

Dissenting Statement of Commissioner Peter N. Kirsanow

Introduction

The short version of this report is that there is nothing the government can do, short of immediately admitting every person who presents himself at the southern border, with no regard to whether this person will ever resurface for an immigration hearing or report for removal if ordered removed, that will satisfy the Commission majority (or, for that matter, the judicial #Resistance). Metering to allow only a certain number of people in at a time, so as not to overwhelm Border Patrol facilities? No! It encourages people to cross illegally (which of course is the fault of the U.S., not the people crossing illegally.) Remain in Mexico until your asylum claim is adjudicated? Absolutely not! Safe third country agreement with Guatemala? How dare you even suggest such a thing!

Evidence Adduced by the Commission

Question: “What evidence was adduced by the Commission?” Answer: “Very little.”

No one should take this report seriously. We issued a report in 2015 on immigration detention facilities during the Obama Administration. That report contained serious errors¹, and as Commissioner Heriot noted in her statement, the report credulously reported eight-year-old rumors rather than conducting an investigation into the truth of those rumors.² At least in that instance, the Commission felt it had to go through the motions of actually visiting immigration detention facilities. That didn’t happen for this report. Before we had done any work on this report, the Commission majority had issued a letter denouncing the family separation policy.³ Somewhere a Red Queen is smiling.

Rather than visiting any detention centers, the Commission solicited public comments through a public hearing and email. The Commission states that it “heard directly from immigrant detainees”.⁴ To be precise, it heard from three former detainees. One former detainee who testified, a transgender woman, complained about the treatment she received in July 2012 – during the

¹ Dissenting Statement of Commissioner Peter Kirsanow, *With Liberty and Justice for All: The State of Civil Rights at Immigration Detention Facilities*, U.S. Commission on Civil Rights, 245-246, 2015, https://www.usccr.gov/pubs/docs/Statutory_Enforcement_Report2015.pdf.

² Statement of Commissioner Gail Heriot, *With Liberty and Justice for All: The State of Civil Rights at Immigration Detention Facilities*, U.S. Commission on Civil Rights, 172-181, 2015, https://www.usccr.gov/pubs/docs/Statutory_Enforcement_Report2015.pdf.

³ “The U.S. Commission on Civil Rights Issues Letter to the Departments of Justice and Homeland Security Denouncing Separation of Immigrant Families,” June 15, 2018, <https://www.usccr.gov/press/2018/06-15-18-PR.pdf>.

⁴ Finding III A.

Obama Administration. This person asserted that immigration officers repeatedly touched her genital area to try to determine whether she had had sex reassignment surgery, rather than believing what this person told them on that front. Other complaints included being handcuffed too tightly, not having separate spaces for transgender people (although ICE staff did remove the other inmates from the cell so she could sleep in there alone), gaining 40 pounds in detention due to the unhealthy commissary snacks, and that, due to being unable to shower for the first day after being apprehended, “my facial hair was mixed with my makeup and people looked at me as if I was a circus sensation.”⁵ Likewise, another former detainee complained of treatment he received in 2015 . . . again, under the Obama Administration.⁶ Another former detainee said that when he was detained in Orange County, “I was not allowed to eat for weeks.” Admittedly, this was being stated through a translator, so perhaps something was lost in translation. Whatever terrible things this man may have suffered in detention, however, it seems very unlikely that he was not allowed to eat for *weeks*.⁷

Willful Misunderstanding of Asylum

One of the primary flaws with this report is that it fundamentally misunderstands asylum. “In recent years, typical migrants are families or children escaping violent crime, unrestrained gangs, and failing economies in their home countries in Central America.”⁸ Later, it says:

The process of seeking asylum is very difficult and passage rates are low. In 2017, only 13.67 percent of total asylum applicants were granted asylum, followed by 12.30 of applicants in 2018. In 2018, 14.89 percent of El Salvadoran applicants were granted asylum and 51.28 percent were denied, 13.81 percent of Honduran applicants were granted asylum and 55.48 percent were denied, and 11.18 percent of Guatemalan applicants were granted asylum and 52.23 percent were denied. Despite the dangerous conditions in all three countries, these are lower rates of approval than persons from other countries.⁹

The report itself inadvertently admits that these families are not eligible for asylum. None of these factors are grounds for asylum.¹⁰ “Violent crime” and “dangerous conditions” are not grounds for

⁵ Ishalaa Ortega, Briefing Transcript at 83-88.

⁶ Robin A., Briefing Transcript at 105-109.

⁷ Edouardo Jimenez, Briefing Transcript at 114-117.

⁸ Report at n. 219.

⁹ Report at n. 270-272.

¹⁰ Pub. L. 96-212.

