

DISSENTING STATEMENT OF COMMISSIONER GAIL HERIOT

Long before any evidence was gathered, the Chairman’s proposal to undertake this study had already concluded that “egregious human rights and constitutional violations continue to occur in detention facilities.”¹ That proposal was adopted by the Commission on July 25, 2014.

The Commission thus went into this project intent on uncovering a scandal. Instead of conducting an actual investigation, it structured its initial fact-finding simply to amplify stale rumor and innuendo. No effort was undertaken to establish whether the allegations—all of which were already public—were fact or fancy. The point was simply to give the witnesses an opportunity to make the allegations again at our briefing on January 30, 2015—this time before the C-Span cameras.

Following the testimony of a panel composed largely of activists and advocates, Chairman Castro remarked dramatically before the television audience:

... I am *shocked* to hear the consistency among different facilities we talked about today, the kind of abuse, sexual and otherwise, that’s occurring. Th[is] does not seem to be an isolated incident. What you described, Ms. Hinojosa, is similar, if not identical to what we saw in the complaint from NIJC and the ACLU, what Sister [Norma Pimentel] saw, and what happens in other facilities we’ve gotten reports of. *So, to me that says there’s clearly a culture of this going on.*

Tr. at 127 (italics added).

But the witnesses were selected precisely because they had earlier made the allegations they were then making before the Commission. Of course their testimony would be uniformly troubling. That is why they were asked to testify. Under the circumstances, no one should be shocked by the consistency.

Moreover, the most significant allegation of sexual abuse made at the briefing had already been found to be without evidentiary foundation after an extensive investigation conducted at the direction of the DHS Inspector General. The results of

¹ Martin R. Castro, 2014 Briefing Proposal: The State of Civil Rights at Immigration Detention Facilities at 2 (June 2014). This language re-appears in Chairman Castro’s Statement in this Report. Castro Statement at 3.

that investigation were contained in a report issued weeks before our briefing.² For reasons I cannot understand, no reference to those results was included in the body of this report.³

Our job should have been to examine the allegations concerning detention conditions and try to determine whether they were true (as the DHS Inspector General did). This would have involved piecing together what happened the best we could from the records and witnesses. Almost certainly we would have been able to shed light on

² Memorandum to DHS Secretary Jeh C. Johnson from DHS Inspector General John Roth dated January 7, 2015: Investigative Summary—GEO Group Incorporated Detention Facility, Karnes City, Texas at 2-3. See *infra* at Section D.1 at 35-36 (describing DHS Inspector General’s memorandum).

³ Other allegations of a sexual nature have also turned out to be less striking than they originally seemed when brought to the Commission’s attention. In her statement, Maria Hinojosa wrote, “A GAO audit … found that ICE had received more than 200 allegations of sexual abuse between 2009 and 2013.” Hinojosa Statement at 8. I wish she had also pointed that the 215 allegations were from among 250 facilities, accounting for 1.2 million admissions. Such a rate over the course of several years would not be out of the ordinary for a place of business. Moreover, I believe she should have pointed out that only 7% of these allegations were found to be substantiated (i.e. an investigation determined that the alleged incident took place). Approximately five times that number (38%) were found to be “unfounded” (i.e. an investigation determined that the alleged incident did not occur). The rest (55%) were classified as “unsubstantiated” (i.e. neither proven nor disproven after an investigation). Of the 15 substantiated cases, 11 involved detainee-on-detainee conduct and 4 involved staff-on-detainee conduct. Typical of the accusations were “A male detainee grabbed another male detainee by his genitalia,” and “A male detainee grabbed two other males’ buttocks.” Among the accusations against staff members was “A male guard intimidated and coerced a transgender detainee assigned to protective custody to display the detainee’s breasts and the guard inappropriately touched himself in view of the detainee” and “A female guard attempted sexual intercourse with a male detainee.” The former was prosecuted in state court; the latter was referred for prosecution to the local U.S. Attorney’s Office, but the U.S. Attorney declined to pursue the matter.

Note that “unsubstantiated” cases included cases in which the incident was found to have occurred, but was determined not to constitute sexual abuse or assault (8% of unsubstantiated cases). It also included cases in which the alleged victim (who was not necessarily the complainant) chose not to cooperate or recanted or denied the allegation (29% of unsubstantiated cases), and cases where video surveillance footage was available but did not corroborate the allegation (8% of unsubstantiated cases). See Government Accountability Office, Immigration Detention: Additional Actions Could Strengthen DHS Efforts to Address Sexual Abuse, GAO-14-38 at 17-18 (November 2013). The GAO stated, “Detainees may also report false allegations—for example, in an attempt to delay deportation—according to officials at the facilities we visited.” *Id.* at 17.

some of the allegations, but not on others. But the Commission preferred to rely on hearsay-upon-hearsay anecdotes that were told to us by witnesses or written about by media outlets ranging from international news services like Aljazeera and National Public Radio to local “alternative weekly” newspapers like New Times Broward-Palm Beach.⁴

It is said that where there is smoke, there is fire. But sometimes where there is smoke, there is only a smoke-making machine, busily stoked by publicists working for activist organizations.⁵ When the Commission fails to take its fact-finding mission seriously, it runs the risk of becoming part of such a smoke-making apparatus. That is very far from the Commission’s intended function.⁶

Only after the report was mostly finished did we finally manage to visit two immigration detention facilities—the Karnes County Residential Center and the Port Isabel Processing Center. Members of the Commission worried that we would look foolish if we released a report on immigration detention centers that depended entirely on allegations by immigrant advocates and journalists. And, of course, they were right to worry.

But a funny thing happened on the way to exposing “egregious human rights and constitutional violations.” The detention centers weren’t nearly as bad as we had been led to believe.⁷ Indeed, the Karnes facility was surprisingly attractive for a detention center.

Some of our Commission members and staff appeared to be quite surprised at the quality of treatment they saw. When we were led to a room at the Karnes facility that contained rows and rows of brand new brand-name clothing and told that new arrivals were permitted to select six outfits for themselves and each of their children, the looks

⁴ In his Statement, Chairman Castro states that “accounts in the media and through advocacy organizations ... made it clear that these children were also enduring abuse, rape, and extreme conditions while in custody” and that this report “corroborates many of these conditions.” Castro Statement at 1. I would have to disagree with that. Repeating allegations is not the same as corroborating them. The exception is the allegation that it tends to be cold at the facilities the Border Patrol initially takes illegal entrants that it has picked up near the border. We did generate our own evidence of that. See *infra* at ____.

⁵ The smoke-making machine reference is usually attributed to John F. Kennedy.

⁶ As then-Senate Majority Leader Lyndon Baines Johnson put it, the Commission’s task is to “gather facts instead of charges.” “It can sift out the truth from the fancies; and it can return with recommendations which will be of assistance to reasonable men.” 103 Cong. Rec. 13,897 (1957)(Statement of Sen. Johnson).

⁷ See *infra* at Section D (which I put together largely from my notes of what I saw at Karnes and Port Isabel).

on the faces of my colleagues were of astonishment. Questions were asked: “These clothes aren’t new, are they?” Yes, they are new, the tour guide explained. “I guess they are donated, right?” No, the tour guide replied, they are purchased by GEO (the private company that owns and manages the Karnes facility in cooperation with ICE).⁸

What we found at Karnes and Port Isabel is, of course, not conclusive proof that any particular allegation against ICE or against a particular detention facility is untrue or that there aren’t less dramatic problems at detention centers that should be corrected.⁹ But it makes allegations of a “culture of abuse” in detention facilities much less credible. The real scandal in this report is how little first-hand observation of fact or critical analysis has gone into it. Both the detainees and the detention center employees deserve better. So do the taxpayers.

A. An Example: The Maggot Allegations

Consider, for example, the testimony by Ms. Maria Hinojosa that the food served at Willacy Detention Center was full of live maggots. As the report puts it, “One individual testified to have seen maggots in food while visiting Willacy.” See Report at 42.

Here’s what Ms. Hinojosa actually stated before the Commission—that somebody else saw the maggots:

Our whistleblower is Twana Cooks-Allen. … She had heard the complaints about food and couldn’t believe her eyes when a detainee brought her a napkin with a scoop of food (oatmeal, rice, beans) and when she opened up the napkin it had squirming live maggots. And this is what detainees were expected to eat. … That is when she got the information out to Commissioner Schriro.

Hinojosa Written Testimony at 7. See also Tr. at 118.

The allegation of “maggots”¹⁰ in the food at the Willacy County Detention Center first started surfacing about eight years ago. It is neither obviously true nor obviously false, but if you want to get somebody’s attention, complaining that the food has maggots in it is an excellent strategy. It is therefore an allegation that cries out to be

⁸ See *infra* at Section D.1.

⁹ For example, I agree with Commissioner Kladney that the prohibition on allowing other residents to watch one’s own children while consulting with one’s lawyer is not a good idea. Some women may not be able to be frank if their children are within earshot. See Kladney Statement at 2.

¹⁰ I suspect that, if true, it was not maggots (housefly larvae) but rather the larvae of pantry moths (*plodia interpunctella* or *ephestia kuehniella*). Alas, I speak from experience when I say that pantry moths are hard to get rid of. For what it is worth, they are less likely to carry pathogens than houseflies.

examined, not accepted without reflection. Once such an allegation is made, it will tend to be repeated in lurid detail and attributed to other places and times.

Tracking down whether it was true would be difficult at this late date, and possibly not worth the candle given that Willacy County Detention Center no longer exists. The facility, which was originally operated by Management & Training Corporation, was converted to a correctional facility in 2011 and closed earlier this year.

Ms. Hinojosa appears to have heard the story from a “Commissioner Schriro” who in turn heard it from Ms. Cooks-Allen, who had been a mental health coordinator at Willacy some years ago. Even if Ms. Cooks-Allen’s statement was true and accurate in terms of her first-hand observation, that would still not answer the question of where the napkin full of food came from. Did the detainee who presented it to her take it off his own plate? Or did he get it from another detainee? If he got it from another detainee, where did that detainee get it? It is odd that food that requires cooking—like oatmeal and rice & beans—would have live, squirming maggots in it; one would expect them to be cooked. It is also odd that oatmeal and rice & beans would be served together in the same meal. Is it possible this food was taken from the garbage pail instead of from a plate of food? Was the detainee who gave Ms. Cooks-Allen the napkin full of food one of her mental health patients? If so, is there reason to believe his statement about where he got the food is particularly untrustworthy?

We can ask those questions, but we have probably arrived too late to get answers. The best we can do is look to see what investigations were conducted into the matter back when it allegedly happened and ensure it is not happening now. Fortunately, there are some reports of earlier investigations (though I had to uncover them myself with a Google search).

That touches on one of the major flaws in this report. It fails to sufficiently convey the substantial oversight bureaucracy that exists to ensure that prisons, jails and immigration detention facilities are properly run. When a public accusation of mismanagement like the “maggot allegation” at Willacy is made, you can bet that a number of government and independent investigations will soon be undertaken. The investigators may not be able to conclusively determine whether the allegation was true, but such near-in-time investigations can shed brighter light on the allegation than we can and can better ensure that it will not happen again.

On August 28, 2007, a few weeks after the “maggot allegation” arose, an American Bar Association delegation visited Willacy. The delegation had quite a few criticisms for Willacy (though none so lurid as the accusations that were leveled at our briefing). But it had nothing bad to say about the food. While it acknowledged the Willacy “maggot allegation,” it stated that Willacy appeared to meet the appropriate

standards in the area of food service. It was clear the members of the ABA team had serious doubts about the allegation.¹¹

Two months after the ABA delegation visited Willacy, a two-day Technical Assistance site visit was conducted by the Commission on Accreditation for Corrections. The visit had been requested by ICE for the specific purpose of following up on the allegations of maggots in the food.

The Technical Assistance team members included food service professionals, and they were hardly pushovers. They found a number of problems with the Willacy facility. For example, they found that “food in the dry storage area as well as the freezer are stacked too high,” causing boxes on the bottom to be crushed. In examining the refrigerator temperature logs, they found that on occasion the temperature had crept above 40 degrees. But I suspect few family kitchens anywhere would score perfectly. Indeed, few families even keep a refrigerator temperature log. As refrigerator doors open and close, sometimes temperatures briefly climb higher than they should.

Interviews conducted by the Technical Assistance team members with detainees did not turn up the kinds of complaints that one would expect if conditions were as appalling as media coverage of the “maggot allegation” had been true. Female and male detainees were interviewed separately. The report summarized their view thusly:

1. Female Detainee Responses:

Too many sandwiches and no condiments (ketchup, mustard, mayo)
too many onions – onions smell up the food & tray no variety – they
serve the same food all the time too many eggs – would like some
variety. Would like to have cheese and jalapeno peppers, and
tomatoes/salsa added to the Scrambled Eggs. Delicious. Grateful
for the food. Love it!

2. Male Detainee Responses

Not as good; today was ok.
Too many sandwiches (Cold Cuts)
Too many eggs
Rice – over/under cooked

¹¹ Memorandum of American Bar Association Delegation to Willacy Detention Facility to James T. Hayes, Jr., Acting Director, Office of Detention and Removal, Immigration and Customs Enforcement (March 7, 2008).

Want more coffee
Vegetarian reports no variety. Lunch today was Baked potato & Rice
Salad – no dressing
Bland – no spice/enhancements
Cups & spoons -- not washed properly
Want more than just white bread for sandwiches – want more tortillas
Milk is outdated – beyond dates
Would like to supplement food from commissary – i.e. Cup-a-Soup and Ramen Noodles

Commission on Accreditation for Corrections Technical Assistance Report on Willacy County Processing Center (October 8-9, 2007) at 7.

You can bet that Willacy was never in any danger of receiving even one Michelin star. But the complaints being made by the detainees are not nearly the kind you'd expect if the facility had been serving maggot-ridden food. The site team drew the following conclusion:

The issues reported by the media were not observed during this technical assistance. While there are many improvement opportunities based on the recommendations made during this technical assistance; however, conditions were not as bad as the media had portrayed. It is evident that the media took a small part of the situation and highlighted the isolated report of maggots and portrayed it as more than what it really was. Conditions were not found to be in deplorable conditions as reported.

Id. at 8-9.

Our report also states that “a hunger strike took place at Stewart, located in Lumpkin, GA, due to detainees being served maggot-filled food” and originally cited Ms. Hinojosa’s written testimony for this point. See Report at 42. But Ms. Hinojosa made no such allegation. When I requested more information as to the source for this allegation, I was next directed to what appears to be an undated newsletter from an activist organization calling itself “Detention Watch Network.” It stated:

ICE claims that detention facilities provide “healthy and palatable” meals, but testimonies of people in detention indicate that the food being served is anything but healthy or palatable. In facilities including Etowah (AL), Hudson (NJ), Baker (FL), Glades (FL), Irwin (GA), Polk (TX), Adelanto

(CA), Stewart (GA), and Eloy (AZ), individuals continue to send complaints about the quality and quantity of food provided. They report lengthy periods between meals, small portions, and food quality so poor that worm- and maggot-infested food has been served.

