, right?” No, the tour guide replied, they are purchased by GEO (the private company that owns and manages the Karnes facility in cooperation with ICE).⁸

What we found at Karnes and Port Isabel is, of course, not conclusive proof that any particular allegation against ICE or against a particular detention facility is untrue or that there aren't less dramatic problems at detention centers that should be corrected.⁹ But it makes allegations of a “culture of abuse” in detention facilities much less credible. The real scandal in this report is how little first-hand observation of fact or critical analysis has gone into it. Both the detainees and the detention center employees deserve better. So do the taxpayers.

A. An Example: The Maggot Allegations

⁵ The smoke-making machine reference is usually attributed to John F. Kennedy.

⁶ As then-Senate Majority Leader Lyndon Baines Johnson put it, the Commission's task is to “gather facts instead of charges.” “It can sift out the truth from the fancies; and it can return with recommendations which will be of assistance to reasonable men.” 103 Cong. Rec. 13,897 (1957)(Statement of Sen. Johnson).

⁷ See *infra* at Section D (which I put together largely from my notes of what I saw at Karnes and Port Isabel).

⁸ See *infra* at Section D.1.

⁹ For example, I agree with Commissioner Kladney that the prohibition on allowing other residents to watch one's own children while consulting with one's lawyer is not a good idea. Some women may not be able to be frank if their children are within earshot. See Kladney Statement at 248.

Dissenting Statement of Commissioner Heriot

Consider, for example, the testimony by Ms. Maria Hinojosa that the food served at Willacy Detention Center was full of live maggots. As the report puts it, “One individual testified to have seen maggots in food while visiting Willacy.” See Report at 41.

Here’s what Ms. Hinojosa actually stated before the Commission—that somebody else saw the maggots:

Our whistleblower is Twana Cooks-Allen. ... She had heard the complaints about food and couldn’t believe her eyes when a detainee brought her a napkin with a scoop of food (oatmeal, rice, beans) and when she opened up the napkin it had squirming live maggots. And this is what detainees were expected to eat. ... That is when she got the information out to Commissioner Schriro. (Hinojosa Written Testimony at 7. See also Tr. at 118.)

The allegation of “maggots”¹⁰ in the food at the Willacy County Detention Center first started surfacing about eight years ago. It is neither obviously true nor obviously false, but if you want to get somebody’s attention, complaining that the food has maggots in it is an excellent strategy. It is therefore an allegation that cries out to be examined, not accepted without reflection. Once such an allegation is made, it will tend to be repeated in lurid detail and attributed to other places and times.

Tracking down whether it was true would be difficult at this late date, and possibly not worth the candle given that Willacy County Detention Center no longer exists. The facility, which was originally operated by Management & Training Corporation, was converted to a correctional facility in 2011 and closed earlier this year.

Ms. Hinojosa appears to have heard the story from a “Commissioner Schriro” who in turn heard it from Ms. Cooks-Allen, who had been a mental health coordinator at Willacy some years ago. Even if Ms. Cooks-Allen’s statement was true and accurate in terms of her first-hand observation, that would still not answer the question of where the napkin full of food came from. Did the detainee who presented it to her take it off his own plate? Or did he get it from another detainee? If he got it from another detainee, where did that detainee get it? It is odd that food that requires cooking—like oatmeal and rice & beans—would have live, squirming maggots in it; one would expect them to be cooked. It is also odd that oatmeal and rice & beans would be served together in the same meal. Is it possible this food was taken from the garbage pail instead of from a plate of food? Was the detainee who gave Ms.

¹⁰ I suspect that, if true, it was not maggots (housefly larvae) but rather the larvae of pantry moths (*plodia interpunctella* or *ephestia kuehniella*). Alas, I speak from experience when I say that pantry moths are hard to get rid of. For what it is worth, they are less likely to carry pathogens than houseflies.

Cooks-Allen the napkin full of food one of her mental health patients? If so, is there reason to believe his statement about where he got the food is particularly untrustworthy?

We can ask those questions, but we have probably arrived too late to get answers. The best we can do is look to see what investigations were conducted into the matter back when it allegedly happened and ensure it is not happening now. Fortunately, there are some reports of earlier investigations (though I had to uncover them myself with a Google search).

That touches on one of the major flaws in this report. It fails to sufficiently convey the substantial oversight bureaucracy that exists to ensure that prisons, jails and immigration detention facilities are properly run. When a public accusation of mismanagement like the “maggot allegation” at Willacy is made, you can bet that a number of government and independent investigations will soon be undertaken. The investigators may not be able to conclusively determine whether the allegation was true, but such near-in-time investigations can shed brighter light on the allegation than we can and can better ensure that it will not happen again.

On August 28, 2007, a few weeks after the “maggot allegation” arose, an American Bar Association delegation visited Willacy. The delegation had quite a few criticisms for Willacy (though none so lurid as the accusations that were leveled at our briefing). But it had nothing bad to say about the food. While it acknowledged the Willacy “maggot allegation,” it stated that Willacy appeared to meet the appropriate standards in the area of food service. It was clear the members of the ABA team had serious doubts about the allegation.¹¹

Two months after the ABA delegation visited Willacy, a two-day Technical Assistance site visit was conducted by the Commission on Accreditation for Corrections. The visit had been requested by ICE for the specific purpose of following up on the allegations of maggots in the food.

The Technical Assistance team members included food service professionals, and they were hardly pushovers. They found a number of problems with the Willacy facility. For example, they found that “food in the dry storage area as well as the freezer are stacked too high,” causing boxes on the bottom to be crushed. In examining the refrigerator temperature logs, they found that on occasion the temperature had crept above 40 degrees. But I suspect few family kitchens anywhere would score perfectly. Indeed, few families

¹¹ Memorandum of American Bar Association Delegation to Willacy Detention Facility to James T. Hayes, Jr., Acting Director, Office of Detention and Removal, Immigration and Customs Enforcement (March 7, 2008).

Dissenting Statement of Commissioner Heriot

even keep a refrigerator temperature log. As refrigerator doors open and close, sometimes temperatures briefly climb higher than they should.

Interviews conducted by the Technical Assistance team members with detainees did not turn up the kinds of complaints that one would expect if conditions were as appalling as media coverage of the “maggot allegation” had been true. Female and male detainees were interviewed separately. The report summarized their view thusly:

1. Female Detainee Responses:

- Too many sandwiches and no condiments (ketchup, mustard, mayo)
- Too many onions – onions smell up the food & tray no variety
- They serve the same food all the time too many eggs
- Would like some variety.
- Would like to have cheese and jalapeno peppers, and tomatoes/salsa added to the scrambled eggs.
- Delicious.
- Grateful for the food.
- Love it!

2. Male Detainee Responses

- Not as good; today was ok.
- Too many sandwiches (Cold Cuts)
- Too many eggs
- Rice – over/under cooked
- Want more coffee
- Vegetarian reports no variety. Lunch today was baked potato & rice
- Salad – no dressing
- Bland – no spice/enhancements
- Cups & spoons -- not washed properly
- Want more than just white bread for sandwiches – want more tortillas
- Milk is outdated – beyond dates
- Would like to supplement food from commissary – i.e., Cup-a-Soup and ramen noodles (Commission on Accreditation for Corrections Technical Assistance Report on Willacy County Processing Center (October 8-9, 2007) at 7.)

You can bet that Willacy was never in any danger of receiving even one Michelin star. But the complaints being made by the detainees are not nearly the kind you’d expect if the facility had been serving maggot-ridden food. The site team drew the following conclusion:

The issues reported by the media were not observed during this technical assistance. While there are many improvement opportunities based on the recommendations made during this technical assistance; however, conditions were not as bad as the media had portrayed. It is evident that the media took a small part of the situation and highlighted the isolated report of maggots and portrayed it as more than what it really was. Conditions were not found to be in deplorable conditions as reported. (*Id.* at 8-9.)

Our report also states that “a hunger strike took place at Stewart, located in Lumpkin, GA, due to detainees being served maggot-filled food” and originally cited Ms. Hinojosa’s written testimony for this point. See Report at 41. But Ms. Hinojosa made no such allegation. When I requested more information as to the source for this allegation, I was next directed to what appears to be an undated newsletter from an activist organization calling itself “Detention Watch Network.” It stated:

ICE claims that detention facilities provide “healthy and palatable” meals, but testimonies of people in detention indicate that the food being served is anything but healthy or palatable. In facilities including Etowah (AL), Hudson (NJ), Baker (FL), Glades (FL), Irwin (GA), Polk (TX), Adelanto (CA), Stewart (GA), and Eloy (AZ), individuals continue to send complaints about the quality and quantity of food provided. They report lengthy periods between meals, small portions, and food quality so poor that worm- and maggot-infested food has been served. (Detention Watch Network, Expose & Close: One Year Later at 8.)

Again, however, the source didn’t support the allegation. Yes, it mentioned worm- and maggot-infested food, but if one reads further one see that the allegations were from two anonymously-quoted detainees. Neither mentioned Stewart. They cited Adelanto and Irwin. At the end of the newsletter is the following disclaimer: “Except where a publication is cited, the information reported here is based solely on claims made by detained individuals without independent corroboration.” (*Id.* at 12.)

Even if these witnesses had mentioned Stewart, this document would not be the kind of evidence that the Commission should be relying on in its report—at least not if it does not also obtain the near-in-time food service inspection reports for those facilities. It does not surprise me in the least that rumors of maggot-infested food would circulate. When I was a girl growing up in Fairfax, Virginia (not a part of the country known for serving unsanitary food), rumors often flew that the food in the school cafeteria was maggot-infested. School children love that sort of story. If it happened to somebody’s cousin twenty years ago in Nome, Alaska, we’d have heard that it happened yesterday to the students at our school during the lunch period preceding ours. To my knowledge, it was never true of any school I attended. But if it was true of some Fairfax County school lunch cafeteria at some point in

Dissenting Statement of Commissioner Heriot

time, it was certainly an isolated incident and not a general indication of unsanitary conditions.

I Googled “Stewart Detention” and “maggot” myself and found that an unsourced allegation of maggot-infested food had indeed been made in the *Atlanta Journal-Constitution*.¹² But it had been immediately followed with this information:

ICE denied there was a hunger strike at Stewart, which is operated by Nashville-based Corrections Corporation of America. . . . ICE said the food at the Stewart [Detention Facility] meets federal standards and is monitored by a registered dietician. A health inspector looked into an anonymous tip about maggots in the food at Stewart but didn’t find any. State health inspectors gave Stewart’s dining facility a 96 percent score following an April inspection [which was two months before the complaint about the facility’s food were made], ICE said.¹³

There are several things the Commission’s report could have done. It could have chosen not to entertain the various “maggot allegations” at all, given the fact that the investigations before or immediately after the allegations arose tended to show a lack of a serious problem (and, in the case of Willacy, the fact that it is no longer in operation and the allegation is eight years old). But if it chose to highlight the allegations, it was obliged to include the evidence that the allegations were either false or isolated problems at worst. The Commission needed to reference the reports of the ABA and the Technical Assistance team at Willacy, the Georgia health inspectors’ report at Stewart and any other relevant report.

Moreover, the Commission should have more fully discussed the various ways in which food service at detention centers is routinely inspected to ensure that the food being served is healthy. From reading this report, one gets the idea that nobody ever inspects the kitchens at immigration detention centers, and that the U.S. Commission on Civil Rights is the only institution standing between detainees and unsanitary food. That is very far from the case. Inspection tours, including inspections by food service experts, are being regularly conducted at these facilities. These multiple inspections are not a guarantee of consistently sanitary food. No doubt slip-ups will occur, just as they do in restaurants and family

¹² In the meantime, this Report was amended to cite the oral testimony of Steven Conry, as quoted in the Commission’s briefing transcript at 132, for the proposition that maggots appeared in food at Stewart. But Conry didn’t testify to that proposition either. At the cited page, Conry discusses accommodations for Muslim detainees at Stewart who have special dietary needs for religious reasons. This testimony had nothing to do with maggots.

¹³ *Riot Tied to Food Served at South Georgia Immigration Detention Center*, *Atlanta Journal-Constitution* (June 19, 2014).

kitchens. But these repeated efforts are much more likely to have the desired effect than our one-shot investigation is.

Finally, the Commission could have inspected the kitchens and conducted its own systematic poll of large numbers of detainees concerning the food.

What the Commission did instead is peculiar: It concluded that there is no evidence that federally-run facilities have a problem with food service, but “that certain [privately-run detention facilities] are not fully adhering to contractually set standards and are not providing detainees with nutritious food in sufficient quantities”¹⁴

Put simply, not having even darkened the door of the actual kitchen facilities of any detention center, even at the two facilities that we visited, the Commission decided to credit food rumors. Not only did it decide not to credit the near-in-time investigations, which found no evidence to support those rumors, it apparently chose not to mention the investigations.

One reason for the Commission’s decision to credit the rumors is obvious: After having concluded *before the investigation* that “egregious human rights and constitutional violations continue to occur in detention facilities,”¹⁵ it was hell-bent on finding those violations. Evidence from food preparation experts that tended to indicate the contrary had to be ignored. Indeed, most of the detainees with whom we spoke at Karnes and Port Isabel were content with the food and hence their views had to be swept out of the way too.¹⁶

But the distinction drawn in the Report between government-run and privately-run facilities is especially misguided. Curiously, the only non-rumor evidence of food services problems at immigration detention centers that I have been able to uncover is against a government-run location (the ICE-run Florence Service Processing Center in Florence, Arizona), not a privately-run one.¹⁷ The allegation is old, and hence the problem has presumably been corrected.

¹⁴ Report at 124 and 42.

¹⁵ See text and note at n. 1.

¹⁶ When members of the Commission asked a couple of dozen detainees at Karnes and at Port Isabel, the response was generally positive. One woman at Karnes was concerned that her baby did not like the food and had gone back to breastfeeding as a result. But if the worst that can be said about the food at Karnes is that not all the children like it, that speaks well for Karnes. No cafeteria, family kitchen or Five-Star Michelin restaurant has ever produced food that every child likes. See *infra* at Section D1. It is worth pointing out that, according to our tour guide at Karnes, food service personnel make efforts to adjust the cuisine to suit the tastes of residents. For example, when residents were found to prefer black beans to pinto beans and corn tortillas to flour tortillas, adjustments were made to menus. *Id.*

¹⁷ It is possible there are other reports out there. These are the kind of evidence that the full-time Commission staff should have obtained in the course of the year. Instead, I have had to do it over the course of the month since I received the first draft of the report. The Commission rules require that Commissioners (who are part-

Dissenting Statement of Commissioner Heriot

The report on Florence, an ICE-run facility, stated:

The tour of the kitchen prep and dish washing areas were not clean. The floors needed scrubbing and repaired [sic]. There was a large surface hole in the floor near the end of the floor drain that is a safety and health hazard. It had standing water which appeared to be old, needed draining and floor repaired. Ovens and back plates had not been cleaned, and there was evidence of built-up grease and grime. Inside one oven had leftover food in it, which appeared not to have been clean for several days. ... Mousetraps were located throughout the kitchen area. There were mouse feces on top of the dishwashing machine. It is evident that there is a rodent problem in the kitchen area. (See Commission on Accreditation for Corrections, Technical Assistance Visit Report at 6 (July 16-18 [2007]).)¹⁸

It is not clear why rumors about unsanitary conditions at privately-run facilities made it into this report, while documented unsanitary conditions at ICE-run facilities did not. It is hard to avoid the conclusion that this Commission is employing a double standard.

B. Privately-Run Detention Centers Should Not Be Viewed with Greater Suspicion than Government-Run Facilities.

Businesses that contract with the federal and state governments to furnish correctional and detention services are the *bête noir* of many Progressives, apparently including some members of the Progressive caucus here at the Commission and maybe even some of the staff.¹⁹ As I have outlined in Part A, this bias has seeped into this report, including some of the Statements by my fellow Commissioners.²⁰ Chairman Castro's statement is particularly

time) be given 30 days after the adoption of the report's final draft by the Commission to draft their Statements. That ordinarily would have given me two months, working part time, to work to correct the report's defects and, failing that, to write my own statement. For this report, the 30-day period was shortened to a week.

¹⁸ See also Ana Arboleda & Dorian Ediger-Seto, *Seeking Protection, Enduring Prosecution: The Treatment and Abuse of Unaccompanied Undocumented Children in Short-Term Immigration Detention* 13 (August 2009)(containing allegations that the food in certain ICE-run facilities "was unappetizing, insufficient, and often smelled as if it had gone bad").

¹⁹ The issue has received considerable attention in the media. For example, *Corrections* is a 2001 documentary film directed by Ashley Hunt. She describes it this way: "Corrections is a story of justice turned to profit, where the war on crime has found new investors: Venture Capital and For-Profit Prisons, the story of the Private Prison. ... [A]t a time when our citizens are exposing big tobacco corporations and breaking up Microsoft, there is growing suspicion over corporate corruption as well. Corrections bring these growing concerns together with an innovative documentary in the tradition of filmmakers Emile Di Antonio and Erroll Morris, and such films as *Roger and Me*." See www.imdb.com/title/tt0280573/

²⁰ The Report's discussion of food service, which I discussed in Section A, is just one example. Its discussion of medical care is similar. For ICE-run facilities, the Commission finds only that "additional research" is needed. Report at 32. But for "certain privately owned detention centers," the Commission jumps right in and finds they "are not complying with DHS detention [medical] standards." Report at 36. In both cases, actual evidence (as opposed to rumor and innuendo) is lacking.

overwrought, claiming that “[t]he ‘incarceration industrial complex’ has extended its tentacles from running traditional prisons on a for-profit basis, to their new growth market—immigration detention.” Castro Statement at 152. “Jailing people for profit is obscene,” he wrote, “it has gone on for too long, and it must end now.” *Id.* at 153.²¹

One could argue that milder forms of this bias are just part of a more general skepticism on the part of modern Progressives toward government outsourcing.²² But somehow privately-run prison and detention facilities have tended to be especially controversial—despite some evidence that private prisons are actually better managed than government-run prisons. See e.g., Charles H. Logan, *Well Kept: Comparing Quality of Confinement in Private and Public Prisons*, 83 *J. Crim. L. & Criminology* 577 (1992)(comparing three women’s prisons, one state-run, one federally-run and one privately-run and concluding that while “all three prisons are regarded as having been high in quality, the private prison outperformed its governmental counterparts on nearly every dimension”).²³

Another way in which the Report manifests its bias is the suspicion with which it views the fact that the federal government cannot simply unilaterally change a contract with a detention facility to suit its purposes. As a result, changes in the applicable standards to which the company can be held cannot be altered at the will of the government; new standards must either be phased in when the contract comes up for renewal or be made part of a midterm renegotiation. This is normal. These contracts are carefully drafted and negotiated to give both parties the incentives necessary to run the detention center properly. The company is entitled to a certain amount of money for those services, neither more nor less. If more duties are required of it than the contract originally contemplated, it must be compensated for those increased duties. That’s what contracts are all about. By contrast, the federal government can require its own facilities to change immediately if it so desires. Unlike companies that contract to provide correctional or detention services, the federal employees who work at correctional or detention facilities get their salaries adjusted every year and (more importantly) if they decide they do not want to perform the duties required of them, they are free to quit their jobs, no questions asked. If a private company under contract decides that it just doesn’t want to provide correctional or detention services anymore, it will be sued. Once it has committed itself to perform, it doesn’t get a choice anymore. That’s why it is not required to perform if it hasn’t committed itself to do so. There is nothing nefarious about any of this.

²¹ Vice Chair Timmons-Goodson’s statement is more measured than the Chairman’s, but she still spends an inordinate amount of her time discussing privately-run detention facilities, especially given that nothing we uncovered showed that privately-run facilities were any less well run than ICE-run facilities. She does point out a significant difference between ICE-run and privately-run facilities. The former are subject to the Freedom of Information Act and the latter, like all government contractors, are not. Some lawmakers have advocated changing this. Given that this was not an issue that the Commission explored in depth, I express no opinion on it other than it would have been worth exploring. The Commission itself could have easily subpoenaed any material it had use for in drafting a balanced report. It apparently did not think that such material would be useful.

²² See, e.g., Michelle Chen, *When the Government Outsources to Private Companies, Inequality Gets Worse*, *The Nation* (March 24, 2014); Rebecca Paley, *Fighting for the Down and Out(sourced)*, *Mother Jones* (May/June 2004). See also *Protesters Oppose [North Miami Beach] Plan to Privatize Trash Hauling*, *Miami Herald* (August 4, 2015); David Giambusso, *Newark Sanitation Workers Demand Mayor Booker Reconsider Privatizing Jobs*, *The Star Ledger* (Newark) (August 12, 2010).

²³ Part of the lack of good will toward privately-run prisons, jails and detention centers may be the result of misunderstandings. For example, the issue of private prisons was touched on ever-so-slightly in a previous report of the Commission. See U.S. Commission on Civil Rights, *Enforcing Religious Freedom in Prison* 110 (2008)(Statement of Commissioners Arlan Melendez and Michael Yaki). In that report, Commissioners Melendez and Yaki worried

Dissenting Statement of Commissioner Heriot

Anyone holding the belief that government-run detention facilities are superior to privately-run detention facilities would have experienced some cognitive dissonance during the Commission's tour of Karnes and Port Isabel. While both facilities appeared to be well run, there is no doubt as to which facility a reasonable person would prefer to be assigned to. Karnes was cleaner, more modern and generally more attractive than Port Isabel.²⁴ Indeed, Karnes, which is run by the GEO Group, Inc. ("GEO"), has been criticized for being too attractive by Members of Congress and by Fox News.²⁵ Representative Lamar Smith called staying at Karnes a "Holiday on ICE" while Fox News commentator Greta Van Susteren called it "the Ritz Carlton of federal detention centers," citing its "big screen t.v.s, basketball courts and a hair salon." Praise like that for the ICE-run Port Isabel facility would have flunked the laugh test.

about whether private facilities would be held to operate under color of law for Section 1983 purposes. In fact, the issue of whether private prisons stand in the shoes of the state government for Section 1983 has been definitively resolved by the courts in the obvious way. *Of course* they can be. *Rosborough v. Management & Training Corp.*, 350 F.3d 459 (5th Cir. 2003)(per curiam); *Skelton v. Pri-Cor, Inc.*, 963 F.2d 100 (6th Cir. 1991), cert. denied, 503 U.S. 989 (1992); *Palm v. Marr*, 174 F. Supp. 2d 484, 487-88 (N.D. Tex. 2001); *Kesler v. King*, 29 F. Supp. 2d 356, 370-71 (S.D. Tex. 1998). See also *Correctional Services Corp. v. Malesko*, 534 U.S. 61, 72 n. 5 (2001)("[s]tate prisoners ... already enjoy a right of action against private correctional providers under 42 U.S.C. § 1983")(dictum). Indeed, private corporations operating correctional (or detention) facilities on behalf of states should be relieved that courts have held that they are subject to Section 1983 in this context. If they are not operating under both the color and fact of law, they would be guilty of a serious crime for confining individuals against their will and subject to liability for false imprisonment. See Model Penal Code at § 212.1—212.3; Restatement (Second) of Torts at § 35.

Although the Supreme Court in *Malesko* did not recognize a *Bivens*-style action against a corporate half-way house operator for the federal government, it was not because they are not operating under color of law. Rather, the Court simply declined to extend the already-extraordinary *Bivens* action to non-employees of the federal government, noting that "alternative remedies are at least as great, and in many respects greater, than anything that could be had under *Bivens*." *Id.* at 72. The most obvious such remedy is the "parallel tort claim that is unavailable to prisoners housed in [federal] facilities." A tort claim against a corporate half-way house operator can be enforced in federal courts (when the requirements for diversity jurisdiction are met) or in state court (under all circumstances). *Id.* at 71-72.

When the *Malesko* Court stated that the remedies against a corporate halfway house operator "are at least as great, and in many respects greater, than anything that can be had under *Bivens*," it was likely referring to the constellation of sovereign and official immunity issues that make lawsuits against the federal government and its employees difficult. In *Richardson v. McKnight*, 521 U.S. 399 (1997), the Court went so far as to hold that prison guards employed by private prison corporations were not entitled to the same qualified immunity as government employees. It is thus in some ways easier to maintain an action against a prison guard employed by a government contractor than it is against a prison guard who is a government employee. The same rule would likely apply to the government contractor itself, at least in most contexts.

²⁴ See *infra* at Section D.

²⁵ Edwin Mora, New Rules Make Detention for Illegal Aliens a "Holiday on ICE", CNSNews.com (March 29, 2012); Greta Van Susteren, Inside Swanky New Detention Center for Illegal Immigrants, Fox News (August 1, 2014), <http://video.foxnews.com/v/3709051485001/inside-swanky-new-detention-center-for-illegal-immigrants/?#sp=show-clips>. See also Immigrant Detention Center Has Hair Salon for Women, Houston.CBSlocal.com (August 1, 2014).

More important, immediately after our briefing, I asked one of the witnesses, Kevin Landy, Assistant Director for the ICE Office of Detention Policy and Planning, whether privately-run detention facilities have more problems than government-run facilities. He told me that they do not, and that the more significant differences are not between private and government facilities, but rather between dedicated and non-dedicated facilities. Put differently, those facilities that are run exclusively as detention facilities tend to do a good job adhering to standards, whether government run or privately run. But facilities that are primarily prisons or primarily jails (but which agree to house some immigration detainees since they have some excess capacity) are sometimes less familiar with the special standards that apply to immigration detention facilities and may therefore make mistakes.

So what is all the fuss about? Why does this report attempt to suggest that privately-run facilities serve maggot-infested food, while government-run facilities are okay? Why does it cite unsourced complaints about the food at privately-run facilities, while ignoring one unsourced and one fully sourced complaint about the food at government-run facilities?

Usually when a particular public policy concern is getting exponentially more attention than it is due relative to other concerns, it makes sense to ask the age-old question: Cui Bono? (Who stands to benefit?) In this case, it is worth noting that there is a longstanding battle between private providers of correctional and detention services and prison/security guard unions.²⁶ Prison guards at government-run facilities are paid more generously than

²⁶ See, e.g., Matt Dixon, *New Contracts Give Private Prison Giant Nearly 80 Percent of Florida's Private Prison Market*, *The Florida Times-Union* (December 16, 2013)(stating that a proposal to move 14,500 South Florida prisoners to private prisons “was fiercely opposed by unions who represented state correctional officers”); Scott Whipple, *Unions Say Outsourcing Corrections is Failed Idea*, *New Britain Herald* (October 25, 2010)(“‘Privatization will close prisons and the economic effect on surrounding communities will be devastating,’ AFSCME Local 387 President Dwayne Bickford predicted. ‘Connecticut’s track record shows that privatization equals corruption at the highest levels of government.’”); Dan Morain, *Davis to Close State’s Privately Run Prisons; Funding: Elected with the Help of \$2.3 million from Guards’ Union, Governor Includes Plan in Budget*, *Los Angeles Times* (March 15, 2002)(“Gov. Gray Davis is ending California’s experiment with privately operated prisons, fulfilling his promise to a state prison guard union that spent \$2.3 million to help elect him four years ago. . . . Davis’ budget proposes closing five of California’s nine private prisons on June 30 and phasing out the rest as their operating contracts expire. He cites budget concerns, saying that the state can save about \$5 million by closing the minimum-security facilities. Others, including the legislative analyst’s office, dispute the potential savings. Although administration officials cited problems with some private prisons, recent audits by the California Department of Corrections gave high marks to all five facilities slated for closure”)(paragraph breaks deleted). See also Jennifer Warren, *When He Speaks, They Listen: In 20 Years, Don Novey Has Built the Once Powerless California Prison Guards Union into One of the Most Influential and Richest Forces in State Politics*, *Los Angeles Times* (August 21, 2000)(Identifying the California prison guards’ union, the California Correctional Peace Officers Association—as the No. 1 donor to legislative races in the 1998 election cycle and stating that its president “has stalled efforts to expand private prisons in California”); Charles H. Logan, *Private Prisons: Cons and Pros* 11 (1990)(“Unions were the major force behind legislation in Pennsylvania imposing a one-year moratorium on new privatization of prisons or jails. They also forced the nonrenewal of a jail management contract in that state when the AFSCME threw its support behind two candidates for county commission running on a ‘take back the jail’ platform”).