The term “refugee” means (A) any such person who is outside any country of such person’s nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable to unwilling to return to, and is unable or unwilling

asylum. I agree that, for many, El Salvador, Guatemala, and Honduras are not great places to live. But that isn't grounds for asylum. The south side of Chicago isn't a great place to live either, but no one thinks gang violence there entitles Chicago residents to asylum in Canada. The report does not allege, nor does anyone have the gall to claim that there is an identifiable group in these countries facing targeted violence akin to that suffered by Yazidis and Christians in Syria during the rule of ISIS. Those are the types of situations intended to be addressed by asylum, not generic bad places to live. Were it otherwise, the majority of the world's population would have arguable claims for asylum.

Since at least the Obama Administration, many people from Central American countries seem to have been laboring under the misapprehension that the United States simply allows minors into the country. During the Obama Administration, news of the Administration's limited amnesty, DACA, filtered into the consciousness of Central Americans as "the U.S. is handing out permits to illegal alien minors." This was somewhat true, but inaccurate in that the U.S. government was not handing out permits at the border. Then-Department of Homeland Security Secretary Jeh Johnson issued an open letter to be published in Central American countries, warning parents who were thinking of sending their children illegally to the U.S. that "there are no 'permisos,' 'permits,' or free passes at the end."¹¹

There is also evidence that illegal aliens are coached on what to say in order to pass a credible fear interview, regardless of whether what they are saying is true. *The Atlantic* and ProPublica, describing their recent co-investigation of human smuggling, wrote:

In recent years, a favored tactic has been to coach migrants to surrender to U.S. border authorities and request political asylum, which often gained them temporary residence while cases languish in the overwhelmed immigration court

to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution ***on account of race, religion, nationality, membership in a particular social group, or opinion***, or (B) in such special circumstances as the President after appropriate consultation (as defined in section 207(e) of this Act) may specify, any person who is within the country such person's nationality or, in the case of a person having no nationality, within the country in which such person is habitually residing and who is persecuted or has a well-founded fear of persecution ***on account of race, religion, nationality, membership in a particular social group, or political opinion***.

¹¹ "An open letter to the parents of children crossing our Southwest border," in *Written testimony of DHS Secretary Jeh Johnson for a House Committee on Homeland Security hearing entitled, "Dangerous Passage: The Growing Problem of Unaccompanied Children Crossing the Border,"* June 24, 2014, <https://www.dhs.gov/news/2014/06/24/written-testimony-dhs-secretary-jeh-johnson-house-committee-homeland-security>.

system. Officials said some smuggling organizations track the evolution of U.S. policies, adapting their routes to the enforcement strategies. [emphasis added]¹²

In 2014, a document believed to be a “cheat sheet” was found near McAllen, Texas border crossing that advised illegal immigrants on what to say when questioned by Border Patrol. One sample question was “Why did you abandon your country?” Suggested answers were “Because of poverty and misery,” “You’re in fear of your government and afraid to live in your country” and “You’re afraid of extortion from Maras (the street gang MS-13).”¹³ All of these are straightforward answers that would not require a cheat sheet to answer, *if they were actually true*. And the staff of Congresswoman Veronica Escobar allegedly crossed into Mexico to interview aliens who had been returned to wait in Mexico while their asylum claims were adjudicated and coached some to claim that they did not speak Spanish, which would permit them to immediately enter the U.S.¹⁴

All of this is to say that none of the claims for asylum can be taken simply at face value. There are too many individuals and organizations dedicated to insuring that illegal immigrants say the right things to pass a credible fear interview to take any of these claims seriously without thorough investigation.

An examination of how many people eventually receive asylum also suggests that the vast majority of those claiming asylum are not entitled to it. As I note in my statement in the Commission’s forthcoming statutory enforcement report:

¹² Sebastian Rotella, Tim Golden, and ProPublica, *Human Smugglers Are Thriving Under Trump*, Feb. 21, 2019, <https://www.theatlantic.com/politics/archive/2019/02/human-smugglers-thrive-under-trumps-zero-tolerance/583051/>.

¹³ Michael Zennie, *The ‘cheat sheet’ found near Mexico border [] that shows illegal immigrants how to stay in the United States if detained by authorities*, The Daily Mail, June 26, 2014, <https://www.dailymail.co.uk/news/article-2671292/The-cheat-sheet-near-Mexico-border-shows-illegal-immigrants-guarantee-asylum-hearing-usually-release-detained-U-S-authorities.html>.

¹⁴ Anna Giaritelli, *Democratic congresswoman secretly sending staff into Mexico to coach asylum-seekers*, Wash. Examiner, July 5, 2019, <https://www.washingtonexaminer.com/news/democratic-congresswoman-secretly-sending-staff-into-mexico-to-coach-asylum-seekers>.

Under the bilateral Migration Protection Protocols, or “Remain in Mexico” policy, anyone returned must be fluent in Spanish because they may have to reside in Mexico up to five years until a U.S. federal judge decides their asylum claim. A Democratic politician’s aides re-escorting people back to the port are telling officers the Central American individual with them cannot speak Spanish despite their having communicated in it days earlier, [Customs and Border Protection] officials said.

