

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.

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

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>.

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 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

³ Chairman Martin Castro, The State of Civil Rights at Immigration Detention Facilities, June 2014 (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]

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 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

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." PBND 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.

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

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

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.

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.

¹² *Id.* at 28.

¹³ *Id.* at 29.

¹⁴ *Id.* at 33.

¹⁵ *Id.* at 30.

¹⁶ *Id.* at 32.

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.

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.

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/>.

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/CALPRISd2009.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/>.

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 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.

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>.

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.
- 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

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.

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>.

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 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

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”).

⁴⁵ *Id.* at 1920.

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. 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

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.

⁵¹ Bersani, et al., *supra* note 42, at 1920 ("the vast majority of immigrant youth in these data are of Latino ancestry").

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.

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.

PBNS and PREA

Twenty-five pages in, the report finally gets around to addressing compliance with PBNS and PREA, which were the ostensible bases for the report in the first place.

Here I must add a note regarding the PBNS. 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 PBNS 2008, and the PBNS 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

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>.

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.*

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 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

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.

reporting rumors and had no direct knowledge.⁶² OIG “found 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 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

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.

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.”).

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/29tabledatadecpdf>.

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 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

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 58-63.

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.

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 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

⁸⁰ *Id.* at 41.

⁸¹ *Id.* at 41.

⁸² *Id.* at 41.

⁸³ *Id.* at 42.

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>.

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 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.

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.").

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).

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 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

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).

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).

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 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.”

...

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).

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 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

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]

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.

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 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

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.

¹¹¹ *Id.* at 3.

¹¹² *Id.* at 2-3.

¹¹³ *Id.* at 3.

¹¹⁴ *Id.* at 6.

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 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

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>.

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>.

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 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]

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.

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 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 102. 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

¹²⁴ *Galvan v. Press*, 347 U.S. 522 (1954).

¹²⁵ *Kleindienst v. Mandel*, 408 U.S. 753, 766-67 (1972).

¹²⁶ THE FEDERALIST NO. 69 (Alexander Hamilton).

Jails.”¹²⁷ This time, the photo has a credit to Paul J. Richards and Getty Images, but does not indicate where the picture 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 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’ tactic to

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>.

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/>.

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 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.

¹³² Gallup, Immigration, <http://www.gallup.com/poll/1660/immigration.aspx>.