Detention Watch Network, Expose & Close: One Year Later at 8.

Again, however, the source didn't support the allegation. Yes, it mentioned worm- and maggot-infested food, but if one reads further one sees that the allegations were from two anonymously-quoted detainees. Neither mentioned Stewart. They cited Adelanto and Irwin. At the end of the newsletter is the following disclaimer: "Except where a publication is cited, the information reported here is based solely on claims made by detained individuals without independent corroboration." Id at 12.

Even if these witnesses had mentioned Stewart, this document would not be the kind of evidence that the Commission should be relying on in its report—at least not if it does not also obtain the near-in-time food service inspection reports for those facilities. It does not surprise me in the least that rumors of maggot-infested food would circulate. When I was a girl growing up in Fairfax, Virginia (not a part of the country known for serving unsanitary food), rumors often flew that the food in the school cafeteria was maggot-infested. School children love that sort of story. If it happened to somebody's cousin twenty years ago in Nome, Alaska, we'd have heard that it happened yesterday to the students at our school during the lunch period preceding ours. To my knowledge, it was never true of any school I attended. But if it was true of some Fairfax County school lunch cafeteria at some point in time, it was certainly an isolated incident and not a general indication of unsanitary conditions.

I Googled "Stewart Detention" and "maggot" myself and found that an unsourced allegation of maggot-infested food had indeed been made in the Atlanta Journal-Constitution.¹² But it had been immediately followed with this information:

ICE denied there was a hunger strike at Stewart, which is operated by Nashville-based Corrections Corporation of America.

...
ICE said the food at the Stewart [Detention Facility] meets federal standards and is monitored by a registered dietician.

¹² In the meantime, this Report was amended to cite the oral testimony of Steven Conry, as quoted in the Commission's briefing transcript at 132, for the proposition that maggots appeared in food at Stewart. But Conry didn't testify to that proposition either. At the cited page, Conry discusses accommodations for Muslim detainees at Stewart who have special dietary needs for religious reasons. This testimony had nothing to do with maggots.

A health inspector looked into an anonymous tip about maggots in the food at Stewart but didn't find any.

State health inspectors gave Stewart's dining facility a 96 percent score following an April inspection [which was two months before the complaint about the facility's food were made], ICE said.¹³

There are several things the Commission's report could have done. It could have chosen not to entertain the various "maggot allegations" at all, given the fact that the investigations before or immediately after the allegations arose tended to show a lack of a serious problem (and, in the case of Willacy, the fact that it is no longer in operation and the allegation is eight years old). But if it chose to highlight the allegations, it was obliged to include the evidence that the allegations were either false or isolated problems at worst. The Commission needed to reference the reports of the ABA and the Technical Assistance team at Willacy, the Georgia health inspectors' report at Stewart and any other relevant report.

Moreover, the Commission should have more fully discussed the various ways in which food service at detention centers is routinely inspected to ensure that the food being served is healthy. From reading this report, one gets the idea that nobody ever inspects the kitchens at immigration detention centers, and that the U.S. Commission on Civil Rights is the only institution standing between detainees and unsanitary food. That is very far from the case. Inspection tours, including inspections by food service experts, are being regularly conducted at these facilities. These multiple inspections are not a guarantee of consistently sanitary food. No doubt slip-ups will occur, just as they do in restaurants and family kitchens. But these repeated efforts are much more likely to have the desired effect than our one-shot investigation is.

Finally, the Commission could have inspected the kitchens and conducted its own systematic poll of large numbers of detainees concerning the food.

What the Commission did instead is peculiar: It concluded that there is no evidence that federally-run facilities have a problem with food service, but "that certain [privately-run detention facilities] are not fully adhering to contractually set standards and are not providing detainees with nutritious food in sufficient quantities"¹⁴

Put simply, not having even darkened the door of the actual kitchen facilities of any detention center, even at the two facilities that we visited, the Commission decided to credit food rumors. Not only did it decide not to credit the near-in-time

¹³ *Riot Tied to Food Served at South Georgia Immigration Detention Center*, Atlanta Journal-Constitution (June 19, 2014).

¹⁴ Report at 135 and 42.

investigations, which found no evidence to support those rumors, it apparently chose not to mention the investigations.

One reason for the Commission’s decision to credit the rumors is obvious: After having concluded *before the investigation* that “egregious human rights and constitutional violations continue to occur in detention facilities,”¹⁵ it was hell-bent on finding those violations. Evidence from food preparation experts that tended to indicate the contrary had to be ignored. Indeed, most of the detainees with whom we spoke at Karnes and Port Isabel were content with the food and hence their views had to be swept out of the way too.¹⁶

But the distinction drawn in the Report between government-run and privately-run facilities is especially misguided. Curiously, the only non-rumor evidence of food services problems at immigration detention centers that I have been able to uncover is against a government-run location (the ICE-run Florence Service Processing Center in Florence, Arizona), not a privately-run one.¹⁷ The allegation is old, and hence the problem has presumably been corrected.

The report on Florence, an ICE-run facility, stated:

The tour of the kitchen prep and dish washing areas were not clean. The floors needed scrubbing and repaired [sic]. There was a large surface hole in the floor near the end of the floor drain that is a safety and health hazard. It had standing

¹⁵ See text and note at n. 1.

¹⁶ When members of the Commission asked a couple of dozen detainees at Karnes and at Port Isabel, the response was generally positive. One woman at Karnes was concerned that her baby did not like the food and had gone back to breastfeeding as a result. But if the worst that can be said about the food at Karnes is that not all the children like it, that speaks well for Karnes. No cafeteria, family kitchen or Five-Star Michelin restaurant has ever produced food that every child likes. See *infra* at Section D1. It is worth pointing out that, according to our tour guide at Karnes, food service personnel make efforts to adjust the cuisine to suit the tastes of residents. For example, when residents were found to prefer black beans to pinto beans and corn tortillas to flour tortillas, adjustments were made to menus. *Id.*

¹⁷ It is possible there are other reports out there. These are the kind of evidence that the full-time Commission staff should have obtained in the course of the year. Instead, I have had to do it over the course of the month since I received the first draft of the report. The Commission rules require that Commissioners (who are part-time) be given 30 days after the adoption of the report’s final draft by the Commission to draft their Statements. That ordinarily would have given me two months, working part time, to work to correct the report’s defects and, failing that, to write my own statement. For this report, the 30-day period was shortened to a week.

water which appeared to be old, needed draining and floor repaired. Ovens and back plates had not been cleaned, and there was evidence of built-up grease and grime. Inside one oven had leftover food in it, which appeared not to have been clean for several days. ... Mousetraps were located throughout the kitchen area. There were mouse feces on top of the dishwashing machine. It is evident that there is a rodent problem in the kitchen area.

See Commission on Accreditation for Corrections, Technical Assistance Visit Report at 6 (July 16-18 (2007).¹⁸

It is not clear why rumors about unsanitary conditions at privately-run facilities made it into this report, while documented unsanitary conditions at ICE-run facilities did not. It is hard to avoid the conclusion that this Commission is employing a double standard.

B. Privately-Run Detention Centers Should Not Be Viewed with Greater Suspicion than Government-Run Facilities.

Businesses that contract with the federal and state governments to furnish correctional and detention services are the bête noir of many Progressives, apparently including some members of the Progressive caucus here at the Commission and maybe even some of the staff.¹⁹ As I have outlined in Part A, this bias has seeped into this report, including some of the Statements by my fellow Commissioners.²⁰ Chairman

¹⁸ See also Ana Arboleda & Dorian Ediger-Seto, Seeking Protection, Enduring Prosecution: The Treatment and Abuse of Unaccompanied Undocumented Children in Short-Term Immigration Detention 13 (August 2009)(containing allegations that the food in certain ICE-run facilities “was unappetizing, insufficient, and often smelled as if it had gone bad”).

¹⁹ The issue has received considerable attention in the media. For example, *Corrections* is a 2001 documentary film directed by Ashley Hunt. She describes it this way: “Corrections is a story of justice turned to profit, where the war on crime has found new investors: Venture Capital and For-Profit Prisons, the story of the Private Prison. ... [A]t a time when our citizens are exposing big tobacco corporations and breaking up Microsoft, there is growing suspicion over corporate corruption as well. Corrections brings these growing concerns together with an innovative documentary in the tradition of filmmakers Emile Di Antonio and Erroll Morris, and such films as *Roger and Me.*” See www.imdb.com/title/tt0280573/

²⁰ The Report’s discussion of food service, which I discussed in Section A, is just one example. Its discussion of medical care is similar. For ICE-run facilities, the Commission finds only that “additional research” is needed. Report at 32. But for “certain privately owned detention centers,” the Commission jumps right in and

Castro's statement is particularly overwrought, claiming that "[t]he 'incarceration industrial complex' has extended its tentacles from running traditional prisons on a for-profit basis, to their new growth market—immigration detention." Castro Statement at 6. "Jailing people for profit is obscene," he wrote, "it has gone on for too long, and it must end now." Id. at 7.²¹

One could argue that milder forms of this bias are just part of a more general skepticism on the part of modern Progressives toward government outsourcing.²² But

finds they "are not complying with DHS detention [medical] standards." Report at 37. In both cases, actual evidence (as opposed to rumor and innuendo) is lacking.

Another way in which the Report manifests its bias is the suspicion with which it views the fact that the federal government cannot simply unilaterally change a contract with a detention facility to suit its purposes. As a result, changes in the applicable standards to which the company can be held cannot be altered at the will of the government; new standards must either be phased in when the contract comes up for renewal or be made part of a midterm renegotiation. This is normal. These contracts are carefully drafted and negotiated to give both parties the incentives necessary to run the detention center properly. The company is entitled to a certain amount of money for those services, neither more nor less. If more duties are required of it than the contract originally contemplated, it must be compensated for those increased duties. That's what contracts are all about. By contrast, the federal government can require its own facilities to change immediately if it so desires. Unlike companies that contract to provide correctional or detention services, the federal employees who work at correctional or detention facilities get their salaries adjusted every year and (more importantly) if they decide they do not want to perform the duties required of them, they are free to quit their jobs, no questions asked. If a private company under contract decides that it just doesn't want to provide correctional or detention services anymore, it will be sued. Once it has committed itself to perform, it doesn't get a choice anymore. That's why it is not required to perform if it hasn't committed itself to do so. There is nothing nefarious about any of this.

²¹ Vice Chair Timmons-Goodson's statement is more measured than the Chairman's, but she still spends an inordinate amount of her time discussing privately-run detention facilities, especially given that nothing we uncovered showed that privately-run facilities were any less well run than ICE-run facilities. She does point out a significant difference between ICE-run and privately-run facilities. The former are subject to the Freedom of Information Act and the latter, like all government contractors, are not. Some lawmakers have advocated changing this. Given that this was not an issue that the Commission explored in depth, I express no opinion on it other than it would have been worth exploring. The Commission itself could have easily subpoenaed any material it had use for in drafting a balanced report. It apparently did not think that such material would be useful.

²² See, e.g., Michelle Chen, When the Government Outsources to Private Companies, Inequality Gets Worse, *The Nation* (March 24, 2014); Rebecca Paley, Fighting for the Down and Out(sourced), *Mother Jones* (May/June 2004). See also

somehow privately-run prison and detention facilities have tended to be especially controversial—despite some evidence that private prisons are actually better managed than government-run prisons. See e.g., Charles H. Logan, *Well Kept: Comparing Quality of Confinement in Private and Public Prisons*, 83 J. Crim. L. & Criminology 577 (1992)(comparing three women’s prisons, one state-run, one federally-run and one privately-run and concluding that while “all three prisons are regarded as having been high in quality, the private prison outperformed its governmental counterparts on nearly every dimension”).²³

Protesters Oppose [North Miami Beach] Plan to Privatize Trash Hauling, Miami Herald (August 4, 2015); David Giambusso, Newark Sanitation Workers Demand Mayor Booker Reconsider Privatizing Jobs, The Star Ledger (Newark) (August 12, 2010).

²³ Part of the lack of good will toward privately-run prisons, jails and detention centers may be the result of misunderstandings. For example, the issue of private prisons was touched on ever-so-slightly in a previous report of the Commission. See U.S. Commission on Civil Rights, Enforcing Religious Freedom in Prison 110 (2008)(Statement of Commissioners Arlan Melendez and Michael Yaki). In that report, Commissioners Melendez and Yaki worried about whether private facilities would be held to operate under color of law for Section 1983 purposes. In fact, the issue of whether private prisons stand in the shoes of the state government for Section 1983 has been definitively resolved by the courts in the obvious way. *Of course* they can be. *Rosborough v. Management & Training Corp.*, 350 F.3d 459 (5th Cir. 2003)(per curiam); *Skelton v. Pri-Cor, Inc.*, 963 F.2d 100 (6th Cir. 1991), cert. denied, 503 U.S. 989 (1992); *Palm v. Marr*, 174 F. Supp. 2d 484, 487-88 (N.D. Tex. 2001); *Kesler v. King*, 29 F. Supp. 2d 356, 370-71 (S.D. Tex. 1998). See also *Correctional Services Corp. v. Malesko*, 534 U.S. 61, 72 n. 5 (2001)(“[s]tate prisoners … already enjoy a right of action against private correctional providers under 42 U.S.C. § 1983”)(dictum). Indeed, private corporations operating correctional (or detention) facilities on behalf of states should be relieved that courts have held that they are subject to Section 1983 in this context. If they are not operating under both the color and fact of law, they would be guilty of a serious crime for confining individuals against their will and subject to liability for false imprisonment. See Model Penal Code at § 212.1—212.3; Restatement (Second) of Torts at § 35.

Although the Supreme Court in *Malesko* did not recognize a *Bivens*-style action against a corporate half-way house operator for the federal government, it was not because they are not operating under color of law. Rather, the Court simply declined to extend the already-extraordinary *Bivens* action to non-employees of the federal government, noting that “alternative remedies are at least as great, and in many respects greater, than anything that could be had under *Bivens*.” *Id.* at 72. The most obvious such remedy is the “parallel tort claim that is unavailable to prisoners housed in [federal] facilities.” A tort claim against a corporate half-way house operator can be enforced in federal courts (when the requirements for diversity jurisdiction are met) or in state court (under all circumstances). *Id.* at 71-72.