Dissenting Statement of Commissioner Heriot

those at privately-run facilities.²⁷ Indeed, it is largely because privately-run facilities tend to be more economical that governments find them appealing.

University of Connecticut sociologist Charles H. Logan put it this way:

Probably the most powerful opponent to private prisons is the AFSCME, which is the sixth largest of all the AFL-CIO international unions. It represents over 50,000 corrections workers nationally. As of 1981, correctional employees were unionized in 29 of 52 jurisdictions (state, federal and District of Columbia). Union strength is weakest in the southern tier of the United States, which is where the private prison industry has concentrated most of its efforts. The AFSCME and other public employee unions are opposed to contracting out virtually all public services, but their opposition to prison privatization seems especially vehement.²⁸

Michael Jacobson, Executive Director of the Vera Institute and hardly a political conservative on incarceration issues, agreed:

Private prisons are anathema to public prison unions. They threaten the number of prison jobs held by their members and pose a significant potential threat to their long-term viability should they gain too much of a foothold in a particular state. Therefore, it can be reliably predicted that any political capital accumulated by public corrections unions will be used to ward off prison privatization.²⁹

None of this is to say that my Progressive colleagues are wrong to view companies that provide correctional and detention services with some level of skepticism. When (and if) such an organization lobbies for high levels of detention, its motives should be viewed skeptically. But don't stop there. It's not just so-called "for profit" enterprises whose motives should sometimes be greeted with skepticism.³⁰ When unions lobby for high levels

²⁷ Nancy Heitzeg, *The High Cost of Profit, Racism, Classism, and Interests Against Prison Privatization* in Byron Eugene Price & John Charles Morris, *3 Prison Privatization: The Many Facets of a Controversial Industry* 42 (2012) ("Union opposition to privatization is based not only on the failure of privatization to create the promised quality jobs in private prisons. ... Corrections officers are paid substantially less in private facilities").

²⁸ Charles H. Logan, *Private Prisons: Cons and Pros* 11 (1990).

²⁹ Michael Jacobson, *Downsizing Prisons: How to Reduce Crime and End Mass Incarceration* 68 (2005). Jacobson notes that the state with the largest number of private prisons in 2001—Texas with 42 out of the 158 private prisons then in existence—had at the time no prison guard union. *Id.* at 69.

³⁰ "For profit" appears to be a derogatory term in the Progressive lexicon. It should not be. See James Boswell, *I The Life of Samuel Johnson, LL.D.* 464 (1791) ("There are few ways in which a man can be more innocently employed than in getting money") (quoting Johnson). See also Adam Smith, *I The Wealth of Nations* ch. II, 26-27 at para. 12 (1776) ("It is not from the benevolence of the butcher, the brewer or the

of detention³¹ or *against privately-run correctional and detention facilities*, their motives should be suspect too.³² Similarly, when government officials argue for the preservation or expansion of government bureaucracies (and hence for their authority and budget), their statement should be met with a wry smile and their motives examined carefully.³³

The core defect of Progressivism is its tendency to assume the good faith of political and government actors, while doubting the motives of individuals acting in their private capacity. If anything, the ranking should be reversed, given the greater difficulty of channeling the activities of government actors into areas that are in the public interest.³⁴ But in the context of immigration detention one will not go too far wrong by employing equal levels of skepticism.

C. A Central Issue Is Whether Detention is a Useful Practice or Whether Federal Authorities Would Do Better to Release Current Detainees into Alternative to Detention Programs, Thus Relying on the Those Detainees to Voluntarily Show Up for Their Hearings.

baker that we expect our dinner, but from their regard to their own interest. We address ourselves not to their humanity but to their self-love, and never talk to them of our own necessities, but of their advantages”).

³¹ See Alexander Volokh, *Privatization and the Law & Economics of Political Advocacy*, 60 *Stan. L. Rev.* 1197 (2008)(pointing out that prison guard unions are in fact active advocates of pro-incarceration policies).

³² The two are very similar for these purposes. In theory, publicly traded corporations engaged in government contracting—like the GEO Group, Inc. and Corrections Corporation of America—are operated for the benefit of their investor-beneficiaries, the most typical of whom are (ultimately) ordinary individuals saving for or in the midst of their retirement. While not directly relevant here, some argue that in practice, so-called for-profit corporations are sometimes hijacked for the benefit of management-level employees, who have a lot more control over the corporation’s activities and hence the ability to consciously or unconsciously direct the corporation’s activities to enhance their own interests and prestige. Similarly, public employees’ unions are in theory operated for the benefit of their members. Again, arguments can be made that they are often run more for the benefit of management-level union employees, who have a lot more control over their activities than rank-and-file members. Either way, both institutions—government contractors and public employees’ unions—are similar in their desire for profit in exchange for their services.

³³ A whole branch of economics is devoted to the study of how ordinary rules of human self-interest play out in the area of government and politics. See, e.g., Iain McLean, *Public Choice: An Introduction* (1991). Its bottom line is simple: Human beings do not change their stripes because they are engaged in politics, get elected to public office or get a government job. Indeed, in some ways, especially given government’s power to coerce, it is more difficult to channel the self-interest of politicians and government workers in a way that comports with the public interest than it is to channel the self-interest of private sector actors to do so. In theory, governments are run in the public interest. But in practice, the “public interest” is an amorphous concept and thus easily confused with the interests of those who mostly directly influence, control and manage the apparatus of government. *Id.*

³⁴ *Id.*

Dissenting Statement of Commissioner Heriot

Several of the advocates who testified at our briefing have taken the position that detention is appropriate only as a last resort³⁵—quite apart from whether detention conditions are deplorable.³⁶ In their view, the current system should be replaced with one under which

³⁵ See, e.g., Written Testimony of Karen Lucas at 9 (“No one should be deprived of their liberty except as a last resort. Everyone should be placed in the least restrictive setting necessary to serve the government’s legitimate interest.”).

³⁶ The argument is frequently bolstered by attempting to point out that the detainees have not been charged with a crime. It is worth pointing out, however, that most, but not all, detainees have indeed committed a crime and that a more appropriate statement would be that they haven’t been convicted of a crime (much like those arrested and put in jail have not been convicted of a crime). Those who attempt to enter the country surreptitiously or under false pretenses are guilty of the crime of improper entry (even if they could have gained entry to the country by presenting themselves to a proper official at a proper port of entry and properly requesting asylum). The fact that they have not been charged (and may never be) is simply a matter of prosecutorial discretion. The first such entry is a misdemeanor, and any subsequent illegal entries are felonies:

8 U.S.C. § 1325—Improper Entry by an Alien

(a) Improper time or place; avoidance of examination or inspection; misrepresentation and concealment of facts

Any alien who

- (1) enters or attempts to enter the United States at any time or place other than as designated by immigration officers, or
- (2) eludes examination or inspection by immigration officers, or
- (3) attempts to enter or obtains entry to the United States by a willfully false or misleading representation or the willful concealment of a material fact, shall, for the first commission of any such offense, be fined under title 18 or imprisoned not more than 6 months, or both, and, for a subsequent commission of any such offense, be fined under title 18, or imprisoned not more than 2 years, or both.

Adult detainees apprehended while attempting an improper entry usually fall into one of two categories. If they cannot articulate a credible fear that would entitle them to an asylum hearing, they are guilty of improper entry, but prosecution is not usually regarded as worthwhile, since they are subject to expedited removal and will thus quickly be leaving the country. If they can allege a credible fear, they may be entitled to a hearing to adjudicate whether they are in fact eligible for asylum and they may be detained prior to that hearing in order to ensure their appearance. If they are found to be ineligible for asylum, they are subject to removal. At that point, prosecution is not a particularly appealing option, especially given the cost of incarceration. If they are found to be entitled to asylum, they have often already been detained for longer than they would have been sentenced. Consequently, even though they were still illegal entrants, prosecution is again not an appealing option.

Other detainees are legal entrants who were convicted of a crime during their stay and are hence subject to deportation under 8 U.S.C. § 1227(a)(2).

In any event, all of these detainees are being held not as a form of punishment for a crime, but as a means of ensuring their attendance at their hearing, and if it turns out they are not entitled to remain in the United States, to assure their removal. *Bell v. Wolfish*, 441 U.S. 520 (1979), concerned pretrial detainees awaiting criminal trials, but the principles established in that case apply equally to immigration detainees. In *Bell*, the Court held that in evaluating the constitutionality of detention conditions, the proper question is “whether those conditions amount to punishment of the detainee.” *Id.* at 535. The Court went on to state:

[I]f a particular condition or restriction of pretrial detention is reasonably related to a legitimate governmental objective, it does not, without more, amount to “punishment.” Conversely, if a restriction or condition is not reasonably related to a legitimate goal—if it is arbitrary or purposeless—a court permissibly may infer that

many more are released on bond or on their own recognizance. They favor combining this with supervision programs designed to encourage attendance at hearings.³⁷

A central issue therefore is how would the rate at which aliens simply disappear increase if more were released.³⁸ Unfortunately, this is an area for which the statistics are in a state of disarray. Numbers cited vary wildly. I wish this were something the Commission had tried to sort out. Instead of sinking its teeth into this crucial issue, however, the report simply

the purpose of the governmental action is punishment that may not constitutionally be inflicted upon detainees qua detainees. (Id. at 539.)

The constitutional question is thus whether detaining those who are currently being detained is “purposeless.” If it could be found that they are no more or less likely to show up for their hearing and comply with removal orders regardless of whether they are detained or not detained, then detention itself (as opposed to some particular aspect of detention) may be arbitrary or purposeless. Virtually 100% of those who are detained show up for their hearings. That same cannot be said for those who are released on bond or on their own recognizance. It therefore seems unlikely that a court could find the detention itself unconstitutional.

³⁷ One argument in favor of decreased detention coupled with increased non-detention intensive supervision is that intensive supervision is less costly than detention. This is true, though one countervailing consideration is the length of time to adjudicate a case. Detention cases are ordinarily fast-tracked. While intensive supervision is much cheaper per unit of time, non-detained aliens take longer to have their cases fully litigated.

³⁸ It cannot be emphasized enough that the purpose of immigration detention is to ensure that they do not disappear prior to the disposition of their case. Karen Lucas, Associate Director of Advocacy at the American Immigration Lawyers Association, stated in her written testimony that “the purpose of detention, according [to DHS] Secretary [Jeh] Johnson, was to deter other mothers and children in the violence-torn region in the Northern Triangle—El Salvador, Guatemala, and Honduras.” She condemns him for this, stating, “Detaining one person to deter another is wrong.” But regardless of when one can ethically and legally use detention of this kind as a general deterrent, it is simply *not true* that Secretary Johnson said that the purpose of detention was to deter other mothers from making the journey from Central America to the United States. Alas, Commissioner Kladney repeated Ms. Lucas’s misstatement. He wrote that “[t]he official rationale for holding families was to deter others from crossing the border” and “[t]his is a wrong-headed policy” and (like Lucas) cited Secretary Johnson’s written statement before the Senate Committee on Appropriations on July 10, 2014 for this point. Kladney Statement at 2 & n.9. But what Secretary Johnson actually said was that the Administration needed funds to support “an aggressive deterrence strategy focused on the removal and repatriation of recent border crossers.” See Statement of DHS Secretary Jeh Johnson Before the United States Senate Committee on Appropriations (July 10, 2014, *available at* <http://www.dhs.gov/news/2014/07/10/statement-secretary-homeland-security-jeh-johnson-senate-committee-appropriations>). Note that strategy is not to detain, but to send back as quickly as possible. He said it over and over in his testimony—that the Administration’s strategy was to deport illegal entrants as quickly as possible in order to send a message to others that attempting to enter the United States is futile. At one point, Johnson does indeed say that a temporary detention facility had just been opened near the border at Artesia, New Mexico in order “to hold them until their expedited removal orders are effectuated.” But this statement is completely consistent with standard doctrine: He was saying that detention was being used in order to ensure that removal could be conducted quickly and efficiently. It is the expeditious removal itself that was intended to be the deterrent.

None of this is to say that the federal government is forbidden to mention an obvious fact: If the federal government were to cease detaining illegal entrant families, this would increase the likelihood that others would decide to risk qualify for making the trip and that an adult might well be encouraged to bring a child with her in order to special rules that discourage detention for families in particular. Indeed, failing to point that out to a judge considering an order that would forbid the federal government from detaining families would be inappropriate.

Dissenting Statement of Commissioner Heriot

quotes one of our witnesses, Mary Meg McCarthy, executive director of Heartland Alliance’s National Immigrant Justice Center, as follows:

According to a study conducted by the Vera Institute of Justice, detained immigrants who participated in an alternative to detention (ATD) program had a 91 percent appearance rate at all required hearings and a 93 percent appearance rate for asylum seekers. (Report at 53.)³⁹

Ms. McCarthy uses the Vera Institute study to bolster the position that the nation should cut back dramatically on detention and instead rely on those who might otherwise have been detained to appear voluntarily at their hearings. Her view has obviously been favorably received by Homeland Security Secretary Jeh Johnson (and evidently by the Commission and its staff too). Whether the new policies deemphasizing detention are grounded in good sense depends largely on whether she is right about the risk of flight. Is the rate of voluntary appearance (and ultimate compliance with order of removal) a problem? Will it grow to be a problem if detention is de-emphasized?

There are many things wrong with Ms. McCarthy’s citation to the Vera Institute’s study (and the Commission’s baffling decision just to quote her and not examine the actual study). I will discuss only a few of the reasons that the compliance figures she cited are too high—indeed much too high—when used to predict compliance when detention is de-emphasized.

(1) The Vera Institute study was intended to examine and compare compliance rates for several different categories of non-citizens. The individuals being studied had all been either (a) initially released on their own recognizance or (b) briefly detained then released to supervision, parole and/or bond. This was not a random sample of detainees. In terms of expected compliance, they were the cream of the crop—the ones somebody has already determined to be good candidates for non-detention methods. The immediate purpose of the study was to determine whether intensive supervision increases the likelihood of compliance relative to never-detained or released individuals who were not intensively supervised.⁴⁰ It was not intended to help determine whether the detention of other non-citizens with higher-risk profiles was unnecessary or undesirable.

³⁹ At least the staff-written part of the report mentions the issue. The statements of the Commissioners who voted in favor of the report do not address it at all. Given the importance of the issue, their silence is difficult to defend.

⁴⁰ While 91% of the intensively supervised non-citizens attended all their hearings, only 71% of the comparison group did. For the group designated “asylum seekers”, the corresponding numbers were 93% and 78%.

- (2) The categories of non-citizen under study were (a) asylum seekers who presented themselves to immigration authorities at an international airport, primarily Kennedy International; (b) criminal aliens, most of whom were lawful permanent residents, but who had been convicted of a crime;⁴¹ and (c) undocumented workers apprehended at work sites. All three groups were drawn from the New York area; all three have greater incentives to cooperate with immigration authorities than the typical illegal entrant. Members of the first group stood a reasonable chance of being granted asylum—higher than the typical asylum seeker who enters the country surreptitiously outside of an approved port of entry—and hence had reason to cooperate with authorities. The latter two groups consisted of individuals had put down roots in a particular community. The median age of the criminal alien group was 36, and their median time in the United States was 14 years. More than half were from the Caribbean. The typical undocumented worker was in his late 20s and had been in the United States about 5 years. Many owned or leased homes, and had children in school, bank accounts, cars and other indicators of an ordinary American life. They differ substantially from individuals who attempted to enter the country surreptitiously and only upon apprehension claimed asylum.
- (3) The study has little validity even as a measurement for the effectiveness of intensive supervision relative to the control group. Those undergoing the intensive supervision were volunteers, while the control groups included individuals who declined the opportunity to participate. Consequently, it is not clear that the gaps in hearing attendance between the intensively supervised and the control groups were telling. The participants in the intensive supervision programs were not just the cream of the crop (relative to persons the immigration authorities chose to detain instead), they were the *crème de la crème* (relative to persons who were given the opportunity to forgo detention, but who were unwilling to submit to intensive supervision).
- (4) Attendance at hearings is not the same thing as compliance with an order to leave the country. In addition to those who failed to attend their hearings and were thus presumed not to have complied with the court's order of removal in absentia, the report makes clear that there were also a significant number of persons undergoing intensive supervision who attended all hearings, but did not in fact depart the country as required by law.⁴² This is consistent with a 2003 study done by DOJ's Inspector

⁴¹ The criminal aliens in the study sample were all apprehended or detained before the beginning of mandatory detention in 1998. Vera Institute at 33.

⁴² The Vera report did not have a lot of data on compliance. At the time it was completed, many of the cases it had followed were on appeal, so it was not clear whether orders to remove or grants of voluntary departure would ultimately be complied with or not. But ten intensively supervised individuals—one asylum seeker and nine undocumented workers—who were granted voluntary departure had been given departure dates sufficiently early for Vera to be able to track whether they had complied. Of the ten, Vera reported that seven had departed as required, one departed late and only after a threat of re-detention had been communicated to her relatives, and two did not depart at all. Vera at 60-61. The notion that the 91% of intensively supervised

Dissenting Statement of Commissioner Heriot

General, which found that while almost 94% of detainees with final orders of removal were deported, only 11% of those not detained who were issued final orders of removal actually left the country.⁴³ Lamenting the low rate at which orders of removal are actually obeyed by those not detained, former immigration judge Mark H. Metcalf has stated, “The man who ... disobeys an order to leave the United States does so knowing that the court that can order him removed cannot enforce its judgment.”⁴⁴

I believe there are statistics out there that, while still highly imperfect, would be more useful than the Vera Institute’s. In March of this year, the EOIR issued its FY 2014 Statistics Yearbook. Appendix P of that document reports the rates of “in absentia” orders in completed cases.

The figures are not happy ones for those who argue detention is unnecessary. According to the figures in the FY 2014 Statistics Yearbook, 39% of initial case completion orders in cases in which the alien was initially detained and then released on bond or on the alien’s own recognizance were issued in absentia.⁴⁵ That means that 39% of “released aliens” failed to show up for their final hearing before the trial-level immigration judge. The judge thus issued an order of removal “in absentia,” which was almost certainly never carried out. As the Inspector General’s 11% figure suggests, the federal government does not have the resources necessary to ensure the deportation of those aliens who do show up for their hearings, much less seek out and deport aliens subject to in absentia orders. Similarly, 31% of initial case completion orders in cases in which the alien was never detained are issued in absentia.⁴⁶

But, once again, even those statistics understate the problem. For one thing, they are calculated as a percentage of *all case completions* before the trial-level immigration court rather than all orders of removal. Only 72% of all orders issued in connection with initial case completions are orders for removal. The category “all case completions” also includes

persons who appeared at their hearings will also comply with the ultimate outcome of their case is thus false. It is also worth pointing out that Vera states that of the eight people who left the country as ordered, “five were interviewed prior to departing and three were interviewed via telephone after they had returned to their home countries.” Vera at 61, n. 53. If I am interpreting this correctly, there may even be some question as to whether the five departed the country as ordered.

⁴³ Office of the Inspector General, U.S. Department of Justice, The Immigration and Naturalization Service’s Removal of Aliens Issued Final Orders, Rep. No. I-2003-004 (February 2003).

⁴⁴ Mark H. Metcalf, *Built to Fail: Deception and Disorder in America’s Immigration Courts* 9 (October 2011).

⁴⁵ This number has been increasing steadily over the last few years—22% (FY 2010), 28% (FY 2011), 30% (FY 2012), and 33% (FY 2013). See Executive Office of Planning Analysis & Technology, Office for Immigration Review, U.S. Department of Justice, FY 2014 Statistics Yearbook at P3 (March 2015).

⁴⁶ *Id.* at p. 2.

cases in which asylum or other relief in the alien's favor was ultimately granted.⁴⁷ An alien with a strong case is much more likely to show up for his hearing than an alien with a weak case. So the percentage of released aliens who are able to dodge an order of removal by the simple expedient of not showing up for a final hearing is much higher than 39% (and much higher than 31% for never-detained aliens).⁴⁸

Another angle of the same problem has been flagged by the Office of the Inspector General for the Department of Justice. According to that office, "administrative events such as changes of venue and transfers are reported as completions even though the immigration courts have made no decisions on whether to remove aliens from the United States." As a result, according to the Office of the Inspector General's report, "a case may be 'completed' multiple times." Indeed, out of the large sample (1785) of so-called closed cases looked at by that office, about 27% turned out to be simple transfers and other non-final administrative dispositions.⁴⁹ This will cause compilations like the FY 2014 Statistics Yearbook to understate the rate of in absentia orders of removal. The more time that goes by, the more likely it is that an alien will fail to appear for a hearing. If a single alien appears at his first hearing, at which the immigration judge simply transfers his case, but fails to appear at his second hearing at which a different immigration judge issues a removal order in absentia, it will look from the statistics that he cooperated till his final hearing 50% of the time. In fact, however, he cooperated till the end 0% of the time.

In addition, as with the Vera Institute, the FY 2014 Statistics Yearbook fails to take into consideration that an order of removal by the immigration court is not the end of the story. A significant number of aliens who attend their final hearing do not actually leave the country. In Fiscal Year 2014, 15% of all removal decisions in initial case completions were for "voluntary departure."⁵⁰ Voluntary departures are sought after, in part because they give the alien the opportunity to select his own date and method of departure. But voluntary departure is easy to abuse. The alien can simply disappear prior to the date on which he was

⁴⁷ For example, in Fiscal Year 2014, asylum was granted in 8,775 cases (6003 affirmative grants and 2772 defensive grants). *Id.* at K3-K4.

⁴⁸ Since the figures for non-removal initial case completions are not broken down on the basis of always-detained, never-detained and released, I cannot calculate how much higher. Assuming that non-removal initial case completions are spread evenly (a generous assumption) and that those who win their cases attended their hearings, the proportion of never-detained aliens whose removal order is issued in absentia would be about 43% and the percentage of released aliens whose removal order is issued in absentia would be about 53%. On the other hand, perhaps some of those who failed to show up for their final hearing would have won their cases, so that might drive the numbers down somewhat.

⁴⁹ U.S. Department of Justice, Office of the Inspector General, Evaluation and Inspections Division, Management of Immigration Cases and Appeals by the Executive Office for Immigration Review, I-2013-001 at i (October 2012). The problem might well disproportionately affect released aliens, since their moving out of detention or around the country could be the cause of the transfer. It is hard to say what effect this would have on the numbers other than that it could be substantial.

⁵⁰ *Id.* at O1.

Dissenting Statement of Commissioner Heriot

required to leave before. In addition, about 10% of all initial case decisions of immigration judges are appealed to the Board of Immigration Appeals.⁵¹ Note that this figure seriously undercounts the proportion of removal orders that are appealed. Grants of amnesty don't get appealed. Other kinds of final immigration court action, like transfer and in absentia, are also unlikely to be appealed. Appeals are mostly from non-absentia removal orders. If all 13,547 appeals were from non-absentia removal orders, then the rate of appeal would be 19%. Since only 30% of aliens whose cases are on appeal are detained, this provides another opportunity for aliens to simply disappear into the nation's cities, towns or rural areas. If the observations of the Inspector General were correct, many take advantage of this opportunity.

It is not clear what justification can be offered for the failure to cite the FY 2014 Statistics Yearbook (or for failing to discuss its defects) in this report and for citing Ms. McCarthy's description of the Vera Institute report instead. It is also not clear why, given the decision to quote Ms. McCarthy's description of the Vera Institute study, this Report does not scrutinize in the slightest its conclusions or the effort to apply those conclusions to the issues in this report.

But the most puzzling aspect of this Report's treatment of flight risk comes in the next thing Ms. McCarthy told the Commission, which is also quoted in the body of the Report. Immediately after her reference to the Vera Institute study, she stated:

Additionally, a more recent study suggests that a majority of migrant children who were released from detention had a high appearance rate as well. (Report at 55.)

Only a "majority" had a "high appearance rate"? That doesn't sound all that helpful to the case against detention. And exactly what study is being cited here? Wasn't anyone on the Commission staff curious before incorporating Ms. McCarthy's statement into the report? Did it really find that only "a majority" of migrant children have a "high appearance rate"? If so, isn't that an admission that de-emphasizing detention will be a disaster for compliance? Virtually all detained persons—as in 100%—show up for their hearings.

I therefore requested the Commission staff to provide a citation to the study that Ms. McCarthy was referring to. The best that could be done was to provide me with Ms. McCarthy's e-mail address. In response, Ms. McCarthy kindly pointed to *Taking*

⁵¹ Id. at V1. The total number of immigration judge decisions was 136,396 and the number of appeals was 13,547.

Attendance: New Data Finds Majority of Children Appear in Immigration Court by Mark Noferi, a legal writing instructor at Brooklyn Law School.⁵²

But it turns out that this article does not demonstrate the point for which it was cited. It found that “[c]hildren have been designated *in absentia* only 18.4% of the time” and that therefore “in 82.6 percent of cases, the child has either appeared in court or insufficient evidence exists for removal or relief, so far.” But this includes cases for which no final hearing in the immigration court has been held (or indeed no hearing at all). What Noferi really means is that in 82.6% of cases, ***the immigration court has not designated the child in absentia yet***. When it comes to “closed cases” at the immigration court level, the *in absentia* rate for children rises to 31.2% even according to Noferi.

A 31.2% rate is not small. Imagine, for example, what the public’s response would be if 31.2% of individuals accused of a crime skipped bail and thus did not attend their trial.⁵³

Even 31.2% understates the problem. The 68.8 percent of children who presumably attended their final hearing in immigration court includes (1) children whose case for asylum or other relief in their favor was strong, such that it was very much in their interest to attend; (2) children who planned to appeal an adverse decision and who therefore knew they would likely have other opportunities to melt into the background before any final order of deportation; and (3) children who were granted voluntary departure and hence would have additional opportunities to disappear. If the issue is what proportion of the children in the immigration court system who under our law should have been deported are able to ultimately elude deportation, the number is much higher than 31.2%.⁵⁴

⁵² Mark Noferi, *Taking Attendance: New Data Finds Majority of Children Appear in Immigration Court* (July 18, 2014)(using government data from Syracuse University’s Transactional Records Access Clearinghouse (TRAC) program).

⁵³ There seems to be a general agreement that numbers like that would be unacceptable in the criminal context. See, e.g., *Skip Bail, You Go To Jail* (Editorial), *Phil. Inquirer* (May 9, 2012). Approximately, one-quarter of all released felony defendants fail to appear at trial. Eric Helland & Alexander Tabarrok, *The Fugitive: Evidence on Public Versus Private Law Enforcement from Bail Jumping*, 47 *J.L. & Econ.* 93 (2004)(using figures from the State Court Processing Statistics program of the Bureau of Justice Statistics at the U.S. Department of Justice). Some of these failures to appear are due to sickness or forgetfulness and are quickly corrected, but many represent planned abscondments. Because this is completely unacceptable, considerable resources are put into getting these defendants into court for their trials. Still, after one year, some 30 percent of the felony defendants who initially fail to appear remain fugitives from the law. In absolute numbers, some 200,000 felony defendants fail to appear every year, and of these, approximately 60,000 will remain fugitives for at least one year. It is hard to understand why anyone would not regard the much higher rates of non-attendance in the immigration context as a problem that needs fixing.