“What we’re hearing from management is that they’re attempting to return people, and the story was changed in Mexico, where a person who understood Spanish before now doesn’t understand – where a person who didn’t have any health issues before now has health issues,” the union representative said.

The Commission majority would likely dispute my assertion that many of those claiming asylum at the southern border do not have a valid claim. Only 44.5 percent of asylum applicants who pass a credible fear interview show up in court to apply for asylum.¹⁵ If you are truly worried that you will be subjected to physical persecution if you are returned to a country, you would be a little more on top of ensuring that you *actually applied* for asylum. After all, as we are told many times, these people undertake a treacherous journey from Central America to arrive at our southern border. If you can make it from Honduras to the United States, you can definitely show up in court to make your asylum claim – *if* you believe your claim is likely to be granted. If you know it is unlikely to be granted, you will probably vanish into the interior of the United States and hope to avoid removal. And this is exactly what the majority of those who have passed a credible fear interview do.

Of those who do show up for their hearing after passing a credible fear interview, DHS notes that “many more fail to comply with the lawfully issued removal orders from the immigration courts and some families engage in dilatory legal tactics when ICE works to enforce those orders.”¹⁶ Furthermore, the number of those who do not show up for hearings or removal has ballooned. According to EOIR (Executive Office for Immigration Review), in 2006 there were 573 final orders issued in absentia for cases originating as credible fear claims. In FY 2017, this had exploded to 4,038 – which actually was a marked decline from FY 2016, in which 8,999 such orders were issued.¹⁷ Only 16 percent of adults who initially receive credible fear determinations are ultimately granted asylum.¹⁸

¹⁵ Andrew R. Arthur, *Trump Baites the Press on Asylum No-Shows*, Center for Immigration Studies, Nov. 2, 2016, <https://cis.org/Arthur/Trump-Baits-Press-Asylum-NoShows>.

¹⁶ 83 FR 45520.

¹⁷ Credible Fear in the U.S. Immigration System, U.S. Dep’t of Justice, Executive Office for Immigration Review (EOIR), May 24, 2018, at 5, https://cis.org/sites/default/files/2018-09/EOIR_Credible%20Fear_USCIS%20Proceedings%20Table.pdf; see also Andrew R. Arthur, *Trump Baites the Press on Asylum No-Shows*, Center for Immigration Studies, Nov. 2, 2016, <https://cis.org/Arthur/Trump-Baits-Press-Asylum-NoShows>; Jessica M. Vaughan, Andrew R. Arthur, and Dan Cadman, *A One-Sided Study on Detention of Illegal-Immigrant Families*, Center for Immigration Studies, Sept. 14, 2018, <https://cis.org/Vaughan/OneSided-Study-Detention-IllegalImmigrant-Families>.

¹⁸ Credible Fear in the U.S. Immigration System, U.S. Dep’t of Justice, Executive Office for Immigration Review (EOIR), May 24, 2018, at 9, https://cis.org/sites/default/files/2018-09/EOIR_Credible%20Fear_USCIS%20Proceedings%20Table.pdf; see also Andrew R. Arthur, *Trump Baites the Press on Asylum No-Shows*, Center for Immigration Studies, Nov. 2, 2016, <https://cis.org/Arthur/Trump-Baits-Press-Asylum-NoShows>; Jessica M. Vaughan, Andrew R. Arthur, and Dan Cadman, *A One-Sided Study on Detention of Illegal-Immigrant Families*, Center for Immigration Studies, Sept. 14, 2018, <https://cis.org/Vaughan/OneSided-Study-Detention-IllegalImmigrant-Families>.

Family Separation

Family separation only occurred when parents decided to cross *illegally* with their children. If a person presented herself at a port of entry and requested asylum, she would not be separated from her children. If these families were primarily interested in seeking asylum, they would have presented themselves at a port of entry to be processed in an orderly manner, rather than entering the U.S. illegally and *then* requesting asylum after they are caught.

The report also does not address the near-certainty that many illegal immigrants bring their children with them in order to game the system. According to NPR:

Garcia [an advocate for illegal immigrants] says so many immigrants are traveling with their children these days – because the smugglers tell them to. “Bring one of your kids, because you stand a better chance of not getting locked up right off the bat,” he says, “And so that’s part of the way the smuggler presents it.”¹⁹

The *Wall Street Journal*, a strong supporter of expansive immigration policies, wrote in 2018:

On this city’s violent outskirts, where families live in tin-roofed shacks on streets menaced by gangs, the word is out about one of the biggest factors that can determine their fate in the U.S. immigration system: children.

The number of Central American families with children arriving at the U.S. border seeking asylum has surged in recent years – and they keep coming, as more migrant caravans make their way through Mexico.

Families from crime-ridden Honduras, Guatemala and El Salvador are able to gain entry by demonstrating a credible fear of returning home, and having children in tow can shorten the length of time they are detained in the U.S. because of a 20-day limit on detaining minors; an adult traveling alone could be detained much longer.