When the *Malesko* Court stated that the remedies against a corporate halfway house operator “are at least as great, and in many respects greater, than anything that can be had under *Bivens*,” it was likely referring to the constellation of sovereign and official

Anyone holding the belief that government-run detention facilities are superior to privately-run detention facilities would have experienced some cognitive dissonance during the Commission's tour of Karnes and Port Isabel. While both facilities appeared to be well run, there is no doubt as to which facility a reasonable person would prefer to be assigned to. Karnes was cleaner, more modern and generally more attractive than Port Isabel.²⁴ Indeed, Karnes, which is run by the GEO Group, Inc. ("GEO"), has been criticized for being too attractive by Members of Congress and by Fox News.²⁵ Representative Lamar Smith called staying at Karnes a "Holiday on ICE" while Fox News commentator Greta Van Susteren called it "the Ritz Carlton of federal detention centers," citing its "big screen t.v.s, basketball courts and a hair salon." Praise like that for the ICE-run Port Isabel facility would have flunked the laugh test.

More important, immediately after our briefing, I asked one of the witnesses, Kevin Landy, Assistant Director for the ICE Office of Detention Policy and Planning, whether privately-run detention facilities have more problems than government-run facilities. He told me that they do not, and that the more significant differences are not between private and government facilities, but rather between dedicated and non-dedicated facilities. Put differently, those facilities that are run exclusively as detention facilities tend to do a good job adhering to standards, whether government run or privately run. But facilities that are primarily prisons or primarily jails (but which agree to house some immigration detainees since they have some excess capacity) are sometimes less familiar with the special standards that apply to immigration detention facilities and may therefore make mistakes.

So what is all the fuss about? Why does this report attempt to suggest that privately-run facilities serve maggot-infested food, while government-run facilities are okay? Why does it cite unsourced complaints about the food at privately-run facilities, while ignoring one unsourced and one fully sourced complaint about the food at government-run facilities?

immunity issues that make lawsuits against the federal government and its employees difficult. In *Richardson v. McKnight*, 521 U.S. 399 (1997), the Court went so far as to hold that prison guards employed by private prison corporations were not entitled to the same qualified immunity as government employees. It is thus in some ways easier to maintain an action against a prison guard employed by a government contractor than it is against a prison guard who is a government employee. The same rule would likely apply to the government contractor itself, at least in most contexts.

²⁴ See *infra* at Section D.

²⁵ Edwin Mora, New Rules Make Detention for Illegal Aliens a "Holiday on ICE", CNSNews.com (March 29, 2012); Greta Van Susteren, Inside Swanky New Detention Center for Illegal Immigrants, Fox News (August 1, 2014), <http://video.foxnews.com/v/3709051485001/inside-swanky-new-detention-center-for-illegal-immigrants/?#sp=show-clips>. See also Immigrant Detention Center Has Hair Salon for Women, Houston.CBSlocal.com (August 1, 2014).

Usually when a particular public policy concern is getting exponentially more attention than it is due relative to other concerns, it makes sense to ask the age-old question: Cui Bono? (Who stands to benefit?) In this case, it is worth noting that there is a longstanding battle between private providers of correctional and detention services and prison/security guard unions.²⁶ Prison guards at government-run facilities are paid more generously than those at privately-run facilities.²⁷ Indeed, it is largely because privately-run facilities tend to be more economical that governments find them appealing.

²⁶ See, e.g., Matt Dixon, New Contracts Give Private Prison Giant Nearly 80 Percent of Florida's Private Prison Market, The Florida Times-Union (December 16, 2013)(stating that a proposal to move 14,500 South Florida prisoners to private prisons "was fiercely opposed by unions who represented state correctional officers"); Scott Whipple, Unions Say Outsourcing Corrections is Failed Idea, New Britain Herald (October 25, 2010) ("Privatization will close prisons and the economic effect on surrounding communities will be devastating," AFSCME Local 387 President Dwayne Bickford predicted. 'Connecticut's track record shows that privatization equals corruption at the highest levels of government."); Dan Morain, Davis to Close State's Privately Run Prisons; Funding: Elected with the Help of \$2.3 million from Guards' Union, Governor Includes Plan in Budget, Los Angeles Times (March 15, 2002) ("Gov. Gray Davis is ending California's experiment with privately operated prisons, fulfilling his promise to a state prison guard union that spent \$2.3 million to help elect him four years ago. ... Davis' budget proposes closing five of California's nine private prisons on June 30 and phasing out the rest as their operating contracts expire. He cites budget concerns, saying that the state can save about \$5 million by closing the minimum-security facilities. Others, including the legislative analyst's office, dispute the potential savings. Although administration officials cited problems with some private prisons, recent audits by the California Department of Corrections gave high marks to all five facilities slated for closure") (paragraph breaks deleted). See also Jennifer Warren, When He Speaks, They Listen: In 20 Years, Don Novey Has Built the Once Powerless California Prison Guards Union into One of the Most Influential and Richest Forces in State Politics, Los Angeles Times (August 21, 2000) (Identifying the California prison guards' union, the California Correctional Peace Officers Association—as the No. 1 donor to legislative races in the 1998 election cycle and stating that its president "has stalled efforts to expand private prisons in California"); Charles H. Logan, Private Prisons: Cons and Pros 11 (1990) ("Unions were the major force behind legislation in Pennsylvania imposing a one-year moratorium on new privatization of prisons or jails. They also forced the nonrenewal of a jail management contract in that state when the AFSCME threw its support behind two candidates for county commission running on a 'take back the jail' platform").

²⁷ Nancy Heitzeg, The High Cost of Profit, Racism, Classism, and Interests Against Prison Privatization in Byron Eugene Price & John Charles Morris, 3 Prison Privatization: The Many Facets of a Controversial Industry 42 (2012) ("Union opposition to privatization is based not only on the failure of privatization to create the promised quality jobs in private prisons. ... Corrections officers are paid substantially less in private facilities").

University of Connecticut sociologist Charles H. Logan put it this way:

Probably the most powerful opponent to private prisons is the AFSCME, which is the sixth largest of all the AFL-CIO international unions. It represents over 50,000 corrections workers nationally. As of 1981, correctional employees were unionized in 29 of 52 jurisdictions (state, federal and District of Columbia). Union strength is weakest in the southern tier of the United States, which is where the private prison industry has concentrated most of its efforts. The AFSCME and other public employee unions are opposed to contracting out virtually all public services, but their opposition to prison privatization seems especially vehement.²⁸

Michael Jacobson, Executive Director of the Vera Institute and hardly a political conservative on incarceration issues, agreed:

Private prisons are anathema to public prison unions. They threaten the number of prison jobs held by their members and pose a significant potential threat to their long-term viability should they gain too much of a foothold in a particular state. Therefore, it can be reliably predicted that any political capital accumulated by public corrections unions will be used to ward off prison privatization.²⁹

None of this is to say that my Progressive colleagues are wrong to view companies that provide correctional and detention services with some level of skepticism. When (and if) such an organization lobbies for high levels of detention, its motives should be viewed skeptically. But don't stop there. It's not just so-called "for profit" enterprises whose motives should sometimes be greeted with skepticism.³⁰ When unions lobby for

²⁸ Charles H. Logan, *Private Prisons: Cons and Pros* 11 (1990).

²⁹ Michael Jacobson, *Downsizing Prisons: How to Reduce Crime and End Mass Incarceration* 68 (2005). Jacobson notes that the state with the largest number of private prisons in 2001—Texas with 42 out of the 158 private prisons then in existence—had at the time no prison guard union. *Id.* at 69.

³⁰ "For profit" appears to be a derogatory term in the Progressive lexicon. It should not be. See James Boswell, I *The Life of Samuel Johnson*, LL.D. 464 (1791) ("There are few ways in which a man can be more innocently employed than in getting money") (quoting Johnson). See also Adam Smith, I *The Wealth of Nations* ch. II, 26-27 at para. 12 (1776) ("It is not from the benevolence of the butcher, the brewer or the baker that we expect our dinner, but from their regard to their own interest. We address ourselves not to their humanity but to their self-love, and never talk to them of our own necessities, but of their advantages").

high levels of detention³¹ or *against privately-run correctional and detention facilities*, their motives should be suspect too.³² Similarly, when government officials argue for the preservation or expansion of government bureaucracies (and hence for their authority and budget), their statement should be met with a wry smile and their motives examined carefully.³³

The core defect of Progressivism is its tendency to assume the good faith of political and government actors, while doubting the motives of individuals acting in their private capacity. If anything, the ranking should be reversed, given the greater difficulty of channeling the activities of government actors into areas that are in the public interest.³⁴ But in the context of immigration detention one will not go too far wrong by employing equal levels of skepticism.

C. A Central Issue Is Whether Detention is a Useful Practice or Whether Federal Authorities Would Do Better to Release Current

³¹ See Alexander Volokh, Privatization and the Law & Economics of Political Advocacy, 60 Stan. L. Rev. 1197 (2008)(pointing out that prison guard unions are in fact active advocates of pro-incarceration policies).

³² The two are very similar for these purposes. In theory, publicly traded corporations engaged in government contracting—like the GEO Group, Inc. and Corrections Corporation of America—are operated for the benefit of their investor-beneficiaries, the most typical of whom are (ultimately) ordinary individuals saving for or in the midst of their retirement. While not directly relevant here, some argue that in practice, so-called for-profit corporations are sometimes hijacked for the benefit of management-level employees, who have a lot more control over the corporation’s activities and hence the ability to consciously or unconsciously direct the corporation’s activities to enhance their own interests and prestige. Similarly, public employees’ unions are in theory operated for the benefit of their members. Again, arguments can be made that they are often run more for the benefit of management-level union employees, who have a lot more control over their activities than rank-and-file members. Either way, both institutions—government contractors and public employees’ unions—are similar in their desire for profit in exchange for their services.

³³ A whole branch of economics is devoted to the study of how ordinary rules of human self-interest play out in the area of government and politics. See, e.g., Iain McLean, *Public Choice: An Introduction* (1991). Its bottom line is simple: Human beings do not change their stripes because they are engaged in politics, get elected to public office or get a government job. Indeed, in some ways, especially given government’s power to coerce, it is more difficult to channel the self-interest of politicians and government workers in a way that comports with the public interest than it is to channel the self-interest of private sector actors to do so. In theory, governments are run in the public interest. But in practice, the “public interest” is an amorphous concept and thus easily confused with the interests of those who mostly directly influence, control and manage the apparatus of government. *Id.*

³⁴ *Id.*

Detainees into Alternative to Detention Programs, Thus Relying on the Those Detainees to Voluntarily Show Up for Their Hearings.

Several of the advocates who testified at our briefing have taken the position that detention is appropriate only as a last resort³⁵—quite apart from whether detention conditions are deplorable.³⁶ In their view, the

³⁵ See, e.g., Written Testimony of Karen Lucas at 9 (“No one should be deprived of their liberty except as a last resort. Everyone should be placed in the least restrictive setting necessary to serve the government’s legitimate interest.”).

³⁶ The argument is frequently bolstered by attempting to point out that the detainees have not been charged with a crime. It is worth pointing out, however, that most, but not all, detainees have indeed committed a crime and that a more appropriate statement would be that they haven’t been convicted of a crime (much like those arrested and put in jail have not been convicted of a crime). Those who attempt to enter the country surreptitiously or under false pretenses are guilty of the crime of improper entry (even if they could have gained entry to the country by presenting themselves to a proper official at a proper port of entry and properly requesting asylum). The fact that they have not been charged (and may never be) is simply a matter of prosecutorial discretion.

The first such entry is a misdemeanor, and any subsequent illegal entries are felonies:

8 U.S.C. § 1325—Improper Entry by an Alien

(a) Improper time or place; avoidance of examination or inspection; misrepresentation and concealment of facts

Any alien who

(1) enters or attempts to enter the United States at any time or place other than as designated by immigration officers, or

(2) eludes examination or inspection by immigration officers, or

(3) attempts to enter or obtains entry to the United States by a willfully false or misleading representation or the willful concealment of a material fact, shall, for the first commission of any such offense, be fined under title 18 or imprisoned not more than 6 months, or both, and, for a subsequent commission of any such offense, be fined under title 18, or imprisoned not more than 2 years, or both.

Adult detainees apprehended while attempting an improper entry usually fall into one of two categories. If they cannot articulate a credible fear that would entitle them to an asylum hearing, they are guilty of improper entry, but prosecution is not usually regarded as worthwhile, since they are subject to expedited removal and will thus quickly be leaving the country. If they can allege a credible fear, they may be entitled to a hearing to adjudicate whether they are in fact eligible for asylum and they may be detained prior to that hearing in order to ensure their appearance. If they are found to be ineligible for asylum,

current system should be replaced with one under which many more are released on bond or on their own recognizance. They favor combining this with supervision programs designed to encourage attendance at hearings.³⁷

they are subject to removal. At that point, prosecution is not a particularly appealing option, especially given the cost of incarceration. If they are found to be entitled to asylum, they have often already been detained for longer than they would have been sentenced. Consequently, even though they were still illegal entrants, prosecution is again not an appealing option.

Other detainees are legal entrants who were convicted of a crime during their stay and are hence subject to deportation under 8 U.S.C. § 1227(a)(2).

In any event, all of these detainees are being held not as a form of punishment for a crime, but as a means of ensuring their attendance at their hearing, and if it turns out they are not entitled to remain in the United States, to assure their removal. *Bell v. Wolfish*, 441 U.S. 520 (1979), concerned pretrial detainees awaiting criminal trials, but the principles established in that case apply equally to immigration detainees. In *Bell*, the Court held that in evaluating the constitutionality of detention conditions, the proper question is “whether those conditions amount to punishment of the detainee.” Id. at 535. The Court went on to state:

[I]f a particular condition or restriction of pretrial detention is reasonably related to a legitimate governmental objective, it does not, without more, amount to “punishment.” Conversely, if a restriction or condition is not reasonably related to a legitimate goal—if it is arbitrary or purposeless—a court permissibly may infer that the purpose of the governmental action is punishment that may not constitutionally be inflicted upon detainees qua detainees.

Id. at 539.

The constitutional question is thus whether detaining those who are currently being detained is “purposeless.” If it could be found that they are no more or less likely to show up for their hearing and comply with removal orders regardless of whether they are detained or not detained, then detention itself (as opposed to some particular aspect of detention) may be arbitrary or purposeless. Virtually 100% of those who are detained show up for their hearings. That same cannot be said for those who are released on bond or on their own recognizance. It therefore seems unlikely that a court could find the detention itself unconstitutional.

