U.S. COMMISSION ON CIVIL RIGHTS

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TRAUMA AT THE BORDER

THE HUMAN COST OF INHUMANE IMMIGRATION POLICIES

BRIEFING
REPORT

OCTOBER 2019

U.S. COMMISSION ON CIVIL RIGHTS

The U.S. Commission on Civil Rights is an independent, bipartisan agency established by Congress in 1957. It is directed to:

- Investigate complaints alleging that citizens are being deprived of their right to vote by reason of their race, color, religion, sex, age, disability, or national origin, or by reason of fraudulent practices.
- Study and collect information relating to discrimination or a denial of equal protection of the laws under the Constitution because of race, color, religion, sex, age, disability, or national origin, or in the administration of justice.
- Appraise federal laws and policies with respect to discrimination or denial of equal protection of the laws because of race, color, religion, sex, age, disability, or national origin, or in the administration of justice.
- Serve as a national clearinghouse for information in respect to discrimination or denial of equal protection of the laws because of race, color, religion, sex, age, disability, or national origin.
- Submit reports, findings, and recommendations to the President and Congress.
- Issue public service announcements to discourage discrimination or denial of equal protection of the laws.

[1]42 U.S.C. §1975a.

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Trauma at the Border: The Human Cost of Inhumane Immigration Policies

The United States Commission on Civil Rights
Washington, D.C.

Report

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UNITED STATES COMMISSION ON CIVIL RIGHTS

1331 Pennsylvania Ave., NW • Suite 1150 • Washington, DC 20425 www.usccr.gov

Letter of Transmittal

October 24, 2019

President Donald J. Trump
Vice President Mike Pence
Speaker of the House Nancy Pelosi

On behalf of the United States Commission on Civil Rights ("the Commission"), I am pleased to transmit our report, *Trauma at the Border: The Human Cost of Inhumane Immigration Policies*. The report is also available in full on the Commission's website at www.usccr.gov.

For this report, the Commission reopened our 2015 report on the condition of immigration detention centers, amid renewed concerns about worsening conditions. Based on media reports, government investigations, eyewitness accounts, and public testimony received by the Commission, the report details how the current Administration's changes to asylum, the detention of children, and certain other immigration policies, practices, and procedures have created an unnecessary human and civil rights crisis at the southern border. The report does not rely on information provided directly by the relevant federal agencies as, regretfully, they did not respond to our discovery requests.

The institution of the Zero Tolerance policy and decision to forcibly and deliberately separate children, including infants and toddlers, from parents or adult family members on a mass scale, which proceeded with no plans or coordination to reunite families, is a gross human and civil rights violation. The impact of separating immigrant families and indefinite detention is widespread, long-term, and perhaps irreversible physical, mental and emotional childhood trauma. Disturbingly, there remain credible allegations that family separations continue, despite an Executive Order halting them. Immigrant children, as well as adults, experienced trauma as a result of the Administration's policies. The Commission heard directly from immigrant detainees who confirmed traumatic experiences as a result of not only being separated from their families, but also the trauma they suffered as a result of enduring inhumane conditions at detention facilities and sometimes on account of the cruel treatment by Department of Homeland Security personnel.

In addition, the new testimony and data indicate that federal agencies have not heeded the Commission's recommendations from its 2015 report. Agencies continue not to provide appropriate and critical legal and medical services to detainees, or transparency about the government's policies in detaining individuals. Further, agencies continue inequitable treatment of Lesbian, Gay, Bisexual, and Transgender (LGBT) individuals, individuals with disabilities, and non-English speakers. The Commission found that detention conditions have significantly deteriorated under the current Administration's policies. Some child detention facilities lack basic hygiene and sleeping arrangements; they sometimes lack soap, blankets, dental hygiene, potable

water, clean clothing, and nutritious food. The Commission received evidence and testimony that child detention facilities lack appropriately trained medical personnel and medicine, medical staff are not routinely present at detention facilities, and wait times to see a doctor can be weeks long, regardless of how dire the situation. Language barriers pose an immense hurdle to staff's ability to offer adequate and appropriate medical and mental health treatment to children while detained.

The Commission majority voted for key recommendations, including the following: the Administration must immediately reunify any remaining children with their parents, including parents who were deported before, during, and after Zero Tolerance, unless there is a proven serious risk to the best interests of the child. The Administration should immediately remedy conditions in detention centers regarding overcrowding, food, and sanitation so as not to further traumatize children forced to flee their homes.

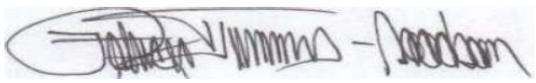
The Department of Homeland Security should conduct greater oversight and inspection of detention centers, specifically those relating to child detention centers, and should enforce detention center standards up to and including the closure of a detention facility for violating detention center standards and other applicable laws. Congress should expand the authority of Department of Homeland Security Office for Civil Rights and Civil Liberties to respond directly to complainants and enforce civil rights protections. New immigration policies should be precleared by Office for Civil Rights and Civil Liberties or another independent body to ensure they do not violate civil rights, prior to causing harm.

Due to the inconsistent and inhumane treatment of children, Congress should pass legislation that sets minimum safe, sanitary and humane detention conditions, and provide sufficient funding to address the crisis in detention facilities for both children and adults. Because the purpose of immigration detention is not punitive, the standard of care should be based on providing reasonable care and safety, and not on incarceration standards. Congress should require that no funds should be used for the detention of any asylum seeker who has been found to establish a credible fear of persecution, apart from narrow exceptions.

Congress must provide sufficient funding to address the need for hiring, full training, and retention of experienced and qualified administrative law judges and related staff to process asylum and other immigration claims, to ensure asylum seekers and other immigrants are accorded full due process. Congress should pass legislation allowing members of Congress and members of this Commission to conduct independent inspections of detention facilities with minimal notice (no more than 24 hours) and be given full access to detainees to interview them.

We at the Commission are pleased to share our views, informed by careful research and investigation as well as civil rights expertise, to help ensure that all Americans enjoy civil rights protections to which we are entitled.

For the Commission,



Patricia Timmons Goodson
Vice Chair

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ACKNOWLEDGEMENTS

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Katherine Culliton-González, Esq., the Commission's Office of Civil Rights Evaluation (OCRE) Director, conducted substantial principal research and drafting on the background of this report and also reviewed, edited, and offered editorial comments for the report.

With the assistance of Attorney-Advisor Pilar Velasquez McLaughlin, and Law Clerks Christine Kumar (J.D. Candidate 2020, George Washington University), Lilian Ofili (J.D. Candidate 2021, George Washington University), Benjamin Falstein (J.D. Candidate 2021, George Washington University), and Brooke Schwartz (J.D. Candidate 2021, George Washington University), the Commission's General Counsel Maureen E. Rudolph reviewed and approved the report for legal sufficiency. Attorney-Advisor Pilar Velasquez McLaughlin, Law Clerks Christine Kumar, Lilian Ofili, Benjamin Falstein, and Brooke Schwartz, and the Commission's General Counsel Maureen E. Rudolph also provided valuable legal research assistance and writing for the report.

EXECUTIVE SUMMARY

The U.S. Commission on Civil Rights last addressed civil rights and constitutional concerns in connection with the immigration detention of families and children, including conditions of detention centers in its 2015 report, *With Liberty and Justice for All: The State of Civil Rights at Immigration Detention Facilities* ("2015 Report").[1] In 2018, public reports documented worsening conditions at the southern border. Changes in federal policy further resulted in substantially increased law enforcement activity at the southern border and the separation of thousands of migrant children from their parents.

Recent developments have resulted in serious civil rights implications, including the protection of the physical and mental well-being of both adult and child immigration detainees and their due process rights. In light of these concerns the Commission formed a bipartisan subcommittee and reopened its 2015 Report to update its investigation of the immigration detention of families and children.[2] The subcommittee 1) sought information from the Departments of Homeland Security and Health and Human Services,[3] 2) held a public comment session where it took in testimony from experts, impacted individuals, witnesses to the impacts of family separation, and other interested members of the public, and 3) solicited written comments from the public.

This report first provides context and background for the current situation of immigrant arrivals at the southern border and a summary of recent federal policy changes that triggered this investigation.[4] The report then summarizes and analyzes the testimony the Commission received.

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[1] U.S. Comm'n on Civil Rights, *With Liberty and Justice for All: The State of Civil Rights at Immigration Detention Facilities*, 2015, https://www.usccr.gov/pubs/docs/Statutory_Enforcement_Report2015.pdf (hereinafter 2015 Report). The 2015 Report found that many immigration detention center facilities at the time failed to comply with various laws, regulations, court settlements, and Department of Homeland Security standards for medical care, proper nutrition, the treatment of LGBT individuals, and the detention of children, and practices at detention facilities inhibited detainees' due process rights. Ibid., 124-25.

[2] U.S. Comm'n on Civil Rights, *Telephonic Business Meeting, U.S. Commission on Civil Rights,* Washington*, D.C.*, June 26, 2018, transcript, pp. 17-18. The Subcommittee was chaired by Commissioner Michael Yaki; additional members included Commissioners Adegbile, Kirsanow, Kladney, and Narasaki. While initially a member of the subcommittee, Chair Lhamon was recused from the project in January 2019 and took no further part in the project.

[3] As of publication of this report, the Commission has not received any responses or documents in connection with these requests. *See* note 50 for additional information.

[4] In parallel with the Commission's work on this report, the Commission undertook a two-year investigation into federal civil rights enforcement across the federal government, including an assessment of the Office of Civil Rights and Civil Liberties at the Department of Homeland Security and the Office of Civil Rights at the Department of Health and Human Services from Fiscal Years 2016 – 2018. The Commission's report, *Are Rights Reality? Evaluating Federal Civil Rights Enforcement*, which was adopted by majority vote of the Commission on August 29, 2019, addresses some similar issues to those discussed in this report, and some of the text that appears here also appears in Chapter 8 of that report.

As confirmed by media reports, government investigations, eyewitness accounts, and public testimony received by the Commission, the Trump Administration has implemented immigration policies that appear to violate constitutional due process rights and basic standards of medical and mental health care, and seemingly target migrants based on demographics including national origin, language status, and gender. These new policies have resulted in the separation of family units, lasting trauma and heartache, and shocking detention conditions for both children and adults.

In addition, the new testimony and data indicate that federal agencies have not heeded the Commission's recommendations from its 2015 report. Agencies continue not to provide appropriate and critical legal and medical services to detainees, or transparency about the government's policies in detaining individuals. Further, agencies continue inequitable treatment of LGBT individuals, individuals with disabilities, and non-English speakers.

Current Immigration Policies

Multiple executive branch policies under the Trump Administration are directly impacting the treatment of migrants at the southern border, most of whom are asylum seekers, including families with children: zero tolerance (or criminally prosecuting all who cross the southern border without authorization); metering (or only allowing a certain number of asylum claims per day to be filed); migration protection protocols (requiring asylum seekers to return to Mexico while their claim is processed); and the decision that domestic violence is not a basis upon which asylum will be granted in the U.S.

Functionally, what has resulted from the Administration's policies is the separation of more than 2,700 migrant families and children (including the separation of infants and toddlers from their parents), massive overcrowding of poorly run detention facilities that lack resources and fail to uphold basic standards of medical and mental health care, the forced return to Mexico of over 11,000 migrants waiting to be heard on asylum claims, and other conditions that give rise to concerns of civil and human rights violations.[5] These policies put the lives of migrants and their families in danger and at times resulted in their needless deaths.[6]

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[5] Order Granting Plf.'s Mot. for Classwide Prelim. Inj. 7, *Ms. L v. ICE*, No. 18cv0428 DMS (MDD) (S.D. Cal. June 26, 2018); Deanna Paul, "U.N. human rights chief 'deeply shocked' by migrant detention center conditions in Texas," *Washington Post*, July 8, 2019, https://www.washingtonpost.com/immigration/2019/07/08/un-human-rights-chief-deeply-shocked-by-migrant-detention-center-conditions-texas/?utm_term=.939980bb7bf1; Dep't of Homeland Security, Office of Immigration Statistics, *Annual Flow Report*, *Refugees and Asylees: 2017*, March 2019, Table 6a, p. 7, https://www.dhs.gov/sites/default/files/publications/Refugees_Asylees_2017.pdf.

[6] Hannah Rappleye and Lisa Riordan Seville, "24 Immigrants Have Died in ICE Custody During the Trump Administration," *NBC News*, June 9, 2019, https://www.nbcnews.com/politics/immigration/24-immigrants-have-died-ice-custody-during-trump-administration-n1015291.

Perhaps the most egregious ramification is the long-lasting and possibly irreparable emotional and psychological harm these policies have had and will continue to have on migrant families and their children.[7] When families are separated at the border, children do not have contact with their parents or other family members, even if those family members live in the U.S.[8] According to public reports, the federal government is not providing mental health or emotional support, which in turn causes extreme stress, which can lead to depression, anxiety, and other abnormal psychological functioning.[9] The trauma that migrants and their children face as a result of detention and separation was confirmed through testimony received by the Commission:

> Many families crossing the United State border are fleeing war and violence in their home countries and are already coping with the effects of stress and trauma. . . . A substantial body of research links the trauma of childhood detention with lasting adverse outcomes, including an increased risk of mental illness, such as depression, anxiety, and post-traumatic stress disorder. . . . These migration-related and postmigration stressors can produce demoralization, grief, loneliness, loss of dignity, and feelings of helplessness as normal syndromes of distress that impede refugees from living healthy and productive lives.[10]

> We know without a doubt that these practices cause physical and emotional harm and that this trauma may be long term. It is appalling that, in a country that purports to protect children, that we would, at the same time, victimize children seeking our care and protection.[11]

Implementation of these policies has taken place primarily at the southern border between the United States and Mexico.[12] The overwhelming majority of persons crossing the southern border

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[7] Hurley Riley, "The Impact of Parent-Child Separation at the Border," *Pursuit*, Sept. 7, 2018, https://sph.umich.edu/pursuit/2018posts/family-separation-US-border.html.

[8] *See Ms. L v. ICE*, 310 F.Supp.3d 1133 (S.D. Cal. 2018).

[9] Riley, "The Impact of Parent-Child Separation."

[10] *See* American Psychiatric Association, Written Statement for the Public Comment Session on Immigration Detention before the U.S. Commission on Civil Rights, May 13, 2019, at 2, (hereinafter American Psychiatric Association Statement); *see also* Pepper Black, Written Statement for the Public Comment Session on Immigration Detention before the U.S. Commission on Civil Rights, Apr. 25, 2019, at 1 (hereinafter Black Statement) (detailing the shock responses and extreme distress of children who have been detained).

[11] Mariela Olivares, Professor, Howard University School of Law, Testimony, *Public Comment Session on Immigration Detention before the U.S. Commission on Civil Rights,* Washington, D.C., Apr. 12, 2019, transcript, pp. 152 (hereinafter *Public Comment Session*).

[12] Dep't of Justice, Office of Public Affairs, "Attorney General Announces Zero-Tolerance Policy for Criminal Illegal Entry," press release no. 18-417, Apr. 6, 2018, https://www.justice.gov/opa/pr/attorney-general-announces-zero-tolerance-policy-criminal-illegal-entry.

are persons of color from Latin America.[13] The United States has a long and ongoing history of discrimination against immigrants of color from non-European countries, which the Commission has documented with regard to Latin American immigrants in particular.[14] Currently, in conjunction with xenophobic rhetoric about who crosses the southern border, the implementation of zero tolerance, family separation, Migration Protection Protocols, and metering at the southern border raise civil rights issues as to whether these policies target certain groups based on national origin and language status.

Detention Conditions

The conditions in which the United States houses migrant children remains of high concern, and the landscape of protections may be changing. In 1993, the Supreme Court stated "'legal custody' rather than 'detention' more accurately describes the arrangement" for migrant children then being housed by the federal government.[15] Given that conditions for migrant children held in federal custody in the 1990s included state child custody law protections as well as the clear ability for

[13] From 2010-2014, 71% of unauthorized immigrants in the U.S. were from Mexico and Central America, and 4% were from South America, such that 75% were from Latin American countries. *See* Jie Zong, Jeanne Batalova, and Jeffrey Hallock, "Frequently Requested Statistics on Immigrants and Immigration in the United States, Unauthorized Immigrants," *Migration Policy Institute*, Feb. 8, 2018, https://www.migrationpolicy.org/article/frequently-requested-statistics-immigrants-and-immigration-united-states#Unauthorized.

[14] *See infra* notes 54-102.

[15] *Reno v. Flores*, 507 U.S. 292, 298 (1993). The Court held that because migrant children were not in correctional institutions and were subject to the provisions of state child welfare laws, and because they could be released to a parent or legal guardian, they did not enjoy the full range of due process rights that pertain to persons who are detained by the government. *Id*. at 302:

> "Substantive due process" analysis must begin with a careful description of the asserted right, for "[t]he doctrine of judicial self-restraint requires us to exercise the utmost care whenever we are asked to break new ground in this field." *Collins, supra,* at 125; see *Bowers* v. *Hardwick, supra,* at 194-195. The "freedom from physical restraint" invoked by respondents is not at issue in this case. Surely not in the sense of shackles, chains, or barred cells, given the Juvenile Care Agreement. Nor even in the sense of a right to come and go at will, since, as we have said elsewhere, "juveniles, unlike adults, are always in some form of custody," *Schall,* 467 U. S., at 265, and where the custody of the parent or legal guardian fails, the government may (indeed, we have said *must)* either exercise custody itself or appoint someone else to do so. *Ibid.* Nor is the right asserted the right of a child to be released from all other custody into the custody of its parents, legal guardian, or even close relatives:
>
> The challenged regulation requires such release when it is sought. Rather, the right at issue is the alleged right of a child who has no available parent, close relative, or legal guardian, and for whom the government is responsible, to be placed in the custody of a willing-and-able private custodian rather than of a government-operated or government selected child-care institution.

children to be released to their parents or guardians, the Supreme Court considered that those children had fewer due process rights.[16] As discussed herein, those conditions are changing as children cannot be released to their parents and some detention facilities may be housed on federal lands, including military bases.[17] Under these conditions, migrant children would arguably have more due process rights than those whose rights were defined by the law in the 1990s.[18]

In 1997, the federal government agreed in the *Flores* settlement agreement to provide "safe and sanitary" conditions for detained children,[19] and that agreement has recently been enforced by federal courts.[20] Contrary to this minimal requirement, court filings and media accounts report basic needs at certain southern border facilities are not being met. Examples include lack of shower facilities, soap, diapers, and nutritious food.[21] Additionally, there are multiple reports of sexual violence by staff at facilities, lack of addressing trauma, use of solitary confinement to address mental health, and deaths of children while detained. As this report discusses, these conditions raise concerns under the *Flores* agreement, U.S. Constitution, and federal detention standards.[22]

According to current news and U.S. Government Accountability Office reports, Department of Health and Human Services shelters, which house migrant children after their initial detainment by Customs and Border Protection, are still facing challenges of overcrowding; many are at maximum capacity and there is now additional construction of emergency shelters for thousands

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[16] *Reno v. Flores*, 507 U.S. at 302.