Doris Paz, a 29-year-old mother of three, said that is how her sister-in-law reached San Antonio. It is how a neighbor recently crossed into the U.S. with two children. It is why a cousin grabbed her children and joined a caravan of migrants that left Honduras last month. And it is why Ms. Paz joined the same caravan with her 6-year-old son.

¹⁹ John Burnett, *As Border Crossings Tick Up, Migrants Bring Children, Take More Dangerous Routes*, NPR, April 6, 2018, <https://www.npr.org/2018/04/06/600288184/as-border-crossings-tick-up-migrants-bring-children-take-more-dangerous-routes>.

“They say that bringing your child is your ticket in,” said Ms. Paz. After a few days walking with her son under tropical heat, however, she turned around and went home.²⁰

If people know that this is how to game the system, what would the Commission majority have us do? Nothing? It appears the best approach is what the Administration is, in fact, doing – issuing a regulation to replace the Flores Agreement so parents and children can be detained together while their claims are adjudicated.

It is worth noting that after DHS was ordered to reunite separated children with their parents, the press criticized DHS for having reunited only 364 out of 2,500 children. One reason more parents were not reunited with their children, which is conspicuously absent from the report, is that a large number of parents were found to have criminal records. According to a Congressional Research Services report, “Another 908 parents were not expected to be eligible for reunification because they possessed criminal backgrounds or required ‘further evaluation.’”²¹ In other words, approximately a third of parents separated from their children had criminal records in addition to illegal entry. The Commission report cites the CRS report, but curiously enough, this fact did not make it into the Commission report.²²

Metering

The report states:

The Border Patrol metering policy may have led to an increase in illegal border crossing by asylum seekers who could not have otherwise entered at a port of entry processing site where they would then be susceptible to prosecution under zero tolerance. An increase in illegal border crossings could include asylum seekers taking more dangerous paths to reach the U.S. This was the case for Óscar Alberto Martínez Ramírez and his one-year old daughter, Valeria, who attempted to enter the U.S. at the official port of entry at Matamoros, Texas and told it was closed, and subsequently drowned while attempting to cross the Río Grande River.²³

It is tragic whenever someone dies crossing the border, especially when it is a child who had no choice in the matter. Yet even this sad story illustrates that this is not an asylum issue, except

²⁰ Ryan Dube and Robbie Whelan, *A Way for Migrants to Ease U.S. Entry: Come as a Family*, Wall St. J., Nov. 16, 2018, <https://www.wsj.com/articles/migrants-adopt-strategy-for-u-s-entry-come-as-a-family-1542376796>.

²¹ William A. Kandel, *The Trump Administration’s “Zero Tolerance” Immigration Enforcement Policy*, Congressional Research Service, Feb. 26, 2019, at 12, <https://crsreports.congress.gov/product/pdf/R/R45266>.

²² Report at n. 123.

²³ Report at n. 153-154.

insofar as asylum claims are being abused to obtain entry into the U.S. and then vanish. Interviewed in El Salvador, Ramirez's mother said that she had warned him not to travel north, and that he had done so to work and earn money.²⁴ We can all have sympathy for people who want to live where they can have a better life, but still realize that this is not a basis for asylum. Furthermore, someone who crosses the border illegally because they have to wait in line to make a formal asylum claim is probably not going to show up for removal years later when their asylum claim is denied.

Domestic Violence

The report states, "Under previous administrations, women fleeing gang violence and domestic violence in their home countries, from which the government did not protect them, were permitted to file asylum claims citing a credible fear of physical violence and/or sexual abuse."²⁵ Let's clarify that. Under *one* administration, the Obama Administration, domestic violence was considered grounds for asylum. The *statute* does not provide grounds for considering usual cases of domestic violence as grounds for asylum. The Obama Administration created a "social group" called "married women in Guatemala who are unable to leave their relationship" and deemed it a "particular social group" within the meaning of the statute.²⁶ The Obama Administration issued this decision in 2014, so when the Trump Administration attempted to restore the status quo in 2018, this expanded definition of asylum had only been in place for four years, not since time immemorial.

Unaccompanied Alien Children

The report also faults HHS for (briefly) checking the immigration status of potential sponsors for unaccompanied children. Checking the fingerprints of potential sponsors revealed that many of these individuals were themselves in the country illegally. Referring to unaccompanied alien children as "children," while technically correct, is also somewhat misleading. According to ORR, which is responsible for caring for UACs, 73 percent of unaccompanied minors who came through ORR in FY 2018 were over age 14, and 71% were boys.²⁷ The vast majority of these teenagers are almost certainly considered adults by their cultures and expected to contribute to their families, despite their minimal skills. According to USAID, only 43% of girls and 45% of boys in Guatemala

²⁴ Nelson Renteria, 'I told him not to go,' mother of drowned Salvadoran migrant laments, Reuters, June 26, 2019, <https://www.reuters.com/article/us-usa-immigration-mexico-mother/i-told-him-not-to-go-mother-of-drowned-salvadoran-migrant-laments-idUSKCN1TR2PJ>.