³⁷ One argument in favor of decreased detention coupled with increased non-detention intensive supervision is that intensive supervision is less costly than detention. This is true, though one countervailing consideration is the length of time to adjudicate a case. Detention cases are ordinarily fast-tracked. While

A central issue therefore is how would the rate at which aliens simply disappear increase if more were released.³⁸ Unfortunately, this is an area for which the statistics are in a state of disarray. Numbers cited

intensive supervision is much cheaper per unit of time, non-detained aliens take longer to have their cases fully litigated.

³⁸ It cannot be emphasized enough that the purpose of immigration detention is to ensure that they do not disappear prior to the disposition of their case. Karen Lucas, Associate Director of Advocacy at the American Immigration Lawyers Association, stated in her written testimony that “the purpose of detention, according [to DHS] Secretary [Jeh] Johnson, was to deter other mothers and children in the violence-torn region in the Northern Triangle—El Salvador, Guatemala, and Honduras.” She condemns him for this, stating, “Detaining one person to deter another is wrong.” But regardless of when one can ethically and legally use detention of this kind as a general deterrent, it is simply *not true* that Secretary Johnson said that the purpose of detention was to deter other mothers from making the journey from Central America to the United States. Alas, Commissioner Kladney repeated Ms. Lucas’s misstatement. He wrote that “[t]he official rationale for holding families was to deter others from crossing the border” and “[t]his is a wrong-headed policy” and (like Lucas) cited Secretary Johnson’s written statement before the Senate Committee on Appropriations on July 10, 2014 for this point. Kladney Statement at 2 & n.9. But what Secretary Johnson actually said was that the Administration needed funds to support “an aggressive deterrence strategy focused on the removal and repatriation of recent border crossers.” See Statement of DHS Secretary Jeh Johnson Before the United States Senate Committee on Appropriations (July 10, 2014, available at <http://www.dhs.gov/news/2014/07/10/statement-secretary-homeland-security-jeh-johnson-senate-committee-appropriations>. Note that strategy is not to detain, but to send back as quickly as possible. He said it over and over in his testimony—that the Administration’s strategy was to deport illegal entrants as quickly as possible in order to send a message to others that attempting to enter the United States is futile. At one point, Johnson does indeed say that a temporary detention facility had just been opened near the border at Artesia, New Mexico in order “to hold them until their expedited removal orders are effectuated.” But this statement is completely consistent with standard doctrine: He was saying that detention was being used in order to ensure that removal could be conducted quickly and efficiently. It is the expeditious removal itself that was intended to be the deterrent.

None of this is to say that the federal government is forbidden to mention an obvious fact: If the federal government were to cease detaining illegal entrant families, this would increase the likelihood that others would decide to risk making the trip and that an adult might well be encouraged to bring a child with her in order to qualify for special rules that discourage detention for families in particular. Indeed, failing to point that out to a judge considering an order that would forbid the federal government from detaining families would be inappropriate.

vary wildly. I wish this were something the Commission had tried to sort out. Instead of sinking its teeth into this crucial issue, however, the report simply quotes one of our witnesses, Mary Meg McCarthy, executive director of Heartland Alliance's National Immigrant Justice Center, as follows:

According to a study conducted by the Vera Institute of Justice, detained immigrants who participated in an alternative to detention (ATD) program had a 91 percent appearance rate at all required hearings and a 93 percent appearance rate for asylum seekers.

Report at 55.³⁹

Ms. McCarthy uses the Vera Institute study to bolster the position that the nation should cut back dramatically on detention and instead rely on those who might otherwise have been detained to appear voluntarily at their hearings. Her view has obviously been favorably received by Homeland Security Secretary Jeh Johnson (and evidently by the Commission and its staff too). Whether the new policies deemphasizing detention are grounded in good sense depends largely on whether she is right about the risk of flight. Is the rate of voluntary appearance (and ultimate compliance with order of removal) a problem? Will it grow to be a problem if detention is de-emphasized?

There are many things wrong with Ms. McCarthy's citation to the Vera Institute's study (and the Commission's baffling decision just to quote her and not examine the actual study). I will discuss only a few of the reasons that the compliance figures she cited are too high—indeed much too high—when used to predict compliance when detention is de-emphasized.

- (1) The Vera Institute study was intended to examine and compare compliance rates for several different categories of non-citizens. The individuals being studied had all been either (a) initially released on their own recognizance or (b) briefly detained then released to supervision, parole and/or bond. This was not a random sample of detainees. In terms of expected compliance, they were the cream of the crop—the ones somebody has already determined to be good candidates for non-detention methods. The immediate purpose of the study was to determine whether intensive supervision increases the likelihood of compliance relative to never-detained or released individuals who were not

³⁹ At least the staff-written part of the report mentions the issue. The statements of the Commissioners who voted in favor of the report do not address it at all. Given the importance of the issue, their silence is difficult to defend.

intensively supervised.⁴⁰ It was not intended to help determine whether the detention of other non-citizens with higher-risk profiles was unnecessary or undesirable.

- (2) The categories of non-citizen under study were (a) asylum seekers who presented themselves to immigration authorities at an international airport, primarily Kennedy International; (b) criminal aliens, most of whom were lawful permanent residents, but who had been convicted of a crime;⁴¹ and (c) undocumented workers apprehended at work sites. All three groups were drawn from the New York area; all three have greater incentives to cooperate with immigration authorities than the typical illegal entrant. Members of the first group stood a reasonable chance of being granted asylum—higher than the typical asylum seeker who enters the country surreptitiously outside of an approved port of entry—and hence had reason to cooperate with authorities. The latter two groups consisted of individuals who had put down roots in a particular community. The median age of the criminal alien group was 36, and their median time in the United States was 14 years. More than half were from the Caribbean. The typical undocumented worker was in his late 20s and had been in the United States about 5 years. Many owned or leased homes, and had children in school, bank accounts, cars and other indicators of an ordinary American life. They differ substantially from individuals who attempted to enter the country surreptitiously and only upon apprehension claimed asylum.
- (3) The study has little validity even as a measurement for the effectiveness of intensive supervision relative to the control group. Those undergoing the intensive supervision were volunteers, while the control groups included individuals who declined the opportunity to participate. Consequently, it is not clear that the gaps in hearing attendance between the intensively supervised and the control groups were telling. The participants in the intensive supervision programs were not just the cream of the crop (relative to persons the immigration authorities chose to detain instead), they were the crème de la crème (relative to persons who were given the opportunity to

⁴⁰ While 91% of the intensively supervised non-citizens attended all their hearings, only 71% of the comparison group did. For the group designated “asylum seekers”, the corresponding numbers were 93% and 78%.

⁴¹ The criminal aliens in the study sample were all apprehended or detained before the beginning of mandatory detention in 1998. Vera Institute at 33.

forgo detention, but who were unwilling to submit to intensive supervision).

- (4) Attendance at hearings is not the same thing as compliance with an order to leave the country. In addition to those who failed to attend their hearings and were thus presumed not to have complied with the court's order of removal in absentia, the report makes clear that there were also a significant number of persons undergoing intensive supervision who attended all hearings, but did not in fact depart the country as required by law.⁴² This is consistent with a 2003 study done by DOJ's Inspector General, which found that while almost 94% of detainees with final orders of removal were deported, only 11% of those not detained who were issued final orders of removal actually left the country.⁴³ Lamenting the low rate at which orders of removal are actually obeyed by those not detained, former immigration judge Mark H. Metcalf has stated, "The man who ... disobeys an order to leave the United States does so knowing that the court that can order him removed cannot enforce its judgment.⁴⁴

I believe there are statistics out there that, while still highly imperfect, would be more useful than the Vera Institute's. In March of this year, the EOIR

⁴² The Vera report did not have a lot of data on compliance. At the time it was completed, many of the cases it had followed were on appeal, so it was not clear whether orders to remove or grants of voluntary departure would ultimately be complied with or not. But ten intensively supervised individuals—one asylum seeker and nine undocumented workers—who were granted voluntary departure had been given departure dates sufficiently early for Vera to be able to track whether they had complied. Of the ten, Vera reported that seven had departed as required, one departed late and only after a threat of re-detention had been communicated to her relatives, and two did not depart at all. Vera at 60-61. The notion that the 91% of intensively supervised persons who appeared at their hearings will also comply with the ultimate outcome of their case is thus false. It is also worth pointing out that Vera states that of the eight people who left the country as ordered, "five were interviewed prior to departing and three were interviewed via telephone after they had returned to their home countries." Vera at 61, n. 53. If I am interpreting this correctly, there may even be some question as to whether the five departed the country as ordered.

⁴³ Office of the Inspector General, U.S. Department of Justice, The Immigration and Naturalization Service's Removal of Aliens Issued Final Orders, Rep. No. I-2003-004 (February 2003).

⁴⁴ Mark H. Metcalf, Built to Fail: Deception and Disorder in America's Immigration Courts 9 (October 2011).

issued its FY 2014 Statistics Yearbook. Appendix P of that document reports the rates of “in absentia” orders in completed cases.

The figures are not happy ones for those who argue detention is unnecessary. According to the figures in the FY 2014 Statistics Yearbook, 39% of initial case completion orders in cases in which the alien was initially detained and then released on bond or on the alien’s own recognizance were issued in absentia.⁴⁵ That means that 39% of “released aliens” failed to show up for their final hearing before the trial-level immigration judge. The judge thus issued an order of removal “in absentia,” which was almost certainly never carried out. As the Inspector General’s 11% figure suggests, the federal government does not have the resources necessary to ensure the deportation of those aliens who do show up for their hearings, much less seek out and deport aliens subject to in absentia orders. Similarly, 31% of initial case completion orders in cases in which the alien was never detained are issued in absentia.⁴⁶

But, once again, even those statistics understate the problem. For one thing, they are calculated as a percentage of *all case completions* before the trial-level immigration court rather than all orders of removal. Only 72% of all orders issued in connection with initial case completions are orders for removal. The category “all case completions” also includes cases in which asylum or other relief in the alien’s favor was ultimately granted.⁴⁷ An alien with a strong case is much more likely to show up for his hearing than an alien with a weak case. So the percentage of released aliens who are able to dodge an order of removal by the simple expedient of not showing up for a final hearing is much higher than 39% (and much higher than 31% for never-detained aliens).⁴⁸

Another angle of the same problem has been flagged by the Office of the Inspector General for the Department of Justice. According to that office,

⁴⁵ This number has been increasing steadily over the last few years—22% (FY 2010), 28% (FY 2011), 30% (FY 2012), and 33% (FY 2013). See Executive Office of Planning Analysis & Technology, Office for Immigration Review, U.S. Department of Justice, FY 2014 Statistics Yearbook at P3 (March 2015).

⁴⁶ Id. at P2.

⁴⁷ For example, in Fiscal Year 2014, asylum was granted in 8,775 cases (6003 affirmative grants and 2772 defensive grants). Id. at K3-K4.

⁴⁸ Since the figures for non-removal initial case completions are not broken down on the basis of always-detained, never-detained and released, I cannot calculate how much higher. Assuming that non-removal initial case completions are spread evenly (a generous assumption) and that those who win their cases attended their hearings, the proportion of never-detained aliens whose removal order is issued in absentia would be about 43% and the percentage of released aliens whose removal order is issued in absentia would be about 53%. On the other hand, perhaps some of those who failed to show up for their final hearing would have won their cases, so that might drive the numbers down somewhat.

“administrative events such as changes of venue and transfers are reported as completions even though the immigration courts have made no decisions on whether to remove aliens from the United States.” As a result, according the Office of the Inspector General’s report, “a case may be ‘completed’ multiple times.” Indeed, out of the large sample (1785) of so-called closed cases looked at by that office, about 27% turned out to be simple transfers and other non-final administrative dispositions.⁴⁹ This will cause compilations like the FY 2014 Statistics Yearbook to underestimate the rate of in absentia orders of removal. The more time that goes by, the more likely it is that an alien will fail to appear for a hearing. If a single alien appears at his first hearing, at which the immigration judge simply transfers his case, but fails to appear at his second hearing at which a different immigration judge issues a removal order in absentia, it will look from the statistics that he cooperated till his final hearing 50% of the time. In fact, however, he cooperated till the end 0% of the time.

In addition, as with the Vera Institute, the FY 2014 Statistics Yearbook fails to take into consideration that an order of removal by the immigration court is not the end of the story. A significant number of aliens who attend their final hearing do not actually leave the country. In Fiscal Year 2014, 15% of all removal decisions in initial case completions were for “voluntary departure.”⁵⁰ Voluntary departures are sought after, in part because they give the alien the opportunity to select his own date and method of departure. But voluntary departure is easy to abuse. The alien can simply disappear prior to the date on which he was required to leave before. In addition, about 10% of all initial case decisions of immigration judges are appealed to the Board of Immigration Appeals.⁵¹ Note that this figure seriously undercounts the proportion of removal orders that are appealed. Grants of amnesty don’t get appealed. Other kinds of final immigration court action, like transfer and in absentia, are also unlikely to be appealed. Appeals are mostly from non-absentia removal orders. If all 13,547 appeals were from non-absentia removal orders, then the rate of appeal would be 19%. Since only 30% of aliens whose cases are on appeal are detained, this provides another opportunity for aliens to simply disappear into the nation’s cities, towns or rural areas. If the observations of the Inspector General were correct, many take advantage of this opportunity.

⁴⁹ U.S. Department of Justice, Office of the Inspector General, Evaluation and Inspections Division, Management of Immigration Cases and Appeals by the Executive Office for Immigration Review, I-2013-001 at i (October 2012). The problem might well disproportionately affect released aliens, since their moving out of detention or around the country could be the cause of the transfer. It is hard to say what effect this would have on the numbers other than that it could be substantial.

⁵⁰ Id. at O1.

⁵¹ Id. at V1. The total number of immigration judge decisions was 136,396 and the number of appeals was 13,547.

It is not clear what justification can be offered for the failure to cite the FY 2014 Statistics Yearbook (or for failing to discuss its defects) in this report and for citing Ms. McCarthy's description of the Vera Institute report instead. It is also not clear why, given the decision to quote Ms. McCarthy's description of the Vera Institute study, this Report does not scrutinize in the slightest its conclusions or the effort to apply those conclusions to the issues in this report.

But the most puzzling aspect of this Report's treatment of flight risk comes in the next thing Ms. McCarthy told the Commission, which is also quoted in the body of the Report. Immediately after her reference to the Vera Institute study, she stated:

Additionally, a more recent study suggests that a majority of migrant children who were released from detention had a high appearance rate as well.

Report at 55.