⁵⁴ The problem of counting transfers as completed cases flagged by the Office of the Inspector General for the Department of Justice and discussed above corrupts Noferi’s data too. See text and note *supra* at n. 34. This will cause figures like Noferi’s 31.2% to understate the rate of *in absentia* deportation. The more time that goes by, the more likely that an alien will fail to appear.

Dissenting Statement of Commissioner Heriot

Perhaps most significantly, the data used by Mr. Noferi includes cases in which the children were detained. For those children, attendance at hearings is virtually 100 percent. If those cases were separated out from the cases of never-detained or released children, the in absentia rate for the never detained or released children would climb higher.

Mr. Noferi nevertheless appears to take the position that his data trump an estimate by EOIR Director Juan P. Osuna in his testimony before the Senate Committee on Homeland Security and Government Affairs on July 9, 2014. Mr. Osuna cited a much larger figure--46 percent in absentia rates for unaccompanied children—in response to a question by Senator Jon Tester.⁵⁵ He stated:

There has been a lot of talk about the in absentia rate. The numbers that have been thrown about actually are not accurate. There are ... there is ... a significant number of unaccompanied minors ... juveniles that don't end up in immigration court. The current rate is 46%, in absentia rate.⁵⁶

I can't tell where Mr. Osuna got the 46% figure, so it is difficult for me to critique it. But it is worth noting that knowledgeable individuals have accused EOIR (though not Osuna personally) of skewing figures for non-appearance to make them appear less troubling than they really are, so it is important not to assume that the figure could not also climb higher.⁵⁷

In an interview on the PBS News Hour on July 8, 2014, Senator Jeff Flake stated that the non-appearance rate for children is a whopping 90%.⁵⁸ Again, however, it is unclear how that number was arrived at.⁵⁹ What can be said is that, in context, Flake was referring to

⁵⁵ EOIR has been criticized for calculating its failure to appear rates in misleading ways. For example, according to former immigration judge Mark H. Metcalf, EOIR sometimes includes detainees in its calculation (or at least it was doing so when he wrote about the issue in 2011). See Mark H. Metcalf, *Built to Fail: Deception and Disorder in America's Immigration Courts*, Center on Immigration Studies 5 (October 2011). Detainees, of course, virtually always appear as required. Given the policy question at issue is whether releasing detainees will increase failure to appear rates to unacceptable levels, it would be odd and perhaps even disingenuous to include them in the calculation. I cannot tell from Osuna's testimony whether that is the case here or not. Neither can I tell whether it was the case that it affected the rate a little or a lot, since I do not know how many (if any) of the children Osuna was referring to were detained. This is something the Commission could have looked into over the course of the year during which this report was in preparation.

⁵⁶ Senate Committee on Appropriations, "Emergency Funding for Unaccompanied Children," available at <http://www.c-span.org/video/?320318-1/hearing-emergency-border-security-funding>.

⁵⁷ Mark H. Metcalf, *Built to Fail: Deception and Disorder in America's Immigration Courts*, Center on Immigration Studies (October 2011).

⁵⁸ See Migrants Jam L.A. Courtroom for Deportation Hearing, npr.com (August 12, 2014)(When undocumented children are picked up at the border and "told to appear later in court where their case will be adjudicated ... 90 percent do not then show up."), <http://www.npr.org/2014/08/12/339752981/migrants-jam-la-courtroom-for-deportation-hearing>.

⁵⁹ Senator Flake's numbers may ultimately be traceable to a Newsmax article. Tori Richards, Flood of Illegal Immigrants Coming to a Neighborhood Near You, Newsmax.com (July 1, 2014)("A senior Los Angeles

children picked up along the Mexican border—usually nationals of El Salvador, Guatemala, Honduras or Mexico. This is hardly a cross-section of the cases that reach immigration courts. Since the “no show” rate for released or never detained children who walk across the Texas border from these countries may be higher than it is for immigrants generally, his figure is not provably wrong.

But whether Senator Flake’s figure had a solid basis in the evidence when it was made it has turned out to be consistent with figures that are starting to come to light in connection with last summer’s influx of children. Investigative reporter Robert Arnold of Houston’s KPRC-TV (an NBC affiliate) pressed EOIR for figures on appearance rates for accompanied and unaccompanied minors who crossed over the Texas border during that period. Here is what he reported about the data he received from EOIR:

- Thousands of families from Central America caught crossing the border had to be released on their own recognizance because there wasn't enough detention space. All were ordered to appear before an immigration judge at a later date.
- According to the EOIR, of the 30,467 families and unaccompanied children caught crossing the border between July and October, only 22 percent have received a final disposition as to whether they will be allowed to stay in the U.S. or be deported.
- Of the 15,614 families caught crossing the border, but not detained, 4,197 have been ordered removed from the U.S. **However, 96 percent of those removal orders were done "in absentia."**
- The EOIR states an "in absentia" order is done when a person fails to show in immigration court.
- Out of the 1,428 families caught crossing the border and detained, 21 have been ordered removed. Forty-three percent of these orders were done "in absentia."
- Of the 13,425 unaccompanied children caught crossing the border between July and October, 1,671 have been ordered removed from the U.S. **Ninety-two percent of these orders were done "in absentia."**⁶⁰

It is possible that these astonishing numbers—96% and 92%--will come down from their stratospheric levels as more cases are resolved. Perhaps immigration judges are trying to get the no-shows off their dockets as quickly as possible. Nevertheless, it is important to

County Sheriff’s detective who routinely deals with illegal immigrants said a “massive number—80 to 90 percent—do not show up for deportation hearings”), <http://www.newsmax.com/US/Illegal-immigrants-neighborhoods-US/2014/07/01/id/580341/>. If so, it is merely a rough estimate from an individual with some general experience, but no direct access to accurate records.

⁶⁰ Robert Arnold, Thousands of Recent Texas Border Crossing Cases Still Undecided, Click2Houston.com (December 19, 2014)(bolding added), <http://www.click2houston.com/news/thousands-of-recent-texas-border-crossing-cases-still-undecided/30324648>.

Dissenting Statement of Commissioner Heriot

recognize that even if they come down substantially, they will still be high. Indeed, every serious effort to gauge general non-appearance rates has yielded figures that are very high—whether we are talking about Arnold’s rates of 96% for families with children and 92% for unaccompanied children, Osuna’s 46% rate for unaccompanied children, or the FY 2014 Statistics Yearbook rates of 39% for released aliens and 31% for never-detained aliens. Moreover, the non-appearance rates are just the beginning of the story. Those who are present for their final hearing do not necessarily obey removal orders. Indeed, what little data we have suggest that very often they do not.

We will probably never have perfect information on these matters. And even if we did, the data would not necessarily lead us into agreement on what our detention policy (or our immigration policy generally) should be.⁶¹ But better data (and a better understanding of that data) would surely be helpful in sorting through these difficult issues. The Commission has not added to our understanding in this area. Indeed, by simply quoting Ms. McCarthy’s casual citation to two statistics, neither of which directly apply to the issue of how de-emphasizing detention will affect the problem of non-appearance, the Report misleads.

The Report states, “The Commission believes that there is no evidence indicating that ICE or CBP need to detain unaccompanied alien children on a wholesale basis and in the absence of the risk factor analyses cited above.” Report at 55. The statement is nonsense. The risk of flight is high among *virtually all* individuals who attempt to cross the border surreptitiously. It is tied to the community like real estate ownership, a good job, children in school, or even the fact that one has never lived anywhere else in one’s life that make an individual low risk for flight. Illegal entrants, even those with relatively good prospects for asylum, almost never have such ties. Insofar as they had such ties to a different community, they have abandoned them. Alternatively, an individual with few ties to the community, but a long record of good behavior, i.e. no record of criminal arrests or convictions along with affirmative record of good citizenship through service to church, school, military, etc., may be a good prospect. But ICE has no access to such records. They cannot separate the ethical from the unethical among those in their care.

It is already the case that ICE attempts to separate the best risks from the worst ones. Given the high rates of non-appearance, it is obvious that even now ICE is releasing large numbers of individuals who do not show up for their hearings. Releasing those who are thought to be higher risk will likely drive it still higher.

I note that Commissioner Achtenberg states, “The Commission has not heard adequate explanations of the processes by which detainees’ eligibility for release on bond and those by which the amounts of the bond are determined.” And she is right, though the reason that

⁶¹ I express no opinion on any ultimate policy issue related to this report.

she is right is that we were insufficiently diligent in trying to obtain that information. What I don't understand is how she and four other members of the Commission were able to vote for a recommendation that "[t]he process by which bond amounts are set and the range of the bond amounts are inconsistent and perhaps punitive." Achtenberg Statement at 169. How does one know if one doesn't understand the processes?

D. Most of the Meager Independent Investigation Undertaken by the Commission Didn't Make it into the Report.

As I briefly discussed above, Commission members and staff actually did visit the detention facilities at both Karnes and Port Isabel. But with a few trivial exceptions, these trips didn't get mentioned in the report. So allow me to share the material from my notes and my recollections of our tour. In some cases, my notes and recollections have been supplemented by the notes of Carissa Mulder, special assistant to my colleague Peter Kirsanow, who accompanied me and the other Commissioners and staff members on the tour. Bear in mind that I anticipated that the staff-written portion of the report would discuss these trips in greater detail and that I would not have to write about Karnes or Port Isabel myself at such length. Still, I believe that we obtained some information that is worth memorializing.

1. Karnes County Residential Center

I was pleasantly surprised by Karnes. It is a 76,960 square foot facility with a capacity to hold 532 persons, although on the day we visited, May 4, 2015, it had only 301 residents. Owned and operated by GEO, it is located about 50 miles southeast of San Antonio and is currently under contract with ICE to serve exclusively as an immigration detention facility (in contrast to facilities like county jails, which occasionally serve as both immigration detention facilities and jails).

Both employees of GEO and of ICE work at Karnes. Near the entry, there is a separate office for each. GEO employees are at the facility around the clock. Approximately 25 to 30 ICE employees work on one or the other of two shifts. No one from ICE is present from midnight to 6:00 a.m., but someone is always on call.

Karnes opened in February of 2012 as a men-only facility. But in August of 2014, it reopened as a family facility. "Family" in practice means mothers and their children. Karnes does not house men, women without children, or unaccompanied children. By and large the residents at Karnes were apprehended by the Border Patrol trying to cross the border from Mexico. They are most likely to be citizens of El Salvador, Guatemala, Honduras or Mexico.

Dissenting Statement of Commissioner Heriot

Our tour of Karnes was in part conducted by ICE Assistant Field Director Juanita Hester. She rejected the use of the term “detainee” and requested that we use the term “resident” to refer the women and children here.

Karnes is not a work of architectural splendor. Like many elementary schools, it is made of (painted) cinderblock. But it is clean and bright and new. When we started our tour, there was a man at work busily cleaning the glass doors in the interior. A large sign declaring that the facility had gone 280 days without an accident hung on the wall.

The intake area has “Bienvenidos” written in large letters as well as pictures of SpongeBob SquarePants, the sun, a cactus and a giraffe whose neck contains the markings of a ruler (thus allowing children’s height to be measured). The staff there seemed pleasant.

When we visited the intake area, there was not a lot going on. But when a group comes in from the Rio Grande Valley, it is said to be quite lively. Our guide told us they like to keep the new groups down to 30 at most.

New arrivals are taken to a waiting room, where a “Know Your Rights” video in both English and Spanish is on constant loop, just off the main intake area. The waiting room was decorated with pictures of a rainbow, butterflies, clouds, fish and various other things that children are thought to enjoy. It also contains two bathroom stalls, which were equipped with plenty of toilet paper, feminine sanitary supplies, paper towels, hand soap and a trashcan. The mirror was made of shiny metal rather than glass, presumably because glass can be a hazard in institutional settings like this one.

Showers are available at this point. Each family is allowed privacy for its shower, which can be organized as desired. They can shower together, or a mother can shower with any very young children and then stand watch as any older children shower. Flip-flops, baby bottles, diapers, baby shampoo, brushes, body lotion, and pacifiers are also available.

Anyone who arrives with large luggage or valuables can store them in a secure area. Identification cards and materials are put on file to prevent them from being lost or stolen.

Four telephones line one of the walls in the intake area. Everyone is permitted to make a certain number of calls. My notes do not make clear how many.

We were told that new arrivals get two separate orientations—one from GEO, which deals with the facility, and one from ICE, which deals with the immigration process. Residents also receive a handbook, though since some of the residents are illiterate, it does not always do them any good. Particularly with the illiterate residents, the oral presentations are likely to be more effective. Although some of the residents’ native language is indigenous

(K'iche' was mentioned in particular), the vast majority of indigenous language speakers understand Spanish anyway.

New arrivals also get a quick medical screening. A more complete screening is mandated to come within 14 days, but at Karnes it is in fact done within 24 hours.

Among other things, every arrival age 2 or older gets a chest x-ray for tuberculosis during the initial medical screening. If I understood correctly, the x-ray is immediately forwarded to experts at the University of Maryland, who preliminarily analyze the results almost instantly and always before the intake exam is over. Maryland occasionally returns a preliminary positive reading in which case the patient is confined to a negative pressure room until a final reading is provided. A negative pressure room is one in which the ventilation system pumps the air in the room outdoors rather than letting it circulate within the facility. Final results are always available within 4 to 12 hours. Karnes has never had a positive final reading for tuberculosis.

In theory, a resident can refuse the tuberculosis test for herself or her children, but nobody ever does. If someone did, the staff would simply observe them (as they observe persons under age 2) for signs of tuberculosis. On the other hand, residents refuse immunizations quite often—a very troubling sign. I should note that part of the reason that there were only 301 residents on the day the Commission visited and not 532 (the facility's capacity) is that there had been a chicken pox outbreak. For a six-week period, the Karnes facility accepted no new residents (although it did release residents into the country during that period.)

There was in fact a little girl and her mother in the negative pressure room when I walked by. I am not sure if they were there on account of a preliminary positive reading for tuberculosis or for some other reason, but neither appeared to be ill. Both mother and daughter were happy and smiling. They waved as we walked by.⁶²

The apparently well-equipped clinic has 28 nurses, both registered nurses (14), including one full-time nurse practitioner, and licensed practical nurses (14). They are there not just to conduct the intake screenings, but also to look after the health of the residents generally. There is a full-time physician on the staff who reviews each resident's medical intake chart, and there is a psychologist on staff as well. A psychiatrist is available on an as-needed basis. Among other things, the clinic has medical observation rooms, each with two beds, a bath area, a television and one of the ubiquitous shiny steel mirrors. The clinic is open on a walk-in basis twenty-four hours a day, seven days a week. The nearest hospital is four miles away.

⁶² My colleague Commissioner Achtenberg writes that "Commissioners observed very young children appearing lethargic and depressed." Achtenberg Statement at 161. I did not see that. The children at the meeting she describes struck me as well-behaved.

Dissenting Statement of Commissioner Heriot

A couple of children were in the clinic as I passed by. They seemed happy and greeted us with “Buenos Dias.”

Everyone sees a dentist within 14 days of arriving. The facility has a dentist who comes on site, but we were told that “important” dental work (which included major dental work and pediatric dentistry) is done off site.

As I discussed in my introduction, one of the first things to strike me at the beginning of our tour was the room that we passed by filled with rows and rows of clothing and shoes. After visiting the intake area and the clinic, we came back to this room. Our guide told us that new residents are given the opportunity to select six outfits for each of their children and for themselves prior to their showers at intake. The clothing is new—something that seemed to surprise some and possibly all the members of the Commission present (including me). I observed tags on clothing from well-known makers of children’s clothing like Carter’s and Fisher Price—all of it purchased by GEO. As for their old clothing, GEO washes it while they are taking their intake shower and returns it to them.

Once a week, there is an opportunity for shoe exchange. Children’s feet grow fast. But if a child loses a shoe or if the mothers need additional shoes or clothing at other times, the opportunity is available. All in all, it is hard not to conclude that this is a nice place.

Everyday life at Karnes is conducted largely in rooms that open onto the large courtyards with gazebo-like structures, a soccer field and picnic tables.⁶³ I believe there are two such courtyards. With the exception of a number of small rose bushes and a smallish tree or two, there was not a lot of landscaping in the courtyard we saw. But it was fresh and airy, and the rose bushes and trees will grow.

While we were out there in one of the courtyards several women excitedly ran up to Chairman Castro to tell him (in Spanish) about their concerns. My Spanish is a little rusty (although the Chairman kindly helped me out by translating some of what was being said). The gist of it seemed to be that they were tired of being detained at Karnes and that they wanted out. Who can blame them? One woman said she had been there 11 months and seen an immigration judge more than 20 times. If I understood her correctly, a judge or other officer had concluded that she was not in credible fear for asylum purposes, but the opposite conclusion had been drawn with regard to her son (presumably by a different judge or officer). It is easy to see how this would be troubling, but since the subject of this

⁶³ Commissioner Achtenberg is concerned that “children have limited access to outside play in a courtyard fully surrounded and enclosed by buildings.” Achtenberg Statement at 162. My feeling was the other way. Many American children must walk blocks to reach a park as large and spacious as the courtyards at Karnes. These children have such a space right out their front door.

report is conditions at detention facilities and not the immigration courts, I will refrain from further commenting.

Meals are served in a dining room with tables for four and plastic chairs. School-aged children eat first. Mothers and their younger children come next. We were told that at dinner and on weekends, families eat as a group.

Efforts are made to adjust menus to the tastes of the residents. For example, we were told that the facility used to serve pinto beans, but the menu planners learned that the residents usually preferred black beans and therefore have tried to serve black beans when they can. They also learned that most residents preferred corn tortillas to flour tortillas and that they liked to eat bananas and plantains.

We observed children eating lunch. There was a salad bar. Lunch that day was shredded chicken, peas and carrots, mashed potatoes with gravy, white beans, bread. Dessert was a baked apple dish, like a Brown Betty. Butter (or was it margarine?) was available. It looked and smelled good. I was hungry.

The Chairman engaged some of the children in Spanish (although one boy said he preferred English and others appeared to speak it too). They look happy and pleased to be the recipients of the Chairman's attention. Some said they wanted pizza. "What are they saying in Spanish?" I asked. "I want out of here," replied the Chairman good naturedly. I understand the feeling. But the problem did not appear to be detention conditions as opposed to detention itself.

GEO runs a school for the children, although we didn't see much of those classes. There is also an attractive library—nicer than the library at my elementary school—with lots of books in both English and Spanish. The colorful carpet beneath one of the tables has a "We are the World" theme with children of various nationalities holding hands surrounding a map of the world. Nearby is a room with 11 computers that are available to get e-mail via Yahoo and Gmail and to visit other web sites. Like computers in government offices, these won't allow users to log on to social media or other sites forbidden to government employees. We were told that they are used by the children quite a bit, but not so much by their mothers.

There is also a room with 10 computers dedicated to Lexis/Nexis and to Westlaw. When we passed by, nobody was in there except an employee. We were told that the men used to use it back when Karnes was a detention center for adult males. But it gets hardly any use now that Karnes is a family facility.

The living quarters for the residents were Spartan, but clean and comfortable. The rooms I visited were said to be typical and had 4 bunk beds as well as toys for the children. No

Dissenting Statement of Commissioner Heriot

children under 10 are permitted in the top bunks. The mattresses had blue leatherette coverings. Two tables with four chairs each were in each room with a chessboard printed on at least one of the tables. The bathroom area had a toilet, shower and sink. Our guide explained that they try to combine groups by the age and sex of the children. Lights are turned out at 10:00 p.m.

At that point, if I understood correctly, adults may go out to a gathering room, which is equipped with a television, a couch, two refrigerators, a microwave oven, a sink, a pencil sharpener, four telephones, a playpen, and toys, but the gazebo in the courtyard is off limits (since conversations in that area might disturb the children).

The Karnes staff was kind enough to post a sign-up sheet a couple of days before our arrival for residents who wanted to speak directly to us. Quite a few women signed up—probably about 20. But their complaints tended not to be about Karnes, but about the Border Patrol and the various locations they had been taken to prior to coming to Karnes. One woman, for example, was tearful on account of the lack of clocks at the place she was initially taken by the Border Patrol. Her son was running a fever when they were picked up and had therefore been given medication by the doctor. The medication needed to be taken on a certain schedule. She therefore needed to know what time it is. She said the guard at that place was rude and uncooperative.

Among those who complained about circumstances at Karnes, the complaints tended to be minor:

- One woman from Mexico said that the Border Patrol had not treated her badly and that she has been treated well at Karnes. She appreciated the Zumba fitness classes and other adult education classes offered there, but she wished they would offer classes in how to speak English. (We were told by facility staff members that English and life skills classes that teach residents such things as “how to open a checking account” are available, but seldom attract more than four or five students.)
- Another woman from Honduras was concerned that her 18-month-old baby didn’t like the food or the milk served at Karnes. She was therefore having to breastfeed him. She stated, however, that she and her children are treated very well at Karnes, and numerous women in the room nodded in agreement.
- Several women were unhappy that they are not allowed to entrust their children to other residents while they attend to other things.

The Chairman asked if they had access to telephones. They nodded yes. He also specifically asked the women whether they had had been sexually harassed with at Karnes. They all said no, and said they had been treated well.

Their response to his question about sexual harassment was especially important given the accusations that had been leveled by one of our briefing witnesses, MALDEF staff attorney Marisa Bono. In her written testimony, she stated that “a least a few women detained at the Karnes Facility alleged that sexual abuse was ongoing since the facility opened in August of 2014, including:

- “Karnes Facility guards and/or personnel removing female detainees from their cells [sic: residents live in dormitory rooms at Karnes, not cells] late in the evening and during early morning hours for the purpose of engaging in sexual acts in various parts of the facility;
- Karnes Facility guards and/or personnel calling detainees their “novias” or “girlfriends,” and using their respective position and power over the highly vulnerable detained women within the detention facility by requesting sexual favors from female detainees in exchange for money, promises of assistance with their pending immigration cases, and shelter when and if the women are released; and
- Karnes Facility guards kissing, fondling, and/or groping female detainees in front of other detainees, including children.” (Written Testimony of Marisa Bono at 2 [Jan. 30, 2015].)

According to Ms. Bono, MALDEF and other organizations sent a joint letter to the U.S. Department of Homeland Security, ICE, the Karnes facility and GEO Group, Inc. complaining of these incidents. They were later informed that the Office of the Inspector General would be conducting an investigation. According to Bono, “Despite repeated requests, Complainants have no additional information regarding the details of the investigations.”

Even more significant than the answer to the Chairman’s informal question about sexual harassment was the Inspector General’s report on his office’s investigation of the MALDEF et al. letter. Released almost a month before Ms. Bono’s testimony, it found no inappropriate conduct.

The Inspector General states that OIG agents had “interviewed 33 witnesses and spent 380 hours investigating the allegations.” Among other things, they found:

- “Each of the female detainees identified by the complainant denied they had ever engaged in any form of inappropriate activity, to include sexual acts, with any Detention Officers. They also each denied having been escorted into a laundry room, restroom, or other area to engage in any sexual activity or having received any money, benefits, or preferential treatment in exchange for sex or anything of value.
- The female reportedly impregnated by a Detention Officer denied the allegation and voluntarily submitted to a pregnancy test which was negative.

Dissenting Statement of Commissioner Heriot

- Review of over 360 hours of time lapsed surveillance video footage of the laundry room and day room areas failed to confirm that any of the detainees were escorted to those areas after hours by Detention Officers.
- Review of the Detention Facility’s commissary account records determined that none of the deposits into these accounts were made by Detention Officers.
- Each of the Detention Officers who could have been referenced by the complainant denied the allegations. Specifically, each denied engaging in any misconduct with any female detainee, including any apartment rentals, deposits into commissary accounts, after-hours escorts, having sex or sexual relations with female detainees, impregnating any female detainee, or providing preferential treatment in exchange for sex.
- The responsible Supervisory Detention Officer stated that he was unaware of any inappropriate relationships between Detention Officers and detainees and would have immediately reported such activity.
- Interviews of managerial personnel at the facility disclosed that no female detainees had reported any incidents concerning any form of misconduct against any of the facility’s employees.”

The following conclusions were drawn by the OIG:

- “We found no evidence to substantiate the allegations and were unable to identify a victim or suspect in this matter.
- Review of video footage revealed that two [expunged] Detention Officers were engaged in a romantic relationship with each other and had engaged in inappropriate physical contact in the laundry room while on duty. When presented with this information, Federal and State prosecutors concluded that no violation of Federal or State statute had occurred. Both employees [expunged] after being interviewed.
- A report of our investigative findings was provided to ICE and DHS Civil Rights and Civil Liberties (CRCL) officials before a scheduled CRCL inspection of the facility.
- ICE complied with the Prison Rape Elimination Act reporting requirements.” (Memorandum to DHS Secretary Jeh C. Johnson from DHS Inspector General John Roth dated January 7, 2015: Investigative Summary—GEO Group Incorporated Detention Facility, Karnes City, Texas at 2-3.)

There is a small courtroom at the Karnes facility. Lots of immigration hearings are held here. It looks quite official, complete with a “bar” and counsel tables and seating for observers. Our tour guide told us that about 75% claim to be in fear (and hence arguably entitled to asylum) at the border. The other 25% don’t claim it until they reach Karnes. She said the proportions used to be 50%/50%, but the coyotes have gotten more savvy and

advise the women to make their claim early. Those who fail to claim it are processed quickly and sent back over the border.

2. Port Isabel

My notes on Port Isabel are somewhat less extensive.

On May 5, 2015, our little entourage visited the Port Isabel Service Processing Center, which is located in the Laguna Atacosa National Wildlife Refuge in South Texas. It has a view of Laguna Madre and of South Padre Island. Despite the view, the windy facility looks far more like a prison than the Karnes facility. If you are looking for pictures of SpongeBob SquarePants and rainbows, this is not the place to come.

Note that some of the residents at Port Isabel are here precisely because they have been convicted of a crime. Unlike Karnes, the residents here were not all or nearly all picked up trying to cross the border illegally. Legal immigrants with green cards may be deported if they are found to have committed a crime (and are sometimes picked up while trying to re-enter the country legally after visits abroad). Some of those at Port Isabel fall into that category.

We began our visit with a meeting with Francisco Venegas, Facility Assistant Field Office Director, Pedro Olivarez, who is head of detention, and Michael Watkins. I did not catch Mr. Watkins' title, but he apparently used to be the top officer at Port Isabel and has since been promoted to a regional position. During our tour, several individuals, including one or two detainees, greeted him warmly as someone they had not seen in a while.

We learned that upon arrival at Port Isabel, residents are issued jumpsuits in either blue, orange or red. About 10 to 15% of the residents wear red, which signifies that they have been convicted of a very serious crime, like rape or murder. Orange, which is somewhat less common, means the wearer has been convicted of a less serious crime that nevertheless demonstrates moral turpitude, like theft. About 75% of the residents wear blue jumpsuits, which suggests that they either have never been convicted of a crime in the United States or that, if they have, it is a minor one like possession of marijuana or simple assault.

The color of one's jumpsuit is, of course, not a perfect indicator of one's criminal record or lack thereof. Individuals who are apprehended crossing the border illegally for the first time have often not had the opportunity to acquire a criminal record in the United States, but may have one elsewhere. (For example, one of the detainees discussed *infra* at ___ said he decided to flee to the United States after he was arrested for drunk driving and had his picture shown on television, which resulted in a renewal of extortion efforts by a local gang.) But color-coding is a useful way for ICE personnel (as well as detainees) to judge the dangerousness of the individuals with whom they have to deal.

Dissenting Statement of Commissioner Heriot

If there are significant problems at Port Isabel, we failed to uncover them. Port Isabel is an ICE owned and operated facility (although some of its guards are employed by contractors, rather than ICE itself). It has a capacity of 1500, organized into five divisions with four “pods” each. Each pod has 75 beds. Port Isabel houses adult men and adult women, but there are many more men, so only one pod is used for women. The day that we visited, the facility had about 900 male residents and about 50 female. I did not see any of the female detainees during the tour.