²⁵ Report at n. 189.

²⁶ Matter of A-R-C-G-, 26 I. & N. Dec. 388 (BIA 2014).

²⁷ U.S. Dept. of Health and Human Servs., *Fact Sheet – Unaccompanied Alien Children (UAC) Program*, August 6, 2019, <https://www.hhs.gov/sites/default/files/Unaccompanied-Alien-Children-Program-Fact-Sheet.pdf>.

enroll in middle school, and those in rural areas are even less likely to enroll in middle school.²⁸ USAID further notes, “more than 1.6 million youth between 15 and 24 years, including 600,000 youth in the Western Highlands, are out of school and do not have basic life or vocational skills to enter the workforce.”²⁹ Educational attainment in El Salvador is similarly low. USAID reports that 66 percent of youth in El Salvador attend 7th-9th grade, and “There are over 300,000 youth aged 15 to 24 that neither study nor work.”³⁰

These are not, as sold to the American public, helpless toddlers. These are teenagers who are coming to join their illegal alien parents in the U.S., likely in order to start working illegally in the U.S. themselves. There is a very good reason for not turning UACs over to their illegal alien parents, namely, that the U.S. government is assisting lawbreakers in completing their course of lawbreaking. As U.S. District Court Judge Andrew Hanen wrote in 2013:

Mirtha Veronica Nava–Martinez pleaded guilty to attempting to smuggle a ten-year-old El Salvadorean female, Y.P.S., into the United States in violation of [8 U.S.C. § 1324\(a\)\(1\)\(A\)\(ii\)](#). This Court sentenced Nava–Martinez in accordance with the established federal procedure, the law, and the United States Sentencing Guidelines, and has purposefully waited until after signing that judgment before addressing the issue that is the subject of this Order.

On May 18, 2013, Nava–Martinez, an admitted human trafficker, was caught at the Brownsville & Matamoros Bridge checkpoint. She was trying to smuggle Y.P.S. into the United States using a birth certificate that belonged to one of her daughters. Nava–Martinez had no prior relationship with Y.P.S. and was hired by persons unknown solely to smuggle her into the United States. Nava–Martinez is a resident alien and this was her second felony offense in three years, having committed a food stamp fraud offense in 2011. She was to be paid for smuggling Y.P.S. from Matamoros to Brownsville, although the identity of her immediate payor and the amount are unknown. The details as to how Y.P.S. got to Matamoros, Mexico from El Salvador, and how she was to get from Brownsville to Virginia were also not disclosed to the Court. **This conspiracy was started when Patricia Elizabeth Salmeron Santos solicited human traffickers to smuggle Y.P.S. from El Salvador to Virginia. Salmeron Santos currently lives illegally in the United States. She applied for a tourist visa in 2000, but was turned down. Despite being denied legal entry into the United States, she entered the United States illegally and is living in Virginia.**

Salmeron Santos admitted that she started this conspiracy by hiring alien smugglers to transfer her child from El Salvador to Virginia. She agreed to pay \$8,500 (and

²⁸ USAID, *Guatemala: Sector Brief, Education*, June 2018, at 1, https://www.usaid.gov/sites/default/files/documents/1862/sector_brief_-_education_june_2018.pdf.

²⁹ *Id.*

³⁰ USAID, *El Salvador: Education*, July 29, 2019, <https://www.usaid.gov/el-salvador/education>.

actually paid \$6,000 in advance) for these human traffickers to smuggle her daughter. The criminal conspiracy instigated by Salmeron Santos was temporarily interrupted when Nava–Martinez was arrested. Despite this setback, the goal of the conspiracy was successfully completed thanks to the actions of the United States Government. This Court is quite concerned with the apparent policy of the Department of Homeland Security (hereinafter “DHS”) of completing the criminal mission of individuals who are violating the border security of the United States. Customs and Border Protection agents stopped the Defendant at the border inspection point. She was arrested, and the child was taken into custody. The DHS officials were notified that Salmeron Santos instigated this illegal conduct. **Yet, instead of arresting Salmeron Santos for instigating the conspiracy to violate our border security laws, the DHS delivered the child to her—thus successfully completing the mission of the criminal conspiracy. It did not arrest her. It did not prosecute her. It did not even initiate deportation proceedings for her.** This DHS policy is a dangerous course of action.

The DHS, instead of enforcing our border security laws, actually assisted the criminal conspiracy in achieving its illegal goals. The Government's actions were not done in connection with a sting operation or a controlled delivery situation. Rather, the actions it took were directly in furtherance of Y.P.S.'s illegal presence in the United States. It completed the mission of the conspiracy initiated by Salmeron Santos. In summary, instead of enforcing the laws of the United States, the Government took direct steps to help the individuals who violated it. A private citizen would, and should, be prosecuted for this conduct.