Only a "majority" had a "high appearance rate"? That doesn't sound all that helpful to the case against detention. And exactly what study is being cited here? Wasn't anyone on the Commission staff curious before incorporating Ms. McCarthy's statement into the report? Did it really find that only "a majority" of migrant children have a "high appearance rate"? If so, isn't that an admission that de-emphasizing detention will be a disaster for compliance? Virtually all detained persons—as in 100%—show up for their hearings.

I therefore requested the Commission staff to provide a citation to the study that Ms. McCarthy was referring to. The best that could be done was to provide me with Ms. McCarthy's e-mail address. In response, Ms. McCarthy kindly pointed to *Taking Attendance: New Data Finds Majority of Children Appear in Immigration Court* by Mark Noferi, a legal writing instructor at Brooklyn Law School.⁵²

But it turns out that this article does not demonstrate the point for which it was cited. It found that "[c]hildren have been designated *in absentia* only 18.4% of the time" and that therefore "in 82.6 percent of cases, the child has either appeared in court or insufficient evidence exists for removal or relief, so far." But this includes cases for which no final hearing in the immigration court has been held (or indeed no hearing at all). What Noferi really means is that in 82.6% of cases, ***the immigration court has not designated the child in absentia yet.***

⁵² Mark Noferi, *Taking Attendance: New Data Finds Majority of Children Appear in Immigration Court* (July 18, 2014)(using government data from Syracuse University's Transactional Records Access Clearinghouse (TRAC) program).

When it comes to “closed cases” at the immigration court level, the in absentia rate for children rises to 31.2% even according to Noferi.

A 31.2% rate is not small. Imagine, for example, what the public’s response would be if 31.2% of individuals accused of a crime skipped bail and thus did not attend their trial.⁵³

Even 31.2% understates the problem. The 68.8 percent of children who presumably attended their final hearing in immigration court includes (1) children whose case for asylum or other relief in their favor was strong, such that it was very much in their interest to attend; (2) children who planned to appeal an adverse decision and who therefore knew they would likely have other opportunities to melt into the background before any final order of deportation; and (3) children who were granted voluntary departure and hence would have additional opportunities to disappear. If the issue is what proportion of the children in the immigration court system who under our law should have been deported are able to ultimately elude deportation, the number is much higher than 31.2%.⁵⁴

Perhaps most significantly, the data used by Mr. Noferi includes cases in which the children were detained. For those children, attendance at hearings is

⁵³ There seems to be a general agreement that numbers like that would be unacceptable in the criminal context. See, e.g., Skip Bail, You Go To Jail (Editorial), Phil. Inquirer (May 9, 2012). Approximately, one-quarter of all released felony defendants fail to appear at trial. Eric Helland & Alexander Tabarrok, *The Fugitive: Evidence on Public Versus Private Law Enforcement from Bail Jumping*, 47 J.L. & Econ. 93 (2004)(using figures from the State Court Processing Statistics program of the Bureau of Justice Statistics at the U.S. Department of Justice). Some of these failures to appear are due to sickness or forgetfulness and are quickly corrected, but many represent planned abscondments. Because this is completely unacceptable, considerable resources are put into getting these defendants into court for their trials. Still, after one year, some 30 percent of the felony defendants who initially fail to appear remain fugitives from the law. In absolute numbers, some 200,000 felony defendants fail to appear every year, and of these, approximately 60,000 will remain fugitives for at least one year. It is hard to understand why anyone would not regard the much higher rates of non-attendance in the immigration context as a problem that needs fixing.

⁵⁴ The problem of counting transfers as completed cases flagged by the Office of the Inspector General for the Department of Justice and discussed above corrupts Noferi’s data too. See text and note *supra* at n. 34. This will cause figures like Noferi’s 31.2% to underestimate the rate of in absentia deportation. The more time that goes by, the more likely that an alien will fail to appear.

virtually 100 percent. If those cases were separated out from the cases of never-detained or released children, the in absentia rate for the never detained or released children would climb higher.

Mr. Noferi nevertheless appears to take the position that his data trump an estimate by EOIR Director Juan P. Osuna in his testimony before the Senate Committee on Homeland Security and Government Affairs on July 9, 2014. Mr. Osuna cited a much larger figure--46 percent in absentia rates for unaccompanied children—in response to a question by Senator Jon Tester.⁵⁵ He stated:

There has been a lot of talk about the in absentia rate. The numbers that have been thrown about actually are not accurate. There are ... there is ... a significant number of unaccompanied minors ... juveniles that don't end up in immigration court. The current rate is 46%, in absentia rate.⁵⁶

I can't tell where Mr. Osuna got the 46% figure, so it is difficult for me to critique it. But it is worth noting that knowledgeable individuals have accused EOIR (though not Osuna personally) of skewing figures for non-appearance to make them appear less troubling than they really are, so it is important not to assume that the figure could not also climb higher.⁵⁷

⁵⁵ EOIR has been criticized for calculating its failure to appear rates in misleading ways. For example, according to former immigration judge Mark H. Metcalf, EOIR sometimes includes detainees in its calculation (or at least it was doing so when he wrote about the issue in 2011). See Mark H. Metcalf, *Built to Fail: Deception and Disorder in America's Immigration Courts*, Center on Immigration Studies 5 (October 2011). Detainees, of course, virtually always appear as required. Given the policy question at issue is whether releasing detainees will increase failure to appear rates to unacceptable levels, it would be odd and perhaps even disingenuous to include them in the calculation. I cannot tell from Osuna's testimony whether that is the case here or not. Neither can I tell whether it was the case that it affected the rate a little or a lot, since I do not know how many (if any) of the children Osuna was referring to were detained. This is something the Commission could have looked into over the course of the year during which this report was in preparation.

⁵⁶ Senate Committee on Appropriations, "Emergency Funding for Unaccompanied Children," available at <http://www.c-span.org/video/?320318-1/hearing-emergency-border-security-funding>.

⁵⁷ Mark H. Metcalf, *Built to Fail: Deception and Disorder in America's Immigration Courts*, Center on Immigration Studies (October 2011).

In an interview on the PBS News Hour on July 8, 2014, Senator Jeff Flake stated that the non-appearance rate for children is a whopping 90%.⁵⁸ Again, however, it is unclear how that number was arrived at.⁵⁹ What can be said is that, in context, Flake was referring to children picked up along the Mexican border—usually nationals of El Salvador, Guatemala, Honduras or Mexico. This is hardly a cross-section of the cases that reach immigration courts. Since the “no show” rate for released or never detained children who walk across the Texas border from these countries may be higher than it is for immigrants generally, his figure is not provably wrong.

But whether Senator Flake’s figure had a solid basis in the evidence when it was made it has turned out to be consistent with figures that are starting to come to light in connection with last summer’s influx of children. Investigative reporter Robert Arnold of Houston’s KPRC-TV (an NBC affiliate) pressed EOIR for figures on appearance rates for accompanied and unaccompanied minors who crossed over the Texas border during that period. Here is what he reported about the data he received from EOIR:

Thousands of families from Central America caught crossing the border had to be released on their own recognizance because there wasn't enough detention space. All were ordered to appear before an immigration judge at a later date.

According to the EOIR, of the 30,467 families and unaccompanied children caught crossing the border between July and October, only 22 percent have received a final disposition as to whether they will be allowed to stay in the U.S. or be deported.

Of the 15,614 families caught crossing the border, but not

⁵⁸ See Migrants Jam L.A. Courtroom for Deportation Hearing, npr.com (August 12, 2014)(When undocumented children are picked up at the border and “told to appear later in court where their case will be adjudicated ... 90 percent do not then show up.”), <http://www.npr.org/2014/08/12/339752981/migrants-jam-la-courtroom-for-deportation-hearing>.

⁵⁹ Senator Flake’s numbers may ultimately be traceable to a Newsmax article. Tori Richards, Flood of Illegal Immigrants Coming to a Neighborhood Near You, Newsmax.com (July 1, 2014)(“A senior Los Angeles County Sheriff’s detective who routinely deals with illegal immigrants said a “massive number—80 to 90 percent—do not show up for deportation hearings”), <http://www.newsmax.com/US/Illegal-immigrants-neighborhoods-US/2014/07/01/id/580341/>. If so, it is merely a rough estimate from an individual with some general experience, but no direct access to accurate records.

detained, 4,197 have been ordered removed from the U.S. **However, 96 percent of those removal orders were done "in absentia."**

The EOIR states an "in absentia" order is done when a person fails to show in immigration court.

Out of the 1,428 families caught crossing the border and detained, 21 have been ordered removed. Forty-three percent of these orders were done "in absentia."

Of the 13,425 unaccompanied children caught crossing the border between July and October, 1,671 have been ordered removed from the U.S. **Ninety-two percent of these orders were done "in absentia."**⁶⁰

It is possible that these astonishing numbers—96% and 92%--will come down from their stratospheric levels as more cases are resolved. Perhaps immigration judges are trying to get the no-shows off their dockets as quickly as possible. Nevertheless, it is important to recognize that even if they come down substantially, they will still be high. Indeed, every serious effort to gauge general non-appearance rates has yielded figures that are very high—whether we are talking about Arnold's rates of 96% for families with children and 92% for unaccompanied children, Osuna's 46% rate for unaccompanied children, or the FY 2014 Statistics Yearbook rates of 39% for released aliens and 31% for never-detained aliens. Moreover, the non-appearance rates are just the beginning of the story. Those who are present for their final hearing do not necessarily obey removal orders. Indeed, what little data we have suggest that very often they do not.

We will probably never have perfect information on these matters. And even if we did, the data would not necessarily lead us into agreement on what our detention policy (or our immigration policy generally) should be.⁶¹ But better data (and a better understanding of that data) would surely be helpful in sorting through these difficult issues. The Commission has not added to our understanding in this area. Indeed, by simply quoting Ms. McCarthy's casual citation to two statistics, neither of which

⁶⁰ Robert Arnold, Thousands of Recent Texas Border Crossing Cases Still Undecided, Click2Houston.com (December 19, 2014)(bolding added), <http://www.click2houston.com/news/thousands-of-recent-texas-border-crossing-cases-still-undecided/30324648>.

⁶¹ I express no opinion on any ultimate policy issue related to this report.

directly apply to the issue of how de-emphasizing detention will affect the problem of non-appearance, the Report misleads.

The Report states, “The Commission believes that there is no evidence indicating that ICE or CBP need to detain unaccompanied alien children on a wholesale basis and in the absence of the risk factor analyses cited above.” Report at 57. The statement is nonsense. The risk of flight is high among *virtually all* individuals who attempt to cross the border surreptitiously. It is ties to the community like real estate ownership, a good job, children in school, or even the fact that one has never lived anywhere else in one’s life that make an individual low risk for flight. Illegal entrants, even those with relatively good prospects for asylum, almost never have such ties. Insofar as they had such ties to a different community, they have abandoned them. Alternatively, an individual with few ties to the community, but a long record of good behavior, i.e. no record of criminal arrests or convictions along with affirmative record of good citizenship through service to church, school, military, etc., may be a good prospect. But ICE has no access to such records. They cannot separate the ethical from the unethical among those in their care.

It is already the case that ICE attempts to separate the best risks from the worst ones. Given the high rates of non-appearance, it is obvious that even now ICE is releasing large numbers of individuals who do not show up for their hearings. Releasing those who are thought to be higher risk will likely drive it still higher.

I note that Commissioner Achtenberg states, “The Commission has not heard adequate explanations of the processes by which detainees’ eligibility for release on bond and those by which the amounts of the bond are determined.” And she is right, though the reason that she is right is that we were insufficiently diligent in trying to obtain that information. What I don’t understand is how she and four other members of the Commission were able to vote for a recommendation that “[t]he process by which bond amounts are set and the range of the bond amounts are inconsistent and perhaps punitive.” Achtenberg Statement at 15. How does one know if one doesn’t understand the processes?

D. Most of the Meager Independent Investigation Undertaken by the Commission Didn’t Make it into the Report.

As I briefly discussed above, Commission members and staff actually did visit the detention facilities at both Karnes and Port Isabel. But with a few trivial exceptions, these trips didn’t get mentioned in the report. So

allow me to share the material from my notes and my recollections of our tour. In some cases, my notes and recollections have been supplemented by the notes of Carissa Mulder, special assistant to my colleague Peter Kirsanow, who accompanied me and the other Commissioners and staff members on the tour. Bear in mind that I anticipated that the staff-written portion of the report would discuss these trips in greater detail and that I would not have to write about Karnes or Port Isabel myself at such length. Still, I believe that we obtained some information that is worth memorializing.

1. Karnes County Residential Center:

I was pleasantly surprised by Karnes. It is a 76,960 square foot facility with a capacity to hold 532 persons, although on the day we visited, May 4, 2015, it had only 301 residents. Owned and operated by GEO, it is located about 50 miles southeast of San Antonio and is currently under contract with ICE to serve exclusively as an immigration detention facility (in contrast to facilities like county jails, which occasionally serve as both immigration detention facilities and jails).

Both employees of GEO and of ICE work at Karnes. Near the entry, there is a separate office for each. GEO employees are at the facility around the clock. Approximately 25 to 30 ICE employees work on one or the other of two shifts. No one from ICE is present from midnight to 6:00 a.m., but someone is always on call.

Karnes opened in February of 2012 as a men-only facility. But in August of 2014, it re-opened as a family facility. “Family” in practice means mothers and their children. Karnes does not house men, women without children, or unaccompanied children. By and large the residents at Karnes were apprehended by the Border Patrol trying to cross the border from Mexico. They are most likely to be citizens of El Salvador, Guatemala, Honduras or Mexico.

Our tour of Karnes was in part conducted by ICE Assistant Field Director Juanita Hester. She rejected the use of the term “detainee” and requested that we use the term “resident” to refer the women and children here.

Karnes is not a work of architectural splendor. Like many elementary schools, it is made of (painted) cinderblock. But it is clean and bright and new. When we started our tour, there was a man at work busily cleaning the glass doors in the interior. A large sign declaring that the facility had gone 280 days without an accident hung on the wall.

The intake area has “Bienvenidos” written in large letters as well as pictures of SpongeBob SquarePants, the sun, a cactus and a giraffe whose neck contains the markings of a ruler (thus allowing children’s height to be measured). The staff there seemed pleasant.

When we visited the intake area, there was not a lot going on. But when a group comes in from the Rio Grande Valley, it is said to be quite lively. Our guide told us they like to keep the new groups down to 30 at most.

New arrivals are taken to a waiting room, where a “Know Your Rights” video in both English and Spanish is on constant loop, just off the main intake area. The waiting room was decorated with pictures of a rainbow, butterflies, clouds, fish and various other things that children are thought to enjoy. It also contains two bathroom stalls, which were equipped with plenty of toilet paper, feminine sanitary supplies, paper towels, hand soap and a trashcan. The mirror was made of shiny metal rather than glass, presumably because glass can be a hazard in institutional settings like this one.