[17] *See infra* notes 300-309, 670-671.

[18] *See also infra* notes 610-613 (discussing *Zadvydas v. Davis*, 533 U.S. 678 (2001) (except in narrow circumstances unreasonable to detain undocumented immigrants for over six months)).

[19] Stipulated Settlement Agreement, *Flores v. Reno*, No.CV 85-4544-RJK (Px) (C.D. Cal. Jan. 17, 1997) (hereinafter *Flores* Agreement).

[20] *See infra* notes 277; 282; 288-290.

[21] Lizzie O'Leary, "Children Were Dirty, They Were Scared, and They Were Hungry," *The Atlantic*, June 25, 2019, https://www.theatlantic.com/family/archive/2019/06/child-detention-centersimmigration-attorney-interview/592540/; Isaac Chotiner, "Inside a Texas Building Where the Government is Holding Immigrant Children," *New Yorker*, June 22, 2019, https://www.newyorker.com/news/q-and-a/inside-a-texas-building-where-the-government-is-holding-immigrant-children; Cedar Attanasio, Garance Burke and Martha Mendoza, "Attorneys: Texas Border Facility is Neglecting Migrant Kids," *AP News*, June 21, 2019 https://www.apnews.com/46da2dbe04f54adbb875cfbc06bbc615.

[22] *See infra* notes 312-322 (discussing U.S. Immigration and Customs Enforcement, *Performance-Based National Detention Standards 2011*, Revised December 2016, V. Expected Practices (hereinafter Immigration and Customs Enforcement, *Performance-Based National Detention Standards 2011*) https://www.ice.gov/doclib/detention-standards/2011/pbnds2011r2016.pdf)); *See also infra* notes 452-463 discussing constitutional concerns (deliberate indifference discussion).

of children.[23] There are also serious problems of overcrowding and lack of access to proper care, along with prolonged detention, of both adults and children at Border Patrol facilities, documented by the Department of Homeland Security, Office of Inspector General and corroborated by testimony received by the Commission.[24]

Bearing Witness: Voices from the Southern Border

The most compelling voices heard by the Commission were those of formerly detained individuals who spoke out about the treatment they endured at border detention facilities and offered first-hand accounts of humiliation, trauma, fear, and courage.

A migrant from El Salvador described his experience at a detention center in Texas and another detention center in New Jersey to which he was later transferred.

> After crossing the border, Immigration put me in the *hielera*, a small cold room with 40 other people. We had to sit on the floor because they did not have beds or chairs. They only gave us aluminum blankets. The border patrol agents shouted at us. They accused us of being smugglers. The Immigration officers sent me to a detention center in Pearsall, Texas. The guards humiliated us. We had to strip in front of one another and put prison clothes on. The officers laughed and made fun of us.[25]
>
> The conditions [in New Jersey] were terrible. They gave us used underwear. The meals were very small portions and sometimes we were hungry. Many people got sick from the food they gave us. I remember well the meat was like cardboard. In the detention center, a detainee hurt and threatened me. I tried to speak to a supervisor but she shouted speak English and she didn't even try to call an interpreter. I had to wait two days for an official who spoke Spanish to accept my complaint. They took me to a hospital in handcuffs and put me in solitary confinement in the detention center, as if I had done something wrong. I felt very bad. I could not eat and I was shaking with fear.[26]

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[23] *See* Maria Sacchetti, "HHS to House Thousands of Unaccompanied Minor Migrants on Military Bases and at Texas Facility," *Washington Post*, June 7, 2019, https://www.washingtonpost.com/immigration/hhs-to-house-thousands-of-unaccompanied-minor-migrants-on-military-bases-at-texas-facility/2019/06/07/a6c2c95c-8938-11e9-a491-25df61c78dc4_story.html?utm_term=.7c65250890c2; *See also, e.g.,* U.S. Gov't Accountability Office, *Unaccompanied Children DHS and HHS Have Taken Steps to Improve Transfers and Monitoring of Care, but Actions Still Needed*, GAO-18-506T, Apr. 26, 2018, https://www.gao.gov/products/GAO-18-506T.

[24] *See infra* notes 149; 325-329; 440-441; 424-425; 473-486; 538.

[25] Robin A. Testimony, *Public Comment Session,* pp. 106-108.

[26] Ibid.

Another formerly detained migrant originally from Mexico explained that:

> My experience in jail was that I was detained in Orange County. My experience, what I saw there, it was horrible, terrible. What I experienced was the worst experience in my life. I was not allowed to eat for weeks. And I was not allowed to bathe. I lost my dignity as a human being there. I was sexually abused and psychologically abused as well. I tried to ask, to talk the immigration officers asking for help. I needed that someone listen to me, to listen to what was happening to me at that moment. I talked to the officers. They didn't listen to me.
>
> They ma[d]e fun of me. They did whatever they wanted with my dignity. They threw the food, my food, to the floor. I had to pick it up.[27]

These stories, like many others the Commission heard, demonstrate the concerns of the Commission regarding a lack of due process and inhumane treatment at the hands of the U.S. government.

[27] Eduardo Jiménez Testimony, *Public Comment Session,* p. 116.

CHAPTER 1: Commission's National Origin Jurisdiction, Prior Report, and Current Fact-Finding Investigation

Congress has tasked the Commission with jurisdiction to investigate potential discrimination and violations of equal protection, including those based on national origin.[28] "National origin" means "the country where a person was born, or, more broadly, the country from which plaintiff's ancestors came."[29] The U.S. Citizenship and Immigration Services defines national origin as "the individual's place of birth, country of origin, ethnicity, ancestry, native language, accent, or the perception that they look or sound 'foreign.'"[30] Many other agencies similarly define national origin, including in guidance for federal law enforcement.[31]

Discrimination based on national origin happens when people are singled out and denied equal opportunity because "they or their family are from another country, because they have a name or accent associated with a national origin group, because they are limited English proficient, or because they participate in certain customs associated with a national origin group."[32] Likewise, the Equal Employment Opportunity Commission defines discrimination on a basis of national origin as "including, but not limited to, the denial of equal employment opportunity because of an individual's, or his or her ancestor's, place of origin; or because an individual has the physical, cultural or linguistic characteristics of a national origin group."[33] Additionally, while the Supreme

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[28] *See* 42 U.S.C. § 1975a(a)(2)(A)-(D). Congress has tasked the Commission with "study[ing] and collect[ing] information relating to . . . discrimination or denials of equal protection . . . because of color, race, religion, sex, age, disability, *or national origin*, or in the administration of justice."

[29] *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 88-89 (1973).

[30] U.S. Citizenship and Immigration Services, *Handbook for Employers M-274: 11.2.3 National Origin Discrimination*, July 2017, https://www.uscis.gov/i-9-central/1123-national-origin-discrimination.

[31] The U.S. Customs and Border Protection follows guidance provided by the Department of Justice regarding the "Use of Race, Ethnicity, Gender, National Origin, Religion, Sexual Orientation, or Gender Identity." *See* Dep't. of Justice, *Guidance for Federal Law Enforcement Agencies Regarding the Use of Race, Ethnicity, Gender, National Origin, Religion, Sexual Orientation, or Gender Identity*, December 2014, https://www.justice.gov/sites/default/files/ag/pages/attachments/2014/12/08/use-of-race-policy.pdf?utm_source=google&utm_medium=google&utm_term=(not%20provided)&utm_content=undefined&utm_campaign=(not%20set)&gclid=undefined&dclid=undefined&GAID=248423598.1569429947. In guidance for federal law enforcement, the Department. of Justice defines national origin as "an individual's, or his or her ancestor's, country of birth or origin, or an individual's possession of the physical, cultural or linguistic characteristics commonly associated with a particular country." Ibid., 2. The Department of Justice, Civil Rights Division defines national origin as someone's "birthplace, ancestry, culture, or language." Dep't. of Justice, Civil Rights Division, *Federal Protections Against National Origin Discrimination*, August 2010, p. 1, http://www.justice.gov/sites/default/files/crt/legacy/2011/04/07/natorigin2.pdf.

[32] Dep't. of Justice, *Federal Protections Against National Origin Discrimination*, p. 1.

[33] 29 C.F.R. § 1606.1. The Equal Employment Opportunity Commission issued updated guidance in 2016, generally defining national origin discrimination as mentioned above, and provided further guidance on examples of national

Court has distinguished between citizenship and national origin discrimination, the Court clarified that the Civil Rights Act prohibits "discrimination on the basis of citizenship whenever it has the purpose or effect of discriminating on the basis of national origin."[34]

In 2015, the Commission examined "civil rights and constitutional concerns" at immigration detention centers,[35] and published "With Liberty and Justice for All: The State of Civil Rights at Immigration Detention Facilities."[36] The Commission's 2015 report focused on the federal government's response to an increase in migration of children, and the "growing concerns over federal apprehension of immigrants and inhumane detention conditions detained immigrants suffer that are inconsistent with American values."[37] The Commission's investigation included background research and analysis, a briefing held in Washington, D.C., and fact-finding site visits to the Karnes Immigration Family Detention Center in Karnes City, Texas and the Port Isabel Immigration Detention Center in Los Fresnos, Texas.[38] Through this process:

> [T]he Commission gathered facts and data to analyze whether [the Department of Homeland Security], its component agencies, and private detention corporations with whom the federal government contracts to detain immigrants were complying with the Performance Based National Detention Standards, Prison Rape Elimination Act Standards, the *Flores* Settlement Agreement and other related immigrant child detention policies, and the United States Constitution.[39]

In 2015, the Commission found that the federal government was not respecting the civil rights and due process rights of immigrant detainees.[40] The Commission made several recommendations, regarding families in detention, including that 1) Department of Homeland Security should act

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origin discrimination. *See* U.S. Equal Emp. Opportunity Comm'n, *EEOC Enforcement Guidance on National Origin Discrimination*, Nov. 18, 2016, https://www.eeoc.gov/laws/guidance/national-origin-guidance.cfm.

[34] *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 92 (1973).

[35] 2015 Report, *supra* note 1.

[36] Ibid.

[37] Ibid., 2.

[38] Ibid., Letter of Transmittal, 1.

[39] Ibid.

[40] Ibid., 125.

immediately to release families from detention,[41] 2) Congress should no longer fund family detention and should reduce its funding for immigration detention generally, in favor of alternatives to detention,[42] and 3) Department of Homeland Security must ensure the provision of appropriate education and mental and medical health care for all detained adults, children, and youth.[43] In response to the 2015 Report, a Department of Homeland Security spokesperson stated "[Department of Homeland Security] takes very seriously the health, safety and welfare of those in our care. The Department is committed to ensuring that individuals housed in our all of our centers have the proper care and appropriate resources, that they are held and treated in a safe, secure and humane manner, and that their civil and due process rights are respected. We have consistently improved and updated our standards and policies to reflect this commitment."[44]

Now, Department of Homeland Security's 2018 zero tolerance policy and resulting separation of migrant children from their parents at the southern border (hereinafter "border") have raised even more serious civil rights issues. On June 15, 2018, the Commission majority sent a letter to the Departments of Justice and Homeland Security, urging the ending of separating families at the border and the zero tolerance policy.[45] The zero tolerance policy, the Commission noted, coerced parents into withdrawing valid asylum applications and impaired their legal immigration proceedings for fear of what would happen to their children if they did not comply.[46] The Commission emphasized its concern that these policies, directed at Mexican and Central American immigrants coming to the U.S. through the border, raised questions of unwarranted discrimination of the basis of national origin.[47] In addition, the Commission noted that the policy disregarded that many of those individuals coming to the U.S. are fleeing dangerous situations in their home countries and are seeking asylum within the parameters of our nation's immigration laws.[48] On

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[41] Ibid., Letter of Transmittal, 2.

[42] Ibid., 129.

[43] Ibid., 162.

[44] Franco Ordóñez, "Civil Rights Commission: Release Migrant Children, Parents," *McClatchy DC*, Sept. 17, 2015, https://www.mcclatchydc.com/news/nation-world/national/article35612661.html (citing: Dep't. of Homeland Security spokesperson Marsha Catron).

[45] U.S. Comm'n on Civil Rights Commissioners, letter to former Attorney General Jeff Sessions and former Dep't. of Homeland Security Secretary, June 15, 2018, https://www.usccr.gov/press/2018/06-15-18-letter.pdf (hereinafter June 15 letter).

[46] Ibid., 1.

[47] Ibid., 1-2.

[48] Ibid., 2.

June 26, 2018, the Commission voted to reopen the 2015 investigation, and formed a bipartisan subcommittee to facilitate discovery to update the 2015 report.[49]

To gather information for this investigation, the subcommittee held a public forum on April 12, 2019, and solicited public comments in order to solicit information on the "condition of immigration detention centers and status of treatment of immigrants, including children."[50] The responses from the public forum and public comment period are documented in the third chapter of this report. The Commission also sought formal discovery of information and documents from the Departments of Homeland Security and Health and Human Services, but as of the publication of this report the Commission has not received any responses or documents in connection with these discovery requests.[51]

Since the 1960s the Commission and its state advisory committees have chronicled the civil rights implications of our nation's immigration laws and policies.[52] Herein, the Commission adds to this record by examining the due process rights of detainees (including children) regarding the right to family integrity/unity, rights related to conditions of confinement, and the right to counsel during immigration proceedings. In addition, the Commission seeks to determine if national origin discrimination underlie any of the federal government's actions in separating families. The Commission also considers language access and whether the federal government is apprising migrants of their rights or inquiring about their status at crossing, while detained, and throughout any legal proceedings.

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[49] U.S. Comm'n on Civil Rights, *Telephonic Business Meeting, U.S. Commission on Civil Rights*, Washington, D.C., June 26, 2018, transcript, p. 17.

[50] U.S. Comm'n on Civil Rights, Sunshine Act Meeting Notice, 84 Fed. Reg. 13003 (Apr. 3, 2019).

[51] Under the Commission's authorizing statute, "[a]ll Federal agencies shall cooperate fully with the Commission to the end that it may effectively carry out its functions and duties." 42 U.S.C. § 1975b(e). On August 16, 2018, the Commission served discovery requests to Dep't. of Homeland Security seeking information regarding the conditions of detention of undocumented immigrant children and families. *See* Maureen Rudolph, General Counsel, U.S. Comm'n on Civil Rights to Kirstjen Nielsen, Secretary, Dep't. of Homeland Security, Aug. 16, 2018, https://www.usccr.gov/press/2018/12-12-DHS-letter.pdf (a copy of this discovery request can be found in Appendix B). On September 17, 2018, Dep't. of Homeland Security wrote a letter objecting to the Commission's jurisdiction to collect such information. On October 18, 2018, the Commission replied to Dep't. of Homeland Security's letter explaining how the Commission had jurisdiction. The Commission also served similar discovery requests to Department of Health and Human Services on December 11, 2018, and followed up with a letter on February 15, 2019, after not receiving a response. *See* Interrogatories sent from Maureen Rudolph, General Counsel, U.S. Comm'n on Civil Rights to Alex M. Azar, Secretary, U.S. Dep't of Health and Human Services, Dec. 11, 2018, https://www.usccr.gov/press/2018/12-12-HHS-letter.pdf (a copy of this discovery request can be found in Appendix C).

[52] *See* U.S. Comm'n on Civil Rights, *The Mexican American; A Paper Prepared for the U.S. Commission on Civil Rights,* 1968, https://www2.law.umaryland.edu/marshall/usccr/documents/cr12m57.pdf; U.S. Comm'n on Civil Rights, *U.S. Commission on Civil Rights Commends President Obama on Issuance of Immigration Accountability Executive Action*, Nov. 21, 2014, http://www.usccr.gov/press/2014/Immigration_letter.pdf (summarizing history of U.S. Comm'n on Civil Rights immigration investigations).

CHAPTER 2: Historic and Current Treatment of Migrants at the Southern Border

This chapter provides context and background for the current situation of immigrant arrivals at the southern border, conditions at detention facilities, treatment of immigrant detainees, and recent policy changes that triggered the Commission's investigation. The federal response to migrants at the border involves multiple federal departments and agencies, whose actions are governed by various federal statutes, the U.S. Constitution, case law, consent decrees, policies, and standards.[53] This chapter provides a brief summary of the various roles of federal departments and agencies federal policies that affect federal immigration detention practices.

Historic Treatment of Migrants from Central and South America

The current immigration policies are the latest in a long history of the U.S. government's pattern of inviting and then reversing course to deport migrants. When the U.S. agricultural economy needed laborers to fill work shortages in the early 1900s, there was a large push to establish the first guest-worker program to fill those needs.[54] As migration from Europe declined, the U.S. increasingly turned to Mexico to fill the void by bringing more than 70,000 Mexican workers into the U.S., providing Mexican migrants with temporary legal status that lasted for decades.[55] But in the late 1920s to the mid-1930s, as the U.S. attempted to rebuild after the Great Depression, more than 50,000 Mexican American immigrants, including those who had become U.S. citizens as well as U.S. citizen children, were rounded up and sent back to Mexico - known as the Mexican Repatriations - under the belief that deporting them would provide job opportunities for native-born citizens.[56] What ensued was a "racially motivated program to create jobs by getting rid of people."[57] This targeted effort consisted of raids in cities that were heavily populated by Latino

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[53] A summary of federal agency roles in immigration is provided in Appendix A.