This is the fourth case with the same factual situation this Court has had in as many weeks. In all of the cases, human traffickers who smuggled minor children were apprehended short of delivering the children to their ultimate destination. **In all cases, a parent, if not both parents, of the children was in this country illegally. That parent initiated the conspiracy to smuggle the minors into the country illegally.** He or she also funded the conspiracy. **In each case, the DHS completed the criminal conspiracy, instead of enforcing the laws of the United States, by delivering the minors to the custody of the parent illegally living in the United States.** [emphasis added]³¹

There is no reason to think this has changed dramatically in the intervening six years. Even 15 year olds are unlikely to be able to fund a trip to the United States on their own, and 6 year olds definitely will be unable to do so. Just because they show up at the border without their parents does not mean their parents did not assist in planning and funding their trip. The parents themselves are engaging in human trafficking, funding human trafficking, and exposing their children to the dangers inherent in human trafficking. As former Secretary of the Department of Homeland

³¹ U.S. v. Nava-Martinez, 2013 WL 8844097 (S.D. Tex. 2013).

Security Jeh Johnson testified, “These organizations not only facilitate illegal migration across our border, they traumatize and exploit the children who are objects of their smuggling operation.”³²

When we turn UACs over to illegal alien parents who are living in the U.S., we are ensuring that the parents achieve exactly what they wanted. This only encourages other people to fund and make similar journeys.

Child Deaths

The report blames DHS for the deaths of several minors who were in DHS custody.³³ Certainly, Americans expect DHS and all government departments and agencies to do everything they can to protect the lives of individuals in custody. But to generally assign blame for these deaths is irresponsible and detached from reality. First, as everyone agrees, there has been a huge increase in the number of children showing up at the border, both on their own and accompanied by adults. According to ORR, which is responsible for finding placements for UAC:

For the first nine years of the UAC Program at ORR, fewer than 8,000 children were served annually in this program. Since Fiscal Year 2012 (October 1, 2011-September 30, 2012), this number has jumped dramatically, with a total of 13,625 children referred to ORR by the end of FY 2012. The program received 24,668 UAC referrals from DHS in FY 2013, 57,496 referrals in FY 2014, 33,726 referrals in FY 2015, 59,170 in FY 2016, and 40,810 in FY 2017. In FY 2019 49,100 UAC were referred.³⁴

In other words, there was a 500% increase in the number of UACs ORR is responsible for in 2019 as compared to 2011. Probability alone would suggest deaths might occur.

Second, apparently no blame attaches to the parents for transporting their young children on an arduous journey of hundreds of miles. In the tragic case of Jakelin Caal Maquin, for example, even her family did not say there was a burning reason for her to accompany her father. Her mother and three other siblings remained in their village with their extended family. According to her grandfather, “Jakelin’s father decided to leave because he was frustrated of living in extreme poverty. ‘He wanted to work, because he said he could make a better living there,’ Caal said. Speaking on behalf of Jakelin’s mother, who only speaks a Mayan dialect, Caal said she hopes her

³² Written testimony of DHS Secretary Jeh Johnson for a House Committee on Homeland Security hearing entitled, “Dangerous Passage: The Growing Problem of Unaccompanied Children Crossing the Border,” June 24, 2014, <https://www.dhs.gov/news/2014/06/24/written-testimony-dhs-secretary-jeh-johnson-house-committee-homeland-security>.

³³ Report at n. 340-363.

³⁴ U.S. Dept. of Health and Human Servs., *Fact Sheet – Unaccompanied Alien Children (UAC) Program*, August 6, 2019, <https://www.hhs.gov/sites/default/files/Unaccompanied-Alien-Children-Program-Fact-Sheet.pdf>.

husband stays in the U.S. to work. The family is worried they would not be able to pay the debt they acquired to send Jakelin and her father north, he says.”³⁵

It is strange that the death of another, unnamed Salvadoran child is included in this report. The report states:

In May 2019, the death of an unnamed Salvadoran child in HHS custody came to light. Though she died in September of 2018, her passing was not reported until eight months later. She entered the United States at an ORR facility in Texas in a “medically fragile” state and was transferred by DHS between multiple medical facilities across multiple states for a number of months before she finally passed away.³⁶

It does not appear DHS was in any way at fault. Rather, this poor child entered the U.S. in a medically fragile state (doubtless exacerbated by the journey from El Salvador), and DHS kept seeking medical treatment for her. Just because the medical treatment was ultimately unavailing does not mean DHS contributed in any way to her death. And in fact, this is what happened. According to local news in Nebraska:

Darlyn was encountered by Border Patrol on March 1, 2018, a few miles west of Hidalgo, Texas. She complained of chest pain and three days later, was transferred to HHS custody where she remained for about seven months. Darlyn was treated for a congenital heart defect at various hospitals – including in San Antonio, Texas and Phoenix, Arizona.

