UNITED STATES COMMISSION ON CIVIL RIGHTS

1331 PENNSYLVANIA AVE NW, SUITE 1150, WASHINGTON, DC 20425
www.usccr.gov

President Barack Obama
The White House
Washington, D.C. 20500

The Honorable Loretta Lynch
Attorney General
Washington, D.C. 20530-0001

The Honorable Jeh Johnson
Secretary of Homeland Security
Washington, D.C. 20528

September 21, 2015

RE: **Jenny L. Flores, et al. v. Jeh Johnson, et al. CV 85-4544 DMG (AGRx)**

Dear Mr. President, Madam Attorney General and Mr. Secretary:

We write today as two members of the eight-member United States Commission on Civil Rights, and not on behalf of the Commission as a whole, to respond to a letter (the "Flores Letter") you recently received from five of our fellow Commissioners.

In that letter, our colleagues on the Commission urged you to comply with orders issued by the Honorable Dolly Gee of the United States District Court, Central District of California in the above-entitled matter. They based this recommendation on a recent Commission report about conditions at immigration detention centers supposedly so horrible that "[n]o children, with or without an accompanying adult, should be forced to live in these facilities." The casual reader might be easily led to assume that the Commission reached this dramatic conclusion based on careful original research into detention conditions.

Unfortunately, the Commission's investigation was nowhere near as thorough as the Flores Letter suggests. That is why both of us voted against a motion to approve the final report at the Commission's business meeting on August 14, 2015. We have also each published dissenting statements included in the report that document this report's many shortcomings. Copies of each of those dissents have been attached to this letter.[1]

To summarize our objections briefly: long before any evidence was gathered, Commission Chairman Martin Castro's proposal to undertake this study had already concluded that "egregious human rights and constitutional violations continue to occur in detention facilities."[2] The Commission thus went

[1] You may also find copies of the Heriot dissent online at http://www.newamericancivilrightsproject.org/wp-content/uploads/2014/03/ImmigrationStatementandRebuttalCombined.pdf and the Kirsanow dissent online at http://www.newamericancivilrightsproject.org/wp-content/uploads/2014/03/Immigration-Detention-Facilities-Kirsanow-Statement-FINAL.pdf.

[2] Martin R. Castro, 2014 Briefing Proposal: The State of Civil Rights at Immigration Detention Facilities at 2 (June 2014).

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.

The Commission should have tried to examine the allegations concerning detention conditions and try to determine whether they were true. 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 Aljareeza and National Public Radio to local "alternative weekly" newspapers like New Times Broward-Palm Beach.

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 organizations.[3]

Only after the report was mostly finished did the Commission 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.[4] Indeed, the Karnes facility was surprisingly attractive for a detention center.

Some of the 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 our 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).

What the Commission delegation saw 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. But it makes allegations of a "culture of abuse" in detention facilities much less credible.

Like the Commission report, the Flores Letter reflects a misunderstanding of the purposes of immigration detention. It states that "Government lawyers have gone even further, stating the purpose of

[3] The smoke-making machine reference is usually attributed to John F. Kennedy.
[4] Only one of the signatories to this letter (Gail Heriot) went on the tour of the Karnes and Port Isabel facilities. Peter Kirsanow has spoken with Gail about her experiences and also relied on the notes and impressions of his special assistant and counsel, Carissa Mulder, who toured the facilities along with the Commission group.

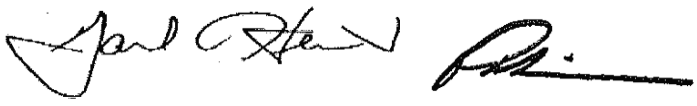
this detention is to deter families (a parent and child(ren)) from coming to the United States when they seek asylum because of conditions in their home countries." Although detention might serve this deterrent purpose in some instances, it would be wrong to suggest that this is its main purpose or anything other than an incidental purpose. Immigrants who are detained are virtually certain to show up for their hearings, whereas those released on bond or on their own recognizance sometimes vanish before their court dates. As is discussed in greater detail in Commissioner Heriot's statement, we lack good statistics showing how common such failures to appear are. But the numbers we have are high enough to suggest that pre-hearing disappearances are a genuine problem. Further, given that DHS already releases individuals who in their judgment are low risk for flight, the numbers would likely climb higher were more permissive detention policies implemented. In any case, it is misleading to suggest, as our colleagues do, that detention serves no purpose other than deterring migration.

The Flores Letter also offers a recommendation concerning the setting of bond for immigrants that lacks adequate factual foundation. It states "More importantly, the government's setting of bail is without standards and is at the broad discretion of the Immigration Judge." Yet one commissioner, Roberta Achtenberg, who signed the Flores Letter acknowledged the limitations of the Commission's investigation into the topic: "The Commission has not heard adequate explanations of the processes by which the amounts of such bonds are determined." She is right, although the reason that she is right is that the Commission was insufficiently diligent in trying to obtain the relevant information. As Commissioner Heriot noted in her dissent, both of us were therefore surprised that five Commissioners nonetheless voted for a finding that "the process by which bond amounts are set and the range of bond amounts are inconsistent and perhaps punitive." We are similarly baffled that the Flores Letter contains the above-quoted similar statement that appears rooted in equally little research. How can our colleagues make recommendations about bail-setting if they admit that they don't understand the relevant process?

The two of us express no opinion as Commissioners on whether you should or should not appeal Judge Gee's order. As lawyers ourselves, we recognize that litigation decisions hinge on many considerations often not fully apparent to outsiders who have not been immersed in the case files. All we ask is that, given the Commission report's many shortcomings, that you not rely on it or on the Flores Letter in making decisions about how to proceed in this matter.

Should you have any questions about it or about this letter, you may write to Gail Heriot at gheriot@usccr.gov and/or to Peter Kirsanow at pkirsanow@usccr.gov.

Sincerely,



Gail Heriot
Member

Peter Kirsanow
Member

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