[54] "Timeline of Agricultural Labor," *National Farm Worker Ministry*, http://nfwm.org/farm-workers/farm-worker-issues/timeline-of-agricultural-labor/ (accessed July 9, 2019).

[55] Ibid.

[56] Steven Mintz, "Historical Context: Mexican Americans and the Great Depression," *Gilder Lehrman Institute of American History*, https://www.gilderlehrman.org/content/historical-context-mexican-americans-and-great-depression (accessed July 10, 2019).

[57] Alex Wagner, "America's Forgotten History of Illegal Deportations," *The Atlantic*, Mar. 6, 2017, https://www.theatlantic.com/politics/archive/2017/03/americas-brutal-forgotten-history-of-illegal-deportations/517971/.

people and resulted in the deportation by train and busloads of thousands of Mexican Americans, who were sent to regions of Mexico without regard to where their family originated.[58]

In 1929, Congress passed the law which made entering the U.S. without authorization a criminal misdemeanor.[59] The law, originally constructed by Senator Coleman Livingston Blease, a white supremacist who also defended lynching and segregation, and then Secretary of Labor, James Davis, who oversaw immigration under the Department, was done so with two goals in mind – deterrence and punishment.[60] Between 1920 and 1930 close to 7,000 illegal entry and re-entry entrants were prosecuted under the new law.[61] Along with the Quota Acts of 1921 and 1924 severely limiting immigration from Asia, "[I]mmigration policy [during this period] rearticulated the U.S.-Mexico border as a cultural and racial boundary, as a creator of illegal immigration. Federal officials self-consciously understood their task as creating a barrier where, in a practical sense, none had existed before."[62]

In the 1940s and continuing through the 1960s, the U.S. government reopened its doors and invited close to 400,000 temporary workers from Mexico through a series of bi-lateral agreements with Mexico that became known as the Bracero Program.[63] Notwithstanding the Bracero Program, many Mexicans chose to enter the U.S. without authorization (versus through the Bracero Program), and by late 1948 the Department of Justice convicted nearly 8,000 individuals for illegal

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[58] Ibid.; *see also* Francisco E. Balderrama and Raymond Rodríguez, *Decade of Betrayal: Mexican Repatriation in the 1930s* (New Mexico: University of New Mexico Press, 2006) (describing the injustice and discrimination that the Mexican American community experienced in 1930s).

[59] *See* 8 U.S.C. § 1325; Act of Mar. 4, 1929, Pub. L. No. 70-1018, § 2, 45 Stat. 1551 (final version of the law), http://legisworks.org/congress/70/publaw-1018.pdf; *see also* Ian MacDougall, "Behind the Criminal Immigration Law: Eugenics and White Supremacy," *ProPublica*, June 19, 2018, https://www.propublica.org/article/behind-the-criminal-immigration-law-eugenics-and-white-supremacy; Jasmine Aguilera, "Section 1325 of U.S. Immigration Law was a Hot Topic in Wednesday's Debate. Here's Why it's a Big Deal," *Time*, June 27, 2019, https://time.com/5615757/section-1325-immigration-law-2020-debate/.

[60] MacDougall, "Behind the Criminal Immigration Law."

[61] *See* U.S. Dep't of Labor, *Annual Report of the Commissioner General of Immigration*, (Washington, DC. Government Printing Office, 1930), p. 21, https://archive.org/stream/annualreportofco1930unit/annualreportofco1930unit_djvu.txt; *see also* Doug Keller, *Re-thinking Illegal Entry and Re-entry*, 44 LOY. U. CHI. L. J. 65, 76 (2012), https://lawecommons.luc.edu/luclj/vol44/iss1/2/?utm_source=lawecommons.luc.edu%2Fluclj%2Fvol44%2Fiss1%2F2&utm_medium=PDF&utm_campaign=PDFCoverPages.

[62] Keller, *supra* note 61, at 72 (quoting Mae M. Ngai, *Impossible Subjects: Illegal Aliens and the Making of Modern America* 67 (2004)).

[63] "The Bracero Program: Bracero History Archive," *UCLA Labor Center*, https://www.labor.ucla.edu/what-we-do/research-tools/the-bracero-program/ (accessed July 9, 2019).

entry and re-entry and by 1951, that number grew close to 15,000.[64] Most of the individuals entering without authorization, however, were not actually criminally prosecuted and were offered voluntary departure.[65] And despite their contributions to U.S. agriculture and labor market, Mexican laborers were continually treated as a "temporary fix for the domestic economy's current labor needs."[66]

> [B]y treating the immigrant as a temporary fix for the domestic economy's current labor needs, guest worker programs encourage the receiving society to treat immigrants as mere means to an end rather than as potentially permanent members of its communities. By labeling the immigrant a temporary guest, such programs contribute to a climate of inflexibility and intolerance vis-a-vis the cultural pluralism immigrants inevitably generate—a belief that immigrants should be temporary and should not change the "character" of our communities.[67]

In 1952, Congress passed a number of immigration reforms in the McCarran-Walter Act, which re-codified all of the immigration law, repealing some laws and creating new ones including revised illegal entry and re-entry provisions.[68] The revised illegal entry offense was categorized as misdemeanor punishable by up to six months in prison,[69] and the second offense deemed a felony punishable by up to two years in prison.[70] Two years later, in 1954, the U.S. government undertook "Operation Wetback" -- a plan instituted by President Eisenhower who ordered Border Patrol to round up millions of undocumented immigrants (and U.S. citizens of Mexican descent),

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[64] *See* U.S. Dep't of Labor, *Annual Report of the Commissioner General of Immigration*, 81 tbl.49A, (noting that there were nearly 3500 convictions for illegal entry and over 4100 convictions for illegal re-entry); *see also* Keller, *supra* note 61, at 80.

[65] Keller, *supra* note 61, at 80-81.

[66] Cristina M. Rodríguez, *Guest Workers and Integration: Toward a Theory of What Immigrants and Americans Owe One Another*, 2007 U. CHI. LEGAL F. 219 (2007).

[67] *Id*. at 224.

[68] *See generally* Act of June 27, 1952, Pub. L. No. 82-414, ch. 477, § 275, 66 Stat. 163; *see also* Keller *supra* note 61, at 83. Under the revised illegal entry provision, an "alien" (i.e., a noncitizen) who "(1) enters 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) obtains entry to the United States by a willfully false or misleading representation or the willful concealment of a material fact." Thus, consistent with the initial enactment of the law, illegal entry was a criminal offense, but illegal presence in the U.S. was merely a civil offense.

[69] Act of March 4, 1929, Pub. L. No. 70-1018, ch. 690, § 2, 45 Stat. 1551 (The 1929 version of the law made the first offense punishable by up to a year.).

[70] Act of June 27, 1952, Pub. L. No. 82-414, ch. 477, § 275, 66 Stat. 163, 229 (The illegal entry provision was codified at 8 U.S.C. § 1325, where it remains.).

and begin deportation efforts.[71] By 1964, the Bracero program ended. Despite the program's termination, less expensive Mexican labor remained in high demand, but many Mexican workers no longer had legal status to work in the U.S.[72]

The 1965 Immigration and Nationality Act was the first immigration-related statute to be revised after the 1964 Civil Rights Act.[73] The Immigration and Nationality Act previously included discriminatory national origin quotas that permitted large numbers of immigrants from Europe, while limiting immigration from other regions of the world.[74] The current Immigration and Nationality Act prohibits such national origin discrimination and permits that each country receive seven percent of available visas.[75] This has resulted in a disparate impact on individuals who would seek to migrate legally from India, China, the Philippines, and Mexico, as their wait list for the major categories of legal visas stretches for decades, while wait lists from most European countries are non-existent.[76] However, the Immigration and Nationality Act also remedied the more extreme prior disparities caused by the former discriminatory quotas, resulting in changing demographics of immigration to the U.S. In 1960, 75% of immigrants came from Europe, whereas by 2012, that

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[71] Juan Ramón García, *Operation Wetback: The Mass Deportation of Mexican Undocumented Workers in 1954*, (United States: Praeger 1980); Ian F. Haney-López, *Racism on Trial: The Chicano Fight for Justice*, (Massachusetts: Belknap Press, 2003); *see also* "Depression War, and Civil Rights, Hispanics in the Southwest," *U.S. House of Representatives: History, Art, and Archives*, https://history.house.gov/Exhibitions-and-Publications/HAIC/Historical-Essays/Separate-Interests/Depression-War-Civil-Rights/ (accessed July 9, 2019).

[72] Keller, *supra* note 61, at 88-89.

[73] Immigration and Nationality Act of 1952, Pub. L. 82-414, 66 Stat. 163 (codified at 8 U.S.C. ch.12).

[74] *See* Quota Act of 1921, Pub. L. No. 67-5, ch. 8, § 2, 42 Stat. 5; Immigration Act of 1924, Pub. L. No. 68-139, ch. 190, § 11, 43 Stat. 153.

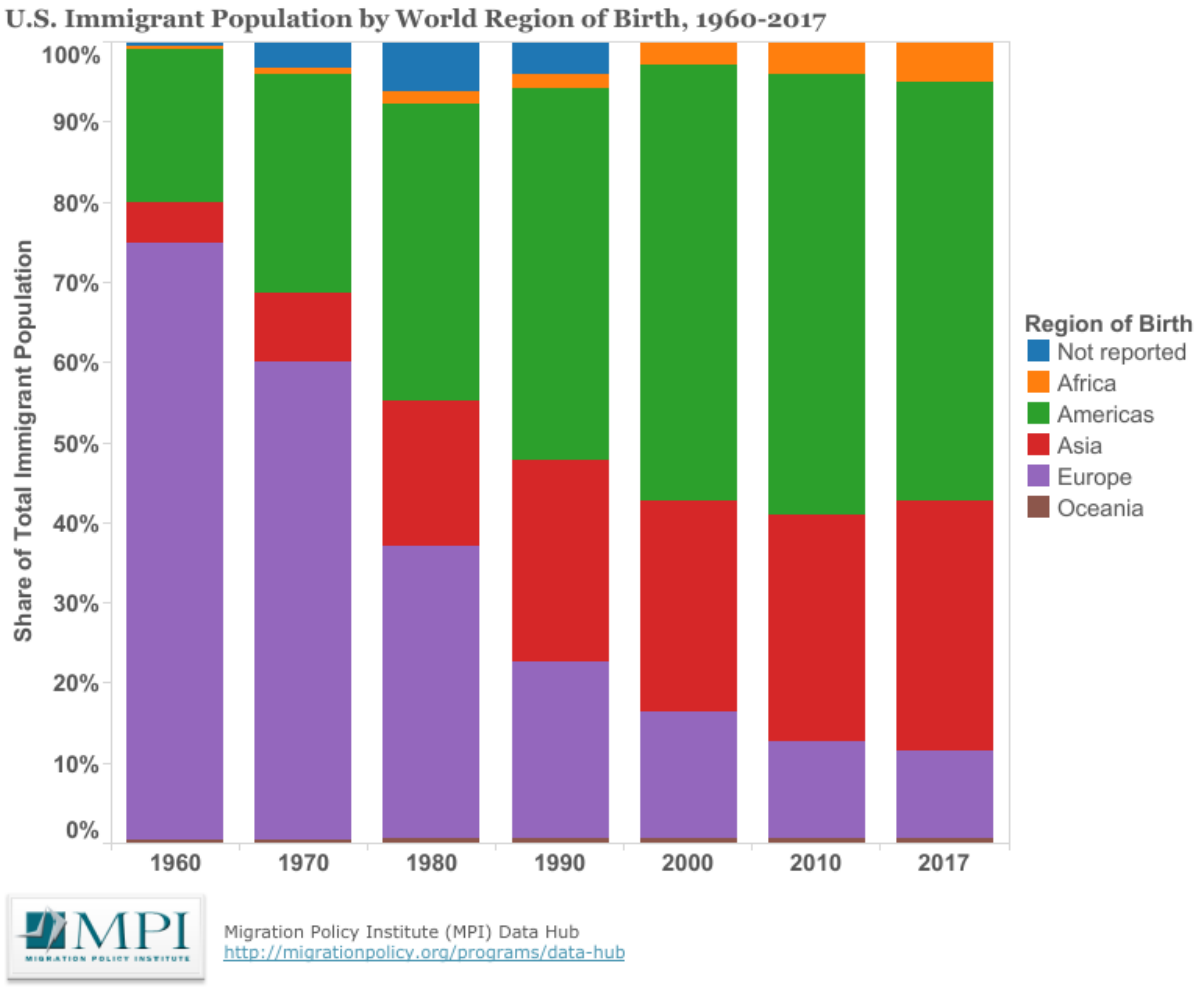
[75] 8 U.S.C. §§ 1152(a)(1)(nondiscrimination) and 1152(a)(2)(with limited exceptions, family-sponsored and employment-based visas given to natives of each foreign state not exceed 7 percent of worldwide total).

[76] *See, e.g.,* David J. Bier, "Immigration Wait Times from Quotas Have Doubled: Green Card Backlogs are Long, Growing and Inequitable," Cato Institute, June 18, 2019, pp. 2-3 https://object.cato.org/sites/cato.org/files/pubs/pdf/pa-873-updated.pdf (reviewing United States Citizenship and Immigration Services processing times and finding that:

> The country limits result in each nationality waiting in lines that move at different speeds within each category. The wait time for Mexican siblings of U.S. citizens is different from that of Filipino siblings of U.S. citizens, and both wait times differ from those of Mexican or Filipino spouses of legal permanent residents. For the most part, just four nationalities—Indians, Chinese, Filipinos, and Mexicans—reach the country limits. When a nationality reaches the country limit, nationals of other countries pass them in the line. Each month, the State Department publishes the Visa Bulletin, which informs immigrants who entered the line before a certain date that they may now apply for a green card. For example, in October 2018, the date for Mexican-born siblings of U.S. citizens was January 22, 1998, meaning that Mexican-born siblings had waited about two decades for the chance to apply for a green card.

number dropped to less than 12%.[77] As the following Census data analyzed by Migration Policy Institute illustrates, from 1965 to 2017, immigration has changed from largely European to largely non-European:

Table 1: *Regions of Birth for Immigrants in the United States, 1960-Present*[78]



Source: Migration Policy Institute tabulation of data from U.S. Census Bureau, 2010 and 2017 American Community Surveys, and 2000 Decennial Census; data for 1960 to 1990 were from Campbell J. Gibson and Emily Lennon, "Historical Census Statistics on the Foreign-Born Population of the United States: 1850-1990" (Working Paper No. 29, U.S. Census Bureau, Washington, D.C., February 1999).

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[77] "The Facts on Immigration Today," Center for American Progress, Oct. 23, 2014, https://www.americanprogress.org/issues/immigration/reports/2014/10/23/59040/the-facts-on-immigration-today-3/.

[78] Migration Policy Institute, *Regions of Birth for Immigrants in the United States, 1960-Present*, https://www.migrationpolicy.org/programs/data-hub/us-immigration-trends (accessed July 9, 2019) (noting "[t]his bar chart displays the immigrant population in the United States, between 1960 and 2017, by region of birth. The chart demonstrates the significant shift in origins—from mostly European to predominantly Latin American and Asian, and more recently African—that resulted after enactment of the 1965 amendments to the Immigration and Nationality Act.").

During the same period of time, and particularly since the 1990s, U.S. immigration policy became stricter.[79] An example of such stringent legislation came in 1996 when Congress passed the Illegal Immigration Reform and Immigration Responsibility Act.[80] This legislation amended 8 U.S.C. § 1325 to make it possible for a noncitizen "apprehended while entering or attempting to enter the United States at a time or place other than as designated by immigration officers" to be charged with a civil penalty.[81] The Illegal Immigration Reform and Immigration Responsibility Act also introduced bars to reentry to the U.S. for individuals who had previously accrued unlawful presence in the U.S., such that persons who would otherwise have access to legal status under other provisions under the Immigration and Nationality Act could no longer enter the U.S. legally.[82] Scholars have also documented that stricter immigration controls have been pushed by xenophobic reactions to non-white immigrants.[83] In particular, scholars have pointed to policies like "Secure Communities" and state laws like Arizona's S.B. 1070 as targeting Latino immigrants.[84]

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[79] *See, e.g.*, Yolanda Vázquez, *Constructing Crimmigration: Latino Subordination in A "Post-Racial" World*, 76 OHIO ST. L.J. 599, 636-37 (2015) (tracing the history of immigration policy developments from the 1980s to today); David Alan Sklansky, *Crime, Immigration, and Ad Hoc Instrumentalism*, 15 NEW CRIM. L. REV. 157, 157 (2012) (describing the "rise of an intertwined regime of "crimmigration" law. . . attributed to some combination of nativism, overcriminalization"); César Cuauhtémoc García Hernández, *Creating Crimmigration*, 2013 B.Y.U. L. REV. 1457, 1461-67 (2013) (assessing the disparate racial impacts of the criminal justice system on contemporary immigration enforcement); *see also* Yolanda Vázquez, *Perpetuating the Marginalization of Latinos: A Collateral Consequence of the Incorporation of Immigration Law into the Criminal Justice System*, 54 HOW. L.J. 639, 666 (2011) (examining the disparate deportation of Latinos; in 2009 comprising ninety-four percent of deportations).

[80] Immigration Reform and Immigration Responsibility Act, Division C of Pub. L. No. 104-208, 110 Stat. 3009-546 (1996).

[81] *Id.* § 105, 110 Stat. 3009-556 (codified at 8 U.S.C. § 1325).

[82] *Id.* § 301, 110 Stat. 3009-576 (codified at 8 U.S.C. § 1182(a)) (introducing 3- and 10-year bars to reenter the U.S. for certain individuals who have accrued various lengths of unlawful presence in the U.S.).