Mr. Watkins stated that Port Isabel’s strategy for making the detainees’ stays as pleasant and problem-free as possible is to ensure that they have plenty of opportunities to engage in athletics and that he believed the results of this strategy have been very positive. Port Isabel has three recreational specialists on staff who organized recreational activities for the detainees.

Transgender “female” residents (i.e. residents who were born male and continue to present physically as male but who identify as female) are asked if they feel comfortable being held among the general male population or if they prefer to be in the “special management” unit. The option of residing in the female unit is not available to them. The special management unit contains eight, double-bunked cells and is thus not solitary confinement. Special management unit residents can move about the unit and engage in recreational activities.

There are both male and female guards at Port Isabel. Female guards are always in charge of female detainees. However, there are occasions when there are not enough female guards to cover the lunch schedule, so male guards are briefly brought in to deal with female detainees. To guard against the possibility of sexual abuse (or any other kind of misconduct), 24/7 cameras are placed throughout the facility.

Watkins conceded that Port Isabel had had claims of sexual assault, including a recent one that is still under investigation. He later told us that the facility always seeks to prosecute individuals accused of sexual assault. Every officer prosecuted for sexual assault during his five years at Port Isabel went to prison.

The intake area at Port Isabel is decidedly unattractive. New arrivals, who typically arrive during the graveyard shift from 11 p.m. to 7 a.m., are put into holding rooms with peeling paint, concrete floors and seating, and toilets. Privacy in using the toilet is limited in that the wall around the toilet goes up only about three feet. The lateness of the hour is probably a function of the fact that most individuals attempting to cross the border illegally attempt to do so under cover of night.

In 2014, Port Isabel processed 72,000 individuals. Those numbers bring home the fact that most people don't spend much time here. Since the facility's capacity is only 1500, it is clear that most individuals must be processed through very quickly.

Intake is in some ways similar to intake at the Karnes facility. Detainees get a preliminary medical screening here too, which includes a chest x-ray that is read by experts at the University of Maryland for tuberculosis. During the screening, detainees are also asked about medications and already-existing medical conditions. Their blood pressure is taken and a few other routine things are checked out.

The graveyard shift typically has 2 to 3 registered nurses and 1 to 2 licensed practical nurses to conduct the intake screenings. Altogether, the facility's clinic, which is run by the Public Health Service, has 37 registered nurses, 19 licensed practical nurses and 6 "mid-level providers" (meaning nurse practitioners or physician's assistants) split over three shifts. There is also a PHS physician on temporary duty here and a psychiatrist available via video hookup. There are two open positions for physicians on the clinic staff; they are working to fill them.

The clinic also has a pharmacy and a dental clinic with a dentist and dental assistant. All detainees get a screening to check for issues. If a medical or dental problem is detected that can't be handled on site, it is referred out to an appropriate provider in the local community. Urgent problems are handled urgently. Non-urgent problems can take a week or two. A detainee who remains at Port Isabel for a long period of time will also get regular cleanings.

Chicken pox is a seasonal problem here. For that and other contagious diseases, the facility has a large number of so-called "negative pressure" rooms in which the air is pumped outdoors and not allowed to circulate in the building with other detainees.

As at Karnes, we were afforded the opportunity to meet with detainees at Port Isabel. The participants were an interesting group—somewhere between 15 and 20 attended. On the whole, they looked older than the women who participated in the meeting at Karnes. Their stories varied in interesting ways. Curiously, *nobody* complained about conditions at Port Isabel. Nobody even appeared to be feeling particularly sorry for himself. It would have been hard not to like them.

Here is a quick summary of the individuals who spoke up during the meeting:

- (1) The first detainee to discuss his situation spoke up even before all the members of our entourage were in the room. In response to the Chairman's question about conditions, he responded (in Spanish) that if they let him out on Sundays, he wouldn't mind staying indefinitely. While a Mexican national, he had been here since a young age (11) and was a legal permanent resident. Nine years ago,

Dissenting Statement of Commissioner Heriot

however, at the age of 27, he was convicted of possession of marijuana. He also let his green card expire. When he attempted to board a flight with a family member, the expiration of his green card was discovered, along with the fact of his marijuana conviction. This landed him at Port Isabel. He wore a blue jumpsuit.

(2) Another 25-year-old detainee also had a green card and had been living in the United States since age 8. While crossing the border at Brownsville, the border agent asked for his green card and somehow discovered that he had been charged at some point with possession of marijuana and with assault. This man's English was fluent, and it may well have been his primary language. Like the first man, he wore a blue jumpsuit, despite the fact that he had been charged with a violent crime (assault). It was unclear to me whether he was talking about charges or convictions on his record.

(3) The third detainee to share his story, whom we nick-named "James Bond," had me going for a while, but ultimately it got the point where my colleagues and I had to conclude that he was mentally ill. He started out telling us that someone had surreptitiously written on his asylum paperwork that he was an assassin for the U.S. Government. The story became increasingly complex with multiple deportations, kidnappings, attempted murders, torture by Los Zetas, and speeding sports cars. Other detainees looked somewhat embarrassed and amused as if they'd heard this story before. If James Bond was telling the truth, there should be an action movie or two out of it. But since it had nothing to do with the subject of this report—conditions in detention centers—I believe his story was better left to others to sort out.

(4) Only one of the men in the room had an orange jumpsuit. Commissioner Kladney made it a point to ask him his story. He replied in English that he had been in this country since he was a little boy in 1991, but, while legal, he had never thought to naturalize. He had a good job as a paralegal and is married to a U.S. citizen with whom he has a child. In addition, he has custody of a child with his first wife; the child is currently being cared for by his mother. At some point in the past, he signed a check that was not his own, thus committing a crime of moral turpitude. He had an explanation for his crime, but I did not quite follow it. In any event, he recently went to Mexico for medical treatment that could be obtained more cheaply there than here. When he attempted to return, his check fraud arrest came up. He was asked about his treatment at Port Isabel and replied that if you treat people the way you want to be treated, everyone will treat you well here. He was particularly pleased with the opportunities to engage in sports activities at Port Isabel and noted that they have religious services here as well.

(5) A recent arrival from El Salvador said he had owned an air-conditioning business back home. But a gang of thugs had been forcing him to pay them \$400 a month, apparently for the privilege of doing business free from their interference. When he failed to pay them consistently, they stabbed him as a warning. Fortunately, he was able to borrow enough money to keep them at bay for the rest of the year. Only when they came back for more at the beginning of the new year did he decide he needed to escape to America. He was grateful to the Mexican people who gave him work during the three months it took him to reach the United States border. When he arrived he was treated well by the Border Patrol.

The Chairman asked those present whether the Border Patrol had put them in cold rooms. Several of those present agreed that the rooms had been cold, but they did not seem to think this was a significant problem. Earlier, one of the ICE staff members had suggested to us that the problem might be that many Central Americans aren't used to air conditioning. What Americans (and Texans in particular) regard as a comfortable temperature might seem cold to them.

All in all, it is impossible to miss the fact that Karnes is a more comfortable facility than Port Isabel. The latter really does look like a prison. On the other hand, the men there complained about the speed at which their cases were being resolved, not about the conditions at the facility. Those complaints are outside the scope of this report.

E. The Commission Needs to Undertake More Modest Projects and to Adhere to Its Procedures Designed to Ensure the Commissioners Have Time to Correct Errors in Reports and to Submit Statements. It Also Needs to Avoid Hyperbole in its Reports.

Our staff is small. Perhaps if we had undertaken a more modest task—like investigating food service at immigration detention centers or the accommodation of religious exercise—we would have accomplished more. The Commission's tendency is simply to pick a broad topic and unleash the staff to go forth and study. We fail to take the responsibility to sharpen the focus on a clear and contested issue of fact that is susceptible to proof or disproof. We fail to take the responsibility for research design. The results are ordinarily, perhaps invariably, disappointing.

The fact that I have not critiqued every aspect of this report should not be taken as agreement with those aspects I failed to discuss.⁶⁴ It is simply a matter of lack of time

⁶⁴ For example, in the section on medical standards, the report states:

In 2013, the University of Arizona conducted a study by interviewing 1,113 recent deportees: 37 percent of the respondents reported that ICE was denying them medical attention while in ICE custody.

Dissenting Statement of Commissioner Heriot

before the deadline for Commissioner’s statement, which was shortened from the usual 30 days from date on which the Commission adopts the final draft of the report.

I am apparently not the only Commissioner to be disadvantaged by the shortened length of time for statements. In Commissioner Yaki’s Statement, he states that “[t]he murder rates in Guatemala and El Salvador are more than 800 times that of the United States, while Honduras has more than 1,900 times more murder per 100,000 people than in the United States.” Yaki Statement at 254, n. 5.⁶⁵ A usual rule of thumb is that if a statistic seems utterly incredible, it usually is literally not credible. The intentional homicide rate in the United States is about 5 per 100,000. If the rate in Honduras were 1900 times that, it would be about 9500 per 100,000, or just shy of 10% per year. That would make spending a year in Honduras massively more likely to result in death than fighting in the Battle of Bulge. The actual figures are more like 8 times greater for Guatemala and El Salvador and 18 times for Honduras.⁶⁶ Decimal points matter.

A few things do deserve mention despite the short time period in which Commissioner are permitted to write statements. One is a proposed finding that suggested detention facilities were engaged in conduct that is analogous to torture. The proposed finding would have read:

Furthermore, while [the] Commission does not find that DHS is torturing detained immigrants, the Commission finds that certain DHS-owned

This is simply wrong. The University of Arizona report stated that “37% of those that requested medical attention from authorities did not receive it.” (page 26, emphasis added). It is unclear how many requested medical attention. The University of Arizona report stated that “23% indicated they needed medical attention,” but it is unclear whether this means that 23% actually asked for medical attention or only that 23% later told the researchers that they needed medical attention. If it is the former, it would mean that only 8.5% of the respondents requested and failed to receive medical care. If it is the latter, the relevant number could dip even lower.

Moreover, the 1,113 individuals interviewed were apparently subjected to “expedited removal.” They crossed the border illegally, were apprehended and failed to make an adequate claim to the right of asylum. They were therefore dropped back on the other side of the border in short order. Their stay in the United States was better measured in hours than weeks. They either never saw the inside of a detention facility like Karnes or Port Isabel or saw it only for a very short period.

The Border Patrol is not in a position to offer medical care out in the field except in the case of emergencies. It is entirely possible (indeed likely) that some of those who did not receive medical attention were not facing emergencies and were returned to the other side of the border within hours, where they were free to seek medical care at their leisure.

⁶⁵ These erroneous figures were directly taken from Center for American Progress, *The Facts on Immigration Today* 19 (October 23, 2014). This is not the kind of error the Center for American Progress should be making. The figures should have been spotted as implausible before the document was published.

⁶⁶ The World Bank, “Intentional homicides (per 100,000 people), available at <http://data.worldbank.org/indicator/VC.IHR.PSRC.P5>.

facilities and CDFs are subjecting detained immigrants to extreme living conditions. The Torture Victim Protection Act of 1991 (TVPA) defines “torture” as:

[A]ny act, directed against an individual in the offender’s custody or physical control, by which severe pain or suffering (other than pain or suffering arising only from or inherent in, or incidental to, lawful sanctions), whether physical or mental, is intentionally inflicted on that individual for such purposes as obtaining from that individual or a third person information or a confession, punishing that individual for an act that individual or a third person has committed[,] or is suspected of having committed, intimidating or coercing that individual or a third person, or for any reason based on discrimination of any kind.

The evidence contained in this entire report suggests that some DHS owned facilities and CDFs may be subjecting detainees to significant physical and emotional pain. Chapters 3, 4, and 5 of this report details evidence suggesting that immigration detention facility officials punish detained immigrants punish detained immigrants for crossing the U.S. Border without proper documentation. For example, detainees are held in unjustifiably cold⁶⁷ and overly crowded detention cells, only given one meal during processing, forced to drink unclean and possibly toxic waters⁶⁸ ... and sometimes beaten and sexually abused by guards and detention officials.⁶⁹ In addition to physical pain, some DHS-facilities and CDFs subject detainees to mental pain and suffering.

Torture and the Torture Victim Protection Act of 1991 should never have been mentioned in connection with this report. It only hurts the Commission’s and the report’s credibility.

⁶⁷ It may well have been cold. But that doesn’t make it cause for citing the Torture Victim Protection Act of 1991 even as an analogy. Commission members who think otherwise need to get a hold of themselves. As I learned when married to a Texan, cranking up the air conditioning is as much a part of Texas culture as barbecue, the Alamo, and Tex-Mex cuisine. An illegal entrant apprehended crossing into this country, especially after walking long distances in scorching heat, might well feel cold when brought inside. Indeed, when it was brought up to them, the detainees at Port Isabel acknowledged that the building where they were taken by the Border Patrol was cold. But, unlike the Commission members, they took it in stride. It is worth remembering that some of the asylum seekers among them probably know what torture or being subjected “to extreme living conditions” really means. See supra 210. All that said, given this evidence, the Border Patrol should dial down the air-conditioning.

⁶⁸ American water sometimes tastes funny to visitors from other nations. That is in part because of the level of chlorination used to protect against disease, and in part because of the presence of other minerals that affect taste. The taste of water varies from geographical location to location, and most people like the taste of the water of the place where they grew up. Detainees are likely no exception.

⁶⁹ For a discussion of some of the allegations of sexual misconduct made by witnesses at our briefing that were found to be unfounded by federal investigations, see supra at n. 2-3 and at Section D.1 at 204. The Commission’s report recounts the allegations, but fails to cite the reports of the investigations.

Dissenting Statement of Commissioner Heriot

This is a serious subject that deserves serious study, not over-the-top rhetoric. Fortunately, cooler heads prevailed on this one, and the proposed finding was rejected.

But the torture language has popped up again in Chairman Castro's Statement. Indeed, he uses stronger language than the earlier proposal. His discussion of the subject begins, "While the Commission did not find that DHS is torturing immigrants, I believe that certain DHS-owned facilities and CDFs are subjecting detained immigrants to torture-like conditions." Castro Draft Statement at 149. He later states, "I dare anyone reading this Report to be subjected to the conduct to which these detained immigrants are subjected to and not feel that you were being tortured as a result." (Id. at 152.)

If you wonder why Democrats and Republicans in Washington can't come together to get things done, over-the-top rhetoric like this is certainly a part of the reason. Most of the detainees had no complaints whatsoever. Those that did have complaints were balanced in the way they made their complaints. It's too bad members of the U.S. Commission on Civil Rights can't be as level-headed.

The other thing that deserves mention is healthcare. I have no doubt there have been some cases of egregiously bad medical service at detention centers over the last decade or so. With 400,000 detentions per year, one has to expect that. There are cases of egregiously bad medical service everywhere that the numbers are that large. But I believe that both the staff-written portion of the report and Commissioner Statements that spend significant time discussing healthcare are unfair. Among other things, they never made an effort to get all sides of the cases they refer to.

When we first were able to review a draft of the staff-written portions of the report, in early July, Commissioner Peter Kirsanow and I began our independent research by reaching out to ICE about the case of Victor/Victoria Arellano. Below I have quoted in full the portion of the letter we received from the Deputy Director of ICE concerning Ms. Arellano's death from HIV/AIDS while in ICE custody:

"As background, Ms. Arellano was a transgender female citizen of Mexico who was originally removed from the United States in 2002, and removed two additional times in 2003. In April 2007, Ms. Arellano was convicted of driving under the influence of crystal methamphetamine and driving without a license, and received a sentence of 36 months' probation, 45 days' imprisonment, and a fine. Ms. Arellano died while in ICE custody in July 2007.

Upon arrival in ICE detention, Ms. Arellano confirmed a diagnosis of HIV but indicated that she was stable and had not previously taken any anti-HIV medications, although she indicated that she knew that her

disease was serious. In addition, she indicated an allergy to several HIV-related medications, including dapsons. While she initially refused suggested treatment by the medical staff, she subsequently accepted treatment after lab results confirmed the seriousness of her condition [sic] and additional counseling was provided by ICE facility medical staff.

As Ms. Arellano's health deteriorated, she was closely monitored at the detention facility, and was sent to a local hospital emergency department twice for evaluation and/or treatment. During the first visit, ICE facility medical staff questioned the hospital about the possible need for admission, but the hospital staff indicated that they were aware of Ms. Arellano's lab results and had consulted with the infectious disease specialist before returning her to the detention facility. Ms. Arellano refused her HIV medications several times at the detention facility over the next two days, and she was admitted to the hospital again, three days after her initial visit. Her condition continued to deteriorate while in the hospital, in spite of aggressive treatment.

Evaluation and treatment of all transgender detainees involve a multidisciplinary team to include medical, mental health, pharmacy, nursing, and administrative staff. All detainees in ICE custody who identify as transgender are immediately referred to mental health for an evaluation to determine a diagnosis of gender dysphoria and/or other mental health conditions. Transgender detainees also receive a complete physical exam within two business [sic] days of intake, to include a screening of blood borne pathogens and sexually transmitted infections. If treatment for gender dysphoria is clinically indicated, medical providers will provide hormone therapy, and the detainee will be counseled regarding the risks/benefits as well as reasonable expectations of hormone treatment. Frequency of mental health appointments will also follow as deemed clinically appropriate by the mental health provider.

Per ICE detention standards medical personnel provide all detainees diagnosed with HIV/AIDS medical care consistent with national recommendations and guidelines. Medical and pharmacy personnel ensure timely and confidential access to medications. Upon release, detainees currently receiving highly active antiretroviral therapy and other drugs shall receive up to a 30-day supply of their medication as medically appropriate.

In January 2013, an automated Risk Classification Assessment (RCA) Tool was implemented nationwide to aid ICE officers in assessing whether apprehended individuals have any known special considerations due to, among other special vulnerabilities, their gender identity or sexual orientation. An ICE supervisor must approve a determination to

Dissenting Statement of Commissioner Heriot

detain any alien who is not subject to mandatory detention or to override an RCA recommendation to release an alien based on such factors as public safety and flight risk.

Additionally, in June 2015, ICE issued a memorandum titled “Further Guidance Regarding the Care of Transgender Detainees (Transgender Care Memorandum).” This memorandum is intended to complement existing ICE detention standards, ICE policy and DHS regulations, and is another step in furthering our progress of caring for transgender individuals.”⁷⁰

The Report makes it sound like the failure to treat Ms. Arellano with drugs was a case of gross neglect. The letter, however, if true (and I have no reason to doubt it), shows the problem was more complicated. Ms. Arellano claimed to be allergic to the relevant HIV/AIDS drugs and initially refused treatment.

The Report also lists more five specific cases for which it did no real investigation. While I have made efforts to learn about the circumstances surrounding these cases, those efforts did not pan out in the limited time I had to do the research. Nevertheless, there are a few comments I can make just based on the information contained in the Report itself.

One of cases was alleged by witness Maria Hinojosa to have occurred several years ago at Willacy, back when it was indeed an immigration detention facility. She reported that in connection with a story she put together for PBS’s Frontline in 2010-2011, she sought out individuals who had been held at Willacy and found “Andre,” who suffers from bipolar disorder. He told her that he had been overmedicated at Willacy and hence slept for 36 hours, during which time he fell from his top bunk and hit his head on the floor, resulting in a broken eye socket bone and a ruptured testicle.

It is unclear from Ms. Hinojosa’s testimony when this case occurred or whether she had verified “Andre’s” statement to her in any way. But even if she did, it is worth pointing out that getting the right level of medication for a bipolar patient is not an easy thing. It is largely a matter of trial and error until you get it right. One popular web site has this to say on the matter:

It can take a while to find the right bipolar medication and dose. Everyone responds to medication differently, so you may have to try several bipolar disorder drugs before you find the one that works for you. Be patient, but don’t settle for a bipolar medication that makes you feel lousy, either. Once you’ve discovered the right bipolar disorder drug or drug cocktail, it may still take time to determine the optimal dose. In the case of mood stabilizing

⁷⁰ Letter to Gail Heriot & Peter Kirsanow from ICE Deputy Director Daniel H. Ragsdale.

medications such as lithium, the difference between a beneficial dose and a toxic one is small.⁷¹

To use this case to prove wrongdoing on the part of the medical personnel at Willacy is stretching things.

This was not the only example of the five that seemed a bit strained. The report refers to a man who died of cancer a few days after being admitted to the hospital. According to the report, the man was displaying signs of illness for three weeks prior to his death while at the Adelanto Detention Facility in California. But if he was suffering from cancer, it is highly doubtful that a quicker diagnosis would have saved him. Another accusation—this one against the Northwest Detention Center in Tacoma, Washington—was that a detainee suffered a severe nosebleed and did not receive attention for 24 hours. While the detainee claimed that he “almost drowned” in his own blood, this sounds very dubious. The nosebleed apparently took place during a hunger strike that the particular detainee helped organize to protest deportations and other unspecified grievances.

That leaves two accusations that seem more troubling—one at Karnes and one at the Denver Contract Detention Facility. The Denver case involved a 46-year-old detainee who suffered a heart attack and died. At first glance, one might think that an individual having a heart attack might be lucky to be at a detention center at the time, since medical personnel are right at hand 24 hours a day, seven days a week, but in this case it did not turn out that way. We have been informed that there was a routine investigation by the ICE Office of Detention Oversight (as I believe there is whenever a detainee dies). It “concluded that the detention facility had “failed to provide [the detainee] access to emergent, urgent, or non-emergent medical care.”” Note the triple quotes. I am quoting the report, which in turn is quoting ACLU Staff Attorney Carl Takei, who in turn was quoting the ODO report, which the Commission didn’t actually see. Note that the quoted passage is curiously general: The detention failed to provide access to “emergent, urgent *or* non-emergent” care. Exactly what was the problem? Why didn’t the Commission get the actual report? The second quote in the report on this topic reads, “The ODO investigation expert ‘concluded that the staff’s unfamiliarity with the relevant protocol, failure to administer appropriate cardiac medication, and delays in transporting the patient to a higher level care facility all may have been contributing factors to his death.’” But this is a quote from Mr. Takei, an advocate who is just doing his job if he puts things in an unflattering way for the detention facility; it does not come from the ODO report. What’s wrong with this picture?

The second troubling case involved a seven-year-old Salvadoran girl whose mother told the Border Patrol upon arrival in the United States that her daughter needed immediate

⁷¹ Available at <http://www.helpguide.org/articles/bipolar-disorder/bipolar-medication-guide.htm>.

Dissenting Statement of Commissioner Heriot

treatment for a malignant brain tumor. Again, I wish the Commission had sought out the facts on this one rather than relying entirely on the work of journalists and advocates. They have their job, but we have our job too.

As told by Grassroots Leadership and the media, the story is that the girl—Nayely Beltran—had been receiving treatment for her condition for three years in El Salvador.⁷² During that period, she had received both chemotherapy and surgery, and shunt had been planted in her brain. But more work was needed. “Nayely’s MRI results have been analyzed by three U.S.-trained doctors who recommend immediate care so that her condition does not become life-threatening,” wrote Grassroots Leadership on their website.⁷³ According to Dr. Simon Carlson, a Austin, Texas neuro-radiologist, “This is a case which can become life threatening in very short order, which can take a turn for the worse with little to no forewarning, with devastating outcomes.”

According to media accounts, it took a month for mother and daughter to be released from Karnes and that was only after a public outcry. Why did it take so long? Was this a serious failure of management at Karnes? Or is this a side to this story we don’t know about? All the Commission knows is what we read in the papers: “U.S. Immigration and Customs Enforcement would not comment on the case.”⁷⁴ Put differently, we know that we don’t know ICE’s side of the story. We could have asked, and ICE would have been obligated to respond under our statute, which requires federal agencies to cooperate with us.⁷⁵ We didn’t try.

F. Post Script: The Commission May Not Have Jurisdiction Over This Issue.

Our statute gives us jurisdiction to study “discrimination or denials of equal protection of the laws under the Constitution of the United States because of color, race, religion, sex, age, disability, or national origin, or in the administration of justice.” It does not give us jurisdiction to study anything else.⁷⁶

⁷² See, e.g., Joy Diaz, *After Crossing Four Borders, Migrant Family Faces Two More Critical Battles*, KUT.org (September 15, 2014)(“for the last three years she has been in and out of hospitals”).

⁷³ *Seven Year Old With Brain Tumor Being Denied Life Saving Treatment in Detention*, Grassroots Leadership (August 31, 2014).

⁷⁴ Lydia Warren, *Seven-Year-Old Salvadoran Girl with Brain Tumor is Released from Immigrant Detention Center So That She Can Get Treatment After Uproar*, Daily Mail (September 4, 2014).

⁷⁵ 42 U.S.C. 1975b(e) (“All Federal agencies shall cooperate fully with the Commission to the end that it may effectively carry out its functions and duties.”)

⁷⁶ The Commission is also required to investigate allegations in writing under oath or affirmation relating to deprivations as result of any pattern or practice of fraud of the right of United States citizens to vote or have their votes counted (apparently without regard to any relationship to color, race, religion, sex, age disability or national origin. 42 U.S.C. § 1975(3)(a)(1)(B). But that is not this case.

At one point in the report, it appears to rely on the notion that this report has a jurisdictional hook in “national origin” discrimination. But that argument has been easily dismissed. It was foreclosed by cases like *Espinoza v. Farah Manufacturing*, 414 U.S. 86 (1973)(holding that a prohibition on national origin discrimination does not extend to discrimination on the basis of citizenship).⁷⁷ The Border Patrol does not discriminate on the basis of one’s ethnicity; it discriminates against those who are neither citizens of the United States nor authorized visitors or residents.

The report therefore seems to place alternative reliance on the argument that our jurisdiction over “discrimination or denials of equal protection of the laws under the Constitution of the United States“ extends broadly to anything “in the administration of justice.” Since the immigration detention system is part of the “administration of justice,” it doesn’t matter that no discrimination or denial of equal protection occurred “because of color, race, religion, sex, age, disability or national origin.”

There is support for the argument that the statute gives us jurisdiction to study “discrimination and denials of equal protection” that occur “in the administration of justice” regardless of whether they occur because of color, race, religion, sex, age, disability, or national origin. First of all, the phrase “or in the administration of justice” is placed after the phrase “because of color, race, religion, sex, age, disability, or national origin.” Second, Senator Hubert H. Humphrey specifically said on the floor of Congress that the Commission’s jurisdiction extended to “denials of equal protection because of race, color, religion or national origin, and denials of equal protection in the administration of justice, whether or not related to race, color, religion, or national origin.” The statement was made after the passage of the 1957, but before some of the re-promulgations of our statute.

I have my doubts about Senator Humphrey’s interpretation. Why would Congress authorize such broad jurisdiction in connection with ill-defined terms like the administration of justice? But even assuming Senator Humphrey’s interpretation of the text is correct, I am not sure it authorizes this report. The Commission uncovered no evidence of discrimination or denials of equal protection on any ground. The report argues that detention is a denial of due process under the Fifth Amendment and also invokes at times the First and Eighth Amendments. But at no time is the complaint that some person is being discriminated against relative to some other person.

No one claims that it is inappropriate to treat undocumented immigrants or legal immigrants who violate the criminal law differently from others. There are obviously rational reasons to make such distinctions. The complaint isn’t that these detainees are

⁷⁷ See also *Morton v. Mancari*, 417 U.S. 535 (1974)(holding that discrimination in favor of tribal members in hiring by the Department of the Interior is not race or national origin discrimination, but rather discrimination on the basis of membership in a quasi-sovereign tribal entity).

Dissenting Statement of Commissioner Heriot

being treated badly relative to some otherwise similarly situated person, the complaint is that *nobody* (or at least nobody who hasn't been convicted of a crime) should be treated that way.