Showers are available at this point. Each family is allowed privacy for its shower, which can be organized as desired. They can shower together, or a mother can shower with any very young children and then stand watch as any older children shower. Flip-flops, baby bottles, diapers, baby shampoo, brushes, body lotion, and pacifiers are also available.

Anyone who arrives with large luggage or valuables can store them in a secure area. Identification cards and materials are put on file to prevent them from being lost or stolen.

Four telephones line one of the walls in the intake area. Everyone is permitted to make a certain number of calls. My notes do not make clear how many.

We were told that new arrivals get two separate orientations—one from GEO, which deals with the facility, and one from ICE, which deals with the immigration process. Residents also receive a handbook, though since some of the residents are illiterate, it does not always do them any good. Particularly with the illiterate residents, the oral presentations are likely to be more effective. Although some of the residents’ native language is indigenous (K’iche’ was mentioned in particular), the vast majority of indigenous language speakers understand Spanish anyway.

New arrivals also get a quick medical screening. A more complete screening is mandated to come within 14 days, but at Karnes it is in fact done within 24 hours.

Among other things, every arrival age 2 or older gets a chest x-ray for tuberculosis during the initial medical screening. If I understood correctly, the x-ray is immediately forwarded to experts at the University of Maryland, who preliminarily analyze the results almost instantly and always before the intake exam is over. Maryland occasionally returns a preliminary positive reading in which case the patient is confined to a negative pressure room until a final reading is provided. A negative pressure room is one in which the ventilation system pumps the air in the room outdoors rather than letting it circulate within the facility. Final results are always available within 4 to 12 hours. Karnes has never had a positive final reading for tuberculosis.

In theory, a resident can refuse the tuberculosis test for herself or her children, but nobody ever does. If someone did, the staff would simply observe them (as they observe persons under age 2) for signs of tuberculosis. On the other hand, residents refuse immunizations quite often—a very troubling sign. I should note that part of the reason that there were only 301 residents on the day the Commission visited and not 532 (the facility's capacity) is that there had been a chicken pox outbreak. For a six-week period, the Karnes facility accepted no new residents (although it did release residents into the country during that period.)

There was in fact a little girl and her mother in the negative pressure room when I walked by. I am not sure if they were there on account of a preliminary positive reading for tuberculosis or for some other reason, but neither appeared to be ill. Both mother and daughter were happy and smiling. They waved as we walked by.⁶²

The apparently well-equipped clinic has 28 nurses, both registered nurses (14), including one full-time nurse practitioner, and licensed practical nurses (14). They are there not just to conduct the intake screenings, but also to look after the health of the residents generally. There is a full-time physician on the staff who reviews each resident's medical intake chart, and there is a psychologist on staff as well. A psychiatrist is available on an as-needed basis. Among other things, the

⁶² My colleague Commissioner Achtenberg writes that "Commissioners observed very young children appearing lethargic and depressed." Achtenberg Statement at 3. I did not see that. The children at the meeting she describes struck me as well-behaved.

clinic has medical observation rooms, each with two beds, a bath area, a television and one of the ubiquitous shiny steel mirrors. The clinic is open on a walk-in basis twenty-four hours a day, seven days a week. The nearest hospital is four miles away.

A couple of children were in the clinic as I passed by. They seemed happy and greeted us with “Buenos Dias.”

Everyone sees a dentist within 14 days of arriving. The facility has a dentist who comes on site, but we were told that “important” dental work (which included major dental work and pediatric dentistry) is done off site.

As I discussed in my introduction, one of the first things to strike me at the beginning of our tour was the room that we passed by filled with rows and rows of clothing and shoes. After visiting the intake area and the clinic, we came back to this room. Our guide told us that new residents are given the opportunity to select six outfits for each of their children and for themselves prior to their showers at intake. The clothing is new—something that seemed to surprise some and possibly all the members of the Commission present (including me). I observed tags on clothing from well-known makers of children’s clothing like Carter’s and Fisher Price—all of it purchased by GEO. As for their old clothing, GEO washes it while they are taking their intake shower and returns it to them.

Once a week, there is an opportunity for shoe exchange. Children’s feet grow fast. But if a child loses a shoe or if the mothers need additional shoes or clothing at other times, the opportunity is available. All in all, it is hard not to conclude that this is a nice place.

Everyday life at Karnes is conducted largely in rooms that open onto the large courtyards with gazebo-like structures, a soccer field and picnic tables.⁶³ I believe there are two such courtyards. With the exception of a number of small rose bushes and a smallish tree or two, there was not a lot of landscaping in the courtyard we saw. But it was fresh and airy, and the rose bushes and trees will grow.

While we were out there in one of the courtyards several women excitedly ran up to Chairman Castro to tell him (in Spanish) about their concerns. My Spanish is a little rusty (although the Chairman kindly

⁶³ Commissioner Achtenberg is concerned that “children have limited access to outside play in a courtyard fully surrounded and enclosed by buildings.” Achtenberg Statement at 4. My feeling was the other way. Many American children must walk blocks to reach a park as large and spacious as the courtyards at Karnes. These children have such a space right out their front door.

helped me out by translating some of what was being said). The gist of it seemed to be that they were tired of being detained at Karnes and that they wanted out. Who can blame them? One woman said she had been there 11 months and seen an immigration judge more than 20 times. If I understood her correctly, a judge or other officer had concluded that she was not in credible fear for asylum purposes, but the opposite conclusion had been drawn with regard to her son (presumably by a different judge or officer). It is easy to see how this would be troubling, but since the subject of this report is conditions at detention facilities and not the immigration courts, I will refrain from further commenting.

Meals are served in a dining room with tables for four and plastic chairs. School-aged children eat first. Mothers and their younger children come next. We were told that at dinner and on weekends, families eat as a group.

Efforts are made to adjust menus to the tastes of the residents. For example, we were told that the facility used to serve pinto beans, but the menu planners learned that the residents usually preferred black beans and therefore have tried to serve black beans when they can. They also learned that most residents preferred corn tortillas to flour tortillas and that they liked to eat bananas and plantains.

We observed children eating lunch. There was a salad bar. Lunch that day was shredded chicken, peas and carrots, mashed potatoes with gravy, white beans, bread. Dessert was a baked apple dish, like a Brown Betty. Butter (or was it margarine?) was available. It looked and smelled good. I was hungry.

The Chairman engaged some of the children in Spanish (although one boy said he preferred English and others appeared to speak it too). They look happy and pleased to be the recipients of the Chairman's attention. Some said they wanted pizza. "What are they saying in Spanish?" I asked. "I want out of here," replied the Chairman good naturedly. I understand the feeling. But the problem did not appear to be detention conditions as opposed to detention itself.

GEO runs a school for the children, although we didn't see much of those classes. There is also an attractive library—nicer than the library at my elementary school—with lots of books in both English and Spanish. The colorful carpet beneath one of the tables has a "We are the World" theme with children of various nationalities holding hands surrounding a map of the world. Nearby is a room with 11 computers that are available to get e-mail via Yahoo and Gmail and to visit other web sites. Like

computers in government offices, these won't allow users to log on to social media or other sites forbidden to government employees. We were told that they are used by the children quite a bit, but not so much by their mothers.

There is also a room with 10 computers dedicated to Lexis/Nexis and to Westlaw. When we passed by, nobody was in there except an employee. We were told that the men used to use it back when Karnes was a detention center for adult males. But it gets hardly any use now that Karnes is a family facility.

The living quarters for the residents were Spartan, but clean and comfortable. The rooms I visited were said to be typical and had 4 bunk beds as well as toys for the children. No children under 10 are permitted in the top bunks. The mattresses had blue leatherette coverings. Two tables with four chairs each were in each room with a chessboard printed on at least one of the tables. The bathroom area had a toilet, shower and sink. Our guide explained that they try to combine groups by the age and sex of the children. Lights are turned out at 10:00 p.m.

At that point, if I understood correctly, adults may go out to a gathering room, which is equipped with a television, a couch, two refrigerators, a microwave oven, a sink, a pencil sharpener, four telephones, a playpen, and toys, but the gazebo in the courtyard is off limits (since conversations in that area might disturb the children).

The Karnes staff was kind enough to post a sign up sheet a couple of days before our arrival for residents who wanted to speak directly to us. Quite a few women signed up—probably about 20. But their complaints tended not to be about Karnes, but about the Border Patrol and the various locations they had been taken to prior to coming to Karnes. One woman, for example, was tearful on account of the lack of clocks at the place she was initially taken by the Border Patrol. Her son was running a fever when they were picked up and had therefore been given medication by the doctor. The medication needed to be taken on a certain schedule. She therefore needed to know what time it is. She said the guard at that place was rude and uncooperative.

Among those who complained about circumstances at Karnes, the complaints tended to be minor:

- One woman from Mexico said that the Border Patrol had not treated her badly and that she has been treated well at Karnes. She appreciated the Zumba fitness classes and other adult education

classes offered there, but she wished they would offer classes in how to speak English. (We were told by facility staff members that English and life skills classes that teach residents such things as “how to open a checking account” are available, but seldom attract more than four or five students.)

- Another woman from Honduras was concerned that her 18-month-old baby didn’t like the food or the milk served at Karnes. She was therefore having to breastfeed him. She stated, however, that she and her children are treated very well at Karnes, and numerous women in the room nodded in agreement.
- Several women were unhappy that they are not allowed to entrust their children to other residents while they attend to other things.

The Chairman asked if they had access to telephones. They nodded yes. He also specifically asked the women whether they had been sexually harassed with at Karnes. They all said no, and said they had been treated well.

Their response to his question about sexual harassment was especially important given the accusations that had been leveled by one of our briefing witnesses, MALDEF staff attorney Marisa Bono. In her written testimony, she stated that “at least a few women detained at the Karnes Facility alleged that sexual abuse was ongoing since the facility opened in August of 2014, including:

- “Karnes Facility guards and/or personnel removing female detainees from their cells [sic: residents live in dormitory rooms at Karnes, not cells] late in the evening and during early morning hours for the purpose of engaging in sexual acts in various parts of the facility;
- Karnes Facility guards and/or personnel calling detainees their “novias” or “girlfriends,” and using their respective position and power over the highly vulnerable detained women within the detention facility by requesting sexual favors from female detainees in exchange for money, promises of assistance with their pending immigration cases, and shelter when and if the women are released; and
- Karnes Facility guards kissing, fondling, and/or groping female detainees in front of other detainees, including children.”

Written Testimony of Marisa Bono at 2 (January 30, 2015).

According to Ms. Bono, MALDEF and other organizations sent a joint letter to the U.S. Department of Homeland Security, ICE, the Karnes facility and GEO Group, Inc. complaining of these incidents. They were later informed that

the Office of the Inspector General would be conducting an investigation. According to Bono, “Despite repeated requests, Complainants have no additional information regarding the details of the investigations.”

Even more significant than the answer to the Chairman’s informal question about sexual harassment was the Inspector General’s report on his office’s investigation of the MALDEF et al. letter. Released almost a month before Ms. Bono’s testimony, it found no inappropriate conduct.

The Inspector General states that OIG agents had “interviewed 33 witnesses and spent 380 hours investigating the allegations.” Among other things, they found:

- * “Each of the female detainees identified by the complainant denied they had ever engaged in any form of inappropriate activity, to include sexual acts, with any Detention Officers. They also each denied having been escorted into a laundry room, restroom, or other area to engage in any sexual activity or having received any money, benefits, or preferential treatment in exchange for sex or anything of value.
- The female reportedly impregnated by a Detention Officer denied the allegation and voluntarily submitted to a pregnancy test which was negative.
- Review of over 360 hours of time lapsed surveillance video footage of the laundry room and day room areas failed to confirm that any of the detainees were escorted to those areas after hours by Detention Officers.
- Review of the Detention Facility’s commissary account records determined that none of the deposits into these accounts were made by Detention Officers.
- Each of the Detention Officers who could have been referenced by the complainant denied the allegations. Specifically, each denied engaging in any misconduct with any female detainee, including any apartment rentals, deposits into commissary accounts, after-hours escorts, having sex or sexual relations with female detainees, impregnating any female detainee, or providing preferential treatment in exchange for sex.
- The responsible Supervisory Detention Officer stated that he was unaware of any inappropriate relationships between Detention

Officers and detainees and would have immediately reported such activity.

- Interviews of managerial personnel at the facility disclosed that no female detainees had reported any incidents concerning any form of misconduct against any of the facility's employees.”

The following conclusions were drawn by the OIG:

- “We found no evidence to substantiate the allegations and were unable to identify a victim or suspect in this matter.
- Review of video footage revealed that two [expunged] Detention Officers were engaged in a romantic relationship with each other and had engaged in inappropriate physical contact in the laundry room while on duty. When presented with this information, Federal and State prosecutors concluded that no violation of Federal or State statute had occurred. Both employees [expunged] after being interviewed.
- A report of our investigative findings was provided to ICE and DHS Civil Rights and Civil Liberties (CRCL) officials before a scheduled CRCL inspection of the facility.
- ICE complied with the Prison Rape Elimination Act reporting requirements.”

Memorandum to DHS Secretary Jeh C. Johnson from DHS Inspector General John Roth dated January 7, 2015: Investigative Summary—GEO Group Incorporated Detention Facility, Karnes City, Texas at 2-3.

There is a small courtroom at the Karnes facility. Lots of immigration hearings are held here. It looks quite official, complete with a “bar” and counsel tables and seating for observers. Our tour guide told us that about 75% claim to be in fear (and hence arguably entitled to asylum) at the border. The other 25% don’t claim it until they reach Karnes. She said the proportions used to be 50%/50%, but the coyotes have gotten more savvy and advise the women to make their claim early. Those who fail to claim it are processed quickly and sent back over the border.

2. Port Isabel

My notes on Port Isabel are somewhat less extensive.

On May 5, 2015, our little entourage visited the Port Isabel Service Processing Center, which is located in the Laguna Atacosa National

Wildlife Refuge in South Texas. It has a view of Laguna Madre and of South Padre Island. Despite the view, the windy facility looks far more like a prison than the Karnes facility. If you are looking for pictures of SpongeBob SquarePants and rainbows, this is not the place to come.

Note that some of the residents at Port Isabel are here precisely because they have been convicted of a crime. Unlike Karnes, the residents here were not all or nearly all picked up trying to cross the border illegally. Legal immigrants with green cards may be deported if they are found to have committed a crime (and are sometimes picked up while trying to re-enter the country legally after visits abroad). Some of those at Port Isabel fall into that category.