[83] *See, e.g.,* Kevin Johnson, *Doubling Down on Racial Discrimination: The Racially Disparate Impacts of Crime-Based Removals*, 66 CASE W. RES. L. REV. 993, 1000-01, 1002, 1017 (2016) (the people most directly affected by the failure of comprehensive immigration reform and increased removals are noncitizens of color); Doris Marie Provine and Roxanne Lynn Doty, *"The Criminalization of Immigrants as a Racial Project,"* JOURNAL OF CONTEMPORARY CRIMINAL JUSTICE 27(3), 261-77 (2011) (examining how contemporary immigration policies "reinforce racialized anxieties"); s*ee generally* Karla Mari McKanders, *The Constitutionality of State and Local Laws Targeting Immigrants*, 31 U. ARK. LITTLE ROCK L. REV. 579 (2009).

[84] *See* Mariela Olivares, *Intersectionality at the Intersection of Profiteering and Immigration Detention*, 94 NEB. L. REV. 963, 1010-12 (2015) (reviewing state and federal immigration policies passed between 1965-2015, including "Secure Communities" and Arizona's S.B. 1070 and observing that more recent "historical and contemporary efforts highlight the fact that, although neither federal nor local laws explicitly and formally include racially or ethnocentrically prohibitive provisions, the practical effect of law and policy is to continue to disparately oppress immigrants of color and, particularly, Latina/os.").

As discussed above, the criminalization of illegal entry under 8 U.S.C. § 1325 has been around for exactly 90 years.[85] Yet, because enforcement is at the discretion of the president, each administration has applied it with varying degrees of intensity. For the first decade after Congress passed 8 U.S.C. § 1325, the U.S. prosecuted more than 44,000 illegal entry cases.[86] Due to the implementation of various economic and social programs in addition to the fact that the southern border was largely unguarded, the years between 1987 and 1992 saw a slump in the rate of apprehension and subsequent prosecutions for illegal entry.[87] From 1996 to 2000, the Clinton Administration remained under 20,000 immigration prosecutions a year.[88] From 2001-2002, the Bush Administration prosecuted a similar amount of immigration cases, holding fairly steady at around 20,000 prosecutions a year.[89] In November of 2002, Congress passed the Homeland Security Act, officially creating the Department of Homeland Security giving it the power to refer the prosecution of immigrants.[90] The year 2003 was subsequently marked by a slight increase of immigration prosecutions, and by 2008 this slight increase in prosecutions peaked to 80,000 cases a year.[91] In 2009, the Obama Administration continued with increasing immigration prosecutions and in 2013 at its peak, prosecuted over 95,000 immigration violation cases in a single year.[92] In 2016, the criminal prosecutions for immigration violations accounted for 52 percent of all federal criminal prosecutions.[93] Of the prosecutions involving immigration violations, 35,367 out of the 69,298 cases involved charges under 8 U.S.C. § 1325.[94]

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[85] *See supra* note 59; 8 U.S.C. § 1325; Act of Mar. 4, 1929, Pub. L. No. 70-1018, § 2, 45 Stat. 1551 (final version of the law), http://legisworks.org/congress/70/publaw-1018.pdf.

[86] Gaby Del Valle, "The Dark, Racist History of Section 1325 of U.S. Immigration Law," *VICE News,* June 27, 2019, https://news.vice.com/en_us/article/a3x8x8/the-dark-racist-history-of-section-1325-of-us-immigration-law.

[87] Keller, *supra* note 61, at 76.

[88] Transactional Records Access Clearinghouse Reports, *Immigration Now 52 Percent of All Federal Crime Prosecutions*, https://trac.syr.edu/tracreports/crim/446/ (accessed July 28, 2019).

[89] Ibid.

[90] Homeland Security Act of 2002, Pub. L. 107-296 (codified at 6 U.S.C. § 101).

[91] Transactional Records Access Clearinghouse Reports, *Immigration Now 52 Percent of All Federal Crime Prosecutions*.

[92] Ibid.

[93] Ibid.

[94] Ibid. Other immigration violation charges in the 69,298 figure include those under: 8 U.S.C. § 1326 (Reentry of a deported noncitizen), 8 U.S.C. § 1324 (Bringing in and harboring certain noncitizens), 8 U.S.C. § 1546 (Fraud and misuse of visas, permits, and other documents), 18 U.S.C. § 1544 (Misuse of passport), 18 U.S.C. § 1028 (Fraud and related activity – Id documents), 18 U.S.C. § 1542 (False statements in application and use of passport), 18 U.S.C. § 922 (Firearms; Unlawful acts), 21 U.S.C. § 841 (Drug abuse Prevention & Control-Prohibited acts A), & 18 U.S.C. § 371 (Conspiracy to commit offense or to defraud the U.S.).

At present, the overwhelming majority of persons crossing the southern border are people of color, primarily from Latin America.[95] Border Patrol data about arrests at the southern border with Mexico and northern border with Canada from FY 2015-2018, show that a total of 837,518 individuals were arrested, the great majority of whom were arrested at the southern border.[96] Of the people arrested by the Border Patrol, 537,650 (64.2%) were from Mexico, 110,802 (13.2%) were from Guatemala, 72,402 (8.6%) were from El Salvador, 68,088 (8.1%) were from Honduras, and 11,600 (0.01%) were from India.[97]

In addition, the Trump Administration's characterization of certain countries exacerbates harmful and untrue stereotypes about immigrants of color, including Latino immigrants. Recent comments from political leaders single out immigrants of color as somehow being less desirable than those from countries where the population is primarily white.[98] Then candidate Trump's characterization of Mexicans as "rapists and murderers"[99] further inflames negative and untrue connotations about Mexicans and immigrants from Mexico and these statements have been considered by federal courts as indicia of discriminatory intent.[100] Likewise, the Administration's

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[95] From 2010-2014, 71% of unauthorized immigrants in the U.S. were from Mexico and Central America, and 4% were from South America, such that 75% were from Latin American countries. Zong et al., "Frequently Requested Statistics"; *see also* Dara Sharif, "Haitians and Africans Are Increasingly Among Those Stranded Along US – Mexico Border by Trump Immigration Policies," *The Root*, July 9, 2019, https://www.theroot.com/haitians-and-africans-are-increasingly-among-those-stra-1836201429.

[96] Transactional Records Access Clearinghouse Reports, *Border Patrol Arrests*, https://trac.syr.edu/phptools/immigration/cbparrest/ (accessed July 11, 2019) ("The data currently begin in October 2014 and track Border Patrol apprehensions through April 2018. (Data for two months - August and September 2017 - has not as yet been received.) Additional FOIA requests are currently outstanding for more recent time periods. As more data become available, the App will continue to be updated.").

[97] Ibid.

[98] For example, President Trump reportedly expressed frustration with lawmakers who wished to protect immigrants from "shithole" countries such as Haiti, El Salvador, and African countries, and suggested the United States bring more people from countries like Norway. Josh Dawsey, "Trump Derides Protections for Immigrants from 'Shithole' Countries," *Washington Post*, Jan. 12, 2018, https://www.washingtonpost.com/politics/trump-attacks-protections-for-immigrants-from-shithole-countries-in-oval-office-meeting/2018/01/11/bfc0725c-f711-11e7-91af-31ac729add94_story.html; s*ee also* Ibram X. Kendi, "The Day 'Shithole' Entered the Presidential Lexicon," *The Atlantic*, Jan. 13, 2019, https://www.theatlantic.com/politics/archive/2019/01/shithole-countries/580054/; Terje Solsvik and Camilla Knudsen, "'Thanks, but no thanks' – Norwegians Reject Trump's Immigration Offer," *Reuters*, Jan. 12, 2018, https://www.reuters.com/article/us-usa-trump-immigration-norway/thanks-but-no-thanks-norwegians-reject-trumps-immigration-offer-idUSKBN1F11QK.

[99] *See Centro Presente v. U.S. Dep't of Homeland Sec.*, 332 F.Supp.3d 393, 400-01 (D. Mass. 2018) (allegations quoting then-candidate Trump regarding Mexican immigrants and alleging they are sending criminals and rapists); Katie Reilly, "Here Are All the Times Donald Trump Insulted Mexicans," *Time Magazine*, Aug. 31, 2016, https://time.com/4473972/donald-trump-mexico-meeting-insult/.

[100] *See Centro Presente v. U.S. Dep't of Homeland Sec.*, 332 F.Supp.3d 393, 412 (finding that Temporary Protective Status (TPS) recipients adequately alleged that the change in TPS policy raised a serious question of equal protection and due process); *Ramos v. Nielsen*, 336 F.Supp.3d 1075, 1098 (N.D. Cal. 2018) ("Plaintiffs have provided sufficient evidence to raise serious questions as to whether a discriminatory purpose was a motivating factor in the decisions to terminate the [Temporary Protective Status] designations. In particular, Plaintiffs have

rhetoric about building a wall between the U.S. and Mexico in order to keep Mexican immigrants out of the U.S. has been considered as additional evidence of the bias against Latino individuals and Latino immigrants.[101] These statements add to historic and unfortunately ongoing discriminatory treatment of immigrants of color (including immigrants from Latin America) in the United States.[102]

Other Changes in Demographics of Migrants and Factors for Migration

The typical migrant crossing the southern boarder used to be a single man from Mexico looking for work in the United States, but today, there are actually more Mexicans leaving the United States than entering.[103] In recent years, typical migrants are families or children escaping violent crime, unrestrained gangs, and failing economies in their home countries in Central America.[104] These families seeking asylum turn themselves into Border Patrol at a higher rate, attempting to

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provided evidence indicating that (1) the [Dep't. Of Homeland Security] Acting Secretary or Secretary was influenced by President Trump and/or the White House in her [Temporary Protective Status] decision-making and (2) President Trump has expressed animus against non-white, non-European immigrants. As this Court noted, even if the [Dep't. Of Homeland Security] Secretary or Acting Secretary did not "personally harbor animus . . ., their actions may violate the equal protection guarantee if President Trump's alleged animus influenced or manipulated their decision making process."); *Regents of the Univ. of California v. U.S. Dep't of Homeland Sec.*, 908 F.3d 476, 514-15 (9th Cir. 2018) (holding that because U.S. Citizenship and Immigration Services retained ultimate discretionary authority over protections granted by Deferred Action for Childhood Arrivals, illegal immigrants did not possess a liberty or property interest protected by due process; but upholding plaintiff's equal protection claim given that the recession of Deferred Action for Childhood Arrivals was motivated by discriminatory animus).

In fact, studies have shown that immigrants (who are majority Mexican nationals) commit fewer crimes than U.S. citizens. *See, e.g.*, Anna Flagg, "Is There a Connection Between Undocumented Immigrants and Crime?," *The Marshall Project*, May 13, 2019, https://www.themarshallproject.org/2019/05/13/is-there-a-connection-between-undocumented-immigrants-and-crime (citing various studies and adding her own study comparing FBI crime data to immigration data).

[101] Kristen Martnez-Gugerli, "Xenophobia and the American Immigration Debate: The Way We View Latino Immigrants," *Panorama*, Oct. 11, 2018, https://www.panoramas.pitt.edu/health-and-society/xenophobia-and-american-immigration-debate-way-we-view-latino-immigrants.

[102] Lee J. Terán, "Civil Rights and Immigration: Fifty Years of Failed U.S. Immigration Laws," Holding up the Mirror 50 Years Later, Mexican American in Texas: 1968-2019, Reports and Recommendations to the U.S. Commission Civil Rights," Nov. 18, 2018, ch. 3: "Civil Rights and Immigration: Fifty Years of Failed U.S. Immigration Laws" (includes list of relevant past Commission and advisory committee reports including "The Tarnished Golden Door: Civil Rights Issues in Immigration" (1980), "Federal Immigration Law Enforcement in the Southwest: Civil Rights Impacts on Border Communities" (1997) (joint report of Arizona, California, New Mexico, and Texas Advisory Committees), and "Migrant Civil Rights Issues Along the Southwest Border" (2003)).

[103] Miriam Jordan, "More Migrants Are Crossing the Border This Year. What's Changed?," *New York Times*, Mar. 5, 2019, https://www.nytimes.com/2019/03/05/us/crossing-the-border-statistics.html (hereinafter Jordan, "More Migrants Are Crossing the Border.").

[104] Adam Isacson, "The U.S. Government's 2018 Border Data Clearly Shows Why the Trump Administration is on the Wrong Track," *Washington Office on Latin America*, Nov. 9, 2018, https://www.wola.org/analysis/us-government-2018-border-data-trump-immigration-asylum-policy/ (hereinafter, Isacson, "2018 Border Data.").

enter with a legal claim of asylum.[105] In 2018, although the total number of migrants apprehended by Border Patrol was the fifth lowest total it had been since 1973, the proportion of migrants who were children and families reached a record high.[106] In 2012, only 10% of apprehended migrants were children and families whereas in 2018, it had grown to 40%.[107] From the beginning of the fiscal year in October 2018 to March 2019, Border Patrol detained 136,150 people traveling in families with children, compared with 107,212 detained during all of fiscal year 2018.[108]

The changing demographics of migrants reflects the changing living conditions in Central America, particularly El Salvador, Guatemala and Honduras, three countries with some of the world's highest levels of violent crime and homicide.[109] Although the number of unaccompanied children peaked in FY 2014 and has declined slightly since, the number of female migrants has been increasing.[110] From FY 1995 to FY 2017, female Mexican migrants averaged about 13% of all Mexican migrants.[111] Today, migrants from Central America are more likely to be female than in previous years, with women accounting for 48% of all Salvadoran migrants and 43% of all Honduran migrants in FY 2017.[112]

The Obama Administration directed aid and funding to the Northern Triangle countries of El Salvador, Guatemala, and Honduras.[113] This money was primarily distributed to U.S. agencies, international organizations, and non-profits and aimed at fostering economic growth, improving governance, and improving security in these three countries.[114] In order to receive the aid, each country's government was required to meet multiple benchmarks established by the State Department that proved they were working to combat corruption, expand their economies, and

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[105] Ibid.

[106] Ibid.

[107] Ibid.

[108] Jordan, "More Migrants Are Crossing the Border."

[109] Ibid; Isacson, "2018 Border Data."

[110] Stephanie Leutert, "Who's Really Crossing the U.S. Border, and Why They're Coming," *Lawfare*, June 23, 2018, https://www.lawfareblog.com/whos-really-crossing-us-border-and-why-theyre-coming.

[111] Ibid.

[112] Ibid.

[113] Ted Hesson, "White House Slow-walking Aid to Central America," *Politico*, Mar. 27, 2019, https://www.politico.com/story/2019/03/27/central-america-aid-1292760.

[114] Ibid.

focus on judicial reform.[115] According to a July 2019 report by the Congressional Research Office, the U.S. had allocated $2.6 billion to Central America since fiscal year 2016.[116]

In March 2019, President Trump declared that the U.S. would no longer be giving aid to Central American countries, in part because he believed the countries were encouraging migrants to come to the United States.[117] Following President Trump's declaration, the State Department determined that about $432 million in aid from prior projects (from the Fiscal Year 2017 budget) would stay in place but further funding (approximately $370 million from the Fiscal Year 2018 budget) would be held back, pending further review.[118] Immigration policy experts state that the lack of aid would likely increase the number of migrants fleeing Central America for the U.S.[119]

Policy Changes and Their Impact on Enforcement at the Southern Border

Several executive branch immigration policies directly impact the treatment of asylum seekers, families, and children: zero tolerance; metering; Migration Protection Protocols (remain in Mexico); Third Country Asylum Rule; and the decision that domestic violence is not a basis upon which asylum will be granted in the U.S.

Zero Tolerance: Prosecute All Who Cross

Zero tolerance has resulted in the separation of thousands of migrant children, including infants and toddlers, from their parents, converted them into unaccompanied minors, and forced them into shelters for 6-8 months, or more. On April 6, 2018, then-Attorney General Jeff Sessions issued the zero tolerance policy memorandum for attempted entry or reentry into the United States along the Southwest border (defined as the border between Mexico and California, Arizona, New Mexico,

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[115] Ibid.

[116] Congressional Research Service, *U.S. Strategy for Engagement in Central America: An Overview*, by Peter J. Meyer, July 2019, p. 1, https://crsreports.congress.gov/product/pdf/IF/IF10371; Samantha Raphelson, "U.S. Decision to Cut Central America Aid Could Worsen Migrant Crisis, Experts Say," *NPR*, Apr. 2, 2019, https://www.npr.org/2019/04/02/709089322/u-s-decision-to-cut-central-american-aid-could-worsen-migrant-crisis-experts-say.

[117] Hesson, "White House Slow-walking Aid."; Julian Borger, "Trump Plans to Cut Central America Aid, Blaming Countries for Migrant Caravans," *The Guardian*, Apr. 2, 2019, https://www.theguardian.com/world/2019/apr/03/trump-to-sanction-central-american-nations-with-aid-cuts.

[118] Matthew Lee, "US Restores Some Aid to El Salvador, Honduras, Guatemala," *Associated Press*, Jun. 18, 2019, https://www.apnews.com/0eaa42865d974e46ba04a51e21e1a81b.

[119] Raphelson, "U.S. Decision to Cut Central America."

and Texas).[120] Under the revised policy, federal prosecutors were directed to criminally prosecute all border crossers apprehended between U.S. ports of entry as criminal misdemeanors and charge them for "improper entry" under 8 U.S.C. § 1325(a).[121] A recent decision by the Ninth Circuit has called into question many of the criminal prosecutions that occurred of asylum seekers under 8 U.S.C. § 1325(a).[122] But under the zero tolerance policy, federal prosecutors began criminally prosecuting *all* adult noncitizens apprehended crossing the border regardless of whether they were seeking asylum or accompanied by minor children.[123] Adults were detained in adult criminal detention facilities, and their children "consequently" were transferred separately to shelters in a marked shift in policy.[124]

The policy was implemented when Border Patrol and Immigration and Customs Enforcement asked for guidance from the Secretary of Homeland Security "regarding various approaches for

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[120] Dep't of Justice, Office of Public Affairs, "Attorney General Announces Zero-Tolerance Policy for Criminal Illegal Entry," press release No. 18-417, Apr. 6, 2018, https://www.justice.gov/opa/pr/attorney-general-announces-zero-tolerance-policy-criminal-illegal-entry.