Dissenting Statement of Commissioner Peter Kirsanow

The Commission Lacks Jurisdiction Over Immigration Detention Facilities

When the Commission voted to examine the state of civil rights in immigration detention facilities as our 2015 enforcement report topic, Commissioner Heriot and I both expressed our concern that this topic was not within the Commission's jurisdiction.¹ I realize that the Commission issued a report on immigration over thirty years ago, but this topic was not really within our jurisdiction then or now.² The final report settled upon national origin discrimination as our jurisdictional hook, with a bootstrap to a statement by then-Senator Hubert Humphrey. This is a stretch. Of course people of non-American national origin will be disproportionately likely to be affected by immigration policy. People of American national origin will not be detained in immigration detention facilities, except in unusual situations where they encounter immigration authorities but lack documentation of their citizenship. In 1980 and today, the report is merely a vehicle for the Commission to express its view on immigration policy, which differs sharply from that of the majority of the public, many of the states, and many members of the legislative branch.

The majority tries a neat trick to find discrimination that will provide a jurisdictional hook. People in immigration detention facilities are by definition almost all of non-American national origin. Most of the people who cross the border illegally are from Latin America, and therefore most of the illegal border crossers who are in immigration detention facilities are Latino. Presto, the majority says, we have discrimination on the basis of ethnicity! Because the overwhelming majority of people who break the law in this way are from Latin American countries, somehow there is racial discrimination going on and the Commission has jurisdiction. This makes no sense. Just because people of a particular ethnic group or national origin are more likely than others to break a particular law does not mean there is a civil rights component. Would the Commission claim that it has jurisdiction to examine the treatment of people convicted of insider trading if those people are disproportionately white? Such a suggestion is ludicrous. It also would never happen, because the entire immigration debate, at this Commission and in public discourse, has fallen captive to special pleading.

When the Commission voted to adopt this statutory enforcement report topic, it was ostensibly limited to examining whether immigration detention facilities comply with certain federal guidelines.

¹ U.S. COMMISSION ON CIVIL RIGHTS, July 25, 2014 Business Meeting Transcript, at 25-30, *available at* http://www.usccr.gov/calendar/trnscrpt/CommissionBusinessMeetingTranscript_July-25-2014.pdf.

² U.S. COMMISSION ON CIVIL RIGHTS, THE TARNISHED GOLDEN DOOR: CIVIL RIGHTS ISSUES IN IMMIGRATION (1980), *available at* <http://files.eric.ed.gov/fulltext/ED198197.pdf>.

The focus of the briefing would be on denials of equal protection in the administration of justice as to immigrant detainees and unaccompanied minors in detention facilities. Specifically, this briefing will focus on DHS ICE's responsibilities and duties to these immigrants under federal legal standards of care in detention facilities with a special emphasis on the Performance Based National Detention Standards (PBNDS) and the Prison Rape Elimination Act (PREA).³

The concept paper that the Commission voted to adopt is a model of modesty and restraint compared to the final report. The final report is of a piece with the Administration's efforts to gut the enforcement of the immigration laws. The report discusses President Obama's initiatives to suspend the deportation of millions of illegal immigrants and grant them work authorizations, which it characterizes as "attempting to fix the U.S. immigration system."⁴ This is hardly a neutral description of the President's actions. One could just as easily point out that the President's efforts to fix the U.S. immigration system along his preferred lines have further eroded the rule of law and dealt a serious blow to our government's separation of powers. Indeed, as of this writing, at least two federal courts have found the President's actions in this regard suspect.⁵

Illegal Aliens' Involvement in Crime

The report then perambulates along to the public debate regarding illegal aliens and crime, where it clumsily and ineffectually tries to smear those who are concerned about illegal aliens' involvement in crime.⁶ Here the report stumbles.⁷ This section of the report is

³ Chairman Martin Castro, *The State of Civil Rights at Immigration Detention Facilities*, June 2014 at (on file with the Commission).

⁴ Report at 5.

⁵ *Tex. v. U.S.*, 2015 WL 648579 (S.D. Tex. 2015); *Tex. v. U.S.*, 787 F.3d 733 (5th Cir. 2015).

⁶ Report at 15-16.

⁷ Report at 15-16.

Some political groups advance the rhetoric that undocumented immigrants are mostly criminals. However, statistical research indicates that their allegations are unfounded. According to the PEW Research Center data set, there were 11.2 million undocumented immigrants living in the United States in 2013. Of those 11.2 million immigrants, only 88,000 were convicted criminals. Therefore, the criminal percentage rate for undocumented immigrants is roughly 0.7 percent. When admitting immigrants to ICE detention facilities, ERO uses a classification system that separates detainees by threat risk and assigns special vulnerability classifications. According to a 2014 Government Accountability Office (GAO) report, "[f]rom fiscal years 2010 through 2013, about 44 percent of ICE detainees were . . . low custody, 41 percent were of a medium custody level, and 15 percent were of a high custody level. Furthermore, a recent study by the American Immigration Council entitled, "The Criminalization of Immigration in the United States" concludes that immigrants are less likely to commit crimes than native born Americans, and higher immigration rates equate with lower crime rates. [citations omitted]

willfully misleading. It misuses the statistics it cites, and although this was pointed out in comments on the draft report, it is still in the final report. I address the American Immigration Council report later in this statement.

The report cites a Center for Immigration Studies report about criminal aliens released by ICE in 2013 and a 2014 GAO report. Here are the problems with the report's "analysis" of these two sources:

1. The report states that the CIS report said that there were 88,000 illegal aliens who were convicted criminals. In fact, the CIS report specifically says that in 2013 ICE released 36,007 convicted criminal aliens. These criminal aliens had 87,818 convictions between them. Somehow, even though this was noted in comments on the draft report, it still was included in the final report.
2. The CIS report only looked at criminal aliens who were released by ICE in 2013. It does not include the number of criminal aliens who were not released by ICE. Nor does it include the number of criminal aliens released by ICE in other years, which is necessary if one is to calculate the prevalence of criminal aliens among the illegal alien population, given that the illegal alien population is cumulative.
3. The report does not count criminal aliens who are incarcerated in state and local jails and prisons, only those who were released by ICE. The number of aliens incarcerated in state and local jails and prisons is discussed below.
4. The report does not consider the criminal records aliens may have accrued in their home countries.
5. The report quotes a GAO study that discusses the classification of detainees, but it does not explain how ICE determines the classifications.⁸ After examining ICE's

⁸ ICE's custody classification system states that the low custody level "May include detainees with minor criminal histories and non-violent felony charges and convictions." PBNDS 2011 (AS MODIFIED BY FEBRUARY 2013 ERRATA), at 75, *available at* http://www.ice.gov/doclib/detention-standards/2011/classification_system.pdf. If you examine ICE's Custody Classification, you see that "low custody" are detainees with 0-2 points, medium-low custody are detainees with 3-5 points, medium-high custody are detainees with 6-11 points, and high custody are detainees with 12+ points. *Id.* at 80. ICE officers fill out the sheet by examining "the most serious charge/conviction that led to the [ICE] encounter." *Id.* at 82. Points are assigned based on the seriousness of the offense. Then the officers examine the detainee's criminal history, if any, and points are assigned based on the seriousness of the offenses and how much time has elapsed. *Id.* at 82-83.

It is worth discussing ICE's "Severity of Offense" classification system. The "low" category includes driving under the influence, leaving the scene of an accident, battery, possession of marijuana, worthless checks, and carrying a concealed weapon (other than firearm). *Id.* at 87. These offenses result in 0-2 points, depending on how much time has elapsed since the offense occurred. *Id.* at 79. The "moderate" category includes armed trespass, burglary, carrying a concealed firearm, grand theft, and "manslaughter." *Id.* at 87. These offenses result in 1-4 points, depending on how much time has elapsed. *Id.* at 79. The "high" category includes aggravated battery, aggravated child abuse, extortion, and armed robbery. *Id.* at 86. These offenses result in 5-6 points. *Id.* at 79. The "highest" category includes murder, kidnapping, and sexual battery (with violence upon a minor). *Id.* at 86. These offenses result in 5-7 points. *Id.* at 79.

custody classification system, it is almost certain that at least 56 percent of ICE detainees have been involved in criminal activity.

The report does not consider the number of criminal aliens incarcerated in state and local jails and prisons. According to GAO, in FY 2009 295,959 SCAAP criminal aliens,⁹ of whom approximately 227,600 are illegal aliens,¹⁰ were incarcerated in state jails and prisons. This is a 40 percent and 25 percent increase, respectively, in criminal alien incarcerations in state jails and prisons since FY 2003.¹¹

Detainees can also be assigned points for being members of “security threat groups” such as gangs, and if they have a record of institutional disciplinary infractions. *Id.* at 83. Using the classification system, this means that at least 56 percent of the inmates either have committed sufficient offenses to wind up with at least three points, have a pattern of institutional disciplinary problems, or belong to gangs or other criminal organizations. It is likely that some of the remaining 44 percent classified as “low” also have arrests and convictions for some offense, as the checklist contemplates that some offense has brought them into contact with ICE in the first place. In short, contra the report, it is almost certain that at least 56 percent of ICE detainees have been involved in criminal activity.

⁹ The State Criminal Alien Assistance Program (SCAAP) partially reimburses states and localities for the cost of incarcerating certain criminal aliens. It does not reimburse states and localities for the cost of incarcerating criminal aliens who are in the country legally. There are two types of criminal aliens for which SCAAP will reimburse the incarcerating authority: SCAAP illegal aliens, whom DHS has definitively determined are in the country illegally; and SCAAP unknown aliens, for whom DHS is unable to find a record, but who are probably in the country illegally. *See generally* GAO, CRIMINAL ALIEN STATISTICS: INFORMATION ON INCARCERATIONS, ARRESTS, AND COSTS, at 1-6 (March 2011), *available at* <http://www.gao.gov/assets/320/316959.pdf>.

¹⁰ In FY 2009, there were 295,959 SCAAP criminal aliens incarcerated in state and local jails and prisons. Of SCAAP criminal aliens incarcerated in state prisons, “about 63,000 were SCAAP illegal aliens and about 28,000 were SCAAP unknown aliens. We did not include about 1,300 inmates of unknown country of birth.” GAO, CRIMINAL ALIEN STATISTICS: INFORMATION ON INCARCERATIONS, ARRESTS, AND COSTS, at 13 (March 2011), *available at* <http://www.gao.gov/assets/320/316959.pdf>. Of SCAAP criminal aliens incarcerated in local jails, “about 60,000 were SCAAP illegal aliens and about 144,000 were SCAAP unknown aliens. We did not include about 1,000 inmates of unknown country of birth.” *Id.* at 14.

DOJ uses a reimbursement metric based on how many SCAAP unknown aliens are believed to be illegal aliens. “DOJ is to reimburse states for 65 percent, cities for 60 percent, and counties for 80 percent of correctional salary costs associated with unknown aliens. According to DOJ officials, this methodology was developed based on analysis that the former Immigration and Naturalization Service (INS) conducted in 2000 where it analyzed the records of aliens submitted for SCAAP reimbursement in 1997 whose immigration status was at that time unknown. Based upon this analysis, INS determined that 65 percent of those unknown aliens submitted for reimbursement by states did not have legal status, 60 percent submitted for reimbursement by cities did not have legal status, and 80 percent submitted for reimbursement by counties did not have legal status.” *Id.* at 47.

Using DOJ’s metrics, it therefore appears that approximately 81,200 SCAAP criminal aliens incarcerated in state prisons, out of a possible 91,000 examined by GAO, were in the country illegally. Using those same metrics, approximately 146,400 to 175,200 SCAAP criminal aliens incarcerated in local jails, out of a possible 204,000 examined by GAO, were in the country illegally. (The range is because “local jails” are not differentiated into city and county jails, but DOJ believes that the percentage of illegal aliens within the SCAAP unknown alien group varies between the two.)

¹¹ *Id.* at 10.

The crimes for which the SCAAP illegal aliens were incarcerated are not predominantly minor crimes. GAO examined five states that had large SCAAP illegal alien populations in 2008 – Arizona, California, Florida, New York, and Texas. Arizona was the only state where traffic offenses were a substantial percentage of SCAAP illegal alien convictions. Setting aside traffic offenses, 41 percent of the SCAAP illegal alien convictions in Arizona were for drug offenses and assault.¹² In California, “about 50 percent of California’s primary convictions related to SCAAP illegal aliens were for drugs, assault, and sex offenses.”¹³ Texas had a similar breakdown of SCAAP illegal alien offenses.¹⁴ In Florida, “about 50 percent of all Florida state convictions of SCAAP illegal alien inmates were for drugs, sex offenses, burglary, and robbery”.¹⁵ And, shockingly, in New York, 27 percent of SCAAP illegal alien primary convictions were for homicide – more than the 23 percent convicted for drug-related offenses.¹⁶

There were 5,000 SCAAP illegal aliens incarcerated in New York in 2008. This means that there were approximately 1,350 SCAAP illegal aliens imprisoned for homicide in New York. There were approximately 2,430 SCAAP illegal aliens imprisoned for homicide in California, 900 in Texas, 480 in Florida, and 240 in Arizona, for a total of 5,400 in those five states.

By way of comparison, in 2009 there were 3,484 total inmates incarcerated in Arizona state prisons for homicide and related offenses (first degree murder, second degree murder, murder (old code), manslaughter, and negligent homicide).¹⁷ Removing the estimated 240 illegal aliens from that total leaves us with 3,244 citizens and legal residents imprisoned for homicide-related offenses out of a total population of approximately 6.3 million residents.¹⁸ The Pew Research Center estimates that approximately 350,000 illegal immigrants lived in Arizona in 2009.¹⁹ That leaves approximately 6 million citizens and legal residents in Arizona. This yields a rate of 68.57 illegal aliens imprisoned for homicide offenses per 100,000 illegal aliens in Arizona, and 54.06 citizens and legal residents imprisoned for homicide offenses per 100,000 citizens and legal residents in Arizona.

¹² *Id.* at 28.

¹³ *Id.* at 29.

¹⁴ *Id.* at 33.

¹⁵ *Id.* at 30.

¹⁶ *Id.* at 32.

¹⁷ DARYL R. FISHER, PRISONERS IN ARIZONA: A PROFILE OF THE INMATE POPULATION, ARIZONA PROSECUTING ATTORNEYS ADVISORY COUNCIL, *available at* 15-16 (March 2010), http://apaac.az.gov/images/stories/prisoners_in_arizona-033010.pdf.

¹⁸ U.S. CENSUS BUREAU, Arizona QuickFacts, <http://quickfacts.census.gov/qfd/states/04000.html>.

¹⁹ Jeffrey S. Passel and D’Vera Cohen, *Unauthorized Immigrant Totals Rise in 7 States, Fall in 14*, PEW RESEARCH CENTER (Nov. 18, 2014), <http://www.pewhispanic.org/2014/11/18/unauthorized-immigrant-totals-rise-in-7-states-fall-in-14/>.

In California, there were 28,030 inmates incarcerated for homicide and related offenses (first degree murder, second degree murder, manslaughter, and vehicular manslaughter) in December 2009.²⁰ Using GAO's 2008 estimate, there were approximately 2430 illegal aliens imprisoned in California for homicide and related offenses. The total population of California was approximately 37 million²¹, and the illegal alien population was approximately 2.5 million.²² Applying the same analysis as above, this yields an estimated rate of 97.2 illegal aliens imprisoned for homicide and related offenses per 100,000 illegal aliens, and 74.1 citizens and legal residents imprisoned for homicide and related offenses per 100,000 citizens and legal residents.

Florida incarcerated 12,684 inmates for murder and manslaughter offenses in 2008-2009.²³ Approximately 480 were illegal aliens. The total population of Florida was approximately 18.8 million²⁴ and the illegal alien population was approximately 875,000.²⁵ This yields an estimated rate of 54.85 illegal aliens imprisoned for murder and manslaughter per 100,000 illegal aliens, and 67.8 legal residents imprisoned for murder and manslaughter per 100,000 legal residents.

At the beginning of 2010, there were 10,254 prisoners incarcerated in New York for murder and manslaughter offenses (murder, first-degree manslaughter, second-degree manslaughter, other homicide).²⁶ Approximately 1,350 were illegal aliens. The total population of New York was approximately 19.3 million²⁷, and the illegal alien population

²⁰ DEPARTMENT OF CORRECTIONS AND REHABILITATION, OFFENDER INFORMATION SERVICES BRANCH, ESTIMATES AND STATISTICAL ANALYSIS SECTION, DATA ANALYSIS UNIT, CALIFORNIA PRISONERS AND PAROLEES 2009: SUMMARY STATISTICS ON ADULT FELON PRISONERS AND PAROLEES, CIVIL NARCOTIC ADDICTS AND OUTPATIENTS AND OTHER POPULATIONS, at 16 (2010), http://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/Annual/CalPris/CALPRI_Sd2009.pdf.

²¹ U.S. CENSUS BUREAU, California Quick Facts, <http://quickfacts.census.gov/qfd/states/06000.html>.

²² Jeffrey S. Passel and D'Vera Cohen, *Unauthorized Immigrant Totals Rise in 7 States, Fall in 14*, PEW RESEARCH CENTER (Nov. 18, 2014), <http://www.pewhispanic.org/2014/11/18/unauthorized-immigrant-totals-rise-in-7-states-fall-in-14/>.

²³ FLORIDA DEPARTMENT OF CORRECTIONS, 2008-2009 AGENCY STATISTICS, INMATE POPULATION, GENERAL CHARACTERISTICS OF POPULATION, http://www.dc.state.fl.us/pub/annual/0809/stats/ip_general.html.

²⁴ U.S. CENSUS BUREAU, Florida QuickFacts, <http://quickfacts.census.gov/qfd/states/12000.html>.

²⁵ Jeffrey S. Passel and D'Vera Cohen, *Unauthorized Immigrant Totals Rise in 7 States, Fall in 14*, PEW RESEARCH CENTER (Nov. 18, 2014), <http://www.pewhispanic.org/2014/11/18/unauthorized-immigrant-totals-rise-in-7-states-fall-in-14/>.

²⁶ STATE OF NEW YORK DEPARTMENT OF CORRECTIONAL SERVICES: UNDER CUSTODY REPORT, PROFILE OF INMATE POPULATION UNDER CUSTODY ON JANUARY 1, 2010, at 12, http://www.doccs.ny.gov/Research/Reports/2010/UnderCustody_Report_2010.pdf.

²⁷ U.S. CENSUS BUREAU, New York Quick Facts, <http://quickfacts.census.gov/qfd/states/36000.html>.

was approximately 800,000.²⁸ This yields an estimated rate of 168.75 illegal aliens incarcerated for murder and related offenses per 100,000 illegal aliens, and 48.12 legal residents incarcerated for murder and related offenses per 100,000 legal residents.

In Texas in 2008-2009, 16,178 people were incarcerated for homicide.²⁹ Approximately 900 of them were illegal aliens. The total population of Texas was roughly 25 million³⁰, and the illegal alien population was roughly 1.65 million.³¹ This yields a rate of 54.54 illegal aliens incarcerated for homicide per 100,000 illegal aliens, and 65.43 legal residents incarcerated for homicide per 100,000 legal residents.

Taking the data *only from these five states*, and assuming that each person incarcerated for a homicide-related offense is responsible for only one death, yields 5,400 people killed by illegal aliens. By way of comparison, the total combat death toll for the wars in Iraq and Afghanistan was 5,313.³²

GAO also requested information from DOJ regarding the citizenship status of the 399 people who at the time had been convicted of crimes in the course of a federal terrorism-related investigation.³³ 17 percent were in the country illegally at the time they were charged.

A recent study issued by the American Immigration Council argues that immigrants (by which they mean both legal and illegal immigrants) are less likely to engage in crime than are their native-born demographic counterparts.³⁴ The study also muddles statistics to suggest that criminal aliens are primarily incarcerated for immigration violations. This is true in federal prison, but not in state prisons and jails. The pertinent paragraph is excerpted below so it can be explained in detail.

²⁸ Jeffrey S. Passel and D’Vera Cohen, *Unauthorized Immigrant Totals Rise in 7 States, Fall in 14*, PEW RESEARCH CENTER (Nov. 18, 2014), <http://www.pewhispanic.org/2014/11/18/unauthorized-immigrant-totals-rise-in-7-states-fall-in-14/>.

²⁹ TEXAS DEPARTMENT OF CRIMINAL JUSTICE, STATISTICAL REPORT FISCAL YEAR 2009, at 9, https://www.tdcj.state.tx.us/documents/Statistical_Report_FY2009.pdf.

³⁰ U.S. CENSUS BUREAU, Texas QuickFacts, <http://quickfacts.census.gov/qfd/states/48000.html>.

³¹ PEW RESEARCH CENTER, *Unauthorized Immigrants in the U.S., 2012* (Nov. 18, 2014), (showing no significant change in Texas since 2009), <http://www.pewhispanic.org/interactives/unauthorized-immigrants-2012/map/population-change/>.

³² See DEPARTMENT OF DEFENSE, Defense Casualty Analysis System, Conflict Casualties, <https://www.dmdc.osd.mil/dcas/pages/casualties.xhtml>.

³³ GAO, CRIMINAL ALIEN STATISTICS: INFORMATION ON INCARCERATIONS, ARRESTS, AND COSTS, at 24-25 (March 2011), available at <http://www.gao.gov/assets/320/316959.pdf>.

³⁴ Walter A. Ewing, Daniel Martínez, and Rubén G. Rumbaut, *The Criminalization of Immigration in the United States*, AMERICAN IMMIGRATION COUNCIL (July 8, 2015), <http://www.immigrationpolicy.org/special-reports/criminalization-immigration-united-states>.

Although there is no reliable source of data on immigrants incarcerated in state prisons and local jails, the U.S. Government Accountability Office (GAO) sought to overcome this limitation in a 2011 study. Not only did the study examine immigrants in federal prison during the Fiscal Year (FY) 2005-2010 period, but also non-federal immigrant prisoners for whom state and local governments had sought reimbursement of some incarceration costs through the U.S. Department of Justice's State Criminal Alien Assistance Program (SCAAP) during the FY 2003-2009 period. The GAO found that, among immigrant prisoners in its sample, 65 percent had been arrested at least once for (though not necessarily convicted of) an immigration violation, 48 percent for a drug offense, and 39 percent for traffic violations – all of which are generally non-violent acts. In comparison, 8 percent had been arrested at least once for homicide and 9 percent for robbery. The GAO also analyzed data from the U.S. Sentencing Commission and found that, in FY 2009, the “federal primary conviction” for 68 percent of offenders who were immigrants was an immigration-related violation – not a violent offense or any sort of crime which could be construed as a threat to public safety.³⁵

There are several problems with these assertions, which I will address in turn.

1. By juxtaposing SCAAP with immigration violations, the article implies that many SCAAP prisoners incarcerated in state and local jails and prisons are incarcerated because of immigration violations. This is misleading, as SCAAP prisoners are incarcerated for violations of state law, not federal law, and immigration offenses are primarily violations of federal law. As discussed above, GAO analyzed the offenses for which SCAAP prisoners were incarcerated in the five states that incarcerated 70 percent of SCAAP prisoners.³⁶ Immigration was not one of the primary offenses in any of the states that GAO examined³⁷, and in only one (Arizona) was immigration even one of the offenses included in the “other” category. The number of illegal immigrants incarcerated for state immigration violations is vanishingly small. And perhaps AIC considers drug offenses and traffic violations (which, if you are incarcerated, almost certainly are DUIs) to be minor offenses that do not pose a threat to public safety, but clearly the American public disagrees or incarceration would not be the penalty for those crimes.

³⁵ *Id.* at 8-9.

³⁶ GAO, CRIMINAL ALIEN STATISTICS: INFORMATION ON INCARCERATIONS, ARRESTS, AND COSTS, at 3 (March 2011), available at <http://www.gao.gov/assets/320/316959.pdf>.

³⁷ *Id.* at 28-34.

2. The AIC study suggests that criminal aliens are underrepresented in jails and prisons. However, the GAO report stated that in 2009, DHS estimated there were 10.8 million illegal aliens in the United States. In 2010, the U.S. population was 308.7 million.³⁸ This means that illegal aliens constituted approximately 3.5 percent of the U.S. population in 2009. And yet, “In fiscal year 2009, SCAAP criminal aliens accounted for about 6 percent of the total number of days spent by all inmates in these 810 local jails compared to about 5 percent in fiscal year 2003.”³⁹

The AIC report argues that illegal immigrants are less likely to engage in criminal behavior than are native-born Americans because poorly educated 18-39 year old Salvadorans, Guatemalans, and Mexicans are less likely to be incarcerated than poorly educated 18-39 year old Americans. Unfortunately, the authors of the study do not identify the tables from the American Community Survey that they used to reach their conclusions, so it is difficult to analyze their work.⁴⁰ Although their conclusions may be true, it still raises a question: Why should Americans draw comfort from the fact that illegal immigrants commit crimes at a lower rate than the American subgroup most likely to be engaged in criminality? One would hope that if one is letting people into one’s country, those new arrivals would as a group be as law-abiding as the most law-abiding native-born American group.

The AIC report also draws upon a study that analyzed the Pathways to Desistance Project⁴¹ and found that 14-17 year-old first-generation immigrants who were convicted of a serious offense desisted from crime more quickly than did the other participants in the study.⁴² There are a couple things to keep in mind when reviewing this study. The first is that the study only examined adolescents who had been convicted of serious crimes, so we are already dealing with a troublesome group of people.⁴³ The second is that second-generation immigrants (those with at least one foreign-born parent) are as likely as their native-born counterparts to persist in crime (this study uses “native-born” as a term of art to refer to children born to two parents who were also born in the United States).⁴⁴ This is important

³⁸ PAUL MACKUN AND STEVEN WILSON, POPULATION DISTRIBUTION AND CHANGE: 2000-2010, U.S. CENSUS BUREAU (2011), <http://www.census.gov/prod/cen2010/briefs/c2010br-01.pdf>.

³⁹ GAO, CRIMINAL ALIEN STATISTICS: INFORMATION ON INCARCERATIONS, ARRESTS, AND COSTS, at 11 (March 2011), available at <http://www.gao.gov/assets/320/316959.pdf>.

⁴⁰ Ewing, et al., *supra* note 34, at 7-8, n. 38.

⁴¹ Carol A. Schubert, et al., *Operational Lessons from the Pathways to Desistance Project*, Jan. 1, 2004, HHS Public Access Author Manuscript, <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2813466/>.

⁴² Ewing, et al., *supra* note 34, at 9; Bianca E. Bersani, Thomas A. Loughran, and Alex R. Piquero, *Comparing Patterns and Predictors of Immigrant Offending Among a Sample of Adjudicated Youth*, JOURNAL OF YOUTH AND ADOLESCENCE 43, no. 11, 1914 (November 2014).

⁴³ Bersani, et al., *supra* note 42, at 1919.

⁴⁴ *Id.* at 1927 (“second generation immigrants offending patterns map more closely on to those observed for their native born peers once again establishing that, even among a sample of at-risk youth, second generation immigrants offend similarly to their native born counterparts”).

when considering the link between immigration and crime, because even if first-generation immigrants are more likely to desist from crime, they will eventually have children. And at least according to this study, those children will be about as likely to persist in crime as their native-born counterparts.

