

Dissenting Statement of Commissioner Gail Heriot

Remarkably little actual research went into this report. While a significant portion of it deals with the allegedly poor conditions at immigration detention centers, the Commission did not even attempt to visit an actual immigration detention center.

Instead, I did so on my own time.¹ What I found at the Otay Mesa detention center was a clean and orderly facility with a law library, basketball courts, and chapel.² Life skill classes are offered. Kosher, halal and vegetarian meals are available. The medical and dental clinics there are overwhelmingly likely to be better equipped than what the detainees were used to in their home countries.³ Indeed, particularly in terms of their accessibility, the medical and dental clinics are no doubt better than what large numbers of Americans get.

This was consistent with what I observed in 2015 during two previous tours of immigration detention centers—Karnes and Port Isabel—which I took, along with many of my Commission colleagues, in connection with our 2015 report on immigration detention. On those occasions, we also had the opportunity to speak with dozens of detainees. They had few complaints about the detention facilities themselves and no serious ones. One detainee at Port Isabel even said (in Spanish) that if they let him out on Sundays, he wouldn't mind staying indefinitely.

¹ I took the tour on September 11, 2019. Note that immigration detention centers, which come under the jurisdiction of Immigration and Customs Enforcement (“ICE”) and the short-term facilities where individuals are taken immediately after being picked up by Border Patrol agents, are not the same. I have not yet visited such a facility. Nor, apparently, has anyone else on the Commission.

² Efforts were made to ensure that detainees were treated appropriately. For example, I saw posters in English and Spanish that stated, “I have a right to be treated fairly regardless of my sexual orientation or gender identity.” Complaint boxes and boxes that allowed detainees to inquire about the status of their case were located through the facility. Internal rules require prompt answers to those inquiries.

This is somewhat in tension with the lurid picture of detention painted by Ishalaa Ortega, a witness at the open-comment period who is affiliated with an advocacy group called Immigration Equality. Ortega testified that she was subject to “verbal and physical abuse.” U.S. Commission on Civil Rights, Transcript of Open Comment Period, 83-88. The final report echoes Ortega’s claims. As far as I know, the Commission did not seek input on her allegations from ICE or from Core Civic, the private corrections company that owns and operates the detention center.

³ The present Otay Mesa facility was built by Core Civic, completed in 2015 and contains about 350,000 square feet. It took about two years to build and is designed to hold 1572 residents (1000 ICE detainees and 572 separately-maintained individuals in the custody of the U.S. Marshals Service). On the day that I visited, there were about 968 ICE detainees, living in “pods” that contain up to 128 detainees each. About two-thirds of the detainees are male. Males and females are completely separated. Like the Port Isabel facility that I visited in 2015, the Otay Mesa detainees are dressed in blue, orange or red jump suits, depending on their known criminal record or lack thereof. By far, most detainees are in blue (signifying no known record or only minor violations). Known gang members and other high-risk prisoners are placed in separate pods from others. The ICE officers who conducted the tour told me that procedures are designed to be the least restrictive possible given the circumstances. They also told me that the detainees on the whole tend to be well-behaved and that few fights break out.

That doesn't mean that all detainees should be content to remain in a detention center a long time (though I suspect that those who are escaping violence in their own countries are often quite happy to be where they are). It is perfectly understandable why detainees would prefer freedom here in America to the Spartan communalism of a detention center.⁴ But under our laws those who are asking for asylum must demonstrate that they are eligible for it. That takes time.⁵ I was told the average length of stay at Otay Mesa was about 68 days.⁶ It can be much longer for those who appeal a finding of ineligibility.

The purpose of this report is said to be to "update" our 2015 report, which was entitled *With Liberty and Justice for All: The State of Civil Rights at Immigration Detention Facilities*. Given how disastrous the 2015 report was for the Commission's credibility, I am not surprised that its members would wish for a second chance. I believe my 47-page dissenting statement to that report was quite devastating.⁷

There are several unusual aspects to this "update." For reasons that were not made completely clear, the Commission decided to do it through a subcommittee. That makes it unique among Commission reports during my 12-year tenure on the Commission. Note that I was not assigned to be on the subcommittee. I am therefore coming to this report somewhat late in the process.