[121] Dep't of Justice, Office of the Attorney General, *Memorandum from the Office of the Attorney General to Federal Prosecutors Along the Southwest Border*; *Zero-Tolerance for Offenses Under 8 U.S.C. § 1325(a)*, Apr. 6, 2018, https://www.justice.gov/opa/press-release/file/1049751/download (hereinafter Dep't of Justice, *Zero-Tolerance Memorandum*). The Attorney General's memorandum "direct[ed] each United States Attorney's Office along the Southwest Border— to the extent practicable, and in consultation with [Dep't. of Homeland Security]— adopt immediately a zero-tolerance policy for all offenses referred for prosecution under section 8 U.S.C. § 1325(a). This zero-tolerance policy shall supersede any existing policies." Ibid. Congress made improper entry, i.e., not at a port of entry, a misdemeanor offense in 8 U.S.C. § 1325.

[122] *United States v. Corrales-Vázquez*, No. 18-50206, 2019 WL 3311349 (9th Cir. July 25, 2019), http://cdn.ca9.uscourts.gov/datastore/opinions/2019/07/24/18-50206.pdf.

[123] Congressional Research Service, *The Trump Administration's "Zero Tolerance" Immigration Enforcement Policy*, by William A. Kandel, Feb. 26, 2019, pp. 7-8, https://crsreports.congress.gov/product/pdf/R/R45266 (hereinafter CRS, *Zero Tolerance*); *see also Oversight of Family Separation and U.S. Customs and Border Protection Short-Term Custody under the Trump Administration: Hearing Before the H. Comm. on the Judiciary*, 116th Cong. 1 (2019) (testimony of Brian S. Hastings, Chief, Law Enforcement Operations Directorate, U.S. Border Patrol, U.S. Customs and Border Protection), https://docs.house.gov/meetings/JU/JU00/20190725/109852/HHRG-116-JU00-Wstate-HastingsB-20190725.pdf. ("Consequently, when a parent or legal guardian traveling with his or her child was accepted for prosecution by [Department of Justice] under Zero Tolerance and was transferred to U.S. Marshals Service custody for the duration of their criminal proceedings, the child could not remain with the parent or legal guardian during criminal proceedings or subsequent incarceration. This is standard for criminal prosecutions when the defendant is incarcerated. Because the detained parent was not able to provide care and physical custody to the child, the child became an Unaccompanied Alien Child, as defined by 6 U.S.C. § 279(g). Section 235(b)(3) of the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 which generally requires an [Unaccompanied Alien Child] in the custody of [Dep't of Homeland Security] be referred to the custody and care of the [Department of Health and Human Services Office of Refugee Resettlement].")

[124] Ibid., 8; *see* "Where Are the Migrant Children Facilities? Scattered Across America," *Washington Post*, June 25, 2018, https://www.washingtonpost.com/graphics/2018/national/migrant-child-shelters/.

implementing Department of Justice's April 2018 memo."[125] In response, then Secretary of Homeland Security Kirstjen Nielsen approved Department of Justice's recommended policy on May 4, and subsequently issued internal guidance on May 11, 2018, implementing the family separation policy.[126]

Shortly thereafter, at the news conference in San Diego, California near the Southern border with Tijuana, Mexico, then-Attorney General Sessions acknowledged that the zero tolerance policy does not have exceptions for those seeking asylum or accompanying minors:

> I have put in place a "zero tolerance" policy for illegal entry on our Southwest border. If you cross this border unlawfully, then we will prosecute you. It's that simple. . . . I have no doubt that many of those crossing our border illegally are leaving difficult situations. But we cannot take everyone on Earth who is in a difficult situation.[127]

Prior to zero tolerance, only a small number of migrant children were separated from their parents if the relationship could not be confirmed, or if they were a threat to the safety of the child.[128] The exact number of family separations prior to zero tolerance is unknown given the fact that Department of Health and Human Services, Office of Refugee and Resettlement staff had only begun informally tracking family separations in 2016.[129] Then-Department of Homeland Security Secretary Nielsen admitted, however, that the rate of family separation under the Obama

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[125] U.S. Dep't of Justice, Justice News, "Attorney General Sessions Delivers Remarks Discussing the Immigration Actions of the Trump Administration," May 7, 2018, https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-discussing-immigration-enforcement-actions (hereinafter Justice News, "Sessions Delivers Remarks.").

[126] U.S. Gov't Accountability Office, *Unaccompanied Children: Agency Efforts to Reunify Children With Parents Separated at the Border*, GAO 19-163, Oct. 2018, p. 7, https://www.gao.gov/assets/700/694963.pdf (hereinafter GAO 19-163, *Unaccompanied Children*) ("Prior to the Attorney General's April 2018 memo, according to [Department of Homeland Security] officials, accompanied children at the border were generally held with their parents in [U.S. Customs and Border Protection] custody for a limited time before being transferred to ICE and released pending removal proceedings in immigration court. However, according to [Department of Homeland Security] and [Department of Health and Human Services] officials, [Department of Homeland Security] has historically separated a small number of children from accompanying adults at the border and transferred them to [Office of Refugee Resettlement] custody for reasons such as if the parental relationship could not be confirmed, there was reason to believe the adult was participating in human trafficking or otherwise a threat to the safety of the child, or if the child crossed the border with other family members such as grandparents without proof of legal guardianship. [The Office of Refugee and Resettlement] has traditionally treated these children the same as other UAC [Unaccompanied Minor].")

[127] Justice News, "Sessions Delivers Remarks."

[128] GAO 19-163, *Unaccompanied Children*, p. 7.

[129] Dep't of Health and Human Services, Office of Inspector General, *Separated Children Placed in Office of Refugee Resettlement Care*, OEI-BL-18-00511, January 2019, p. 6, https://oig.hhs.gov/oei/reports/oei-BL-18-00511.pdf. (hereinafter Dep't. of Health and Human Services, OEI-BL-18-00511, *Separated Children*).

Administration was less than it is under the Trump Administration.[130] According to an investigation by the Department of Health and Human Services, Office of Inspector General separated children accounted for 0.3% of all unaccompanied minors taken into Department of Health and Human Services custody near the end of the Obama Administration in late 2016, and by August 2017 that number had increased to 3.6%.[131] Under zero tolerance, relevant agencies began the wholesale separation of children from families as the norm, rather than the exception. Some parents were not provided with clear notice that their children were being taken from them, and some parents have been deported without their children, making reunification extremely difficult.[132] The removal of children from their families without a determination of the parent's fitness raises civil rights concerns, including constitutional due process rights to family integrity.[133]

Immediately after implementation, the separation of children from their parents at the border led to "international condemnation," and widespread protest in the U.S.[134] In response, on June 20, 2018, President Trump signed an Executive Order amending the policy to include "preservation of the 'family unit' by keeping migrant families together during criminal and immigration proceedings to the extent permitted by law."[135] The Executive Order does not require family reunification of the thousands of children that had already been separated from their parents and does not prohibit family separation. Despite the Executive Order ending the policy and ongoing litigation resulting in federal court orders to reunify migrant children with their families,[136] family separation, as well as accounts that the government is using the threat of family separation to force

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[130] Lori Robertson, "Did the Obama Administration Separate Families," *Factcheck*, June 20, 2018, https://www.factcheck.org/2018/06/did-the-obama-administration-separate-families/. Members of the Obama Administration recall considering all possible options for dealing with the surge of unaccompanied minors in 2014, but could not bring themselves to implement family separation because they believed it to be morally wrong.

[131] Dep't of Health and Human Services, OEI-BL-18-00511, *Separated Children*, p. 6.; Amy Goldstein, "IG: Trump Administration Took Thousands More Migrant Children From Parents," *Washington Post*, Jan. 17, 2019, https://www.washingtonpost.com/local/immigration/ig-trump-administration-took-thousands-more-migrant-children-from-parents/2019/01/17/c05f51e6-19c6-11e9-8813-cb9dec761e73_story.html?utm_term=.f2f021e51995.

[132] Dep't of Homeland Security, Office of the Inspector General, *Special Review – Initial Observations Regarding Family Separation Issues Under the Zero Tolerance Policy*, Sept. 27, 2018, pp. 12-15, https://www.oig.dhs.gov/sites/default/files/assets/2018-10/OIG-18-84-Sep18.pdf (hereinafter Dep't. of Homeland Security, Office of the Inspector General, *Special Review*).

[133] *See infra* note 263.

[134] Prelim. Inj., *Ms. L. v. ICE*, 310 F.Supp.3d 1133 (S.D. Cal. 2018), at 2.

[135] Affording Congress an Opportunity to Address Family Separation, 2018 DAILY COMP. PRES. DOC. 1 (June 20, 2018), https://www.whitehouse.gov/presidential-actions/affording-congress-opportunity-address-family-separation/.

[136] Ibid.

parents to abandon asylum claims, have continued.[137] Miriam Abaya from the Young Center for Immigrant Children's Rights told the Commission that:

> Department of Homeland Security officials with no child welfare expertise are making split-second decisions and these decisions have traumatic lifelong consequences that take months to undo. We are deeply concerned that family separation continues to be used solely to deter families from exercising their legal right to seek protection.[138]

The practice of family separation actually started a year before then-Attorney Sessions' public announcement on zero tolerance in April 2018 when Department of Homeland Security operated a "pilot program" for zero tolerance in El Paso.[139] According to a Government Accountability Office report, the El Paso program "processed approximately 1,800 individuals in families and 281 individuals in families were separated under this initiative."[140] The program ended in November 2017 and Border Patrol officials informed Government Accountability Office that there were no other similar local initiatives that occurred prior to the Attorney General's April 2018 zero tolerance memo.[141]

No Plan for Reunification of Migrant Children

The Departments of Homeland Security and Health and Human Services did not coordinate plans or communicate prior to the Administration's zero tolerance announcement and were not prepared

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[137] Laura Peña, "The Real National Emergency: Zero Tolerance & the Continuing Horrors of Family Separation at the Border," *Texas Civil Rights Project*, Feb. 2019, https://texascivilrightsproject.org/wp-content/uploads/2019/02/FamilySeparations-Report-Final.pdf.

[138] Miriam Abaya Testimony, *Public Comment Session,* pp. 104-105.

[139] Lomi Kriel, "Trump Moves to End 'Catch and Release', Prosecuting Parents and Removing Children Who Cross Border," *Houston Chronicle*, Nov. 25, 2017, https://www.houstonchronicle.com/news/houston-texas/houston/article/Trump-moves-to-end-catch-and-release-12383666.php; Alan Gómez, "Democrats Grill Trump Administration Officials Over Family Separation Policy on the Border," *USA Today*, Feb. 7, 2019, https://www.usatoday.com/story/news/politics/2019/02/07/democrats-trump-administration-family-separation-policy-border-immigration/2794324002/; Lisa Riordan Seville and Hannah Rappleye, "Trump Admin Ran 'Pilot Program' for Separating Migrant Families in 2017," *NBC News*, June 29, 2018, https://www.nbcnews.com/storyline/immigration-border-crisis/trump-admin-ran-pilot-program-separating-migrant-families-2017-n887616 ("More than 1,000 children were separated between October 2016 and September 2017, and 703 were separated between October 2017 and February 2018, according to [the Department of Homeland Security]. It's unclear how many of those 1,768 children were separated after President Donald Trump's inauguration in January 2017. NBC repeatedly asked [the Department of Homeland Security] for comprehensive data, but the agency declined to provide month-by-month figures, did not provide data prior to October 2016 and did not supply any numbers for March and April 2018.").

[140] GAO 19-163, *Unaccompanied Children*, p. 8.

[141] Ibid.

for the increased number of children who would be in the care of Health and Human Services.[142] Brian Hastings, Chief of Law Enforcement Operations for Customs and Border Protection, recently testified at a Judiciary Committee hearing that Customs and Border Protection did not have a plan to reunify children with their parents once it had been determined that the parent was to be deported.[143] While Border Patrol was responsible for the deportation of parents, Hastings reported that whether or not the parent would be reunited with their child was not a consideration before deportation.[144]

Due to the lack of coordination, for its part, Health and Human Services was not fully prepared to reunite the separated families.[145] A Government Accountability Office report found that Health and Human Services has no "specific procedure" for reuniting separated children with their families.[146] Kevin McAleenan, Acting Secretary of the Department of Homeland Security, recently testified before the House Oversight Committee that while Border Patrol does track the relationship of the child and adult when entering the border, it requires coordination of other immigration agencies, such as Department of Health and Human Services and Immigration and Customs Enforcement, in order to actually reunify a child with their parent.[147] McAleenan went on to testify that additional funding would be used to create an "immigration portal" to consolidate all the data from the different immigration agencies to more efficiently reunite the separated families.[148]

Media accounts have also reported that the Department of Homeland Security has continuously failed to comply with the *Flores* agreement which requires Border Patrol to transfer

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[142] Ibid., 13.

[143] *Oversight of Family Separation and U.S. Customs and Border Protection Short-Term Custody under the Trump Administration*, *Hearing Before the H. Comm. On the Judiciary*, 116th Cong. (July 25, 2019), 1:15:50-1:16:25, https://judiciary.house.gov/legislation/hearings/oversight-family-separation-and-us-customs-and-border-protection-short-term.

[144] Ibid., 1:16:18 (video testimony of Chief Brian Hastings to House Judiciary Committee. Question: "You would do the deportation before reunification without any knowledge of whether the parents are being reunified? Answer: Yes.").

[145] GAO 19-163, *Unaccompanied Children*, p. 22.

[146] Nomaan Merchant and Colleen Long, "No Clear Plan Yet on How to Reunite Parents with Children," *AP News*, June 20, 2018, https://apnews.com/8c3d79185d904b2abcc6f3debb9eb870.

[147] *Hearing with Acting Secretary of Homeland Security Kevin K. McAleenan: Hearing Before the H. Comm. on Oversight and Reform*, 116th Cong. (2019) (statement of Kevin K.McAleenan, Acting Director, Department of Homeland Security), https://oversight.house.gov/legislation/hearings/with-the-acting-secretary-of-homeland-security-kevin-k-mcaleenan.

[148] Ibid.

unaccompanied minors to Health and Human Services within 72 hours of making the determination that a child is in fact an unaccompanied child.[149]

Metering: Not Allowing Asylum-Seeking Families to Enter

Concurrent with the zero tolerance policy, the federal government also regulated the flow of entry of asylum seekers through the policy of "metering," or not allowing asylum-seeking families to enter at ports of entry if space is unavailable at the port of entry processing site,[150] resulting in many asylum seekers being turned away.[151] Under U.S. law, once an individual is physically present in the U.S., he or she can apply for asylum regardless of whether or not that individual entered at a port of entry.[152] 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.[153] An increase in illegal border crossings could include asylum seekers taking more dangerous paths to

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[149] Ibid.; Caitlin Dickerson, "'There Is a Stench': Soiled Clothes and No Baths for Migrant Children at a Texas Center," *New York Times*, June 21, 2019, https://www.nytimes.com/2019/06/21/us/migrant-children-border-soap.html; Abigail Hauslohner, "U.S. Returns 100 Migrant Children to Overcrowded Border Facility as HHS Says it is Out of Space," *Washington Post*, June 25, 2019, https://www.washingtonpost.com/immigration/us-returns-100-migrant-children-to-overcrowded-border-facility-as-hhs-says-it-is-out-of-space/2019/06/25/397b0cb6-96b6-11e9-830a-21b9b36b64ad_story.html?utm_term=.ffe72d5a16f9; Isaac Chotiner, "Children Remain in Dangerous Conditions on the Texas Border," *New Yorker*, June 25, 2019, https://www.newyorker.com/news/q-and-a/children-remain-in-dangerous-conditions-on-the-texas-border; *see also* Paul LeBlanc & Pricilla Álvarez, "U.S. Moves 249 Migrant Children from Texas Facility After Reports of Poor Conditions," *CNN*, June 25, 2019, https://www.cnn.com/2019/06/24/politics/hhs-children-border-facility-clint-texas/index.html; *see also* Dep't. of Homeland Security, Office of the Inspector General, OIG-19-51, *Management Alert – DHS Needs to Address Dangerous Overcrowding and Prolonged Detention of Children and Adults in the Rio Grande Valley*, July, 2, 2019, https://www.oig.dhs.gov/sites/default/files/assets/2019-07/OIG-19-51-Jul19_.pdf

[150] Dep't. of Homeland Security, Office of the Inspector General, *Special Review*, pp. 5-7; "When metering, [Border Patrol] officers stand at the international line out in the middle of the footbridges. Before an alien without proper travel documents (most of whom are asylum-seekers) can cross the international line onto U.S. soil, those [Border Patrol] officers radio the ports of entry to check for available space to hold the individual while being processed. According to [Border Patrol], the officers only allow the asylum-seeker to cross the line if space is available," Ibid., 6.

[151] Adam Isacson, "New Border Apprehension Numbers Show Brutal Effect of 'Metering' at Ports of Entry," *WOLA*, May 9, 2019, https://www.wola.org/analysis/new-border-apprehensions-numbers-metering-effect-ports-of-entry/.

[152] Immigration and Nationality Act, 8 U.S.C. § 1158(a)(1)(2012); American Immigration Council, *Asylum in the United States*, May 14, 2018, https://www.americanimmigrationcouncil.org/research/asylum-united-states ("Asylum seekers who arrive at a U.S. port of entry or enter the United States without inspection generally must apply through the defensive asylum process.").

[153] Dep't. of Homeland Security, Office of the Inspector General, *Special Review,* p. 7 ("[T]he practice [of metering] may have unintended consequences. For instance, [the Office of Inspector General] saw evidence that limiting the volume of asylum-seekers entering at ports of entry leads some aliens who would otherwise seek legal entry into the United States to cross the border illegally").