We began our visit with a meeting with Francisco Venegas, Facility Assistant Field Office Director, Pedro Olivarez, who is head of detention, and Michael Watkins. I did not catch Mr. Watkins' title, but he apparently used to be the top officer at Port Isabel and has since been promoted to a regional position. During our tour, several individuals, including one or two detainees, greeted him warmly as someone they had not seen in a while.

We learned that upon arrival at Port Isabel, residents are issued jumpsuits in either blue, orange or red. About 10 to 15% of the residents wear red, which signifies that they have been convicted of a very serious crime, like rape or murder. Orange, which is somewhat less common, means the wearer has been convicted of a less serious crime that nevertheless demonstrates moral turpitude, like theft. About 75% of the residents wear blue jumpsuits, which suggests that they either have never been convicted of a crime in the United States or that, if they have, it is a minor one like possession of marijuana or simple assault.

The color of one's jumpsuit is, of course, not a perfect indicator of one's criminal record or lack thereof. Individuals who are apprehended crossing the border illegally for the first time have often not had the opportunity to acquire a criminal record in the United States, but may have one elsewhere. (For example, one of the detainees discussed infra at ___ said he decided to flee to the United States after he was arrested for drunk driving and had his picture shown on television, which resulted in a renewal of extortion efforts by a local gang.) But color-coding is a useful way for ICE personnel (as well as detainees) to judge the dangerousness of the individuals with whom they have to deal.

If there are significant problems at Port Isabel, we failed to uncover them. Port Isabel is an ICE owned and operated facility (although some of

its guards are employed by contractors, rather than ICE itself). It has a capacity of 1500, organized into five divisions with four “pods” each. Each pod has 75 beds. Port Isabel houses adult men and adult women, but there are many more men, so only one pod is used for women. The day that we visited, the facility had about 900 male residents and about 50 female. I did not see any of the female detainees during the tour.

Mr. Watkins stated that Port Isabel’s strategy for making the detainees’ stays as pleasant and problem-free as possible is to ensure that they have plenty of opportunities to engage in athletics and that he believed the results of this strategy have been very positive. Port Isabel has three recreational specialists on staff who organized recreational activities for the detainees.

Transgender “female” residents (i.e. residents who were born male and continue to present physically as male but who identify as female) are asked if they feel comfortable being held among the general male population or if they prefer to be in the “special management” unit. The option of residing in the female unit is not available to them. The special management unit contains eight, double-bunked cells and is thus not solitary confinement. Special management unit residents can move about the unit and engage in recreational activities.

There are both male and female guards at Port Isabel. Female guards are always in charge of female detainees. However, there are occasions when there are not enough female guards to cover the lunch schedule, so male guards are briefly brought in to deal with female detainees. To guard against the possibility of sexual abuse (or any other kind of misconduct), 24/7 cameras are placed throughout the facility.

Watkins conceded that Port Isabel had had claims of sexual assault, including a recent one that is still under investigation. He later told us that the facility always seeks to prosecute individuals accused of sexual assault. Every officer prosecuted for sexual assault during his five years at Port Isabel went to prison.

The intake area at Port Isabel is decidedly unattractive. New arrivals, who typically arrive during the graveyard shift from 11 p.m. to 7 a.m., are put into holding rooms with peeling paint, concrete floors and seating, and toilets. Privacy in using the toilet is limited in that the wall around the toilet goes up only about three feet. The lateness of the hour is probably a function of the fact that most individuals attempting to cross the border illegally attempt to do so under cover of night.

In 2014, Port Isabel processed 72,000 individuals. Those numbers bring home the fact that most people don't spend much time here. Since the facility's capacity is only 1500, it is clear that most individuals must be processed through very quickly.

Intake is in some ways similar to intake at the Karnes facility. Detainees get a preliminary medical screening here too, which includes a chest x-ray that is read by experts at the University of Maryland for tuberculosis. During the screening, detainees are also asked about medications and already-existing medical conditions. Their blood pressure is taken and a few other routine things are checked out.

The graveyard shift typically has 2 to 3 registered nurses and 1 to 2 licensed practical nurses to conduct the intake screenings. Altogether, the facility's clinic, which is run by the Public Health Service, has 37 registered nurses, 19 licensed practical nurses and 6 "mid-level providers" (meaning nurse practitioners or physician's assistants) split over three shifts. There is also a PHS physician on temporary duty here and a psychiatrist available via video hookup. There are two open positions for physicians on the clinic staff; they are working to fill them.

The clinic also has a pharmacy and a dental clinic with a dentist and dental assistant. All detainees get a screening to check for issues. If a medical or dental problem is detected that can't be handled on site, it is referred out to an appropriate provider in the local community. Urgent problems are handled urgently. Non-urgent problems can take a week or two. A detainee who remains at Port Isabel for a long period of time will also get regular cleanings.

Chicken pox is a seasonal problem here. For that and other contagious diseases, the facility has a large number of so-called "negative pressure" rooms in which the air is pumped outdoors and not allowed to circulate in the building with other detainees.

As at Karnes, we were afforded the opportunity to meet with detainees at Port Isabel. The participants were an interesting group—somewhere between 15 and 20 attended. On the whole, they looked older than the women who participated in the meeting at Karnes. Their stories varied in interesting ways. Curiously, *nobody* complained about conditions at Port Isabel. Nobody even appeared to be feeling particularly sorry for himself. It would have been hard not to like them.

Here is a quick summary of the individuals who spoke up during the meeting:

(1) The first detainee to discuss his situation spoke up even before all the members of our entourage were in the room. In response to the Chairman's question about conditions, he responded (in Spanish) that if they let him out on Sundays, he wouldn't mind staying indefinitely. While a Mexican national, he had been here since a young age (11) and was a legal permanent resident. Nine years ago, however, at the age of 27, he was convicted of possession of marijuana. He also let his green card expire. When he attempted to board a flight with a family member, the expiration of his green card was discovered, along with the fact of his marijuana conviction. This landed him at Port Isabel. He wore a blue jumpsuit.

(2) Another 25-year-old detainee also had a green card and had been living in the United States since age 8. While crossing the border at Brownsville, the border agent asked for his green card and somehow discovered that he had been charged at some point with possession of marijuana and with assault. This man's English was fluent, and it may well have been his primary language. Like the first man, he wore a blue jumpsuit, despite the fact that he had been charged with a violent crime (assault). It was unclear to me whether he was talking about charges or convictions on his record.

(3) The third detainee to share his story, whom we nick-named "James Bond," had me going for a while, but ultimately it got the point where my colleagues and I had to conclude that he was mentally ill. He started out telling us that someone had surreptitiously written on his asylum paperwork that he was an assassin for the U.S. Government. The story became increasingly complex with multiple deportations, kidnappings, attempted murders, torture by Los Zetas, and speeding sports cars. Other detainees looked somewhat embarrassed and amused as if they'd heard this story before. If James Bond was telling the truth, there should be an action movie or two out of it. But since it had nothing to do with the subject of this report—conditions in detention centers—I believe his story was better left to others to sort out.

(4) Only one of the men in the room had an orange jumpsuit. Commissioner Kladney made it a point to ask him his story. He replied in English that he had been in this country since he was a little boy in 1991, but, while legal, he had never thought

to naturalize. He had a good job as a paralegal and is married to a U.S. citizen with whom he has a child. In addition, he has custody of a child with his first wife; the child is currently being cared for by his mother. At some point in the past, he signed a check that was not his own, thus committing a crime of moral turpitude. He had an explanation for his crime, but I did not quite follow it. In any event, he recently went to Mexico for medical treatment that could be obtained more cheaply there than here. When he attempted to return, his check fraud arrest came up. He was asked about his treatment at Port Isabel and replied that if you treat people the way you want to be treated, everyone will treat you well here. He was particularly pleased with the opportunities to engage in sports activities at Port Isabel and noted that they have religious services here as well.

(5) A recent arrival from El Salvador said he had owned an air-conditioning business back home. But a gang of thugs had been forcing him to pay them \$400 a month, apparently for the privilege of doing business free from their interference. When he failed to pay them consistently, they stabbed him as a warning. Fortunately, he was able to borrow enough money to keep them at bay for the rest of the year. Only when they came back for more at the beginning of the new year did he decide he needed to escape to America. He was grateful to the Mexican people who gave him work during the three months it took him to reach the United States border. When he arrived he was treated well by the Border Patrol.

The Chairman asked those present whether the Border Patrol had put them in cold rooms. Several of those present agreed that the rooms had been cold, but they did not seem to think this was a significant problem. Earlier, one of the ICE staff members had suggested to us that the problem might be that many Central Americans aren't used to air conditioning. What Americans (and Texans in particular) regard as a comfortable temperature might seem cold to them.

All in all, it is impossible to miss the fact that Karnes is a more comfortable facility than Port Isabel. The latter really does look like a prison. On the other hand, the men there complained about the speed at which their cases were being resolved, not about the conditions at the facility. Those complaints are outside the scope of this report.

E. *The Commission Needs to Undertake More Modest Projects and to Adhere to Its Procedures Designed to Ensure the Commissioners Have Time to Correct Errors in Reports and to Submit Statements. It Also Needs to Avoid Hyperbole in its Reports.*

Our staff is small. Perhaps if we had undertaken a more modest task—like investigating food service at immigration detention centers or the accommodation of religious exercise—we would have accomplished more. The Commission’s tendency is simply to pick a broad topic and unleash the staff to go forth and study. We fail to take the responsibility to sharpen the focus on a clear and contested issue of fact that is susceptible to proof or disproof. We fail to take the responsibility for research design. The results are ordinarily, perhaps invariably, disappointing.

The fact that I have not critiqued every aspect of this report should not be taken as agreement with those aspects I failed to discuss.⁶⁴ It is

⁶⁴ For example, in the section on medical standards, the report states:

In 2013, the University of Arizona conducted a study by interviewing 1,113 recent deportees: 37 percent of the respondents reported that ICE was denying them medical attention while in ICE custody.

This is simply wrong. The University of Arizona report stated that “*37% of those that requested medical attention from authorities did not receive it.*” (page 26, emphasis added). It is unclear how many requested medical attention. The University of Arizona report stated that “23% indicated they needed medical attention,” but it is unclear whether this means that 23% actually asked for medical attention or only that 23% later told the researchers that they needed medical attention. If it is the former, it would mean that only 8.5% of the respondents requested and failed to receive medical care. If it is the latter, the relevant number could dip even lower.

Moreover, the 1,113 individuals interviewed were apparently subjected to “expedited removal.” They crossed the border illegally, were apprehended and failed to make an adequate claim to the right of asylum. They were therefore dropped back on the other side of the border in short order. Their stay in the United States was better measured in hours than weeks. They either never saw the inside of a detention facility like Karnes or Port Isabel or saw it only for a very short period.

simply a matter of lack of time before the deadline for Commissioner's statement, which was shortened from the usual 30 days from date on which the Commission adopts the final draft of the report.

I am apparently not the only Commissioner to be disadvantaged by the shortened length of time for statements. In Commissioner Yaki's Statement, he states that "[t]he murder rates in Guatemala and El Salvador are more than 800 times that of the United States, while Honduras has more than 1,900 times more murder per 100,000 people than in the United States." Yaki Statement at 2, n. 5.⁶⁵ A usual rule of thumb is that if a statistic seems utterly incredible, it usually is literally not credible. The intentional homicide rate in the United States is about 5 per 100,000. If the rate in Honduras were 1900 times that, it would be about 9500 per 100,000, or just shy of 10% per year. That would make spending a year in Honduras massively more likely to result in death than fighting in the Battle of Bulge. The actual figures are more like 8 times greater for Guatemala and El Salvador and 18 times for Honduras.⁶⁶ Decimal points matter.

A few things do deserve mention despite the short time period in which Commissioner are permitted to write statements. One is a proposed finding that suggested detention facilities were engaged in conduct that is analogous to torture. The proposed finding would have read:

Furthermore, while [the] Commission does not find that DHS is torturing detained immigrants, the Commission finds that certain DHS-owned facilities and CDFs are subjecting detained immigrants to extreme living conditions. The Torture Victim Protection Act of 1991 (TVPA) defines "torture" as:

The Border Patrol is not in a position to offer medical care out in the field except in the case of emergencies. It is entirely possible (indeed likely) that some of those who did not receive medical attention were not facing emergencies and were returned to the other side of the border within hours, where they were free to seek medical care at their leisure.

⁶⁵ These erroneous figures were directly taken from Center for American Progress, The Facts on Immigration Today 19 (October 23, 2014). This is not the kind of error the Center for American Progress should be making. The figures should have been spotted as implausible before the document was published.

⁶⁶ The World Bank, "Intentional homicides (per 100,000 people), available at <http://data.worldbank.org/indicator/VC.IHR.PSRC.P5>.

[A]ny act, directed against an individual in the offender's custody or physical control, by which severe pain or suffering (other than pain or suffering arising only from or inherent in, or incidental to, lawful sanctions), whether physical or mental, is intentionally inflicted on that individual for such purposes as obtaining from that individual or a third person information or a confession, punishing that individual for an act that individual or a third person has committed[,] or is suspected of having committed, intimidating or coercing that individual or a third person, or for any reason based on discrimination of any kind.

The evidence contained in this entire report suggests that some DHS owned facilities and CDFs may be subjecting detainees to significant physical and emotional pain.

Chapters 3, 4, and 5 of this report details evidence suggesting that immigration detention facility officials punish detained immigrants for crossing the U.S. Border without proper documentation. For example, detainees are held in unjustifiably cold⁶⁷ and overly crowded detention cells, only given one meal during processing, forced to drink unclean and possibly toxic waters⁶⁸ ... and sometimes beaten and sexually abused by guards and detention

⁶⁷ It may well have been cold. But that doesn't make it cause for citing the Torture Victim Protection Act of 1991 even as an analogy. Commission members who think otherwise need to get a hold of themselves. As I learned when married to a Texan, cranking up the air conditioning is as much a part of Texas culture as barbecue, the Alamo, and Tex-Mex cuisine. An illegal entrant apprehended crossing into this country, especially after walking long distances in scorching heat, might well feel cold when brought inside. Indeed, when it was brought up to them, the detainees at Port Isabel acknowledged that the building where they were taken by the Border Patrol was cold. But, unlike the Commission members, they took it in stride. It is worth remembering that some of the asylum seekers among them probably know what torture or being subjected "to extreme living conditions" really means. See supra _____. All that said, given this evidence, the Border Patrol should dial down the air-conditioning.

⁶⁸American water sometimes tastes funny to visitors from other nations. That is in part because of the level of chlorination used to protect against disease, and in part because of the presence of other minerals that affect taste. The taste of water varies from geographical location to location, and most people like the taste of the water of the place where they grew up. Detainees are likely no exception.

officials.⁶⁹ In addition to physical pain, some DHS-facilities and CDFs subject detainees to mental pain and suffering.