At the Commission's telephone meeting on August 29, 2019, it adopted the subcommittee's report by a 5 to 1 vote, with one Commissioner recused and one absent. At that meeting, at least one commissioner took the position that our usual rules, which give each Commissioner 30 days to write a statement and an additional 30 days to respond to the statements of other Commissioners,⁸ do not apply to reports produced by a subcommittee. (While it was stated that this was the opinion

⁴ If a detainee prefers freedom in his or her home country, that option is always available. In that sense, detainees hold the key to the detention center in their hands.

⁵ In addition to time, it takes lawyers and judges. The Otay Mesa detention center has an area given over to the U.S. Department of Justice, which employs the administrative law judges who preside over immigration matters. The facilities there include a courtroom and an area for detainees to consult with their lawyers. I was told that the length of time detainees stay at Otay Mesa is generally a function of how long their cases take to get through the legal system. The longest stays are often the result of appeals to the U.S. Court of Appeals for the Ninth Circuit. Speeding up this process would shorten the average length of stay. I cannot comment further on this, because neither the Commission nor I have studied the process. When I visited Port Isabel and Karnes in 2015, the primary complaint I heard was that the process takes too long.

⁶ Would it be possible to allow all individuals who apply for asylum to be released on their own recognizance? Surely this is possible for some asylum seekers, and indeed it is done with some. But even now, many persons so released fail to attend their hearings. If implemented as a general policy, the numbers of migrants disappearing into the interior would likely rise significantly. See Statement of Commissioner Gail Heriot in U.S. Commission Civil Rights, *With Liberty and Justice For All: The State of Civil Rights at Immigration Detention Facilities* 186-198 (2015).

⁷ See Statement of Commissioner Gail Heriot in U.S. Commission Civil Rights, *With Liberty and Justice For All: The State of Civil Rights at Immigration Detention Facilities* (2015).

⁸ The rules also provide for surrebuttal in appropriate circumstances, but surrebuttals are rare.

of our General Counsel, the General Counsel later stated in writing that this was *not* her opinion.) In any event, the Commission voted to allow Commissioners, including me, 30 days to write a statement, but not to allow us the usual 30 days to respond to one another.⁹ This is yet another way in which this report constricted the usual procedures, which were designed to ensure that readers would be fully informed.

Another way in which input has been constricted is that no formal “briefing” was held in which experts and other witnesses were invited to testify. One of the reasons for this—possibly the main reason—is likely that the Commission’s internal rules require that briefings be balanced with regard to the range of responsible viewpoints on the issue at hand. In this case, at a minimum, that would have meant that officials from the federal and state agencies whose work is being examined would have been afforded an opportunity to explain why they do things the way they do. I was told the reason for the lack of a formal briefing was cost. But it is not clear to me why we should undertake to write a report if the Commission’s budget did not permit it to do so in a fair and balanced manner.

Instead, the subcommittee held only a three-hour, open-comment period where anyone from the public could come and talk to us about the topic.¹⁰ Approximately 37 commenters showed up and were given up to five minutes each to make a statement (individuals using interpreters were allowed up to 10 minutes.) Many of the commenters who appeared were affiliated with activist groups and said the same things that they have said in many other places.¹¹

I tend to like the idea of holding an open-comment period in conjunction with our more formal briefings. Even though open comment tends to attract a strong element of “astroturfing,” it also gives individuals who might not otherwise be heard an opportunity to make their grievances known (or to explain why someone else’s grievances are misplaced). Part of the Commission’s role

⁹ U.S. Commission on Civil Rights, Transcript of Commission Business Meeting, August 29, 2019, at 45-51. The Commissioner must have misheard the General Counsel. In a later email, dated September 16, 2019, she informed the Commissioners that she had said no such thing. On the other hand, it is true that the Commission has the *power* to suspend its rules by majority vote. And it did just that. The fact that the Commission has the power to do something is not the same thing as saying that it is appropriate for it to exercise that power. I note that Commissioner Kirsanow and I voted in favor of President Obama’s nominations of our present Chair and Vice Chair on the condition that they would honor our current procedures for Commissioner Statements. In the present case, the Chair had previously recused herself from this report. She abstained from voting on whether to curtail our ordinary rights to respond to our fellow commissioners’ statements. Although not recused, the Vice Chair also abstained rather than vote to honor those procedures.

¹⁰ The Commission also collected written submissions for the record.