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 were told it was closed, and subsequently drowned while attempting to cross the Río Grande River.[154]

Migration Protection Protocols

One of the most drastic policy shifts undertaken in regard to asylum is the practice of sending legal asylum seekers back to Mexico while their asylum cases are pending – this is also known as "Remain in Mexico"[155] or more formally, the "Migration Protection Protocols" (MPP).[156] According to the Department of Homeland Security's website, this policy is a "U.S. Government action whereby certain foreign individuals entering or seeking admission to the U.S. from Mexico – illegally or without proper documentation – may be returned to Mexico and wait outside of the U.S. for the duration of their immigration proceedings, where Mexico will provide them with all appropriate humanitarian protections for the duration of their stay."[157]

According the Department of Homeland Security this policy, with certain exceptions, applies to noncitizens "arriving in the U.S. on land from Mexico (including those apprehended along the border) who are not clearly admissible and who are placed in removal proceedings under Immigration and Nationality Act § 240." [158] The policy includes noncitizens "who claim a fear of return to Mexico at any point during apprehension, processing, or such proceedings, but who have been assessed not to be more likely than not to face persecution or torture in Mexico."[159] Some have criticized this new policy because when asylum seekers come to the border, instead of pleading their case in front of an asylum officer they are instead first put in front of a Border Patrol

[154] Reis Thebault, Luis Velarde, and Abigail Hauslohner, "The Father and Daughter Who Drowned at the Border Were Desperate for a Better Life, Family Says," *Washington Post*, June 26, 2019, https://www.washingtonpost.com/world/2019/06/26/father-daughter-who-drowned-border-dove-into-river-desperation/?utm_term=.75c49688ac75.

[155] Azam Ahmed and Michael Tackett, "U.S. Will Send Migrants Back to Mexico as They Wait on Asylum Claims," *New York Times*, Dec. 20, 2018, https://www.nytimes.com/2018/12/20/world/americas/us-mexico-asylum-migrants.html?module=inline.

[156] Dep't. of Homeland Security, "Migrant Protection Protocols," press release, Jan. 24, 2019, https://www.dhs.gov/news/2019/01/24/migrant-protection-protocols (The Dep't. Of Homeland Security website states that the policy makes some exceptions for unaccompanied migrant children and migrants in expedited removal proceedings.).

[157] Ibid.

[158] Ibid.

[159] Ibid.

officer who determines if they have a sufficient fear of returning to Mexico, despite the officer not likely being trained to elicit or assess relevant statements about whether the person has a credible fear of returning to their country of origin.[160] Recent data also indicate fewer asylum applicants have an attorney compared to regular court cases.[161] As of the end of June 2019, a total of 1,155 MPP cases had already been decided but asylum seekers were represented in only 14 of those cases—only 1.2 percent had legal representation.[162]

The Migrant Protection Protocols policy was resisted for many years due to lack of proof that Mexico was a safe place for migrants,[163] and it was only recently announced in December of 2018.[164] On May 7, 2019, the Ninth Circuit allowed the policy to go forward stating that the Immigration and Nationality Act granted immigration officials discretion whether to allow foreign nations to remain in the U.S. or force them to stay in Mexico while they wait for their hearing.[165] According to news reports, as well as an amicus brief filed by the labor union for federal asylum

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[160] Charles Tjersland Jr., "I became an Asylum Officer to Help People. Now I Put Them Back in Harm's Way," *Washington Post*, July 19, 2019, https://www.washingtonpost.com/outlook/i-became-an-asylum-officer-to-help-people-now-i-put-them-back-in-harms-way/2019/07/19/1c9f98f0-a962-11e9-9214-246e594de5d5_story.html?utm_term=.f771f00c22b4. (The author argues many asylum seekers have not prepared to answer questions about their time in Mexico and are unaware that the standard of proof is higher in an MPP interview with Border Patrol than it is in a regular asylum hearing, thus making it nearly impossible for them to prove a fear of returning to Mexico.); Ibid.

[161] Transactional Records Access Clearinghouse Reports, *Access to Attorneys Difficult for Those Required to Remain in Mexico*, July 29, 2019, https://trac.syr.edu/immigration/reports/568/.

[162] Ibid.

[163] According to the U.S. Dep't. of State, Mexico is not safe for migrants as they face violence, abuse and extortion, from police, immigration officers, other criminal groups, and even the gangs they sought to escape in their home countries. U.S. Dep't of State, *2018 Country Reports on Human Rights Practices: Mexico*, Mar. 13, 2019, pp. 20-21, https://www.state.gov/reports/2018-country-reports-on-human-rights-practices/mexico/. The U.S. Dep't. of State also reports that the asylum system in Guatemala is inadequate stating that migration authorities and the police did not have sufficient training regarding the rules for establishing refugee status and that the process for referring asylum seekers was deficient. U.S. Dep't of State, *2018 Country Reports on Human Rights Practices: Guatemala*, Mar. 13, 2019, pp. 20-21, https://www.state.gov/reports/2018-country-reports-on-human-rights-practices/guatemala/.

[164] Tanvi Misra, "An Expanded 'Remain in Mexico' Policy May Cause More Suffering, Not Curb Migration," *Roll Call*, June 10, 2019, https://reimagine.rollcall.com/news/expanded-remain-mexico-policy-may-cause-suffering-not-curb-migration.

[165] *Innovation Law Lab v. McAleenan*, 924 F.3d 503 (9th Cir. 2019) (order denying stay of migrant protection protocols, allowing for them to take effect).

workers,[166] more than 11,000 migrants[167] have been returned to Mexico to wait out their asylum cases pending in the U.S., burdening migrant shelters in Mexico and putting asylum seekers at increased risk of violence. Several asylum seekers who were turned away from U.S. ports-of-entry have been killed, women have been raped, and children have been kidnapped, calling into question the relative safety of Central Americans in Mexico.[168]

Third Country Rule (Designation of Mexico and Guatemala)

On July 15, 2019, the Department of Justice's Executive Office for Immigration Review and the Department of Homeland Security's U.S. Citizenship and Immigration Services announced plans to adopt a joint interim final rule regarding asylum claims.[169] The new rule ("Third-Country Asylum Rule") revises 8 C.F.R. § 208.13(c) and 8 C.F.R. § 1208.13(c), requiring immigrants seeking asylum from the U.S.-Mexico border to first "apply for protection in a third country outside of the [immigrant's] country of citizenship, nationality, or last lawful habitual residence through which the [immigrant] transited en route to the United States."[170] The Department of Justice and Department of Homeland Security state that the interim rule is in response to the "dramatic increase in the number of aliens encountered along or near the southern land border with

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[166] Bobby Allyn, "Asylum Officers: Trump's 'Remain in Mexico' Policy is Against 'Moral Fabric' of U.S.," *NPR* June 27, 2019, https://www.npr.org/2019/06/27/736461700/asylum-officers-trumps-remain-in-mexico-policy-is-against-moral-fabric-of-u-s; Br. for The National Federation of Government Employees Local 1924 as Amici Curiae Supporting Pls.-Appellees, *Innovation Law Lab v. McAleenan*, 924 F.3d 503 (9th Cir. 2019), https://www.documentcloud.org/documents/6172520-Local-1924-Amicus-Brief.html.

[167] As of June 14, 2019, the U.S. government has sent more than 11,000 Central American asylum seekers back to Mexico. *See* Camilo Montoya-Gálvez, "Trump's Plan to Deter Migrants with 'Remain in Mexico' Faces Logistical and Legal Hurdles," *CBS News*, June 14, 2019, https://www.cbsnews.com/news/remain-in-mexico-trumps-plan-to-deter-migrants-faces-logistical-and-legal-hurdles/.

[168] "Safe Third Countries for Asylum-Seekers; Why Mexico Does Not Qualify as a Safe Third Country," *Women's Refugee Commission*, p. 2, https://www.womensrefugeecommission.org/images/zdocs/SafeThirdCountries.pdf; Kevin Sieff, "When Death Awaits Deported Asylum Seekers," *Washington Post*, Dec. 26, 2018, https://www.washingtonpost.com/graphics/2018/world/when-death-awaits-deported-asylum-seekers/?utm_term=.8c8b2c1f5b80; Debbie Nathan, "Trump's 'Remain in Mexico' Policy Exposes Migrants to Rape, Kidnapping and Murder in Dangerous Border Cities," *The Intercept*, July 14, 2019, https://theintercept.com/2019/07/14/trump-remain-in-mexico-policy/; Amnesty International also reports that Mexico's asylum procuress does not provide adequate protection to refugees, finding that "the Mexican government is routinely failing in its obligations under international law to protect those who are in need of international protection, as well as repeatedly violating the *non-refoulement* principle, a binding pillar of international law that prohibits the return of people to a real risk of persecution or other serious human rights violations. These failures by the Mexican government in many cases can cost the lives of those returned to the country from which they fled." Amnesty International, *Overlooked, Under-Protected; Mexico's Deadly Refoulement of Central Americans Seeking Asylum*, 2018, p. 4, https://www.amnestyusa.org/wp-content/uploads/2018/01/AMR4176022018-ENGLISH-05.pdf.

[169] Dep't. of Homeland Security, "DHS and DOJ Issue Third-Country Asylum Rule," July 15, 2019, https://www.dhs.gov/news/2019/07/15/dhs-and-doj-issue-third-country-asylum-rule.

[170] Ibid.; Establishing Asylum Eligibility, 8 C.F.R. § 208.13; Establishing Asylum Eligibility, 8 C.F.R. § 1208.13.

Mexico," and specifically in the rise of immigrants seeking asylum when confronted with Department of Homeland Security officials.[171]

The Third Country Asylum Rule is a departure from past asylum policy, which previously allowed immigrants to apply for asylum at the U.S. border without first applying for protections in other countries before coming to the U.S. border.[172] Under this new rule, immigrants seeking protections at the U.S.-Mexico border only have viable claims under statutory withholding or Convention Against Torture protections, pursuant to 8 C.F.R. § 208.30, and thus must meet the higher reasonable-fear standard as opposed to the credible-fear standard used for determining asylum eligibility.[173] The Third Country Asylum Rule includes three exceptions to the bar to asylum eligibility: (1) if the immigrant demonstrates application for protection in at least one of the countries traveled through to get to the United States; (2) if the immigrant demonstrates they are a "victim of a severe form of trafficking in persons,"[174]; or (3) the immigrant has traveled only through a country or countries that are not parties to the 1951 Refugee Convention[175] or the 1967 Convention Against Torture[176] to get to the United States.[177]

On July 24, 2019, Jon S. Tigar, United States District Court Judge for the Northern District of California, issued a preliminary injunction temporarily barring the Administration's 'Third-

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[171] Dep't. of Homeland Security and Dep't. of Justice, *Asylum Eligibility and Procedural Modifications: Interim Final Rule; Request for Comment*, July 15, 2019, p. 5, https://s3.amazonaws.com/public-inspection.federalregister.gov/2019-15246.pdf (hereinafter Third Country Asylum Interim Final Rule).

[172] Third Country Asylum Interim Final Rule, p. 30.

[173] Ibid.; Credible fear determinations involving stowaways and applicants for admission who are found inadmissible pursuant to section 212(a)(6)(C) or 212(a)(7) of the Act of whose entry is limited or suspended under section 212(f) or 215(a)(1) of the Act, 8 C.F.R. § 208.30(e)(2) ("An alien will be found to have a credible fear of persecution if there is a *significant possibility*, taking into account the credibility of the statements made by the alien in support of the alien's claim and such other facts as are known to the officer, the alien can establish eligibility for asylum….or for withholding of removal.") (emphasis added). Cf. Reasonable fear of persecution or torture determinations involving aliens ordered removed under section 238(b) of the Act and aliens whose removal is reinstated under section 241(a)(5) of the Act, 8 C.F.R. § 203.31(c) ("The alien shall be determined to have a reasonable fear of persecution or torture if the alien establishes a *reasonable possibility* that he or she would be persecuted on account of his or her race, religion, nationality, membership in a particular social group or political opinion, or a reasonable possibility that he or she would be tortured in the country of removal.") (emphasis added); "Vindicating the Rights of Asylum Seekers at the Border and Beyond," *Asylum Advocacy*, June 2018, p. 14, https://asylumadvocacy.org/wp-content/uploads/2018/06/ASAP-Expedited-Removal-Guide.pdf.

[174] 8 C.F.R. § 214.11.

[175] Convention relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 1954.

[176] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85.

[177] Third Country Asylum Interim Final Rule, p. 22.

Country Asylum Rule' from taking effect and ordered the previous asylum system, in which only safe third countries could be considered in the process of reviewing claims to asylum in the U.S., restored.[178] Judge Tigar granted the injunction on the grounds that: the new third country rule is inconsistent with current U.S. asylum laws and provides none of the statutory protections ensuring the country is safe,[179] the administration had not complied with the Administrative Procedures Act's notice-and-comment rules thus calling into question its validity, and that the rule does not take into account the special requirements of unaccompanied minors. The Judge also found that the government's decision to promulgate the rule was arbitrary and capricious in that it reasoned to offer asylum seekers a safe alternative – Mexico – which is neither safe nor offers a complete and equitable asylum process, and finally, the public has a strong interest in ensuring that the U.S. does not subject asylum seekers to greater harm.[180]

On July 26, 2019, after threatening increased tariffs and a ban on entry of Guatemalan migrants, among other negative consequences, the Trump Administration announced an agreement with Guatemala that would require other migrants who had passed through its border to first seek asylum there.[181] According to *Voice of America*, under the new agreement, in exchange for $40 million, El Salvadoran and Honduran asylum seekers would be flown from the U.S. border to Guatemala.[182] U.S. Department of Homeland Security Director McAleenan described the document signed on July 26, 2019 as a "safe third country agreement,"[183] apparently referring to the Immigration and Nationality Act's statutory rule that to be designated so, a country must be safe for asylum seekers and moreover, persons sent there would "have access to a full and fair

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[178] *East Bay Sanctuary Covenant v. Barr*, No. 19-cv-04073-JST (N.D. Cal. July 24, 2019) (order granting preliminary injunction), at 1 ("First, Congress has already created a bar to asylum for an applicant who may be removed to a "safe third country." The safe third country bar requires a third country's formal agreement to accept refugees and process their claims pursuant to safeguards negotiated with the United States. As part of that process, the United States must determine that (1) the alien's life or freedom would not be threatened on account of a protected characteristic if removed to that third country and (2) the alien would have access to a full and fair procedure for determining a claim to asylum or equivalent temporary protection there. Thus, Congress has ensured that the United States will remove an asylum applicant to a third country only if that country would be safe for the applicant and the country provides equivalent asylum protections to those offered here. The Rule provides none of these protections.").

[179] *Id*. at § I.A.1, citing 8 U.S.C. § 1158(a)(Safe Third Country Rule).

[180] *Id*. at 1-2.

[181] *See* Michael D. Shear, Zolan Kanno-Youngs, and Elisabeth Malkin, "After Tariff Threat, Trump Says Guatemala Has Agreed to New Asylum Rules," *New York Times*, July 26, 2019, https://www.nytimes.com/2019/07/26/world/americas/trump-guatemala-asylum.html.

[182] *See* Aline Barros, "Acting DHS Secretary in Guatemala to Promote Safe Third Country Agreement," *Voice of America*, Aug. 1, 2019, https://www.voanews.com/usa/immigration/acting-dhs-secretary-guatemala-promote-safe-third-country-agreement.

[183] Shear et al., "After Tariff Threat."

procedure for determining a claim to asylum or equivalent temporary protection there."[184] U.S. State Department Human Rights Reports indicate that Guatemala is objectively unsafe for asylum seekers and the government, which has "widespread corruption," is unable to protect many Guatemalans who are fleeing and seeking asylum from human rights violations.[185] The *New York Times* reported that safe third country agreements are rare and that experts say that "it appears that no such agreement has been signed with a nation that is as ill-equipped as Guatemala to deal with asylum seekers and keep them safe."[186]

Before the agreement can be enforced, the U.S. must certify that Guatemala is able to provide safety and a full and fair asylum process.[187] The agreement was made by the outgoing Guatemalan president, and is still subject to possible litigation, as well as amendment by the new president elected in August 2019.[188]

Removing Domestic Violence as a Basis for Political Asylum

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.[189] On June 11, 2018, then-Attorney General Sessions issued a ruling reversing a 2016 Board of Immigration Appeals (BIA) decision granting an El Salvadorian woman asylum based on her claim of domestic abuse, including

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[184] 8 U.S.C. § 1158(a).

[185] *See generally* U.S. Dep't of State, *2018 Country Reports on Human Rights Practices: Mexico* (Human rights issues included reports of harsh and life-threatening prison conditions; widespread corruption; trafficking in persons; crimes involving violence against lesbian, gay, bisexual, transgender, and intersex (LGBTI) persons, persons with disabilities, and members of other minority groups; and use of forced or compulsory or child labor. Corruption and inadequate investigations made prosecution difficult, and impunity continued to be widespread.), https://www.state.gov/wp-content/uploads/2019/03/MEXICO-2018.pdf .

[186] *See* Kirk Semple, "The U.S. and Guatemala Reached an Asylum Deal: Here's What it Means," *New York Times*, July 28, 2019, https://www.nytimes.com/2019/07/28/world/americas/guatemala-safe-third-asylum.html.

[187] *See* Michael D. Shear and Zolan Kanno-Youngs, "Trump Officials Argued Over Asylum Deal with Guatemala. Now Both Countries Must Make It Work.," *New York Times*, Aug. 2, 2019, https://www.nytimes.com/2019/08/02/us/politics/safe-third-guatemala.html.

[188] *See* Elisabeth Malkin, "Alejandro Giammettei, a Conservative, Wins Guatemala's Presidency," *New York Times*, Aug. 11, 2019, https://www.nytimes.com/2019/08/11/world/americas/guatemala-election.html (discussing the agreement and predicting continued pressure to enforce it); Reuters News Service, "Guatemala Election Winner Alejandro Giammattei Says He Wants To Rewrite Controversial Trump Migration Deal," *Telegraph*, Aug. 12, 2019, https://www.telegraph.co.uk/news/2019/08/12/guatemala-election-winner-alejandro-giammattei-says-wants-rewrite/.