HHS spokesperson Mark Weber told CNN Darlyn had surgery complications that left her in a comatose state. She was transported to a nursing facility in Phoenix and later to Children’s Hospital in Omaha, Nebraska, where she died on September 29, due to fever and respiratory distress.³⁷

To say that this poor child died “in custody” is willfully misleading. She journeyed to the U.S. to join her mother, who is living in the U.S. illegally after leaving her daughter in El Salvador when she was one year old. When the girl reached the U.S., she complained of chest pain and was found to have a congenital heart defect, which by its nature is a preexisting condition. She then received medical treatment and surgery in two different hospitals on the U.S. taxpayers’ dime. Sadly, there

³⁵ Nicole Chavez and Ray Sanchez, *Thousands of miles away, grieving family wants to know how 7-year-old girl died in US custody*, CNN, Dec. 15, 2018, <https://www.cnn.com/2018/12/15/us/guatemalan-girl-border-patrol-death/index.html>.

³⁶ Report at n. 355-356.

³⁷ CNN Wire, *Father of 10-year-old Salvadoran Girl Who Died in U.S. Custody Recalls His Last Words With Her*, KTLA, May 27, 2019, <https://ktla.com/2019/05/27/father-of-10-year-old-salvadoran-girl-who-died-in-u-s-custody-recalls-his-last-words-with-her/>.

were complications. She was transferred to a specialty hospital, undoubtedly to be closer to her mother, who now lives in Omaha, Nebraska. And then, tragically, she died.

If this condition had manifested in El Salvador, the girl likely would have died. HHS treated her just like a U.S. citizen would be treated – specialist hospitals, a skilled nursing facility, months of in-patient care. Yet for some reason this poor girl’s death is blamed on HHS and DHS.

Third Country Rule

The report criticizes the new “Third-Country Asylum Rule,” which requires asylum seekers to have applied for asylum in a third country that they passed through on their way to the U.S. In other words, if you come from Central America and claim to need asylum, you must apply for asylum in Mexico before you apply for asylum in the United States. If your concern is to escape an abusive husband or a gang, you can do that as well in Mexico as in the United States. If, on the other hand, your real concern is that you want to enjoy better job prospects and a higher standard of living, Mexico may be less appealing than the United States. As the rule says, “the additional bar created by this rule also seeks . . . to deny asylum protection to those persons effectively choosing among several countries where avenues to protection from return to persecution are available by waiting until they reach the United States to apply for protection.”³⁸ I am not sure why my colleagues object to this if their true concern is protection from persecution, rather than an intellectual or emotional commitment to open borders.

At any rate, the report states that this rule has been enjoined.³⁹ This is no longer accurate. The Supreme Court stayed the injunction on September 11, 2019. The rule is now in force essentially until the Court either denies the inevitable petition for a writ of certiorari or issues a judgment following the grant of the petition.⁴⁰

Sexual and Physical Violence Against Detained Children

The report states, “DHS’s policies resulting in the forced stay of immigrant children in shelters has further resulted in widespread allegations of sexual abuse, *particularly among contractors.*” [emphasis added] This is false. The Commission’s forthcoming 2019 statutory enforcement report also strongly implies that alleged sexual abuse of detained minors is primarily committed by adult

³⁸ 84 FR 33834.

³⁹ Report at n. 179-180. The report also expresses concern that the Administration did not comply with the notice-and-comment provisions of the Administrative Procedure Act. It is amusing that the Commission is suddenly so concerned with the requirements of administrative law, having just issued a report bemoaning the withdrawal of the Obama Administration’s school discipline and transgender guidances. I suppose there’s a first time for everything, even for the Commission being concerned about administrative law.

⁴⁰ Barr v. East Bay Sanctuary Covenant, 2019 WL 4292781 (2019).

staff members. That report cites the same case involving Levian Pacheco, so I simply reproduce what I wrote in that report:

[I]n the vast majority of complaints, the alleged perpetrator is a fellow minor detainee, not an adult staff member. According to the data published by Axios, of the cases reported to DOJ from October 2014 to July 2018, 851 complaints alleged that another minor was the perpetrator, and 178 alleged that an adult staff member was the perpetrator.⁴¹ Obviously sexual abuse is terrible regardless of the identity of the perpetrator, but by only discussing a case where an adult staff member at a contract facility was convicted of sexual offenses, the report misleads the reader to believe this is a typical case.⁴²

⁴¹ Caitlin Owens, Stef W. Kight, and Harry Stevens, *Thousands of migrant youth allegedly suffered sexual abuse in U.S. custody*, AXIOS, Feb. 26, 2019, <https://www.axios.com/immigration-unaccompanied-minors-sexual-assault-3222e230-29e1-430f-a361-d959c88c5d8c.html>.

⁴² Dissenting Statement of Commissioner Peter Kirsanow, “Are Rights Reality?” U.S. Commission on Civil Rights, forthcoming November 2019.

Appendices

Appendix A: Federal Agency Roles in Immigration

The Department of Homeland Security, Department of Health and Human Services and the Department of Justice carry out the Administration's immigration policies.