¹¹ See, e.g., the testimony of Losmin Jimenez (Advancement Project), Ishalaa Ortega (Immigration Equality); Yael Schacher (Refugees International); Miriam Abaya (Young Center for Immigrant Children’s Rights); Manoj Govindaia (RAICES); Charanya Krishnaswami (Amnesty International); Jasmine Tyler (Human Rights Watch); and Laura Rivera of the Southern Poverty Law Center. I have criticized the Southern Poverty Law Center’s methods in another forthcoming Commission report, *In the Name of Hate: Examining the Federal Government’s Role in Responding to Hate Crimes*.

should be to ensure that everyone is heard. But comments from open-comment periods (or from any source) cannot simply be accepted at face value.¹² The subcommittee should have followed up on the allegations made there and tried to see how many and which ones could be substantiated. As far as I can tell, it didn't. Instead, this report repeats largely verbatim portions of the transcript from that open-comment period.

For example, Eduardo Jimenez, originally from Mexico, testified during the open-comment period about his experiences at the Theo Lacy facility in Orange County, which has since ceased holding immigration detainees. *He said that he was not allowed to eat for weeks, not allowed to bathe, was sexually abused, and that fellow detainees' arms were broken in front of him.*¹³ If those allegations are true, we have a very serious problem on our hands. You would think that if the subcommittee members viewed his allegation as at all credible, they would have followed up rather than simply report the allegation. But they apparently did not do so.

Of course, there are reasons to doubt the allegation. Some of those reasons I learned through an internet search (which apparently the subcommittee did not undertake). While Jimenez did not testify to the dates that he was detained there, the State of California recently published an audit of its state-run facilities that hold federal immigration detainees, including the Theo Lacy facility in Orange County. It found that there were “no health and safety concerns at the facilities.”¹⁴ Apparently “multiple federal entities” also inspected Orange County’s facilities. They found some concerns – including the failure to separate detainees of different risk levels, improper food handling, and mold and mildew in shower stalls – but not violations of the type or gravity that Mr. Jimenez described to us.¹⁵ That makes Jimenez’s jaw-dropping allegations seem less credible than they would otherwise have been. But more specific efforts by the subcommittee to get to the bottom of his story would certainly have been helpful.

Alas, the Commission has made similar mistakes before. In the 2015 report, for example, it uncritically recounted a 2007 rumor that food served by a since-closed Willacy immigration detention center in Texas had contained maggots. As I discuss in my Dissenting Statement in that report, if the Commission had done a simple internet search, it would have learned that shortly after the allegation first surfaced, both an American Bar Association delegation and a team from the Commission on Accreditation for Corrections that included food specialists had been sent in

¹² On occasion, open-comment period witnesses have presented what appear to be fantastic conspiracy theories. See, e.g., U.S. Commission on Civil Rights, Transcript of Briefing, November 2, 2018, at 347-350 (conspiracy theory involving Melania Trump being a spy for the Slovenian government.)

¹³ U.S. Commission on Civil Rights, Transcript of Open Comment Period, April 12, 2019, at 116.

¹⁴ California State Auditor, “City and County Contracts with U.S. Immigration and Customs Enforcement,” February 2019, available at <https://www.auditor.ca.gov/pdfs/reports/2018-117.pdf>. The Commission’s Chair, Catherine Lhamon, was recused from this report “due to [her] work outside the Commission.” She serves as Legal Affairs Secretary for the Governor of California.

¹⁵ *Id.* at 33.

to investigate Willacy.¹⁶ While no one can prove conclusively that the allegation was a fabrication, the findings of those delegations made it extremely unlikely to be true. While neither delegation was composed of pushovers—both noted several issues—they found nothing remotely supportive of the maggot allegation.¹⁷ In that same report, the Commission uncritically recounted a story about a transgender woman with AIDS who died of what was alleged to be negligence on the part of a detention center. When Commissioner Kirsanow and I followed up on that story, we learned that the patient had claimed to be allergic to the appropriate drugs and had initially refused treatment. That puts the matter in a very different light.¹⁸ And again in the same report, the Commission uncritically reported accusations of massive sexual misconduct on the part of detention center guards with female detainees. It failed to mention (presumably because it failed to follow up) that these allegations had been thoroughly investigated by Inspector General for the Department of Homeland Security. After interviewing 33 witnesses and spending 380 hours investigating the situation (including reviewing 360 hours of time lapsed surveillance video footage of the places where the misconduct was alleged to have occurred), the Inspector General found no evidence whatever to substantiate the wild allegations.