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

physical and sexual violence, she endured at the hands of her husband in her country.[190] The *Matter of A-B-* decision held that being a victim of domestic abuse or gang violence will not be accepted as a basis to claim asylum.[191]

After the decision in *Matter of A-B-*, the Department of Homeland Security issued guidance for asylum officers stating that "few gang-based or domestic violence claims involving particular social groups defined by the members' vulnerability to harm may . . . pass the 'significant probability' test in credible fear screenings." [192] In practice, this guidance meant that individuals seeking asylum in the United States based on domestic violence or gang-violence were unlikely to make it past the first step in seeking asylum – the initial credible fear determination – and would be deported without any review of their asylum claim.[193] In December of 2018, a federal district court found that this policy violated the Refugee Act and the Immigration and Nationality Act.[194] The district court's decision barred the federal government from enforcing this policy.[195] In January 2019, the government requested a stay, pending appeal of the court's order, which was subsequently denied by the District Court, reinforcing that the government's "unlawful policies" would be "permanently enjoined from being applied in future cases."[196]

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[190] *Matter of A-B-*, 27 I. & N. Dec. 316 (A.G. 2018) (The *Matter of A-B-* decision also overrules a prior decision, *Matter of A-R-C-G-*, 26 I&N Dec. 338 (BIA 2014), which held that in some circumstances, domestic violence survivors could receive asylum protection.).

[191] *Id.*

[192] Dep't. of Homeland Security, U.S. Citizenship and Immigration Services, *Policy Memorandum, Guidance for Processing Reasonable Fear, Credible Fear, Asylum, and Refugee Claims in Accordance with Matter of A-B-*, July 11, 2018, https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2018/2018-06-18-PM-602-0162-USCIS-Memorandum-Matter-of-A-B.pdf.

[193] *See Grace v. Whitaker*, No. 18-cv-01853, 2019 WL 329572 (D.C. Cir. Dec. 17, 2018). The court held "that Congress has not 'spoken directly' on the question of whether victims of domestic or gang-related persecution fall into the particular social group category." *Id*. at 52. The court held that Matter of A-B- "create[d] a general rule against [domestic and/or gang violence] claims at the credible fear stage" and that the rule was "not a permissible interpretation of the statute." *Id.* at 56. Additionally, the general rule "impermissibly heighten[ed] the standard at the credible fear stage[,]" rendering the rule arbitrary and capricious. *Id*.

[194] *Id*. In January 2019, the government requested a stay, pending appeal of the Court's Order, which was subsequently denied by the District Court, cementing that the governments "unlawful policies" would be "permanently enjoined from being applied in future cases." *Grace v. Whitaker*, No. 18-cv-01853, 2019 WL 329572.

[195] *Id.*

[196] *Id.*

Seeking Asylum and Credible Fear Determinations

The 1996 immigration law reforms allowed for expedited removal of immigrants who have entered the United States with invalid entry documents in which they are ordered removed without further hearings, appeals, or reviews; however, expedited removal is subject to additional procedures should the migrant express an intention to apply for asylum.[197] Migrants who express an intention to apply for asylum[198] or a credible fear of persecution in their home country, must be interviewed by an asylum officer to determine whether they are eligible for asylum, and detained until a credible fear determination has been made.[199] Under the law, the Department of Homeland Security has discretion to parole noncitizens, or release them from detention, when urgent humanitarian reasons are present or there is a significant public interest in doing so.[200] This includes when immigrants have critical medical conditions, including pregnancy.[201]

Under current Border Patrol procedures, immigrants on the southern border who are "apprehended between Ports of Entry and claim credible fear are processed for expedited removal by U.S. Border Patrol."[202] Undocumented immigrants at the southern border who arrive at ports of entry who are found to be otherwise inadmissible into the U.S. (meaning they have not arrived with a visa), and claim credible fear of persecution are also processed for expedited removal.[203] The credible fear claims of undocumented immigrants are referred to asylum officers, where the immigrants are then interviewed to determine whether they are likely to be eligible for asylum.[204] In making credible fear determinations of an asylum applicant, interviewers look to the totality of circumstances; if

[197] 8 U.S.C. § 1225(b)(1)(A)(i).

[198] 8 U.S.C. § 1158.

[199] 8 U.S.C. § 1225(b)(1)(B)(ii).

[200] *Aracely v. Nielsen*, 319 F.Supp.3d 110, 121-22 (D.C. Cir. 2018); Immigration and Customs Enforcement, *Parole of Arriving Aliens Found to Have a Credible Fear of Persecution or Torture*, Dec. 8, 2009, https://www.ice.gov/doclib/dro/pdf/11002.1-hd-parole_of_arriving_aliens_found_credible_fear.pdf.

[201] 8 C.F.R. § 212.5(b).

[202] "Claims of Fear: Customs and Border Patrol Southwest Border and Claims of Credible Fear Total Apprehensions/Inadmissibles (FY2017-FY2018)," *U.S. Customs and Border Protection*, https://www.cbp.gov/newsroom/stats/sw-border-migration/claims-fear (modified Dec. 10, 2018).

[203] Ibid. Publicly available information does not confirm the extent to which these policies have been applied at airports around the United States or the northern border (as distinct from the southern border).

[204] Dep't.of Homeland Security, Office of Immigration Statistics, *Annual Flow Report Refugees and Asylees: 2017*, Mar. 2019, p. 7, https://www.dhs.gov/sites/default/files/publications/Refugees_Asylees_2017.pdf.

the asylum application is deemed not credible based on the totality of the evidence presented, then it is sufficient for an adverse credibility determination.[205]

When seeking asylum, an immigrant subject to expedited removal seeking asylum must inform Border Patrol of the individual's (1) wish to apply for asylum, (2) fear of persecution or torture, and (3) fear of returning to the individual's home country.[206] In seeking asylum, the asylum seeker does not need to show it is more likely than not that he or she will be persecuted in his or her home country.[207] Instead, the asylum seeker need only demonstrate "good reason" to fear persecution if returning to his or her home country.[208] If an asylum seeker succeeds in demonstrating a "well-founded fear of persecution" they still may not be eligible for asylum, as that feared persecution must be "on account of his [or her] race, religion, nationality, membership in a particular social group, or political opinion."[209]

If the asylum officer finds the individual has a credible fear of persecution or torture, the asylum officer will refer the individual's case to an Immigration Judge for a full hearing on the asylum claim.[210] If the asylum officer finds the individual does not have a credible fear of persecution or torture, the individual can request review by an Immigration Judge.[211] If the individual does not request a review of the determination, Immigration and Customs Enforcement will remove the individual from the United States.[212] While asylum seekers' applications are processing, they are afforded the right to be in the United States, however, there is ongoing debate as to whether they should remain detained[213] and whether asylum seekers detained for several months during their application process are entitled to a custody hearing.[214] On July 2, a federal court preliminarily

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[205] *Xiu Xia Lin v. Mukasey*, 534 F.3d 162, 167 (2d Cir. 2008).

[206] "Questions and Answers: Credible Fear Screening," U.S. Citizenship and Immigration Services, https://www.uscis.gov/humanitarian/refugees-asylum/asylum/questions-answers-credible-fear-screening (accessed July 8, 2019).

[207] *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 442, 449 (1987).

[208] *Id.*

[209] *Eduard v. Ashcroft*, 379 F.3d 182, 190 (5th Cir. 2004) (quoting *Matter of Mogharrabi*, 19 I & N Dec. 439, 477 (BIA 1987)).

[210] "Questions and Answers," United States Citizenship and Immigration Services.

[211] Ibid.

[212] Ibid.

[213] *Damus v. Nielsen*, 313 F.Supp.3d 317 (D.C. Cir. 2018).

[214] *See Jennings v. Rodríguez*, 138 S.Ct. 830 (2018).

enjoined the Attorney General's decision that asylum seekers should be indefinitely detained, and at the time of this writing, if an asylum seeker is found to have a credible fear of persecution, they must be provided with a bond hearing and if not a risk, released on bond.[215]

The number of asylum claims filed from FY 2017 to FY 2018 increased by 12.5 percent, from 144,053 to 162,060.[216] The process of seeking asylum is very difficult and the passage rates are low. In 2017, only 13.67 percent of total asylum applicants were granted asylum, followed by 12.30 percent of applicants in 2018.[217] 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.[218] Despite the dangerous conditions in all three countries, these are lower rates of approval than persons from other countries.[219]

Increased Detention of Children

During the current Administration, a high number of migrant children, including unaccompanied minors, have been held in custody. In November 2018, Department of Health and Human Services told reporters that 14,000 undocumented immigrant children have been held in custody, which is an all-time high.[220] This record number is reportedly due in part to a new Department of Homeland Security policy requiring background checks, including immigration status information, of

[215] On July 2, 2019, a federal court issued a nationwide preliminary injunction that immigrants who have entered the U.S. without inspection, requested asylum, and who the Government has determined to have a credible fear of persecution if they are returned home, have rights to a bond hearing with substantive due process. The bond hearing must occur within 7 days after being requested, and asylum seekers who have passed a credible fear interview must also be released if the bond hearing so indicates. The court found that "it is unconstitutional to deny these class members a bond hearing while they await a final determination of their asylum request." Order on Motions RE Preliminary Injunction, *Padilla v. ICE*, No. 2:18-cv-00928 (W.D. Wash. July 2, 2019), https://americanimmigrationcouncil.org/sites/default/files/litigation_documents/challenging_credible_fear_interview_and_bond_hearing_delays_preliminary_injunction_order.pdf.

[216] Dep't. of Justice, Exec. Office for Immigration Review, *Adjudication Statistics: Total Asylum Applications*, Apr. 23, 2019, https://www.justice.gov/eoir/page/file/1163606/download.

[217] Ibid.

[218] Dep't. of Justice, Exec. Office for Immigration Review, *Adjudication Statistics: Asylum Decision Rates by Nationality*, Oct. 24, 2018, https://www.justice.gov/eoir/page/file/1107366/download (additional percentages are accounted for by abandonment, withholding of removal, withdrawal, failure to adjudicate, or other).

[219] Ibid.

[220] Tal Kopen, "More Than 14,000 Immigrant Children are in U.S. Custody, an All-time High," *San Francisco Chronicle*, Nov. 26, 2018, https://www.sfchronicle.com/nation/article/More-than-14-000-immigrant-children-are-in-U-S-13399510.php.

persons, including family members, to whom the children would be released.[221] "Previous administrations didn't look into people's immigration status when deciding whether to release children into their care, but that changed under President Trump."[222] The Administration's aggressive immigration enforcement policies, leading to deportation of persons who were not previously prioritized (such as those without a criminal record or those with family ties, Deferred Action for Childhood Arrivals, or humanitarian parole),[223] have reportedly made parents afraid to attempt to reunite with their children.[224] In the month of September 2018, Department of Homeland Security reportedly arrested 41 family members seeking to have their children released to them.[225] In December 2018, an Immigration and Customs Enforcement spokesman said that Immigration and Customs Enforcement arrested 170 immigrants when they applied to take a child from government custody, from July to November, and of those, 109 (64.1%) had no criminal record.[226] On December 18, 2018, Department of Health and Human Services changed its policy to no longer require that potential sponsors for unaccompanied children submit to fingerprint background checks when they apply to sponsor a child.[227]

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[221] Ibid. ("The reason is that children who arrive unaccompanied in the U.S. are spending more time in holding facilities before they can be released to suitable adults, often family members. One change that has especially slowed that down is an agreement Health and Human Services signed earlier this year for Immigration and Customs Enforcement to do background checks on potential sponsors. ICE confirmed in September that it had used that information to arrest undocumented adults who came forward to take custody of children.").

[222] Ibid.

[223] *See* Immigration and Customs Enforcement, *Memorandum: Implementing the President's Border Security and Interior Enforcement Priorities*, Feb. 21, 2017, p. 1, https://www.documentcloud.org/documents/3889695-doc00801320170630123624.html ("Effective immediately, all [Enforcement and Removal] Officers will take enforcement action against all removable aliens encountered in the course of their duties… Under the terms of the E.O. [several 2017 executive orders from President Trump cited], [Dep't. of Homeland Security] will no longer exempt classes or categories of removable aliens from potential enforcement."); *Cf.* Dep't. of Homeland Security, *Policies for the Apprehension, Detention and Removal of Undocumented Immigrants*, Nov. 20, 2014, https://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf (Obama Administration policies prioritizing removal of persons who are threats to national security or public safety).

[224] *See* Chris Baines, "Record High of 14,000 Immigrant Children in US Custody as Potential Careers 'Deterred by Fears of Retribution*,*" *Independent*, Nov. 17, 2018, https://www.independent.co.uk/news/world/americas/us-politics/record-high-immigrant-children-us-government-custody-ice-background-checks-a8638771.html. (Immigration and Customs Enforcement arrests of parents seeking to have their children released to them "confirming suspicions the agency was using the [new] vetting process to track down illegal immigrants.").

[225] Ibid. ("Last month [Immigration and Customs Enforcement] confirmed it had arrested 41 people who came forward to take care of unaccompanied minors.").

[226] Tal Kopan, "ICE Arrested Undocumented Adults Who Sought to Take in Immigrant Children," *San Francisco Chronicle*, Dec. 10, 2018, https://www.sfchronicle.com/politics/article/ICE-arrested-undocumented-adults-who-sought-to-13455142.php.

[227] Dep't of Health and Human Services, *Fact Sheet – Unaccompanied Alien Children Program*, Dec. 20, 2018, https://www.hhs.gov/sites/default/files/Unaccompanied-Alien-Children-Program-Fact-Sheet.pdf; *See also* Dianne Gallagher, Devon M. Sayers, and Geneva Sands, "Feds Reverse Fingerprint Policy in Move Expected to

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Speed Release of Unaccompanied Children in HHS Custody," *CNN*, Dec. 18, 2018, https://www.cnn.com/2018/12/18/politics/hhs-fingerprint-policy/index.html.

CHAPTER 3: U.S. Commission on Civil Rights Public Record

To collect information on the condition of immigration detention centers and the status of treatment of immigrants, including children, on April 12, 2019, the Commission held a public forum where 37 individuals shared their testimony. In addition, the Commission offered an opportunity for the public to submit written public comments. The Commission received 280 email and 34 additional written submissions. The comments the Commission received came from individuals who had experienced being detained in one of the southern border detention centers, individuals and groups who had visited and volunteered at immigrant detention centers, and individuals who had concerns about the treatment of immigrants in detention facilities. The testimonies regarding detention facilities are not all about a single facility, but rather, are about multiple detention centers throughout the country.

In this chapter, the Commission has compiled the comments received by subject matter. The Commission has provided brief summaries for each category/sub-category along with contextual information including applicable legal standards and background. In addition, we quote testimony to highlight the comments received.

Overview of Comments

Those who submitted public comments and gave testimony at the public briefing expressed general opposition to the use of immigration detention facilities for asylum seekers in particular, and concern about inhumane conditions of immigration detention facilities.[228] Public commenters expressed concern about many aspects of detention, particularly:

- Treatment of asylum seekers;[229]
- Separation of children from their parents, resulting trauma, and lack of reunification;[230]
- Detention of children;[231]

[228] All of the 280 emails except for 1 expressed opposition to immigration detention centers.

[229] *See* Charanya Krishnaswami, America's Advocacy Director, Amnesty International USA, *Public Comment Session,* p. 130; *see also* Olivares Testimony, *Public Comment Session,* p. 152; *see also* Yael Schacher, Senior U.S. Domestic Advocate, Refugees International, Testimony, *Public Comment Session,* p. 96.

[230] Génesis Regalado, Written Statement for the Public Comment Session on Immigration Detention before the U.S. Commission on Civil Rights, Mar. 25, 2019, at 1 (hereinafter Regalado Statement); Detained Migrant Solidarity Committee, Written Statement for the Public Comment Session on Immigration Detention before the U.S. Commission on Civil Rights, May 12, 2019, at 1 (hereinafter Detained Migrant Solidarity Committee Statement).

[231] Mel Hinebauch, Written Statement for the Public Comment Session on Immigration Detention before the U.S. Commission on Civil Rights, May. 12, 2019, at 1 (hereinafter Hinebauch Statement); Maranda J. Anderson, Written Statement for the Public Comment Session on Immigration Detention before the U.S. Commission on Civil Rights, May 13, 2019, at 1 ("This will lead to lifelong damage for the children. I cannot imagine my own children being taken away at the young age of many of these refugee children.") (hereinafter Anderson Statement).

- Language barriers and lack of legal representation for detainees; and
- Lack of effective oversight and substandard living conditions[232]

In addition, many public commenters also believe that such conditions and separation policies are not an adequate deterrent to stop individuals from trying to enter the United States, because many are fleeing dangerous conditions in their home countries and are seeking asylum in the United States.[233] Many commenters were also concerned about the government outsourcing its responsibilities to private detention centers.[234]

Overview Testimony

> *"Considering the peril that they are leaving and the ordeal of the transit, what level of cruelty would the U.S. have to attain in its policies to have changed their decision to seek asylum here, to have deterred them from coming? In the name of deterrence, how much punishment are we prepared to mete out to these men in order for them to give up their asylum claims? In doing this, are we meeting our legal and humanitarian obligations not to turn away, to push back to danger those who seek refuge in his country?"*[235]
>
> *"[W]e routinely require survivors of trauma to navigate a bureaucratic maze of proceedings, daunting for most licensed attorneys, all while behind bars, proceedings that could culminate in their return to countries where they fear grave harm, even death, is a travesty.*[236]
>
> *"Please allow families to remain intact as they seek a better life in the USA. It is not illegal nor a crime to ask for asylum. In fact, many have arrived in America precisely because they had struggles in their homeland and they*

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[232] Christine Kohnert, Written Statement for the Public Comment Session on Immigration Detention before the U.S. Commission on Civil Rights, May 13, 2019, at 1 (hereinafter Kohnert Statement); Eve Krief, Written Statement for the Public Comment Session on Immigration Detention before the U.S. Commission on Civil Rights, Apr. 12, 2019, at 1 (hereinafter Krief Statement).

[233] Misty Kirby, Written Statement for the Public Comment Session on Immigration Detention before the U.S. Commission on Civil Rights, May 13, 2019, at 1 (hereinafter Kirby Statement); Donna Lannan, Written Statement for the Public Comment Session on Immigration Detention before the U.S. Commission on Civil Rights, May 8, 2019, at 1 (hereinafter Lannan Statement); Sheryl Liberman, Written Statement for the Public Comment Session on Immigration Detention before the U.S. Commission on Civil Rights, May 13, 2019, at 1 (hereinafter Liberman Statement); Gretchen McClain, Written Statement for the Public Comment Session on Immigration Detention before the U.S. Commission on Civil Rights, Apr. 12, 2019, at 1 (hereinafter McClain Statement); Amy McIntyre, Written Statement for the Public Comment Session on Immigration Detention before the U.S. Commission on Civil Rights, May 13, 2019, at 1 (hereinafter McIntyre Statement).