There is one additional wrinkle here, which is that the study does not address that second-generation immigrants' behavior assimilates to that of their native-born peers *in this study*, which means that their behavior is mimicking that of groups *already disproportionately involved in serious crime*. The study's participants were approximately one-third of the juveniles adjudicated for the specified charges in Philadelphia County and Maricopa County, Arizona during a two-year period.⁴⁵ Although the study did not seek to achieve any particular racial balance, white participants were somewhat overrepresented relative to their presence among those who had cases adjudicated, and blacks were somewhat underrepresented.⁴⁶ Otherwise, the study's racial and ethnic composition generally reflects the racial and ethnic composition of juveniles who were found guilty of serious crimes during this period. The differences in reoffending among the different racial and ethnic groups studied are not that great, but the differences in representation among different ethnic groups in the study are stark. In Maricopa County in 2000, 58.7 percent of the population was non-Hispanic white.⁴⁷ 29.6 percent of the population was Hispanic.⁴⁸ In Philadelphia County in 2000, 42.5 percent of the population was non-Hispanic white and 8.5 percent of the population was Hispanic.⁴⁹ Yet in the underlying study, 21 percent of the juveniles adjudicated guilty were white and 28 percent were Hispanic⁵⁰, which indicates that whites were dramatically less likely to be adjudicated guilty of a serious offense than their presence in the population would suggest, and Hispanics were more likely to be adjudicated guilty of a serious offense than their presence in the population would suggest.

⁴⁵ *Id.* at 1920.

⁴⁶ Schubert, et al., *supra* note 41:

Finally, although our enrollment criteria did not include any restrictions on race, we did enroll proportionately more White offenders (test of proportions $z = 3.27$, $p < .005$) and fewer African Americans (test of proportions $z = 3.09$, $p < .005$). We know that this discrepancy was not related to differential rates of participant refusal across racial groups because African Americans were not significantly more likely to refuse. It is instead most likely that the imposition of a cap on the proportion of the sample adjudicated on drug charges probably affected this race proportionality because there is likely to be an association between adjudications for drug charges and race, especially among African Americans in Philadelphia. Indeed, African Americans were significantly more likely ($p = .001$) to be in the drug cap group than were other racial groups.

⁴⁷ U.S. CENSUS BUREAU, American FactFinder, Profile of General Demographic Characteristics: 2000, Maricopa County, Arizona, <http://factfinder.census.gov/faces/nav/jsf/pages/index.xhtml>.

⁴⁸ *Id.*

⁴⁹ U.S. CENSUS BUREAU, American FactFinder, Profile of General Demographic Characteristics: 2000, Philadelphia County, Pennsylvania, <http://factfinder.census.gov/faces/nav/jsf/pages/index.xhtml>.

⁵⁰ Schubert, et al., *supra* note 41, at Table 1.

Even if you examine the percentages of whites and Hispanics petitioned but not adjudicated, whites are underrepresented and Hispanics are overrepresented when you consider the average of the population of the two counties, which slightly favors Hispanics as Philadelphia is weighted a bit more heavily than Phoenix. In short, insofar as the American Immigration Council or others claim that immigrants are less likely to be involved in serious crime than the native-born, that claim only holds, at best, for the first generation. And as for the second generation, who in this study are mostly Hispanic,⁵¹ it seems likely that they assimilate into Hispanics' disproportionate involvement in crime (though admittedly not as disproportionate as blacks), and not to the lower-than-expected involvement of whites. In short, the rosy picture painted by the American Immigration Council does not withstand scrutiny.

Determining whether illegal aliens are more or less likely to be involved in crime than are native-born Americans and legal immigrants is interesting and important, but it is not the crux of the matter. Any crime committed by an illegal alien is a crime committed by someone who should not be in this country. If they were not in this country, whatever crimes they might commit would have been committed elsewhere. This of course does not diminish the evil or seriousness of crime committed in other countries, but it does go to the heart of why Americans object particularly strongly to crimes committed by illegal immigrants. Any government's primary responsibility is to its *citizens*, and by refusing to enforce the immigration laws, the government is prioritizing the interests of illegal immigrants over the protection of citizens.

One high-profile example of this is the murder of Kathryn (Kate) Steinle in San Francisco. Steinle, a 32-year old woman visiting San Francisco with her father, was killed, allegedly by illegal alien Juan Francisco Lopez-Sanchez, who has been charged with murder.⁵² (Lopez-Sanchez claims the shooting was an accident.)⁵³ Lopez-Sanchez had been deported from the United States five times and served almost four years in federal prison. When Lopez-Sanchez was released from federal prison, he was discharged into the custody of San Francisco police. ICE requested that the police notify them if Lopez-Sanchez was about to be released so ICE could deport him again. The police refused to notify ICE because San Francisco is a so-called "sanctuary city" that refuses to cooperate with federal agencies' attempts to deport illegal aliens. Ten weeks later, Kate Steinle was dead.

⁵¹ Bersani, et al., *supra* note 42, at 1920 ("the vast majority of immigrant youth in these data are of Latino ancestry").

⁵² Jaxon Van Derbeken, Carla Marinucci, and Evan Sernoffsky, *Pier-slaying defendant came to S.F. at sheriff's request*, S.F. CHRONICLE, July 8, 2015, <http://www.sfgate.com/news/article/Lee-slams-Mirkarimi-for-not-talking-to-6373929.php>.

⁵³ Vivian Ho, *Defendant pleads not guilty in Pier 14 killing*, S.F. CHRONICLE, July 7, 2015, <http://www.sfgate.com/news/article/Accused-S-F-pier-shooter-pleads-not-guilty-6371391.php>.

This is the real reason why the claim by some “sophisticates” that Americans are rubes for being concerned about illegal aliens and crime does not get more traction with the American people. There are actual, identifiable individuals who have been killed by illegal aliens who would probably be alive if their killers had been deported.⁵⁴ We’re stuck with our fellow American citizens whether we like them or not and whether they are criminals or not. Legal immigrants have the right to be here unless they violate the law. But illegal aliens should not be here in the first place, and if, for example, Lopez-Sanchez had been deported, Kate Steinle would be alive. If ICE had not released illegal alien and convicted felon Apolinar Altamirano on bond, twenty-one-year old Grant Ronnebeck would not have been killed on the job.⁵⁵ Even if illegal aliens as a group commit crimes at a lower rate than native-born Americans or legal immigrants, any crimes they commit are still crimes that would not have been committed if they were not in the United States.

PBNDS and PREA

Twenty-five pages in, the report finally gets around to addressing compliance with PBNDS and PREA, which were the ostensible bases for the report in the first place.

Here I must add a note regarding the PBNDS. There are three standards to which immigration detention facilities are held, depending upon whether they are operated by ICE or a private contractor, and the standards included in the private contractor’s contract. These are the National Detention Standards (NDS), which were promulgated in 2000, the PBNDS 2008, and the PBNDS 2011. All decent people – and most Americans are decent people – want detainees to be treated humanely. But it seems silly to be obsessed about whether facilities are held to the NDS, the PBNDS 2008, or the PBNDS 2011. American prisons and detention facilities in 2000 did not resemble something out of the medieval period. It is also highly likely that if American prisons and detention facilities adhered to whatever the prevailing standard was in 1980, conditions would still be much better than in the prisons of the home countries of the detainees. It is silly to be obsessed regarding whether a facility adheres to the 2000, 2008, or 2011 standard. It is also an indication of how humane our detention system is that it had new, updated standards a mere three years after promulgating the 2008 PBNDS, and also is an indication of how hard the majority must strain to portray the detention facilities as some sort of gulag.

In a system that handles tens of thousands of detainees every year, it is likely that some detainees do not receive medical care as quickly as they ought. Such failures are an opportunity for ICE to correct its procedures. Yet it is telling that although Commissioners

⁵⁴ EJ Montini, *Deport criminal immigrants to save guys like Grant*, THE ARIZONA REPUBLIC, July 1, 2015, <http://www.azcentral.com/story/ejmontini/2015/07/01/rep-matt-salmon-grant-ronnebeck-clerk-criminal-immigrants-deport-grants-law-immigration-and-customs-enforcement/29558379/>.

⁵⁵ *Id.*

and staff visited two detention facilities and spoke with detainees there, the report does not state that those detainees had any complaints about their medical care. Instead, it relies on a few incidents included in witness testimony and on news stories.⁵⁶

Even the witness testimony strains to find instances of abuse. Grassroots Leadership's statement portrays detention facilities as rife with sexual abuse, but mostly relies on vague, unsupported statements claiming widespread instances of sexual abuse. It recounts four instances (although two of those instances involved several incidents of sexual abuse) where sexual abuse or inappropriate sexual behavior is alleged with some specificity. One of the four instances was consensual. The specified incidents occurred over seven years, and the statement otherwise offers that there are "allegations" at some facilities.⁵⁷ It relies on MALDEF regarding claims of widespread sexual abuse at Karnes and cites to an Al-Jazeera America article that relies almost entirely on a complaint filed by MALDEF.⁵⁸

MALDEF's written statement has little more to offer, stating that "at least a few women detained at the Karnes Facility alleged that sexual abuse was ongoing since the facility opened in August of 2014".⁵⁹ MALDEF suggests the GEO Group, Inc. and the Warden of Karnes lied when they testified to the Karnes County Community Court in December 2014 that an investigation had concluded that no sexual abuse took place.⁶⁰ MALDEF also claimed that PREA was not being enforced at Karnes.⁶¹

Everything that MALDEF alleged in regard to Karnes was investigated and disproved even before the Commission's hearing. Contra MALDEF's insinuations, the GEO Group and the Warden were correct when they told the Karnes County Community Court that no sexual abuse had occurred. The DHS OIG ended its investigation on November 24, 2014 and concluded that there was *no* evidence of sexual abuse. DHS's Office of Inspector General (OIG) issued a memorandum explaining their findings on January 7, 2015. The memorandum explained that OIG had investigated the allegations, which in fact were made by one woman who was only reporting rumors and had no direct knowledge.⁶² OIG "found

⁵⁶ Report at 29-39.

⁵⁷ Bob Libal, Written Statement of Grassroots Leadership before the U.S. Commission on Civil Rights, at 6-8.

⁵⁸ *Id.* at 7.

⁵⁹ Marisa Bono, MALDEF, "PREA and Complaints of Sexual Abuse at ICE Karnes Facility," U.S. Commission on Civil Rights, at 2-4.

⁶⁰ *Id.* at 4.

⁶¹ *Id.* at 4.

⁶² Memorandum to Jeh C. Johnson, Secretary, Department of Homeland Security, from John Roth, Inspector General, Investigative Summary – GEO Group Incorporated Detention Facility, Karnes City, Texas, Jan. 7, 2015, https://www.oig.dhs.gov/assets/Mga/OIG_mga-010715.pdf.

no evidence to substantiate the allegations and were unable to identify a victim or suspect in this matter.”

Each of the female detainees identified by the complainant denied they had ever engaged in any form of inappropriate activity, to include sexual acts, with any Detention Officers. They also each denied having been escorted into a laundry room, restroom, or other area to engage in any sexual activity or having received any money, benefits, or preferential treatment in exchange for sex or anything of value.⁶³

OIG’s investigation also revealed that a detainee whom the lone complainant alleged had possibly been impregnated by a detention officer was not in fact pregnant.⁶⁴ No money deposited into detainees’ commissary accounts had been put there by detention officers, disproving the allegation that detention officers were using commissary accounts to pay detainees for sex.⁶⁵ Furthermore, “Review of over 360 hours of time lapsed surveillance video footage of the laundry room and day room areas failed to confirm that any of the detainees were escorted to those areas after hours by Detention Officers.”⁶⁶ OIG also found that “ICE complied with the Prison Rape Elimination Act reporting requirements.”⁶⁷

Likewise, Maria Hinojosa’s testimony would lead one to believe that sexual assault is rampant throughout the immigration detention system. Hinojosa noted that after a report about immigration detention facilities aired on PBS, GAO conducted an investigation and “found that ICE received more than 200 allegations of sexual abuse between 2009 and 2013.”⁶⁸ Obviously, everyone wishes that there were zero allegations of sexual abuse. Yet it should be noted that those allegations of sexual abuse are out of 1.2 million admissions.⁶⁹ GAO reports that this number does not include all the allegations. Even if you assume that 40 percent of the allegations were not reported⁷⁰, this yields 358 allegations of sexual assault and abuse out of more than 1.2 million admissions, which is roughly 29.8 allegations of sexual assault per 100,000 admissions. In contrast, in 2012 there were 86,453 arrests for forcible rape and other sex offenses out of a national population of over 316

⁶³ *Id.* at 2.

⁶⁴ *Id.* at 1, 2.

⁶⁵ *Id.* at 2, 3.

⁶⁶ *Id.* at 2-3.

⁶⁷ *Id.* at 4.

⁶⁸ Hinojosa Statement at 8.

⁶⁹ GAO, ADDITIONAL ACTIONS COULD STRENGTHEN DHS EFFORTS TO ADDRESS SEXUAL ABUSE, at 1 (Nov. 2013), <http://www.gao.gov/assets/660/659145.pdf>.

⁷⁰ *Id.* at 1 (“GAO was unable to locate an additional 28 allegations detainees reported to the 10 facilities GAO visited – or 40 percent of 70 total allegations at these 10 facilities – because ICE field office officials did not report them to ICE headquarters.”).

million⁷¹, which works out to roughly 27.3 arrests for rape and other sex offenses per 100,000 people. Certainly DHS should continue to work to prevent sexual assault and abuse and punish it when it occurs, but there is no evidence of an *epidemic* of sexual abuse in immigration detention facilities.

Furthermore, 123 of the 215 claims of sexual abuse or assault that GAO examined were allegedly perpetrated by another detainee.⁷² 86 of the alleged incidents were committed by a detention officer. When GAO investigated these 215 allegations, only 7 percent were substantiated.⁷³ 38 percent were found to be unfounded (that is, false), and in 55 percent of cases there was insufficient evidence to substantiate the claim.⁷⁴ Also, “Nearly all of the detainees (51 of 53) we interviewed at the 9 facilities we visited housing detainees stated that they felt safe at the detention facility in which they were residing, which they attributed to factors such as respectful treatment and professionalism by guards and a peaceful culture among detainees.”⁷⁵ The data and the interviews of detainees contained in the GAO report contrasts starkly with the picture painted by immigrants-rights advocates at the Commission hearing, some of whom portrayed immigration detention facilities as swept by an epidemic of detention facility guards sexually abusing detainees.

There Is No Evidence UAC Are Regularly Mistreated

The report repeats anecdotes provided by panelists that claim UAC are being mistreated.⁷⁶ Like much of the report, it repeats these anecdotes and implies that these incidents are both cruel and commonplace. The Commission itself did not visit any facilities where UAC are

⁷¹ FBI, UNIFIED CRIME REPORTS, Table 29, Estimated Number of Arrests (2012), <https://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2012/crime-in-the-u.s.-2012/tables/29tabledatadec.pdf>.

⁷² GAO, ADDITIONAL ACTIONS COULD STRENGTHEN DHS EFFORTS TO ADDRESS SEXUAL ABUSE, at 14-15 (Nov. 2013), <http://www.gao.gov/assets/660/659145.pdf>.

Our analysis of ICE JICMS data showed 215 allegations of sexual abuse and assault in ICE detention facilities from October 2009 through March 2013, during which time ICE data indicate that its detention facilities had more than 1.2 million admissions. JICMS data describe the circumstances around the alleged incidents reported to OPR, and our analysis of these data showed that more sexual abuse and assault allegations were made against other detainees than against facility staff, and allegations against staff were most often related to actions taken while staff were conducting job duties. Specifically, our analysis showed that of the 215 allegations, 123 were allegations against fellow detainees or inmates, 86 were allegations against staff members, and 6 did not specify the perpetrator. In general, allegations that named fellow detainees as the perpetrator tended to be allegations of inappropriate touching or penetration or attempted penetration. Allegations that named staff members as the perpetrator tended to be allegations of harassment or allegations that a staff member had sexually abused the victim during the course of job duties – for example, by touching a detainee inappropriately during a pat-down search.

⁷³ *Id.* at 16.

⁷⁴ *Id.* at 16.

⁷⁵ *Id.* at 16-17.

⁷⁶ Report at 56-67.

held, so this section of the report amounts to nothing more than speculation, conjecture, and suggestion that these rumors be investigated. Fortunately, someone did. GAO conducted an exhaustive study of the treatment of UAC and just released the report.⁷⁷

GAO found that CBP and ICE are adhering to seven of the eight required elements of care.⁷⁸ It is worth noting that several of the CBP and ICE standards of care are more stringent than those required by the Flores Agreement.⁷⁹ The remaining element concerns the separation of UACs from unrelated adults and segregation by gender. CBP and ICE reported that due to the overwhelming number of UAC, they did not have the space to fully implement this element.⁸⁰ Instead, they “determined that female and young male UAC were safer in hold rooms with families than in open areas with no barriers between UAC and adult males.”⁸¹

Furthermore, Border Patrol officers were, as individuals, going above and beyond the CBP and ICE requirements.

At the NPC [Nogales Placement Center] we observed Border Patrol agents and OFO officers helping U.S. government public health volunteers provide basic care to UAC, including helping children as young as 2 and 3 years old eat and bathe. At the time of our visit, Border Patrol officials in Arizona were supplementing food supplied by a FEMA contractor with food purchased separately using Border Patrol funding. We also observed toiletries, toys, and other supplies that Border Patrol agents and OFO officers told us had been purchased with personal funds. In addition, we observed Border Patrol agents and OFO officers playing games with UAC.⁸²

GAO does note that investigations by two branches of DHS found isolated problems regarding food and sanitation during the height of the UAC crisis.⁸³ Obviously such problems should be addressed. However, such problems are to be expected when government facilities are overwhelmed by an over 100 percent increase in population. It is not an indication of any sort of systematic cruelty. The majority should take this as a lesson. They seem to support the influx of UAC at the border and do not want them immediately

⁷⁷ GAO, UNACCOMPANIED ALIEN CHILDREN: ACTIONS NEEDED TO ENSURE CHILDREN RECEIVE REQUIRED CARE IN DHS CUSTODY (July 2015), <http://www.gao.gov/assets/680/671393.pdf>.

⁷⁸ *Id.* at 38-41.

⁷⁹ *Id.* at 38.

⁸⁰ *Id.* at 41.

⁸¹ *Id.* at 41.

⁸² *Id.* at 41.

⁸³ *Id.* at 42.

deported. If that is what they want, they should not be so surprised when the systems are overwhelmed.

Congress Should Amend the TVPRA to Provide for Expedited Removal of All Unaccompanied Alien Children

The report notes that under the 2008 reauthorization of the TVPRA, only unaccompanied alien children from Canada and Mexico are subject to expedited removal.⁸⁴ Perhaps at the time the TVPRA was passed, almost all UACs were from Canada and Mexico. Whatever the reason for this quirk in the statute, the TVPRA should be amended so all UACs who have not been subject to severe forms of trafficking and do not have a credible asylum claim are immediately repatriated.⁸⁵ This would also act as a counterweight to rumors in Latin America that the United States is dispensing “permisos” to illegal aliens. Swift repatriation of alien children will do more to discourage others from coming to the United States than articles in newspapers can hope to accomplish.⁸⁶

Detaining Illegal Immigrants and Other Deportable Aliens Does Not Violate the Constitution

One of the odder aspects of the report is that its foundational premise seems to be that people who cross the border illegally, who overstay their visas, or who commit a deportable offense are *entitled* to be in the United States, and that efforts to deport them are illegitimate. This is backwards. If a person comes to the United States illegally, even if they have a legitimate asylum claim, the nation’s decision to grant them asylum is its alone. The person is not a citizen and has no right to be in the United States.⁸⁷ This is even truer in regard to the majority of illegal immigrants, who come to the United States for economic opportunities or to escape a lawless home country. One can sympathize with their motivations (indeed, members of my own family escaped tyranny), but the fact remains that

⁸⁴ Report at 51-52.

⁸⁵ Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. 110-457, Sec. 235 (2008).

⁸⁶ Jeh C. Johnson, *An Open Letter to the Parents of Children Crossing Our Southwest Border*, DEPARTMENT OF HOMELAND SECURITY, June 23, 2014, <http://www.dhs.gov/news/2014/06/23/open-letter-parents-children-crossing-our-southwest-border>.

⁸⁷ *Landon v. Plasencia*, 459 U.S. 21, 32 (1982) (“This Court has long held that an alien seeking initial admission to the United States requests a privilege and has no constitutional rights concerning his application, for the power to admit or exclude aliens is a sovereign prerogative.”); *see also Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155, 187-88 (1993) (“It is perfectly clear that 8 U.S.C. § 1182(f) ... grants the President ample power to establish a naval blockade that would simply deny illegal Haitian migrants the ability to disembark on our shores. Whether the President’s chosen method of preventing the ‘attempted mass migration’ of thousands of Haitians – to use the Dutch delegate’s phrase – poses a greater risk of harm to Haitians who might otherwise face a long and dangerous return voyage is irrelevant to the scope of his authority to take action that neither the Convention nor the statute clearly prohibits.”); *Kleindienst v. Mandel*, 408 U.S. 753, 762 (“It is clear that Mandel personally, as an unadmitted and nonresident alien, had no constitutional right of entry to this country as a nonimmigrant or otherwise.”).

they have no *right* to be here. They are detained because they broke the law. So it is not unjust that they are detained, nor is it a violation of due process.

The courts have routinely upheld the government's ability to detain and exclude immigrants. "Courts have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute largely immune from judicial control."⁸⁸ A person who is stopped at the border has not been legally admitted to the United States, even if he is detained at Ellis Island for years or released on immigration parole pending deportation.⁸⁹

The report claims that detaining illegal immigrants and deportable aliens may violate the Fifth Amendment because the detention facilities resemble penal facilities. This is a misreading of the relevant precedent. In *Wong Wing v. U.S.*, the question was not whether the government had the authority to confine a deportable alien until he could be deported. That was accepted. The question was whether the government had, in sentencing a deportable alien to a term of hard labor prior to his removal without giving him a trial, violated the Fifth and Sixth Amendments by imposing an infamous punishment.⁹⁰ The Court determined that imprisonment with hard labor was indeed an infamous punishment, and therefore a deportable alien could not be sentenced to such a punishment unless he was given a trial. However, the government retained the authority to imprison aliens in order to deport them.

We think it clear that detention or temporary confinement, as part of the means necessary to give effect to the provisions for the exclusion or expulsion of aliens, would be valid. Proceedings to exclude or expel would be vain if those accused could not be held in custody pending the inquiry into their true character, and while arrangements were being made for their deportation.⁹¹

The report cites *Youngberg v. Romeo*, in which the Court upheld a state mental institution's right to physically restrain an inmate as necessary for his safety and that of others, and suggests that it is stale case law.⁹² Yet the case it cites to support this proposition is a lone case from the Ninth Circuit, *Jones v. Blanas*,⁹³ which has itself interpreted its decision as

⁸⁸ *Shaughnessy v. U.S. ex rel. Mezei*, 345 U.S. 206, 210 (1953); *see also* *Landon v. Plasencia*, 459 U.S. 21, 34 (1983) ("Further, it must weigh heavily in the balance that controls over matters of immigration is a sovereign prerogative, largely within the control of the executive and legislature.").

⁸⁹ *See* *Kaplan v. Tod*, 267 U.S. 228 (1925); *Zadvydas v. Davis*, 533 U.S. 678, 693-94 (2001).

⁹⁰ *Wong Wing v. U.S.*, 163 U.S. 228, 233-34 (1896).

⁹¹ *Id.* at 235.

⁹² *Youngberg v. Romeo*, 457 U.S. 307, 317-18 (1982).

⁹³ *Jones v. Blanas*, 393 F.3d 918 (9th Cir. 2004).

consistent with *Youngberg*⁹⁴ and *Wolfish v. Bell* (discussed below). More importantly, *Jones* has been cited by only two other federal appellate courts – once by the Third Circuit in support of the proposition that the “mailbox rule” applies to civil detainees⁹⁵, and once by the Federal Circuit to establish the level of review the Ninth Circuit applies to district court grants of summary judgment because of statutes of limitation.⁹⁶

The issue in *Youngberg v. Romeo* was whether Romeo’s rights were violated by being subjected to physical restraints.⁹⁷ Romeo and the state agreed that he would never be able to be released from the state mental hospital.⁹⁸ Physical restraints do not seem to be a day-to-day feature of detention for most detainees, based on the very few mentions of handcuffs and shackles in the report. It appears that such physical restraints are usually used when apprehending and transporting aliens. That is hardly cruel or punitive. In fact, in most cases, *not* using physical restraints when transporting teenage and adult aliens would be foolish. Furthermore, the Court determined that the use of restraints was a question to which deference was owed to the judgment of professionals charged with caring for Romeo.⁹⁹ Romeo had an interest in freedom from restraint, but the state had a duty to care for him and an interest in an organized society. These interests must be balanced. This case provides no support for the report’s contention that detainees are being subjected to punitive detention in violation of the Fifth and Fourteenth Amendments.

The report also cites *Bell v. Wolfish*: “a [civil] detainee may not be punished prior to an adjudication of guilt in accordance with due process of law.”¹⁰⁰ The insertion of “civil” in brackets is odd, as *Bell* concerned pretrial criminal detainees. It is also odd because although everyone in immigration detention has presumably committed some immigration offense, in many cases the immigration offense is not the only offense they have committed. For example, 8 U.S.C. § 1226(c) allows the Attorney General to take criminal aliens into custody. In other words, an alien may have been in the United States lawfully, but may then have committed a crime that makes him deportable.¹⁰¹ So although the immigration offense itself may be a merely civil offense (although some immigration

⁹⁴ *Clouthier v. County of Contra Costa*, 591 F.3d 1232, 1243 (9th Cir. 2010) (“In *Jones*, we held that an individual detained awaiting civil commitment proceedings was, at a minimum, entitled to the rights of a civilly committed mentally retarded person in *Youngberg* and a pretrial detainee in *Bell*.”)

⁹⁵ *Council v. Nash*, 400 Fed. App’x 681 (3rd Cir. 2010).

⁹⁶ *D-Beam v. Roller Derby Skate Corp.*, 316 Fed. App’x 966 (Fed. Cir. 2008).

⁹⁷ *Youngberg v. Romeo*, 457 U.S. 307, 317-18 (1982).

⁹⁸ *Id.* at 317.

⁹⁹ *Id.* at 321-25.

¹⁰⁰ Report at 96, citing *Bell v. Wolfish*, 441 U.S. 520 (1979).

¹⁰¹ 8 U.S.C. § 1226(c)(B); 8 U.S.C. § 1227(a)(2) (providing that aliens are deportable upon conviction for, among other things, crimes of moral turpitude, multiple criminal convictions, aggravated felonies, high speed flight, failure to register as a sex offender, and drug offenses).

offenses are criminal), the alien himself may qualify as a criminal alien. The report is disingenuous in portraying all immigration detainees as harmless, hapless folks who have merely committed a civil violation. Many have committed crimes, and that is why they are being deported. Many of them are dangerous, and cannot safely be detained in a country club. (Although admittedly the Administration is doing its best to ensure criminal aliens remain in the country.)¹⁰²

Despite this odd choice, *Wolfish* does not support the proposition that immigrant detainees are being punished. The Court writes:

Not every disability imposed during pretrial detention amounts to “punishment” in the constitutional sense, however. Once the Government has exercised its conceded authority to detain a person pending trial, it obviously is entitled to employ devices that are calculated to effectuate this detention. Traditionally, this has meant confinement in a facility which, no matter how modern or how antiquated, results in restricting the movement of the detainee in a manner in which he would not be restricted if he simply were free to walk the streets pending trial. Whether it be called a jail, a prison, or a custodial center, the purpose of the facility is to detain. Loss of freedom of choice and privacy are inherent incidents of confinement in such a facility. And the fact that such detention interferes with the detainee’s understandable desire to live as comfortably as possible and with as little restraint as possible during confinement does not convert the conditions or restrictions of detention into “punishment.”

...