All of this is part of a pattern of sloppy fact-finding.¹⁹ It is worth pointing out here that the Commission decided only near the end of its 2015 investigation (after the draft report was already

¹⁶ The visit by the Commission on Accreditation for Corrections had been requested by ICE for the specific purpose of following up on the allegations of maggots in the food.

¹⁷ The food service issues were minor. For example, the Commission on Accreditation for Corrections 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.”

Detainees were asked about their satisfaction with the food. While there were some criticisms (as well as some praise), none of the criticism was remotely in the category of maggots. A typical example was “too many sandwiches.”

The ABA delegation had quite a few criticisms for Willacy (though none nearly 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 delegation had serious doubts about the allegation. See Memorandum of American Bar Association Delegation to Willacy Detention Facility to James T. Hayes, Jr., Acting Director of Detention and Removal, Immigration and Customs Enforcement (March 7, 2008).

None of this made it into our 2015 report, except through my dissenting statement. See Statement of Commissioner Gail Heriot in U.S. Commission Civil Rights, *With Liberty and Justice For All: The State of Civil Rights at Immigration Detention Facilities* (2015).

¹⁸ Letter to Gail Heriot & Peter Kirsanow for ICE Deputy Director Daniel H. Ragdale. See Dissenting Statement of Commission Heriot in U.S. Commission on Civil Rights, *With Liberty And Justice for All: The State of Civil Rights at Immigration Detention Facilities* 43 (September 2015).

¹⁹ See, e.g., Statement of Commissioner Gail Heriot in U.S. Commission on Civil Rights, *Beyond Suspensions: Examining School Discipline Policies and Connection to School to Prison Pipeline for Students of Color with Disabilities* (2019)(criticizing Commission’s misunderstanding of empirical research); Dissenting Statement of Commissioner Gail Heriot in U.S. Commission on Civil Rights, *Environmental Justice: Examining the*

largely written) that it should actually visit a detention center. That is when—in part at my insistence—we finally went to see Karnes and Port Isabel. I was not the only Commissioner to be surprised at how nice the Karnes Center, which was used for mothers and their minor children, was. As I wrote then:

Some of our Commission members and staff appeared to be quite surprised at the quality of treatment they saw. When we were led to a room at the Karnes facility that contained rows and rows of brand new brand-name clothing and told that new arrivals were permitted to select six outfits for themselves and each of their children, the looks on the faces of my colleagues were of astonishment. Questions were asked: “These 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).²⁰

I described these visits at length in my Commissioner’s Statement.²¹ The staff-written part of the 2015 report, however, barely mentioned the visits. It was almost as if they had never happened. That was really inexcusable.

Although I cannot do them justice in this statement, two more issues deserve mention. First, the current report renews the claim in the 2015 report that private detention centers are inherently worse than publicly run ones. I think I did a reasonable job explaining why I believe such claims are untrue. I will not repeat that explanation here.²² I add only that the Otay Mesa facility is run by Core Civic, a private company. Approximately 74 ICE officers work there along with approximately 400 Core Civic employees.

Second, I have not attempted to deal with the family separation issue in this statement. Serious questions are being raised by both sides of the issue about how best to handle the problem. I do not feel qualified at this time to sort them out.²³ I understand that Commissioner Kirsanow intends to address them in his statement and that he has a somewhat different perspective than that offered by the staff-written portion of the report.

Environmental Protection Agency’s Compliance and Enforcement of Title VI and Executive Order 12,898 (2016)(criticizing the Commission for its fact finding).

²⁰ See Statement of Commissioner Gail Heriot in U.S. Commission Civil Rights, *With Liberty and Justice For All: The State of Civil Rights at Immigration Detention Facilities* at 174 (2015).

²¹ Id. at 198-206 (Karnes); Id. at 206-210 (Port Isabel.)

²² Id. at 181-186.

²³ In the past when the Commission has approved multiple reports during the same time frame, it has staggered the due dates for Commission Statements, so that Commissioners (who are only part-time officials) can comment thoughtfully. This time with three reports going at the same time (and a fourth carried over for revisions from an earlier date), it did not.