Torture and the Torture Victim Protection Act of 1991 should never have been mentioned in connection with this report. It only hurts the Commission's and the report's credibility. This is a serious subject that deserves serious study, not over-the-top rhetoric. Fortunately, cooler heads prevailed on this one, and the proposed finding was rejected.

But the torture language has popped up again in Chairman Castro's Statement. Indeed, he uses stronger language than the earlier proposal. His discussion of the subject begins, "While the Commission did not find that DHS is torturing immigrants, I believe that certain DHS-owned facilities and CDFs are subjecting detained immigrants to torture-like conditions." Castro Draft Statement at 3. He later states, "I dare anyone reading this Report to be subjected to the conduct to which these detained immigrants are subjected to and not feel that you were being tortured as a result." Id. at 6.

If you wonder why Democrats and Republicans in Washington can't come together to get things done, over-the-top rhetoric like this is certainly a part of the reason. Most of the detainees had no complaints whatsoever. Those that did have complaints were balanced in the way they made their complaints. It's too bad members of the U.S. Commission on Civil Rights can't be as level-headed.

The other thing that deserves mention is healthcare. I have no doubt there have been some cases of egregiously bad medical service at detention centers over the last decade or so. With 400,000 detentions per year, one has to expect that. There are cases of egregiously bad medical service everywhere that the numbers are that large. But I believe that both the staff-written portion of the report and Commissioner Statements that spend significant time discussing healthcare are unfair. Among other things, they never made an effort to get all sides of the cases they refer to.

When we first were able to review a draft of the staff-written portions of the report, in early July, Commissioner Peter Kirsanow and I began our independent research by reaching out to ICE about the case of Victor/Victoria Arellano. Below I have quoted in full the portion of the letter we received from the Deputy Director of ICE concerning Ms. Arellano's death from HIV/AIDS while in ICE custody:

"As background, Ms. Arellano was a transgender female citizen of Mexico who was originally removed from the United States in 2002,

⁶⁹ For a discussion of some of the allegations of sexual misconduct made by witnesses at our briefing that were found to be unfounded by federal investigations, see *supra* at n. 2-3 and at Section D.1 at _____. The Commission's report recounts the allegations, but fails to cite the reports of the investigations.

and removed two additional times in 2003. In April 2007, Ms. Arellano was convicted of driving under the influence of crystal methamphetamine and driving without a license, and received a sentence of 36 months' probation, 45 days' imprisonment, and a fine. Ms. Arellano died while in ICE custody in July 2007.

Upon arrival in ICE detention, Ms. Arellano confirmed a diagnosis of HIV but indicated that she was stable and had not previously taken any anti-HIV medications, although she indicated that she knew that her disease was serious. In addition, she indicated an allergy to several HIV-related medications, including dapsone. While she initially refused suggested treatment by the medical staff, she subsequently accepted treatment after lab results confirmed the seriousness of her condition [sic] and additional counseling was provided by ICE facility medical staff.

As Ms. Arellano's health deteriorated, she was closely monitored at the detention facility, and was sent to a local hospital emergency department twice for evaluation and/or treatment. During the first visit, ICE facility medical staff questioned the hospital about the possible need for admission, but the hospital staff indicated that they were aware of Ms. Arellano's lab results and had consulted with the infectious disease specialist before returning her to the detention facility. Ms. Arellano refused her HIV medications several times at the detention facility over the next two days, and she was admitted to the hospital again, three days after her initial visit. Her condition continued to deteriorate while in the hospital, in spite of aggressive treatment.

Evaluation and treatment of all transgender detainees involve a multidisciplinary team to include medical, mental health, pharmacy, nursing, and administrative staff. All detainees in ICE custody who identify as transgender are immediately referred to mental health for an evaluation to determine a diagnosis of gender dysphoria and/or other mental health conditions. Transgender detainees also receive a complete physical exam within two businesses [sic] days of intake, to include a screening of blood borne pathogens and sexually transmitted infections. If treatment for gender dysphoria is clinically indicated, medical providers will provide hormone therapy, and the detainee will be counseled regarding the risks/benefits as well as reasonable expectations of hormone treatment. Frequency of mental health appointments will also follow as deemed clinically appropriate by the mental health provider.

Per ICE detention standards medical personnel provide all detainees diagnosed with HIV/AIDS medical care consistent with national recommendations and guidelines. Medical and pharmacy personnel ensure timely and confidential access to medications. Upon release, detainees currently receiving highly active antiretroviral therapy and other drugs shall receive up to a 30-day supply of their medication as medically appropriate.

In January 2013, an automated Risk Classification Assessment (RCA) Tool was implemented nationwide to aid ICE officers in assessing whether apprehended individuals have any known special considerations due to, among other special vulnerabilities, their gender identity or sexual orientation. An ICE supervisor must approve a determination to detain any alien who is not subject to mandatory detention or to override an RCA recommendation to release an alien based on such factors as public safety and flight risk.

Additionally, in June 2015, ICE issued a memorandum titled “Further Guidance Regarding the Care of Transgender Detainees (Transgender Care Memorandum).” This memorandum is intended to complement existing ICE detention standards, ICE policy and DHS regulations, and is another step in furthering our progress of caring for transgender individuals.”⁷⁰

The Report makes it sound like the failure to treat Ms. Arellano with drugs was a case of gross neglect. The letter, however, if true (and I have no reason to doubt it), shows the problem was more complicated. Ms. Arellano claimed to be allergic to the relevant HIV/AIDS drugs and initially refused treatment.

The Report also lists more five specific cases for which it did no real investigation. While I have made efforts to learn about the circumstances surrounding these cases, those efforts did not pan out in the limited time I had to do the research. Nevertheless, there are a few comments I can make just based on the information contained in the Report itself.

One of cases was alleged by witness Maria Hinojosa to have occurred several years ago at Willacy, back when it was indeed an immigration detention facility. She reported that in connection with a story she put together for PBS’s Frontline in 2010-2011, she sought out individuals who had been held at Willacy and found “Andre,” who suffers from bipolar

⁷⁰ Letter to Gail Heriot & Peter Kirsanow from ICE Deputy Director Daniel H. Ragsdale.

disorder. He told her that he had been overmedicated at Willacy and hence slept for 36 hours, during which time he fell from his top bunk and hit his head on the floor, resulting in a broken eye socket bone and a ruptured testicle.

It is unclear from Ms. Hinojosa's testimony when this case occurred or whether she had verified "Andre's" statement to her in any way. But even if she did, it is worth pointing out that getting the right level of medication for a bipolar patient is not an easy thing. It is largely a matter of trial and error until you get it right. One popular web site has this to say on the matter:

It can take a while to find the right bipolar medication and dose. Everyone responds to medication differently, so you may have to try several bipolar disorder drugs before you find the one that works for you. Be patient, but don't settle for a bipolar medication that makes you feel lousy, either.

Once you've discovered the right bipolar disorder drug or drug cocktail, it may still take time to determine the optimal dose. In the case of mood stabilizing medications such as lithium, the difference between a beneficial dose and a toxic one is small.⁷¹

To use this case to prove wrongdoing on the part of the medical personnel at Willacy is stretching things.

This was not the only example of the five that seemed a bit strained. The report refers to a man who died of cancer a few days after being admitted to the hospital. According to the report, the man was displaying signs of illness for three weeks prior to his death while at the Adelanto Detention Facility in California. But if he was suffering from cancer, it is highly doubtful that a quicker diagnosis would have saved him. Another accusation—this one against the Northwest Detention Center in Tacoma, Washington—was that a detainee suffered a severe nosebleed and did not receive attention for 24 hours. While the detainee claimed that he "almost drowned" in his own blood, this sounds very dubious. The nosebleed apparently took place during a hunger strike that the particular detainee helped organize to protest deportations and other unspecified grievances.

That leaves two accusations that seem more troubling—one at Karnes and one at the Denver Contract Detention Facility. The Denver case involved a 46-year-old detainee who suffered a heart attack and died. At first glance, one might think that an individual having a heart attack might be lucky to be at a detention center at the time, since medical

⁷¹ Available at <http://www.helpguide.org/articles/bipolar-disorder/bipolar-medication-guide.htm>

personnel are right at hand 24 hours a day, seven days a week, but in this case it did not turn out that way. We have been informed that there was a routine investigation by the ICE Office of Detention Oversight (as I believe there is whenever a detainee dies). It “concluded that the detention facility had “failed to provide [the detainee] access to emergent, urgent, or non-emergent medical care.”” Note the triple quotes. I am quoting the report, which in turn is quoting ACLU Staff Attorney Carl Takei, who in turn was quoting the ODO report, which the Commission didn’t actually see. Note that the quoted passage is curiously general: The detention failed to provide access to “emergent, urgent or non-emergent” care. Exactly what was the problem? Why didn’t the Commission get the actual report? The second quote in the report on this topic reads, “The ODO investigation expert ‘concluded that the staff’s unfamiliarity with the relevant protocol, failure to administer appropriate cardiac medication, and delays in transporting the patient to a higher level care facility all may have been contributing factors to his death.’” But this is a quote from Mr. Takei, an advocate who is just doing his job if he puts things in an unflattering way for the detention facility; it does not come from the ODO report. What’s wrong with this picture?

The second troubling case involved a seven-year-old Salvadoran girl whose mother told the Border Patrol upon arrival in the United States that her daughter needed immediate treatment for a malignant brain tumor. Again, I wish the Commission had sought out the facts on this one rather than relying entirely on the work of journalists and advocates. They have their job, but we have our job too.

As told by Grassroots Leadership and the media, the story is that the girl—Nayely Beltran—had been receiving treatment for her condition for three years in El Salvador.⁷² During that period, she had received both chemotherapy and surgery, and shunt had been planted in her brain. But more work was needed. “Nayely’s MRI results have been analyzed by three U.S.-trained doctors who recommend immediate care so that her condition does not become life-threatening,” wrote Grassroots Leadership on their website.⁷³ According to Dr. Simon Carlson, a Austin, Texas neuro-radiologist, “This is a case which can become life threatening in very short order, which can take a turn for the worse with little to no forewarning, with devastating outcomes.”

⁷² See, e.g., Joy Diaz, After Crossing Four Borders, Migrant Family Faces Two More Critical Battles, KUT.org (September 15, 2014)(“for the last three years she has been in and out of hospitals”).

⁷³ Seven Year Old With Brain Tumor Being Denied Life Saving Treatment in Detention, Grassroots Leadership (August 31, 2014).

According to media accounts, it took a month for mother and daughter to be released from Karnes and that was only after a public outcry. Why did it take so long? Was this a serious failure of management at Karnes? Or is this a side to this story we don't know about? All the Commission knows is what we read in the papers: "U.S. Immigration and Customs Enforcement would not comment on the case."⁷⁴ Put differently, we know that we don't know ICE's side of the story. We could have asked, and ICE would have been obligated to respond under our statute, which requires federal agencies to cooperate with us.⁷⁵ We didn't try.

F. Post Script: The Commission May Not Have Jurisdiction Over This Issue.

Our statute gives us jurisdiction to study "discrimination or denials of equal protection of the laws under the Constitution of the United States because of color, race, religion, sex, age, disability, or national origin, or in the administration of justice." It does not give us jurisdiction to study anything else.⁷⁶

At one point in the report, it appears to rely on the notion that this report has a jurisdictional hook in "national origin" discrimination. But that argument has been easily dismissed. It was foreclosed by cases like *Espinoza v. Farah Manufacturing*, 414 U.S. 86 (1973)(holding that a prohibition on national origin discrimination does not extend to discrimination on the basis of citizenship).⁷⁷ The Border Patrol does not discriminate on the basis of one's ethnicity; it discriminates against those who are neither citizens of the United States nor authorized visitors or residents.

⁷⁴ Lydia Warren, Seven-Year-Old Salvadoran Girl with Brain Tumor is Released from Immigrant Detention Center So That She Can Get Treatment After Uproar, Daily Mail (September 4, 2014).

⁷⁵ 42 U.S.C. 1975b(e) ("All Federal agencies shall cooperate fully with the Commission to the end that it may effectively carry out its functions and duties.")

⁷⁶ The Commission is also required to investigate allegations in writing under oath or affirmation relating to deprivations as result of any pattern or practice of fraud of the right of United States citizens to vote or have their votes counted (apparently without regard to any relationship to color, race, religion, sex, age, disability or national origin. 42 U.S.C. § 1975(3)(a)(1)(B). But that is not this case.

⁷⁷ See also *Morton v. Mancari*, 417 U.S. 535 (1974)(holding that discrimination in favor of tribal members in hiring by the Department of the Interior is not race or national origin discrimination, but rather discrimination on the basis of membership in a quasi-sovereign tribal entity).

The report therefore seems to place alternative reliance on the argument that our jurisdiction over “discrimination or denials of equal protection of the laws under the Constitution of the United States” extends broadly to anything “in the administration of justice.” Since the immigration detention system is part of the “administration of justice,” it doesn’t matter that no discrimination or denial of equal protection occurred “because of color, race, religion, sex, age, disability or national origin.”

There is support for the argument that the statute gives us jurisdiction to study “discrimination and denials of equal protection” that occur “in the administration of justice” regardless of whether they occur because of color, race, religion, sex, age, disability, or national origin. First of all, the phrase “or in the administration of justice” is placed after the phrase “because of color, race, religion, sex, age, disability, or national origin.” Second, Senator Hubert H. Humphrey specifically said on the floor of Congress that the Commission’s jurisdiction extended to “denials of equal protection because of race, color, religion or national origin, and denials of equal protection in the administration of justice, whether or not related to race, color, religion, or national origin.” The statement was made after the passage of the 1957, but before some of the re-promulgations of our statute.

I have my doubts about Senator Humphrey’s interpretation. Why would Congress authorize such broad jurisdiction in connection with ill-defined terms like the administration of justice? But even assuming Senator Humphrey’s interpretation of the text is correct, I am not sure it authorizes this report. The Commission uncovered no evidence of discrimination or denials of equal protection on any ground. The report argues that detention is a denial of due process under the Fifth Amendment and also invokes at times the First and Eighth Amendments. But at no time is the complaint that some person is being discriminated against relative to some other person.

No one claims that it is inappropriate to treat undocumented immigrants or legal immigrants who violate the criminal law differently from others. There are obviously rational reasons to make such distinctions. The complaint isn’t that these detainees are being treated badly relative to some otherwise similarly situated person, the complaint is that *nobody* (or at least nobody who hasn’t been convicted of a crime) should be treated that way.