¹⁰² Kate Scanlon, *Ted Cruz Questions ICE Official Over Illegal Immigration: ‘There Is a Reason the American People Are Upset,’* THE DAILY SIGNAL, July 22, 2015, <http://dailysignal.com/2015/07/22/ted-cruz-questions-ice-official-over-illegal-immigration-there-is-a-reason-the-american-people-are-upset/>.

Cruz asked Saldaña how many “criminal illegal aliens” the Obama administration released in 2013.

Saldaña responded with the 2014 figure: “a little over 30,000.”

Cruz pointed out her error.

“When I asked you how many criminals ICE released in 2013, you were off by a factor of three,” Cruz said. “You said 30,000. The correct answer is 104,000.”

Saldaña said that the number “went down from 2013.”

“But you’re omitting the 68,000 criminal illegal aliens that ICE did not begin deportation proceedings against at all. You’ve got to add both of those together. It’s over 100,000,” Cruz responded.

“Yes, sir,” Saldaña said. “That’s absolutely right.”

Cruz said that of the 104,000 immigrants in the country illegally who were released into the public in 2013, 193 had been convicted of homicide, 426 had been convicted of sexual assault and more than 16,000 had been convicted of driving under the influence of alcohol.

[W]e do not accept respondents' argument that the Government's interest in ensuring a detainee's presence at trial is the *only* objective that may justify restraints and conditions once the decision is lawfully made to confine a person. "If the government could confine or otherwise infringe the liberty of detainees only to the extent necessary to ensure their presence at trial, house arrest would in the end be the only constitutionally justified form of detention." The Government also has legitimate interests that stem from its need to manage the facility in which the individual is detained. These legitimate operational concerns may require administrative measures that go beyond those that are, strictly speaking, necessary to ensure that the detainee shows up at trial. For example, the Government must be able to take steps to maintain security and order at the institution and make certain no weapons or drugs reach detainees. Restrictions that are reasonably related to the institution's interest in maintaining jail security do not, without more, constitute unconstitutional punishment, even if they are discomfiting and are restrictions that the detainee would not have experienced had he been released while awaiting trial.¹⁰³ [citations omitted]

The courts have analogized immigrant detainees to the pretrial detainees in *Wolfish*. Immigration detainees also are awaiting an adjudication of their status.¹⁰⁴ The government has the right to detain them and an interest in ensuring that they do not simply vanish into the interior of the country, as so many do.¹⁰⁵ The Supreme Court has repeatedly upheld the

¹⁰³ *Bell v. Wolfish*, 441 U.S. 520, 537, 539-40 (1979).

¹⁰⁴ *Turkmen v. Hasty*, 789 F.3d 218, 237-38, 256-46, 275-78, 282 (2nd Cir. 2015); *Dahlan v. DHS*, 215 Fed. App'x 97, 100 (2007).

¹⁰⁵ *Demore v. Kim*, 538 U.S. 510, 519-20 (2003).

Congress also had before it evidence that one of the major causes of the INS' failure to remove deportable criminal aliens was the agency's failure to detain those aliens during their deportation proceedings. The Attorney General at that time had broad discretion to conduct individualized bond hearings and to release criminal aliens from custody during those removal proceedings when those aliens were determined not to present an excessive flight risk or threat to society. Despite this discretion to conduct bond hearings, however, in practice the INS faced severe limitations on funding and detention space, which considerations affected its release determinations.

Once released, more than 20% of deportable criminal aliens failed to appear for their removal hearings. The dissent disputes that statistic, but goes on to praise a subsequent study by the Vera Institute of Justice that more than confirms it. As the dissent explains, the Vera study found that "77% of those [deportable criminal aliens] released on bond" showed up for their removal proceedings. This finding – that one out of four criminal aliens released on bond absconded prior to the completion of his removal proceedings – is even more striking than the one-in-five flight rate reflected in the evidence before Congress when it adopted § 1226(c). The Vera Institute study strongly supports Congress's concern that, even with individualized screening, releasing deportable criminals on bond would lead to an unacceptable rate of flight. [citations omitted]

government's right to detain immigrants.¹⁰⁶ And the government has the right to create detention facilities that will effectuate that purpose. Furthermore, although the Fifth Amendment applies to aliens, "this Court has firmly and repeatedly endorsed the proposition that Congress may make rules as to aliens that would be unacceptable if applied to citizens."¹⁰⁷

The report's attempt to portray confinement in immigration detention facilities as a constitutional violation turns upon the fact that the facilities are often similar to prisons.¹⁰⁸ They have barbed-wire fences, dormitories, open showers, locked doors, and the detainees wear prison-like jumpsuits. Raising objections about barbed-wire fences and locked doors is bizarre when the detainees are being detained in the first place because they did not respect boundaries, both legal and physical. There is little reason to think that a person who already climbed a fence to cross into the United States illegally would respect another fence around an immigration detention facility, or would not walk through an unlocked door. As Justice Rehnquist wrote, "Whether it be called a jail, a prison, or a custodial center, the purpose of the facility is to detain." There is no constitutional violation.

Detention is Necessary Because Alternatives to Detention Do Not Work

It is difficult to know what the majority would propose as an effective alternative to detention facilities, except that effectiveness is not on the majority's list of priorities. The report cheerfully reports that DHS Secretary Jeh Johnson has announced a new plan to release more detained illegal immigrants on bond, and promised that the "bond amount would be 'realistic' and take into account a detained immigrant's ability to pay the bond, 'while also encompassing risk of flight and public safety.'"¹⁰⁹

There is little reason to think that this initiative will be effective. In February 2015, DHS's Office of the Inspector General released a report on the effectiveness of Alternatives to Detention. The Inspector General examined the Intensive Supervision Appearance Program, which as the name suggests is more intensive than a mere bond.¹¹⁰ The Inspector General notes, "ERO [Enforcement and Removal Operations] tracks more than 1.8 million aliens in immigration removal proceedings, but ICE's budget only funds 34,000 detention

¹⁰⁶ *Id.* at 523 ("this Court has recognized detention during deportation proceedings as a constitutionally valid aspect of the deportation process. . . . deportation proceedings 'would be vain if those accused could not be held in custody pending the inquiry into their true character.'").

¹⁰⁷ *Id.* at 522.

¹⁰⁸ Report at 93-108.

¹⁰⁹ Report at 17.

¹¹⁰ DEPARTMENT OF HOMELAND SECURITY OFFICE OF THE INSPECTOR GENERAL, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT'S ALTERNATIVES TO DETENTION (REVISED), Feb. 4, 2015, https://www.oig.dhs.gov/assets/Mgmt/2015/OIG_15-22_Feb15.pdf.

beds.”¹¹¹ The program examined by the Inspector General is presently known as ISAP II, and is an attempt to monitor some of these aliens who are not detained. The program utilizes electronic monitoring and electronic monitoring plus caseworker monitoring, and according to the report “uses ISAP II in conjunction with the less restrictive release conditions associated with payment of a bond, or having to report periodically to an ERO field office.”¹¹² The electronic monitoring is either telephonic or uses a GPS-enabled ankle bracelets.¹¹³ On the surface, this is not slapdash monitoring. Yet it has a very mixed track record. In 2010, the first year examined by the Inspector General, over 10 percent of ISAP II participants absconded and over 6.5 percent were arrested by another law enforcement agency.¹¹⁴ ERO claimed that those percentages declined every year; however, the Inspector General found that it was impossible to accurately measure whether participants eventually absconded or were arrested, because ERO dropped participants from the monitoring program before their cases were ultimately resolved, but did not correspondingly change the metrics for measuring the program’s effectiveness.¹¹⁵ Furthermore, “ERO does not have sufficient resources to redetain participants who willfully violate ISAP II’s terms of supervision, such as those who tamper with GPS monitors or miss appointments.”¹¹⁶ An alternative to detention is unlikely to be effective if participants know that bad behavior is unlikely to result in detention.

The problem with relying on bonds as a mechanism for people showing up for immigration hearings is that however much the bond is for, it is almost certainly worth less to them than staying in the United States. Remember, these are people who - as we have been told many, many times - undertook a dangerous journey of hundreds of miles to make it to the United States, and who then crossed into the United States illegally. What is a five thousand dollar bond compared with that? Nothing. If over 16 percent of people in the more intensive ISAP II program either abscond or are arrested (it is possible that some people fall into both categories, of course), what is the success rate of the bond program alone?

Happily, the government has data on the success of the bond program as well. In May 2015, the Executive Office for Immigration Review released its 2014 Statistics Yearbook. In FY 2010, 22 percent of formerly detained aliens released on bail or their own recognizance did not appear for their immigration hearings.¹¹⁷ In FY 2014, 39 percent of

¹¹¹ *Id.* at 3.

¹¹² *Id.* at 2-3.

¹¹³ *Id.* at 3.

¹¹⁴ *Id.* at 6.

¹¹⁵ *Id.* at 7-8.

¹¹⁶ *Id.* at 8.

¹¹⁷ EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, FY 2014 STATISTICS YEARBOOK, at P3 (May 2015), <http://www.justice.gov/eoir/pages/attachments/2015/03/16/fy14syb.pdf>.

those aliens did not appear for their immigration hearings. EOIR notes that this is “[an increase of] 153 percent, while the number of immigration judge decisions for those aliens increased by 41 percent.”¹¹⁸ Undoubtedly some of my colleagues will claim that this is the government’s fault. However, if you are released on bond, it is your responsibility to keep ICE apprised of your current address and to show up for your immigration hearing. If you want to live in the United States, the least you can do is show up for your immigration hearing and take responsibility for knowing when and where that will take place.

Furthermore, neither GPS monitoring nor bonds prevent aliens from committing crimes. In July, Keane Dean, an illegal alien whom ICE was seeking to deport, was arrested for sexually assaulting a 14-year-old girl he had met at a grocery store.¹¹⁹ He had previously served time for indecent exposure and lewd conduct in public. The first conviction occurred in 2008, but apparently the government decided to give Dean another chance. Dean had been in detention, but was freed after posting a \$10,000 bond and being required to wear a GPS monitor. Yet that did not deter him from sexually assaulting a young girl.

If we care about enforcing the immigration laws, we should not be reducing our use of detention. As mentioned above, ICE does not even have sufficient beds to redetain people who willfully violate the ISAP II program. Almost 40 percent of people released on bond or on their own recognizance – and if bond is sufficiently low, it is virtually indistinguishable from being released on your own recognizance – do not appear for their immigration hearings. And bonds and GPS monitoring do not prevent people from committing crimes against innocent people. Detention does.

Immigration Policy is Primarily Within the Purview of the Legislative Branch

Much of the problem with our immigration system today is that Congress, as the legislative branch, is primarily responsible for setting immigration policy, but President Obama is engaged in a constitutional power grab that threatens to gut the separation of powers. The majority, of course, safe in the assumption that any future conservative president would not engage in such a power grab (probably a safe bet, but events can take unforeseen turns) support the President in his unconstitutional efforts.

The Supreme Court stated, “Courts have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute largely immune from judicial control. . . . In the exercise of these powers, Congress expressly authorized the President to place additional

¹¹⁸ *Id.*

¹¹⁹ *Man Arrested for Sexually Assaulting 14-Year-Old Girl is Undocumented Immigrant*, Associated Press, July 21, 2015, <http://abc7.com/news/man-arrested-for-sexually-assaulting-14-year-old-girl-is-undocumented-immigrant/871046/>; Cindy Chang, *Sex offender accused of assaulting teen was in the country illegally, officials say*; L.A. TIMES, July 21, 2015, <http://www.latimes.com/local/crime/la-me-sex-offender-immigration-20150721-story.html>.

restrictions on aliens entering or leaving the United States during periods of international tension and strife.”¹²⁰ The Court recognized that immigration policy is within the purview of the political branches, not the judicial branch. Furthermore, the President had the power to exclude Mezei because Congress had authorized him to do so. Would the President have had the power to exclude Mezei in the absence of explicit congressional authority? Perhaps. Would the President have the authority to admit Mezei if there were legislation specifically providing that aliens like Mezei be excluded? No. Yet that is the situation in which we find ourselves today.

The Court recognizes that it is Congress that makes the immigration laws. In *Kleindienst v. Mandel*, the Court recited a lengthy history of American statutes governing immigration since 1875. “The Act of March 3, 1875 barred convicts and prostitutes. Seven years later Congress passed the first general immigration statute. Other legislation followed.”¹²¹ [citations omitted] The Court continues in this vein for several paragraphs, finally concluding, “We thus have almost continuous attention on the part of Congress since 1875 to the problems of immigration and of excludability of certain defined classes of aliens.”¹²² The President and the Executive Branch are nowhere mentioned in this history. The Court continues:

The Court without exception has sustained Congress’ ‘plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden.’ ‘(O)ver no conceivable subject is the legislative power of Congress more complete than it is over’ the admission of aliens.”¹²³ [citations omitted]

The Court then quotes at length from Justice Frankfurter’s opinion in *Galvan v. Press*¹²⁴:

As to the extent of the power of Congress under review, there is not merely a page of history, . . . but a whole volume. Policies pertaining to the entry of aliens and their right to remain here are peculiarly concerned with the political conduct of government. In the enforcement of these policies, the Executive Branch of government must respect the procedural safeguards of due process. . . . But that the formulation of these policies is entrusted exclusively to Congress has become about as firmly embedded in the

¹²⁰ *Shaughnessy v. U.S. ex rel. Mezei*, 345 U.S. 206, 210 (1953).

¹²¹ *Kleindienst v. Mandel*, 408 U.S. 753, 761 (1972).

¹²² *Id.*

¹²³ *Id.* at 766.

¹²⁴ *Galvan v. Press*, 347 U.S. 522 (1954).

legislative and judicial issues of our body politic as any aspect of our government.¹²⁵

Congress is the legislative branch. As the name suggests, and as the Supreme Court has assumed, it legislates – even in the area of immigration. The President has only the power to veto legislation passed by Congress. And even that power is limited, as Hamilton wrote in Federalist 69:

The president of the United States is to have power to return a bill, which shall have passed the two branches of the legislature, for re-consideration; and the bill so returned, is not to become a law, unless, upon that re-consideration, it be approved by two-thirds of both houses. The king of Great Britain, on his part, has an absolute negative upon the acts of the two houses of parliament. . . . The qualified negative of the president, differs widely from this absolute negative of the British sovereign¹²⁶

Congress has declined to pass an immigration bill. In our system of government, that should settle the matter as far as the President’s ability to change the law is concerned. Yet through executive orders, memorandums from government agencies, and proposed rulemakings the President has unilaterally rewritten the immigration laws. He is legislating. Yet the Executive Branch is not the Legislative Branch, and as seen above, the President was intended to have only a qualified power even to veto legislation.

Parts of the Report are Deliberately Dishonest

The most dishonest aspect of this report is the inclusion of false information. The most egregious example is Figure 9 on page 100. The photo is captioned “Nogales Border Patrol Station – Children’s Housing Unit.” Yet the picture is not actually of the Nogales Border Patrol Station. The link in the footnote is to a blog post with the charming title, “Kids Detained in AZ Provides Window Into Totally F*cked US Immigration System,” which might have been a clue that this is not the most reliable source imaginable. Regardless, one scrolls down to find the picture, and sees that the photo is credited to “Colorlines,” with a link. The link takes you to a blog post entitled “Dispatch from Detention: A Rare Look Inside Our ‘Humane’ Immigration Jails.”¹²⁷ This time, the photo has a credit to Paul J. Richards and Getty Images, but does not indicate where the picture Here was taken. The blog post was written in 2012 and focuses entirely on adult detention facilities in Florida and Texas. Using the image to conduct a Google Image search turns up the photo in a 2009

¹²⁵ *Kleindienst v. Mandel*, 408 U.S. 753, 766-67 (1972).

¹²⁶ THE FEDERALIST NO. 69 (Alexander Hamilton).

¹²⁷ Seth Freed Wessler, *Dispatch from Detention: A Rare Look Inside Our ‘Humane’ Immigration Jails*, COLORLINES, Jan. 4, 2012, <http://www.colorlines.com/articles/dispatch-detention-rare-look-inside-our-humane-immigration-jails>.

Human Rights Watch report, which indicates that it is a 2007 photo of women in the Willacy detention facility in Texas.¹²⁸ Is this photo caption accurate? Who knows, but unfortunately in this instance I have more faith in Human Rights Watch than our report.

What makes the inclusion of this photo so egregious is that the photo's dubious provenance was pointed out to staff during the review period of the draft report. Yet instead of attempting to determine whether the photo actually depicts children in Nogales, they left the photo and the citation unchanged. But it is a lie. Those are not children, that is not Nogales, and this photo is probably eight years old.

Likewise, the next photo, Figure 10, is supposedly of a high-security penitentiary in Coleman, Florida.¹²⁹ However, the article that is cited does not indicate that this photo is of the prison in Coleman. The text of the article casts doubt on the likelihood that this is Coleman, as the first two paragraphs state that a corrections officer "hesitated before opening the cell of an apparently drunken inmate" and that when he did, "the prisoner's sober cellmate attacked".¹³⁰ That strongly suggests that the prisoners were in two-person cells, not the dormitory-type housing depicted in the photograph. That would make sense, because Coleman is a high-security facility, and it seems unlikely that a high-security facility would house large numbers of inmates in an open plan setting. Furthermore, our old friend the Google Image search pulls up an article from *The Atlantic* that captions the photo thus: "Inmates walk around a gymnasium where they are housed due to overcrowding at the California Institution for Men state prison in Chino, California in June 2011."¹³¹ Is *The Atlantic's* caption correct? Again, I do not know, but I have more faith in *The Atlantic* than in our report, especially because doubts about this photo were also expressed during the draft review period, and yet it remains unchanged in the final report.

This Report Boils Down to Two Things: Gutting the Immigration System, and the Immigration Lawyers' Full Employment Act

This report illustrates how ill-suited the Commission is to setting immigration policy. The report masquerades as a civil rights document, but in truth it is an attempt to skew immigration policy in the majority's preferred direction. Open-borders advocates, whether in the Administration, the Commission, other agencies, or the courts, use the Lilliputians'

¹²⁸ *US: Immigration Detention Neglects Health*, HUMAN RIGHTS WATCH, March 17, 2009, <https://www.hrw.org/news/2009/03/17/us-immigration-detention-neglects-health>.

¹²⁹ Report at 103.

¹³⁰ Andrew Lapin, *Inmate assaults on federal prison officers underscore staffing, budget shortfalls*, GOVERNMENT EXECUTIVE, Jan. 11, 2012, <http://www.govexec.com/defense/2012/01/inmate-assaults-on-federal-prison-officers-underscore-staffing-budget-shortfalls/35816/>.

¹³¹ Matt Ford, *Californians Vote to Weaken Mass Incarceration*, THE ATLANTIC, Nov. 5, 2014, <http://www.theatlantic.com/politics/archive/2014/11/california-prop-47-mass-incarceration/382372/>.

tactic to override public sentiment in regard to immigration. If they can tie the public down by using a thousand seemingly small strings – unilaterally deferring action for millions of people here, requiring that states fund the education of illegal immigrant children there, finding a heretofore unknown limit on detention there, and, most importantly, accusing the unwashed masses of xenophobia and racism – eventually there will be almost no way to enforce immigration laws or to set immigration policy.

Open borders advocates use this tactic because they know they cannot win legislatively – yet. The House of Representatives, which most directly represents the people, has repeatedly refused to pass the “comprehensive immigration reform” so dear to the hearts of successive presidents of both parties. Gallup polls have consistently shown for decades that the American people have little appetite for increased levels of immigration.¹³² Large majorities of white, black, and Hispanic Americans all consistently report that they want immigration to either remain at its current level or to decrease. Yet we keep experiencing high levels of illegal immigration due to the government’s refusal to enforce the immigration laws, and increased levels of legal immigration are offered every time a “comprehensive immigration reform” bill is proposed.

The majority’s Recommendation 13 urges that taxpayers pay for attorneys for illegal immigrants. Exactly why a nation that is 18 trillion dollars in debt should pay for attorneys for people who broke its immigration laws is unclear, particularly given that most of those heavily burdened taxpayers want recent border crossers packed off to their countries of origin posthaste. Taxpayer funding for immigration attorneys would, however, be a boon to the immigration bar and to open borders advocates. This report is primarily motivated by the interests of those two groups and the need to provide political cover to the Administration’s lawlessness, so perhaps that is the only explanation needed for a recommendation that would extend plundering of taxpayers and gutting of immigration enforcement into a new realm.

Conclusion

There are two difficulties inherent in writing about this issue. The first is that one often knows illegal immigrants, and many are decent people with whom one sympathizes and whom one has no desire to offend. The second is that people are eager to pillory you as cruel and callous, unsympathetic to the plights of unfortunate people. Yet one can be sympathetic and still acknowledge that the United States cannot admit even every deserving refugee. Whatever the suffering experienced by women and children coming from Latin America, it is virtually certain that it pales in comparison to that endured by Christian and Yazidi women and children in Syria and Iraq. Yet we cannot offer sanctuary even to all, or very many, of the latter, deserving as they are. The world is a large and populous place, and

¹³² Gallup, Immigration, <http://www.gallup.com/poll/1660/immigration.aspx>.

it is a cruel place. As a nation, we have made a determination that we will grant asylum to people who are victims of certain state policies, but we cannot grant asylum to every victim of what are, alas, the tragic cruelties of individuals.

Like mold on food left in the refrigerator for too long, the report has spread into an attack on the enforcement of the country's immigration laws, and perhaps on their very existence. Much of the report is at least intellectually dishonest, other parts simply dishonest. This report is outside the Commission's jurisdiction and therefore most of this report is illegitimate. I dissent.

Statement of Commissioner David Kladney

With the Concurrence of Vice Commissioner Patricia Timmons-Goodson & Commissioner Michael Yaki

There are three kinds of facilities immigrants can find themselves detained in: border patrol facilities, family detention facilities, and adult facilities. The Commission's investigation found serious problems with all three. We also found that across the board, immigrants who are detained have difficulty accessing legal representation.

Border Patrol

In Border Patrol facilities, reports of mistreatment are remarkably consistent. Detainees report being placed in extremely cold rooms, given spoiled and inadequate food, and inadequate clothing and blankets. They also report overcrowding. They say that guards treat them with disrespect. We heard identical complaints about border patrol from both panelists at our briefing and detainees who spoke to Commissioners.¹ These conditions are extreme and must be changed.

Border patrol agents are responsible for referring immigrants to the asylum process if they express fear of returning to their home country. Our briefing and other sources revealed that this screening is not always done carefully.² Recently arrived immigrants might have little knowledge of their legal rights. At this time, it is not clear that border patrol is equipped to meaningfully inform immigrants of their rights. Instead, they give a questionnaire that is designed to determine whether an immigrant has a credible fear of return to their home country. The Commission requested a copy of this questionnaire, but one was not provided.³ If an immigrant expresses no fear in response to the questionnaire, that person is immediately removed.⁴ The ability of border patrol to conduct questioning well and for immigrants to understand what is at stake is crucial. We have therefore recommended that Legal Orientation Programs be expanded into border patrol facilities.

Having legal representation for immigrants available on site would be an even better solution. The presence of outside groups could also help monitor conditions at border patrol facilities.

¹ Testimony of Maria Hinojosa, USCCR January 30, 2015 Briefing Transcript (hereinafter Briefing Transcript), p. 107; Testimony of Carl Takei, Briefing Transcript, p. 234.

² *U.S. Asylum Seekers May Face Barriers from Border Patrol*, Frontline, PBS, November 13, 2014, available at <http://www.pbs.org/wgbh/pages/frontline/immigration-2/u-s-asylum-seekers-may-face-barriers-from-border-patrol/>.

³ Testimony of Franklin Jones, Briefing Transcript, p. 43.

⁴ *Ibid.*

Family Detention

The Commission visited Karnes County Residential Center, a family detention facility. Although the facility is clean and has some provisions for children, it is clear that it is a very restrictive environment. Two or three families are housed in each room. The rooms are the size of a motel room with bunk beds along the walls and a sink at the end. A restroom with a shower is attached to each room. There is little privacy for adults, teenagers or children.

Women reported to the Commissioners that they have been held in this facility for months. A staff member told me the average stay at the Karnes facility was 4 months. The mothers said the children know they are being confined against their will. They are sad they cannot leave. One mother said her son would make friends with other children detainees and watch them leave the facility. His depression deepened as he saw friend after friend leave him behind. The women reported a lack of government-provided childcare and an unreasonable government prohibition restricting the detainees from watching each other's children. This means that women must bring their children to meetings with their lawyers (if they have one), meetings with immigration officers and medical appointments for themselves or any other minor children. In these situations, women face the choice of relaying physical, mental and/or sexually traumatizing events in front of their children, or being less candid at the risk of jeopardizing their claim.⁵ The government should not force them to make such a choice when a regulation allowing other detainees to watch the children during these times is an easy fix.

We also heard that when women went on a hunger strike to protest conditions, they were put in solitary confinement. This is an unacceptable and mean-spirited response that could lead to mental issues.

A federal District Court Judge has assessed the conditions in family detention and determined they do not comply with the government's obligations to immigrant children.⁶ I wholeheartedly agree with Honorable Judge Dolly Gee's assessment. (See Judge Gee's Decision on the Order to Show Cause, attached). The Commission has recommended that DHS take steps to release families from detention as quickly as possible, making sure the families have a safe place to reside and support while they await their immigration hearings. This change would be a return to the policy DHS had in place only a year ago.⁷

⁵ See *Locking up Family Values, Again*, Lutheran Immigration & Refugee Service and Women's Refugee Commission, October 2014, p. 12, available at http://lirs.org/wp-content/uploads/2014/11/LIRSWRC_LockingUpFamilyValuesAgain_Report_141114.pdf.

⁶ *Jenny L. Flores, et al. v. Jeh Johnson, et al.*, CV 85-4544 DMG, Order of June 24, 2015 (C.D. Cal.).

⁷ Testimony of Marisa Bono, Briefing Transcript, p. 159-160.

Families are being detained without individualized assessments of whether there is a valid reason to detain them. These reasons range from them being a flight risk, health risk or safety risk to the community. These families are overwhelmingly seeking asylum.⁸ The official rationale for holding families was to deter others from crossing the border.⁹ This is a wrong-headed policy. We heard reports that bond amounts are arbitrarily set by the Immigration Judge without clear guidelines.¹⁰ We also heard that women with children are often detained while people without children are released, sometimes called the “mommy penalty.”¹¹ Detention should not be arbitrary. Holding one person when there is no reason to, solely in an attempt to deter someone else is retaliatory and punitive. It is not the least bit American.

Finally, many of the asylum seekers have family in the United States who are willing to sign and be responsible for their support while they await their immigration hearing. They are also able to obtain a work permit after their asylum application has been pending for six months.¹² Detention is not the only option.

Adult Detention

We also visited an adult detention facility, Port Isabel Detention Center. This center was indistinguishable from a minimum/medium security prison. The men there wore prison uniforms. They were housed in dormitory-like rooms, as are used in minimum security prisons. There is a sally port to access different areas of the facility, as in a prison. We spoke with some of the detainees. Some told us they are in removal proceedings because they committed a felony, although some of these crimes were non-violent (for example, writing a bad check). A secure facility may be necessary when holding people who have committed or are accused of committing crimes. However, there is no indication that every

⁸ Testimony of Karen Lucas, Briefing Transcript, p. 166. Ms. Lucas stated that 80% of the women detained at one family detention facility expressed fear of returning to their home countries.

⁹ See Statement by Secretary of Homeland Security Jeh Johnson Before the Senate Committee on Appropriations, July 10, 2014, available at <http://www.dhs.gov/news/2014/07/10/statement-secretary-homeland-security-jeh-johnson-senate-committee-appropriations>. DHS has since stated that it will not use general deterrence as a rationale for custody determinations. See Statement By Secretary Jeh C. Johnson On Family Residential Centers, June 24, 2015, available at <http://www.dhs.gov/news/2015/06/24/statement-secretary-jeh-c-johnson-family-residential-centers>. Nevertheless, it has also argued in court that it must continue the use of family detention or risk a renewed surge in immigrants crossing the border. See Jason Buch, Government: Judge’s ruling will make us separate immigrant families, San Antonio Express News, August 7, 2015, available at <http://www.expressnews.com/news/local/article/Government-Judge-s-ruling-will-make-us-6431099.php>.