Department of Homeland Security

The Department of Homeland Security includes Customs and Border Protection, Immigration and Customs Enforcement, and Citizenship and Immigration Services.⁷⁶⁵

Customs and Border Protection

Border Patrol Agents police the 6,000 miles of American borders shared with Mexico and Canada as well as coastal waters around Florida and Puerto Rico.⁷⁶⁶ Border Patrol agents are the first individuals representing the U.S. government that migrants encounter when they approach the Southern border and seek admittance to the U.S. at a port of entry. Agents also patrol the areas between the ports of entry – either a physical, man-made barricade or natural barrier separating the U.S. and Mexico - and take into custody migrants who attempt to cross in these areas. Children, who are found unaccompanied or removed from an adult are transferred to the custody of Department of Health and Human Services, Office of Refugee Resettlement for placement in a shelter.⁷⁶⁷

Immigration and Customs Enforcement

Immigration and Customs Enforcement is the principal investigative arm of Department of Homeland Security⁷⁶⁸ whose primary mission is to promote homeland security and public safety

⁷⁶⁵ See “Secure U.S. Borders and Approaches,” Dep’t. Of Homeland Security, <https://www.dhs.gov/administer-immigration-laws>.

⁷⁶⁶ See “About CBP,” Customs and Border Protection, <http://www.cbp.gov/about> (accessed Sept. 26, 2019); “Border Patrol Overview,” Customs and Border Protection, <https://www.cbp.gov/border-security/along-us-borders/overview> (accessed Sept. 26, 2019); see also Congressional Research Service, *Border Security: The Role of the U.S. Border Patrol*, by Chad Haddal, Aug. 11, 2010, p. 3, <https://fas.org/sgp/crs/homsec/RL32562.pdf>.

⁷⁶⁷ U.S. Gov’t Accountability Office, *Unaccompanied Children: Agency Efforts to Reunify Children With Parents Separated at the Border*, Government Accountability Office 19-163, Oct. 2018, pp. 2-3. The President’s June 20, 2018, Executive Order altered this process and directed the Secretary of Department of Homeland Security to maintain custody of alien families during any criminal improper entry or immigration proceedings involving their members, to the extent possible. Exec. Order No. 13,841, 83 Fed. Reg. 29,435 (June 25, 2018). Although the executive order was announced on June 20, 2018, it was not published in the Federal Register until June 25, 2018.

⁷⁶⁸ “Who We Are,” Immigration and Customs Enforcement, <https://www.ice.gov/about> (accessed May 11, 2019).

through the criminal and civil enforcement of federal laws governing border control, customs, trade, and immigration.⁷⁶⁹

Immigration and Customs Enforcement's Enforcement and Removal Office is the principal component for enforcing U.S. immigration laws.⁷⁷⁰ Enforcement and Removal enforces these laws by "identifying and apprehending removable aliens, detaining these individuals when necessary, and removing them from the United States."⁷⁷¹ In other words, Enforcement and Removal carries out the detention and deportation functions of the agency.⁷⁷²

Enforcement and Removal is prohibited from detaining a child unless the child is detained with his/her family and is housed at a family detention center.⁷⁷³ If an immigrant child is unaccompanied, Enforcement and Removal must transfer him/her to the Department of Health and Human Service office within 72 hours.⁷⁷⁴

Citizenship and Immigration Services

U.S. Citizenship and Immigration Services is responsible for overseeing the federal government's immigration service functions⁷⁷⁵, namely for the initial adjudication of asylum applications for migrants.⁷⁷⁶ U.S. Citizenship and Immigration Services has jurisdiction over asylum applications after Customs and Border Protection or Immigration and Customs Enforcement determines if a child is an unaccompanied minor and transfers the minor to the Department of Health and Human Services Office of Refugee Resettlement. Additionally, U.S. Citizenship and Immigration Services

⁷⁶⁹ "What We Do," Immigration and Customs Enforcement, <https://www.ice.gov/overview> (accessed May 11, 2019).

⁷⁷⁰ 2015 Report, footnote 65, *supra* note 1.

⁷⁷¹ *Ibid.*

⁷⁷² Doris Meissner, former commissioner of the U.S. Immigration and Naturalization Service, interview, *NPR*, July 2, 2018, <https://www.npr.org/2018/07/02/625406673/the-many-functions-of-ice-and-how-that-came-to-be>.

⁷⁷³ *See* 8 U.S.C. § 1232(b)(3). Family detention centers are detention centers that detain mothers and their children within the same facility.

⁷⁷⁴ *Id.*

⁷⁷⁵ "Online Filing with USCIS," USCIS, <https://www.uscis.gov/> (accessed Sept. 26, 2019).

⁷⁷⁶ Congressional Research Service, *Unaccompanied Alien Children: An Overview*, by Lisa Seghetti, Alison Siskin, and Ruth Ellen Wasem, Sept. 8, 2014, p. 4, <https://trac.syr.edu/immigration/library/P8978.pdf>; Under the William Wilberforce Trafficking Victim Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5074 (USCIS has initial jurisdiction over an asylum application filed by an individual determined to be unaccompanied alien children.).