¹⁰ Written Statement of Karen Lucas, p. 9 available at http://www.usccr.gov/OIG/Karen_Lucas_AILA_StatementforUSCommissiononCivilRights_FINALVERSION.pdf.

¹¹ Testimony of Bob Libal, Briefing Transcript, p. 222.

¹² 8 C.F.R. § 208.7.

immigrant detainee needs to be held in a minimum/medium security facility. When we visited, there was no apparent distinction between people who have been convicted and/or charged with crimes, those who have failed to appear for an immigration hearing, and those who merely have a pending immigration hearing.

Immigration detention is civil in nature and is not intended to punish. Immigrants are held to ensure their appearance at a hearing or for removal. Holding someone in a medium security prison is punishment, and, unless an individual assessment requires that level of security, it should not happen. I strongly support the Commission's recommendation that ICE use the least restrictive means possible to achieve its objective of ensuring appearances, unless a higher level is justified because of the detainee's criminal status. The American Bar Association has recommended standards that should move detention centers towards a civil, rather than punitive, model.¹³ We have recommended that these standards be adopted.

Access to Counsel

We also heard that access to counsel is incredibly difficult for immigrant detainees at all types of facilities. Although there is no right to government-provided counsel for immigration matters, which are not criminal, immigrants do have a right to counsel at their own expense.¹⁴ Even unaccompanied children in immigration proceedings are not provided with counsel by the government.¹⁵ It should be noted tens of thousands of unaccompanied children have entered the United States seeking asylum in the past 2 years.¹⁶

Those with counsel are far more likely to ultimately be successful in their immigration hearings.¹⁷ It is also true that immigration cases have serious consequences on the detainees' lives. If an asylum claim is decided incorrectly, a person who does have a credible fear of persecution will be sent directly into an environment they rightly fear. In many ways, immigration cases are more serious than criminal cases and access to counsel should be a priority. I support the Commission's recommendation that counsel should be provided at no cost to indigent detainees from the time of their initial detainment until they

¹³ ABA Civil Immigration Detention Standards, *American Bar Association*, 2012, available at <http://www.americanbar.org/content/dam/aba/administrative/immigration/abaimmdetstds.authcheckdam.pdf>.

¹⁴ See USCCR, *Statutory Enforcement Report: The State of Civil Rights at Immigration Detention Facilities*, 2015, pp. 106-109.

¹⁵ Testimony of Karen Grisez, Briefing Transcript, p. 137-138.

¹⁶ See Southwest Border Unaccompanied Alien Children, U.S. Customs and Border Protection, <http://www.cbp.gov/newsroom/stats/southwest-border-unaccompanied-children>.

¹⁷ As cited in our report, detained immigrants with counsel are six times as likely to be successful in removal proceedings. USCCR, *Statutory Enforcement Report: The State of Civil Rights at Immigration Detention Facilities*, 2015, p. 108-109 (citing Charles Roth and Raia Stoicheva, *Order in the Court: Commonsense Solutions to Improve Efficiency and Fairness in Immigration Court*, NIJC, October 2014.).

are released from the facility. At a minimum, unaccompanied children should be appointed counsel. The assistance of counsel is particularly important at the early stage of the asylum process, where crucial decisions are made in a short time frame.¹⁸

In the absence of government-provided counsel, pro bono attorneys should be welcomed at all detention facilities. Although people in immigration proceedings have a right to counsel at their own expense, for detained immigrants actually getting counsel is a huge hurdle.¹⁹ Facilities tend to be in remote locations. Telephone services may not be accessible. If they are accessible, payment is required, which makes using the phone cost-prohibitive for some detainees.²⁰ There are even reports that detention staff have denied access to counsel when attorneys have made the journey to the facility.²¹ There is no good reason for this. Technology could help this situation. Private videoconferencing and/or Voice over IP with attorneys should be provided to detainees free of charge. It is an easy cost effective fix for the government. Detention should not cut off immigrants' ability to meaningfully prepare a claim.

Costs

Last year alone, the government spent \$ 1,993,770,000 dollars on detention of immigrants.²² Detention is driven by Congress's requirement to maintain 34,000 beds/day,²³ mostly by private contractors. Our resources are skewed towards detaining people, leaving other immigration priorities underfunded. We were told at Karnes that hearings are being scheduled for 2019 and 2020. Releasing asylum seekers, who have every incentive to engage with the process to gain legal status, would allow them to provide for themselves while they await hearings.²⁴ Throughout the immigration system, it would be a more responsible use of our tax dollars to detain only when it is necessary, in the least restrictive environment. It would also be more in line with American values.

¹⁸ Testimony of Franklin Jones, Briefing Transcript, p. 43.

¹⁹ Testimony of Karen Grisez, Briefing Transcript, p. 110.

²⁰ We received reports that telephone charges can range from \$1.25 to retrieve a voicemail at one facility to \$9.20 for a ten minute phone call at a different facility. See Written Statement of Karen Lucas, p. 12 *available at*

http://www.usccr.gov/OIG/Karen_Lucas_AILA_StatementforUSCommissiononCivilRights_FINALVERSION.pdf; Written Statement of Carl Takei, p. 9, *available at*

http://www.usccr.gov/OIG/Carl_Takei_Immigration_Detention_ACLUWrittenStatement_FINAL.pdf.

²¹ See American Immigration Council and Penn State Law, Behind Closed Doors: An Overview of DHS Restrictions on Access to Counsel, Penn State Law, *available at* https://pennstatelaw.psu.edu/_file/Immigrants/LAC_Right_to_Counsel.pdf.

²² Congressional Budget Justification FY 2015, Department of Homeland Security, *available at* <http://www.dhs.gov/sites/default/files/publications/DHS-Congressional-Budget-Justification-FY2015.pdf>.

²³ Consolidated Appropriations Act, 2014, PL 113-76, Page 128 STAT. 251, January 17, 2014.

²⁴ Applicants for asylum are can be granted permission to work in the United States after their application has been pending for six months. 8 C.F.R. § 208.7.

Detention of immigrants is necessary in some cases. Arbitrary detention is not. Allowing conditions that cut off immigrants' access to their lawyers, conditions of overcrowding, inadequate food, cold temperatures in living quarters, and detaining people without regard to their required security status are useless, punitive and not necessary.

America is the land of promise. Our immigration system should reflect our values.

Statement of Commissioner Michael Yaki

With the Concurrence of Vice Chair Patricia Timmons-Goodson

The public, politicians and pundits fail to understand that national and international laws seek to protect individuals fleeing violence and repression in their countries. The right to asylum is just that – a right. While there can and should be processes in place to ensure that the right is being exercised correctly and in good faith, a request for asylum is nevertheless a consequence of horrific conditions being experienced by persons who would rather choose to face an unknown fate against a known and life-threatening danger.

That being said, to treat people with a credible and colorable claim of asylum as if they were criminals is simply difficult to understand.¹ The record shows many detainees are housed in conditions that lack adequate security,² both on a temporary and long-term basis.³ They are not given the right to counsel, or even access to counsel.⁴ Too often federal

¹ As a panelist at the Commission’s briefing, Marissa Bono, an attorney with MALDEF, stated, “Our values are expressed in the way that we treat our most vulnerable. And we do have laws in place to deal with populations who fear the threat of persecution in their home countries. And the Government is trying to circumvent those laws with an expedited deportation process and a no-bond policy for these families.” USCCR Briefing Transcript, p. 193 (Jan. 30, 2015).

² At our briefing, we learned of people crossing the desert to flee to safety, and then being placed in frigid cells, clutching each other to stay warm in their T-shirts and shorts. Briefing Transcript, p. 240. Both the transcript from our briefing and the main report here offer numerous examples of inhumane conditions and instances of physical assault, including sexual assault.

Research shows that immigrant detainees held in private prisons have faced particularly harrowing conditions. As was briefly touched on in this report, in February 2015, a significant riot broke out at the Willacy County Correctional Facility in Texas – a riot which many did not find surprising, based on the conditions there. According to an article on the riot, it was indicant of conditions at numerous private detention centers, as it was “the latest in a string of recent uprisings at lucrative federally contracted private prison facilities known as Criminal Alien Requirement prisons (CARs), which mainly hold immigrants convicted of unauthorized entry or reentry into the United States.” Alex Mierjeski, *Texas Private Prison Left “Uninhabitable” After Immigrant Detainees Riot Over Poor Conditions* (Feb. 23, 2015), <https://news.vice.com/article/texas-private-prison-left-uninhabitable-after-immigrant-detainees-riot-over-poor-conditions>. “It should be of no surprise to anyone that this happened at Willacy,” Bob Libel, executive director of the nonprofit Grassroots Leadership, told VICE News. “This is a facility that for years has been plagued by physical and sexual abuse and neglect, and it’s really a place where immigrants are incarcerated and warehoused by a private prison corporation that’s making hundreds of millions of dollars off of their incarceration, and clearly investing very little of it for the people that are detained there.” *Id.*

ACLU attorney Carl Takei said that the uprising was “a predictable consequence of the BOP turning a blind eye to abuse and mistreatment at these private prisons.” *Id.* This is of grave concern, given the high numbers of detainees held in private prisons across the country. Karen T. Grisez of the ABA stated that “ICE annually detains over 400,000 foreign nationals throughout the United States at a cost of approximately \$2 billion per year. Of the more than 33,000 daily detention beds available to ICE, over half are rented from private prisons and state and local jails.” Karen T. Grisez, ABA, *Written Statement to the U.S. Commission on Civil Rights*, p. 2 (Jan. 30, 2015).

³ Also at our briefing, we heard of people being held for weeks in facilities that were meant for no more than 72-hour detention. Briefing Transcript, p. 240.

or contract employees lack basic understandings of the cultural and political conditions of the countries from which the potential asylum seekers are fleeing. The lack of cultural and political relevancy is an impediment to understanding what could be otherwise legitimate claims by individuals who do not understand the proof requirements under our laws. To then deport many of them under “expedited” procedures without giving them the benefit of due process, not to mention the benefit of humanitarian and charitable considerations, is not only illegal, it flies in the face of the concept of asylum.

Politicians and pundits need to understand that demonizing refugees from Central America is not only legally misplaced, but morally suspect. The press has a responsibility to separate out protests against illegal immigration from the long-cherished ideal of asylum. Both should be exercising leadership by educating the public that the well-known dissident fleeing our sworn enemy is little different, legally, than a family fleeing death squads in the villages of Central America.⁵

For nearly 400 years we have mythologized the voyage of the Mayflower, its tiny hold crammed with families seeking a new land to practice their religion after years of persecution. The truth, however, is slightly different. While it is true that in England they fled religious persecution, they had found sanctuary in Holland for a number of years. They came to the New World in search of a “better and easier” living.⁶

Would the Pilgrims in 2014 find it so easy to stake their claim in the United States of today? Would an asylum officer understand their religion, the history of their homeland? Would the officer argue that it was economic, and not religious reasons that compelled them to brave a dangerous voyage across a vast ocean in search of a new home?

⁴ In their response to the Order to Show Cause in the ongoing *Flores* Settlement enforcement matter, Plaintiffs noted that “[t]he very location of the detention facilities obviously undermines access to counsel and make[s] long-term pro-bono services to these detained families unsustainable.” *Jenny L. Flores, et al. v. Jeh Johnson, et al.*, CV 85-4544 DMG (AGRx), Plaintiffs’ Response to Order to Show Cause, 22 (Aug. 13, 2015).

⁵ A recent study shows that “Honduras is the murder capital of the world, and Guatemala – fourth in homicides – and El Salvador – fifth in homicides – are not far behind. The murder rates in Guatemala and El Salvador are more than 800 times that of the United States, while Honduras has more than 1,900 times more murders per 100,000 people than the United States. As the U.S. Department of Homeland Security has illustrated, the cities in these three countries with the highest incidences of violence are also the cities sending the greatest number of children to the United States.” Center for American Progress, *The Facts on Immigration Today* (Oct. 23, 2014), <https://www.americanprogress.org/issues/immigration/report/2014/10/23/59040/the-facts-on-immigration-today-3>.

⁶ Robert Tracy McKenzie, *Five Myths About the Pilgrims*, WASH. POST. (Nov. 22, 2013), https://www.washingtonpost.com/opinions/five-myths-about-the-pilgrims/2013/11/22/9f93e822-52c1-11e3-9e2c-e1d01116fd98_story.html.

The answer, of course, is uncertain. Finding the answer is not easy. That answer, today, requires access to counsel, cultural and linguistic competency, and an understanding of the political conditions existing in foreign countries. But if we are to be true to our historic legacy, to be true to the spirit of freedom from repression and tyranny upon which our country was founded, we cannot pick and choose when we decide to provide the resources necessary to arrive at a reasoned, justifiable decision to grant asylum or not. We cannot pick and choose for political expediency whether our government invokes expedited acceptance or deportation. In that light, it is difficult to defend and explain the Administration's actions as revealed in this report.⁷ We are a country of, by, and for people from different lands. We are one America, and we are many Americas. The Administration would do well to honor our heritage in treating these refugees with dignity, respect, and humanity.

⁷ To illustrate the disturbing nature of the Administration's actions, and the continued failure to address the treatment of people in family detention centers and to properly and promptly release both children *and* their mothers, I have attached a separate statement and analysis, Attachment A, which examines the background and recent developments in the *Flores* case. See *The Flores Settlement Agreement*, Case No. CV 85-4544-4544-RJK(Px) and *Jenny L. Flores, et al. v. Jeh Johnson, et al.*, CV 85-4544 DMG (AGRx), 9 (C.D. Cal. 2015).

Attachment A

To the Statement of Commissioner Michael Yaki

Key concerns and developments related to family detention continue to evolve. The Commission's main report summarizes the 1997 *Flores* Settlement Agreement, which established guidelines for the treatment of children in immigrant detention. I would like to offer further information on the recent District Court decision regarding enforcement of the Settlement Agreement and the Administration's troubling response to that decision.

Background

The *Flores* Settlement Agreement came in 1997, after more than a decade of litigation involving U.S. detention policies related to a vast wave of unaccompanied children from Central America in the 1980s.⁸ The agreement established national standards regarding the treatment of children in immigration detention, including standards for their detention and release. An excellent summary of the Settlement Agreement by the Women's Refugee Commission and the Lutheran Immigration and Refugee Service briefly sets out the requirements of the settlement as follows:

- (1) Juveniles be released from custody without unnecessary delay, and in order of preference to the following: a parent, legal guardian, adult relative, individual specifically designated by the parent, a child welfare licensed program, or, alternatively when family reunification is not possible, an adult seeking custody deemed appropriate by the responsible government agency.
- (2) Where they cannot be released because of significant public safety or flight risk concerns, juveniles must be held in the **least restrictive setting** appropriate to age and special needs, generally, in a non-secure facility licensed by a child welfare entity and separated from unrelated adults and delinquent offenders.⁹

The summary continues,

Although it was the Immigration and Naturalization Service (INS) **who consented to the agreement**, *Flores* also binds "their agents, employees, contractors, and/or successors in office." Therefore, it **applies to all those in Department of Homeland Security (DHS) custody**—including short-term Customs and Border Protection (CBP) custody and long-term Immigration

⁸ *The Flores Settlement Agreement*, Case. No. CV 85-4544-RJK(Px).

⁹ Women's Refugee Commission and Lutheran Immigration and Refugee Service, *Family Detention & the Flores Settlement Agreement*, p. 1 (Aug. 12, 2015), <https://womensrefugeecommission.org/programs/migrant-rights/research-and-resources/1224-flores-july-2015> (emphasis in original).

and Customs Enforcement (ICE) family detention facilities—and those transferred to Office of Refugee Resettlement (ORR) custody.¹⁰

They also note, importantly, that *Flores* requires a preference for release to a family member except:

- (1) Where the detention of a child is necessary to ensure his or her appearance in immigration court; or
- (2) Where the continued detention of the child is required to ensure his or her safety or the safety of others.¹¹

In their summary of the Settlement Agreement, they conclude,

Children currently held in family detention centers **have not been individually and meaningfully assessed** to determine whether any exceptions apply to them, meaning their detention is out of compliance with Flores requirements. In general, most children and their parents detained in family detention have existing community ties and nearly all have claims for protection, meaning they have strong incentives to appear in court.¹²

Recent Developments

In February 2015, a motion to enforce *Flores* was filed, citing failure to properly release children to parents, failure to properly place children in non-secure, licensed facilities while in custody, and the need to comply with minimum standards regarding the children’s treatment and conditions.

In a July 24, 2015 decision, U.S. District Judge Dolly M. Gee evaluated the motion by Jenny L. Flores et al. to enforce the longstanding *Flores* Settlement Agreement. Ultimately, Judge Gee granted Plaintiffs’ motion to enforce, finding that 1) Defendants Jeh Johnson and the U.S. Department of Homeland Security’s “blanket no-release policy with respect to minors accompanied by their mothers is a material breach of the [*Flores* Settlement] Agreement”¹³ ; 2) as part of its analysis of the no-release policy, that the Defendants’ policy argument in favor of detaining children – contending that “release of accompanied children and their parents gives families a strong incentive to undertake the dangerous journey to this country”¹⁴ – was not persuasive (“even assuming the dubious proposition that the Court can consider a policy agreement to alter the terms of the Parties’ Agreement,

¹⁰ *Id.* at 1-2 (emphasis in original; internal citations omitted).

¹¹ *Id.* at 2 (emphasis in original).

¹² *Id.*

¹³ *Jenny L. Flores, et al. v. Jeh Johnson, et al.*, CV 85-4544 DMG (AGRx), 9 (C.D. Cal. 2015) (hereinafter *Flores*).

¹⁴ *Id.* at 10.

the Court is not persuaded by the evidence presented in support of Defendants' policy argument.")¹⁵ ; 3) Defendants "materially breached the Agreement's requirement that children who are not released be housed in non-secure, licensed facilities"¹⁶; and 4) that "[i]n light of the voluminous evidence ... of the egregious conditions of the holding cells ... Defendants have materially breached the Agreement's term that Defendants provide 'safe and sanitary' holding cells for class members while they are in temporary custody."¹⁷

This was a very significant decision¹⁸, requiring the Defendants to show cause why a number of remedies should not be implemented within 90 days. These remedies included that 1) "Defendants, upon taking an accompanied class member into custody, shall make and record prompt and continuous efforts toward family reunification and the release of the minor pursuant to [the original Settlement Agreement]¹⁹; 2) Defendants must comply with the Agreement "by releasing class members without unnecessary delay in first order of preference to a parent"²⁰; 3) "Accompanied class members shall not be detained by Defendants in unlicensed or secure facilities that do not meet the requirements [of the Settlement Agreement]"²¹; 4) "[A] class member's accompanying parent shall be released with the class member in a non-discriminatory manner ... unless after an individualized custody determination the parent is determined to pose a significant flight risk, or a threat to others or the national security, and the flight risk or threat cannot be mitigated by an appropriate bond or conditions of release"²²; and 5) "Defendants shall propose standards and procedures for monitoring compliance with such standards, for detaining class members in facilities that are safe and sanitary, consistent with concern for the particular vulnerability of minors ... including access to adequate drinking water and food, toilets and sinks, medical assistance if the minor is in need of emergency services, temperature control, ventilation, adequate supervision to protect minors from others, and contact with family members who were arrested with the minor."²³

¹⁵ *Id.* at 11.

¹⁶ *Id.* at 16.

¹⁷ *Id.* at 18.

¹⁸ The *New York Times* called the opinion "a significant legal blow to detention policies ordered by Homeland Security Secretary Jeh Johnson in response to an influx of children and parents, mostly from Central America, across the border in South Texas last summer. In her 25-page ruling, Judge Gee gave a withering critique of the administration's positions, declaring them 'unpersuasive' and 'dubious' and saying officials had ignored 'unambiguous' terms of the settlement." Julia Preston, *Judge Orders Release of Immigrant Children Detained by U.S.*, N.Y. TIMES, July 25, 2015, http://www.nytimes.com/2015/07/26/us/detained-immigrant-children-judge-dolly-gee-ruling.html?_r=0.

¹⁹ *Flores* at 24.

²⁰ *Id.*

²¹ *Id.* at 24-25.

²² *Id.* at 25.

²³ *Id.*

This Order addresses many of the pressing issues raised at the Commission's briefing and in this report, and I am particularly disturbed that the Administration is seeking reconsideration of the order.

Defendants' Response to the Order to Show Cause

Defendants responded to the Order on August 6, 2015. Among the arguments they make, throughout their response, Defendants refer to announcements they have made since the briefing of the *Flores* matter as to reformed policies and procedures. They state that "the policies that the Court construed as imposing 'blanket' detention of female-headed families have been eliminated, and the length of detention of female-headed families has been shortened dramatically."²⁴ They further state that:

Pursuant to recently-announced policies and procedures, Defendants are effectively transitioning the facilities into processing centers at which DHS can: efficiently process families' conduct health screenings and provide immunizations; preliminarily assess whether family members are eligible to apply for relief or protection to remain in the United States; facilitate access to counsel and legal orientation programs; and release those found eligible to apply for relief or protection within an average of approximately 20 days under reasonable conditions designed to achieve their appearance in immigration proceedings.²⁵

They argue, essentially, that "[t]he Court's Order almost exclusively analyzed and addressed detention policies and practices that no longer exist."²⁶

Plaintiffs' Response to the Order to Show Cause

Plaintiffs, in responding to the Order to Show Cause on August 13, 2015, note that, in reality, the two press releases referred to by Defendants "have changed very little for mothers and children illegally incarcerated by DHS. Lengthy and unsafe detention of class member children continues unabated"²⁷ and that "the challenged conduct has in no significant way been 'voluntarily ceased.'"²⁸ One specific issue Plaintiffs raise is that, while Defendants indicated that they have a new policy "designed to ensure that the

²⁴ *Flores*, Defendants' Response to the Order to Show Cause Why the Remedies Set Forth in the Court's July 24, 2015 Order Should Not Be Implemented, 1 (Aug. 6, 2015). The Defendants feel that, because the changes they list occurred after the April 2015 hearing in this matter, the Court should reconsider its Order.

²⁵ *Id.* at 1-2.

²⁶ *Id.* at 8.

²⁷ *Flores*, Plaintiffs' Response to Order to Show Cause, 6-7 (Aug. 13, 2015).

²⁸ *Id.* at 8.

majority of [of class members]’ in unlicensed lock-down detention centers ‘will only suffer illegal detention during the ‘time needed for essential processing (to reach an anticipated average of approximately 20 days ...)’ ... [n]othing in the Settlement states or implies that only a ‘majority’ ... of class members are protected by the Settlement’s terms.”²⁹

Another important point Plaintiffs make is that, while Defendants argue that they need considerable time to provide children and their accompanying mothers with various forms of health care, “there is overwhelming evidence that medical care provided detained class member children is hopelessly inadequate and they are far more likely to become ill, [lose] weight, or be infected with a communicable disease *while detained* than if they were promptly released.”³⁰ Similarly, they argue that prolonged detention is not needed “to facilitate access to counsel and legal orientation programs”³¹ and that, “[i]n fact, “ICE routinely interferes with the families’ ability to access counsel.”³²

Finally, another key point in the Plaintiffs’ Response is that “[r]ather than signaling a willingness to end their breach of the Settlement, Defendants have indicated to their private prison-for-profit groups a readiness to increase the detention of mothers and their children.”³³ They continue:

Just about one week ago, the GEO Group that Defendants pay to operate the Karnes detention facility announced on a second quarter 2015 Earnings Conference Call that by “December 1, [2015], we expect to compete a \$36 million *626 bed expansion* to the Karnes, Texas, Residential Center ... The new facility capacity will be 1,158 beds and will result in a new fixed monthly payment estimated to take place on December 1 of this year.”³⁴

What is to Come

The Court is expected to issue its Final Order soon. Should the improvements announced in DHS’s statements regarding improved conditions and reduced detention periods not exist in reality, and should reduced detention periods only be taking effect for as few as 51% of class members rather than for all class members, I hope that the Final Order will largely mirror the remedies set out in the July 24, 2015 Order, and that the Administration will choose not to appeal the Final Order, but rather will move to quickly comply, honoring the

²⁹ *Id.* at 9-10 (emphasis in original; internal citations omitted).

³⁰ *Id.* at 19-20.

³¹ *Id.* at 21.

³² *Id.*

³³ *Id.* at 24-25 (emphasis in original).

³⁴ *Id.* at 25 (emphasis in original; internal citations omitted).

civil rights and basic human rights of people entering this country – with many doing so to protect their loved ones from horrible conditions and harrowing violence.³⁵

³⁵ Many policy makers and immigration experts agree. Following the July 24, 2015 Order, 178 House Democrats, including Democratic Leader Nancy Pelosi, signed a letter to DHS Secretary Jeh Johnson, writing, “The detained population is largely comprised of refugees fleeing violence and persecution, many of whom have serious medical and mental health needs that have been inadequately addressed in custody,” and that “It is long past time to end family detention. In light of this recent federal court ruling, we urge you to take all necessary and appropriate steps to bring the Department’s practices in line with the settlement agreement and the court ruling.” Letter from Hon. Zoe Lofgren, Hon. Lucille Roybal-Allard, and Hon. Luis V. Gutiérrez et al., U.S. House of Representatives, to Secretary Jeh Johnson, Dept. of Homeland Security (July 31, 2015). Following DOJ’s response to the Order, Representative Zoe Lofgren posted a statement from herself and Representatives Roybal-Allard and Gutiérrez saying, “It’s disappointing that the Administration continues to push to jail women and children seeking asylum. The overwhelming evidence shows that detention facilities are harmful to the health and well-being of children, and the facts show that these asylum seekers will show up for their immigration hearings if they are placed in alternatives to jail.” Available at <https://lofgren.house.gov/news/documentsingle.aspx?DocumentID=397978>. Among organizations, the American Immigration Lawyers Association and the American Immigration Council announced that they were “outraged by the U.S. Department of Justice (DOJ) response to U.S. District Judge Dolly Gee’s ruling on the mass incarceration of children and mothers seeking asylum in the U.S. ... Despite the government’s claims that things have changed, the fact remains that incarcerating asylum seekers is contrary to our laws and values, and detaining children is reprehensible. Instead of arguing about which traumatic facets of detention they are improving, they need to end it once and for all.” American Immigration Council, DOJ’s Shameful Attempt to Pretty up Family Detention Comes up Woefully Short (Aug. 7, 2015), <http://www.americanimmigrationcouncil.org/newsroom/release/dojs-shameful-attempt-pretty-family-detention-comes-woefully-short>.

Also following the Administration’s response to the Order, the Women’s Refugee Commission and the Lutheran Immigration and Refugee Service concluded their analysis of the *Flores* Settlement Agreement by stating that “[r]ather than fighting compliance and appealing the decision, the government should take the following steps ... Children should not be detained, and should be released to a parent or other legal guardian ... If they must be detained, children can be held only in licensed facilities ... Whether a child (and his or her accompanying parent) poses a flight or security risk requires an individualized determination ... Where needed, the government should use the least restrictive alternatives to detention (ATD) possible ... DHS should implement short-term custody standards.” Women’s Refugee Commission and Lutheran Immigration and Refugee Service, *Family Detention & the Flores Settlement Agreement*, p. 4 (Aug. 12, 2015), <https://womensrefugeecommission.org/programs/migrant-rights/research-and-resources/1224-flores-july-2015>.

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