[234] Judi Hincks, Written Statement for the Public Comment Session on Immigration Detention before the U.S. Commission on Civil Rights, Apr. 12, 2019, at 1 (hereinafter Hincks Statement); Hinebauch Statement, at 1.

[235] Schacher Testimony, *Public Comment Session*, p. 96.

[236] Krishnaswami Testimony, *Public Comment Session*, p. 130.

knew their children could receive a better future in America. It is woven into our American Dream and welcomes travelers on the Statute of Liberty."[237]

"I was shocked to see that we are currently treating law-abiding asylum seekers like criminals. They are unable to communicate with the outside world – except at great expense; they are forced to wear color coded jumpsuits and live in prison-like conditions."[238]

"A sensible immigration policy requires smart, thoughtful people to construct practical, compassionate solutions and to develop the needed resources to implement them. We don't have to give up the principles we stand for to protect what we have. We don't have to betray America to protect America."[239]

"There should be no for-profit detention centers – nobody should make money off the suffering and incarceration of children."[240]

Family Separation

Recent reports have indicated that at least 2,737 children have been taken from their parents or guardians, beginning even before zero tolerance was officially implemented.[241] The real total is likely much higher. A July 2019 Staff Report of the U.S. House of Representatives Committee on Oversight and Reform discussed partial data received from the Department of Justice, the Department of Homeland Security, and the Department of Health and Human Services which disclosed separation of 2,648 children, who do not include "children who were reunited with their

[237] Nathalie W. Chandra, Written Statement for the Public Comment Session on Immigration Detention before the U.S. Commission on Civil Rights, May. 12, 2019, at 1 (hereinafter Chandra Statement).

[238] Elyse Wechterman, Written Statement for the Public Comment Session on Immigration Detention before the U.S. Commission on Civil Rights, May 10, 2019, at 1 (hereinafter Wechterman Statement).

[239] Jody Frank, Written Statement for the Public Comment Session on Immigration Detention before the U.S. Commission on Civil Rights, Mar. 24, 2019, at 2 (hereinafter Frank Statement).

[240] Hincks Statement, at 1.

[241] *Ms. L. v. ICE*, 310 F.Supp.3d 1133, 1139 (S.D. Cal. 2018); Olivares Testimony, *Public Comment Session*, pp. 148-49. Based on data provided by the relevant agencies, approximately 900 children were separated from their parents between June 2018 and June 2019; these separations were largely based on allegations of prior criminal conduct. Memorandum in Support of Motion to Enforce Preliminary Injunction, *Ms. L. v. ICE et al.*, Case No. 18-cv-00428-DMS-MDD, Dkt. 439-1 (S.D. Cal. Jul. 30, 2019) at 10. Litigation is ongoing about the sufficiency of these concerns and whether the government had adequate basis to continue separating these families; Hincks Statement.

parents [before June 26, 2018] or more than 700 additional children separated since June 2018."[242] Additionally, as of July 2019, another 149 children were known to have been separated from their parents.[243] Therefore, a bare minimum of 3,497 children appear to have been separated. Though an executive order has purported to end family separation, family separations have continued, and the federal government is reviewing thousands of further past cases in which migrant children may have been separated from their parents or guardians.[244]

The true number of children forcibly separated from their parents at the border appears unknowable absent full disclosure of the involved federal agencies, even assuming that the agencies kept and continue to keep accurate records. The government has admitted in court that there was no plan for reunification and a federal court has found there was no effective system for tracking the separated children.[245] Moreover, the former head of at least one involved federal agency denied the very existence of the Administration's child separation policy after it was already in effect. The U.S. House of Representatives Committee on Oversight and Reform reported that:

> Then Secretary [of Homeland Security Kirstjen] Nielsen stated on multiple occasions that there was no policy to separate children from their parents. On May 15, 2018, she stated in testimony before the Senate Homeland Security and Governmental Affairs Committee: "We do not have a policy to separate children from their parents. On June 17, 2018, Secretary Nielsen

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[242] U.S. House of Representatives, Committee on Oversight and Reform, *Staff Report: Child Separations by the Trump Administration,* July 2019, pp. 5-6, (hereinafter *Staff Report on Child Separations*), https://oversight.house.gov/sites/democrats.oversight.house.gov/files/2019-07-2019.%20Immigrant%20Child%20Separations-%20Staff%20Report.pdf.

[243] Ibid.

[244] Katharina Obser, Senior Policy Advisor, Women's Refugee Commission, Testimony, *Public Comment Session,* p. 136.

[245] *See Ms. L. v. ICE*, 310 F. Supp. 3d at 1137 (family separation with no reunification plan in place), 1140-41 ("Government counsel explained the communication procedures that were in place, and represented, consistent with her earlier representation to the Court, that there was no procedure in place for the reunification of these families."), *Id* at 1144 ("the practice of separating these families was implemented without any effective system or procedure for (1) tracking the children after they were separated from their parents, (2) enabling communication between the parents and their children after separation, and (3) reuniting the parents and children after the parents are returned to immigration custody following completion of their criminal sentence. This is a startling reality. The government readily keeps track of personal property of detainees in criminal and immigration proceedings. Money, important documents, and automobiles, to name a few, are routinely catalogued, stored, tracked and produced upon a detainees' release, at all levels — state and federal, citizen and alien. Yet, the government has no system in place to keep track of, provide effective communication with, and promptly produce alien children. The unfortunate reality is that under the present system migrant children are not accounted for with the same efficiency and accuracy as *property*. Certainly, that cannot satisfy the requirements of due process." [internal citations omitted]).

> tweeted: "We do not have a policy of separating families at the border. Period."[246]

According to testimony submitted to the Commission, these separations occur without the involvement of child welfare specialists or with clear justifications and processes that would ensure the best interests of the children and the due process rights of parents and legal guardians.[247] As discussed below, the government cannot legally remove children from a parent without finding that the parent or guardian is a danger to the child.

Regardless of the exact number of children who have been, are being, and likely will yet be separated from their parents at the border, it is critical to note that the U.S. House of Representatives Committee on Oversight and Reform determined that the Trump "Administration [h]as [n]ot [b]een [c]andid [a]bout [i]ts [p]urpose in [s]eparating [c]hildren" from their parents.[248] Specifically:

> [t]he records obtained by the Committee indicate that the Trump Administration separated children unnecessarily—even under the Administration's own rationale—and then failed to track separated families. These actions caused lengthy delays to reunification and, in some cases, separations that are still ongoing today.
>
> The Trump Administration claimed that child separations under the zero tolerance policy were necessary in order to criminally prosecute the parents and that such separations were no different than what occurs in the context of any criminal prosecution.
>
> . . .
>
> However, the data shows that many child separations were unnecessary even under this claimed rationale. Some parents who were separated from their children were never sent to U.S. Marshals or other federal criminal custody, but instead went straight from [Customs and Border Protection] custody to [Immigration and Customs Enforcement] detention. Other parents were briefly taken into U.S. Marshals' custody and then returned to [Customs and Border Protection] custody within a day or two. These parents were readmitted to the same facilities where they had been separated from

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[246] *Staff Report on Child Separations,* pp. 11-12 (citing Senate Homeland Security and Governmental Affairs Committee, *Hearing on Authorities and Resources Needed to Protect and Secure the United States*, 115th Cong. (May 15, 2018) (online at www.hsgac.senate.gov/hearings/authorities-and-resources-needed-to-protect-and-secure-the-united-states) and then-Secretary Kirstjen Nielsen, Department of Homeland Security, @SecNielsen, Twitter (June 17, 2018) (online at www.twitter.com/SecNielsen/status/1008467414235992069).

[247] Obser Testimony, *Public Comment Session*, p. 136.

[248] *Staff Report on Child Separations,* p. 21.

> their children days before, but the children had already been sent to [Office of Refugee Resettlement] custody. These parents were then sent to Immigration and Customs Enforcement detention and in some cases were deported without their children.
>
> These parents may have been in federal criminal custody for only a brief period—or not at all—because prosecutors declined to prosecute the cases, or because the parents' only criminal offense was the misdemeanor of illegal entry and they were sentenced to time served when they immediately pleaded guilty. Yet their children were nevertheless taken from them and kept apart for weeks or months.[249]

This is layered on top of the apparent lack of candor about the underlying existence of family separation policies for which former Secretary Nielson is cited above.

The Supreme Court has repeatedly found that as persons within the United States' jurisdiction, noncitizens are entitled to substantive due process protections under the Fifth Amendment.[250] The language of the Fifth Amendment applies to all persons, regardless of citizenship.[251] The Court has also recognized a fundamental right to family integrity,[252] which specifically includes the right of parents to have control over the upbringing, custody, and care of their children.[253] Courts have even found that the separation of a child from their parent, "even for a short time, represents a serious impingement" on those fundamental parental rights.[254] Despite the Court articulating parental rights as fundamental, it has yet to establish a level of scrutiny for courts to use when reviewing familial integrity cases.[255] As such, lower courts have used varying levels in evaluating

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[249] Ibid., 21 (citing "Sessions: Parents, Children Entering U.S. Illegally Will be Separated," *NBC News*, May 7, 2018, https://www.nbcnews.com/politics/justice-department/sessions-parents-children-entering-us-illegally-will-be-separated-%20n872081)).

[250] *See Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) (finding Fifth Amendment protects all 'persons' within American borders); *see also Mathews v. Díaz*, 426 U.S. 67, 77 (1976); *see generally Reno v. Flores*, 507 U.S. 292, 306 (1993); *Plyler v. Doe*, 457 U.S. 202, 210 (1982).

[251] U.S. CONST. AMEND V ("No person shall be… deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.").

[252] *Troxel v. Granville*, 530 U.S. 57 (2000).

[253] *See Troxel*, 530 U.S. at 65-66; *Santosky v. Kramer*, 455 U.S. 745, 753 (1982); *Quillion v. Walcott*, 434 U.S. 246 (1978) (finding relationship between parent and child constitutionally protected); *D.B. v. Cardall*, 826 F.3d 721, 740 (4th Cir. 2016); *Croft v. Westmoreland County Children & Youth Servs.*, 103 F.3d 1123, 1125 (3d Cir. 1997) (finding interference in family relationship unconstitutional unless there is some showing that children in danger of staying with parent).

[254] *Jordan v. Jackson*, 15 F.3d 333, 346 (4th Cir. 1994).

[255] *Meyer v. Nebraska*, 262 U.S. 390 (1923).

different parental rights cases, such as rational basis or intermediate scrutiny.[256] For family separation in immigration cases specifically, some courts, such as the federal District Court for the District of Columbia and the D.C. Federal Court of Appeals, which have jurisdiction over federal questions, have used strict scrutiny review. Under strict scrutiny, they require that the government action in question is narrowly tailored to achieve a compelling government interest in order to meet constitutional standards. [257] In 2018, the D.C. federal district found that noncitizens do not lose their fundamental right to family integrity when lawfully detained, and thus separating children from parents "directly and substantially" burdens the right to family integrity.[258]

Courts have also understood substantive due process to protect against government action that "shocks the conscience."[259] This doctrine has been used particularly in due process challenges to President Trump's zero tolerance policy.[260] In its application, courts must determine whether the executive action in question is "so extreme and egregious as to shock the contemporary conscience,"[261] which requires an examination into the totality of the circumstances as opposed to requiring specific elements.[262] Executive actions can be challenged where impacted parties are located, and the federal District Court of the Southern District of California has found that the separation of children from families without a showing of parental unfitness plus the lack of procedure to reunite or even facilitate communication between separated family members is likely to meet the "shock the conscience" standard.[263]

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[256] *Immediato v. Rye Neck Sch. Dist.*, 73 F.3d 454, 457 (2d Cir. 1996) (finding rational basis review, evaluating whether the government action in question is rationally related to a legitimate state interest, appropriate when state interest is education); *New York Youth Club v. Smithtown*, 867 F.Supp.2d 328, 332 (E.D.N.Y. 2012) (finding intermediate scrutiny, evaluating whether the government action in question is substantially related to an important government interest, is appropriate in evaluating an ordinance about curfews).

[257] *Franz v. United States*, 707 F.2d 582, 602 (D.C. Cir. 1983); *M.G.U. v. Nielsen*, 325 F.Supp.3d 111, 120 (D.C. Cir. 2018) (holding that the Department of Health and Human Services "directly and substantially burdened [defendant's] right to family integrity."); *Nolasco v. ICE*, 319 F.Supp.3d 491, 502 (D.C. Cir. 2018) (holding policy of family separation not narrowly tailored to achieve compelling government interest in deterring unlawful immigration.) not narrowly tailored to achieve compelling government interest in deterring unlawful immigration.).

[258] *Nolasco*, 319 F.Supp.3d at 500.

[259] *Pittman v. Cuyahoga Cty. Dep't of Children & Family Servs.*, 640 F.3d 716, 728 (6th Cir. 2011); *Seegmiller v. LaVerkin City*, 528 F.3d 762, 769 (10th Cir. 2008) (finding two strands of substantive due process doctrine not mutually exclusive).

[260] Dep't. of Justice, *Zero-Tolerance Memorandum*.

[261] *DePoutot v. Raffaelly*, 424 F.3d 112, 118 (1st Cir. 2005) (citing County of Sacramento v. Lewis, 523 U.S. 833, 846 (1998)).

[262] *County of Sacramento v. Lewis*, 523 U.S. 833, 850 (1998); *Armstrong v. Squadrito*, 152 F.3d 564, 570 (7th Cir. 1998); *Ms. L v. ICE*, 310 F.Supp.3d 1133, 1143 (S.D. Cal. 2018).

[263] *Ms. L*, 310 F.Supp.3d at 1145; *Lewis*, 523 U.S. at 847.

In addition, despite courts ordering the federal government to stop family separation, migrants continue to allege that family separation is still used as a threat. For example, they say that Department of Homeland Security officials have been falsely informing them that their options are be separated from their children or face deportation.[264]

Finally, for families that already have been separated, public testimony to the Commission revealed that there are no standard procedures in place to ensure reunification, which implicates continuing substantive due process concerns.[265] Though Department of Homeland Security implemented this separation, the lack of coordination between Department of Homeland Security and Department of Health and Human Services regarding the identities of the children and the identities and locations of their parents has resulted in an ongoing, substantial information deficiency. In January 2019, the Office of the Inspector General of the Department of Health and Human Services released a report showing that "thousands of children may have been separated during an influx that began in 2017, before the accounting required by the Court, and Department of Health and Human Services has faced challenges in identifying separated children."[266] Even since the separation of these thousands of children came to light, no official numbers have been released by Department of Homeland Security due to the "lack of a coordinated formal tracking system between the Office of Refugee Resettlement . . . and the Department of Homeland Security."[267]

As of January 19, 2019, the Department of Homeland Security reportedly continued to "struggle[] to provide accurate, complete, reliable data on family separations . . .."[268] On September 27, 2018, after site visits, the Department of Homeland Security Office of the Inspector General issued a report finding that lack of preparation and lack of reliable information systems had led to parents being unable to contact or locate their children.[269] Among numerous findings regarding these information gaps making it challenging for parents to locate their children who had been taken from them, the Office of the Inspector General found that:

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[264] Abaya Testimony, *Public Comment Session*, p. 105

[265] Obser Testimony, *Public Comment Session*, p. 137.

[266] Dep't. of Health and Human Services, Office of Inspector General, *Separated Children Placed in Office of Refugee Resettlement Care*, OEI-BL-18-00511, January 2019.

[267] Miriam Jordan, "Family Separation May Have Hit Thousands More Migrant Children Than Reported," *New York Times*, Jan. 17, 2019, https://www.nytimes.com/2019/01/17/us/family-separation-trump-administration-migrants.html.

[268] Ibid.

[269] Dep't. of Homeland Security, Office of the Inspector General, *Special Review – Initial Observations Regarding Family Separation Issues Under the Zero Tolerance Policy*, Sept. 27, 2018, pp. 9-12.

Border Patrol agents do not appear to take measures to ensure that pre-verbal children separated from their parents can be correctly identified. For instance, based on Office of the Inspector General's observations, *Border Patrol does not provide pre-verbal children with wrist bracelets or other means of identification, nor does Border Patrol fingerprint or photograph most children during processing to ensure that they can be easily linked with the proper file*.[270]

Family Separation - Right to Family Integrity Testimony

"Any discussion of renewing family separation or giving families the false choice between being separated or indefinitely detained together should be recognized for what it is, a clear policy to inflict harm on families and deter them from seeking protection in the United States."[271]

"Though we had received referrals in the past for separated children where the adult's relationship with the child was unclear, what happened in 2017 was different. Some of the children referred to us were toddlers and babies. In all of these cases, there were no doubts about the relationship between these children and their parents but [Department of Homeland Security] still separated them."[272]

"[Immigration and Customs Enforcement] and [Department of Homeland Security] still have no standard procedures or policies in place to prevent family separation in the first place, to identify separated parents or close relatives, to facilitate regular and free communication. Similarly, the Departments still have no meaningful mechanisms to track and document separations or allow a decision with life-long consequences to be appealed."[273]

"We are deeply concerned that family separation continues to be used solely to deter families from exercising their legal right to seek protection."[274]

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[270] Ibid., 15 (emphasis added).

[271] Abaya Testimony, *Public Comment Session*, p. 105.

[272] Ibid., 102.

[273] Obser Testimony, *Public Comment Session*, p. 137.

[274] Abaya Testimony, *Public Comment Session*, pp. 104-05.

Barriers to Reunification Testimony

> *"Worse yet, many parents were deported without knowing where their children were before we were appointed to them. Parents told us they abandoned valid asylum claims because" they were told it would either help their children or allow them to be reunified. In some cases, children believed their parents willingly abandoned them."*[275]

> *"The United States must stop immigrant family separation in all its forms, and all separated families must be immediately reunited. Thanks to recent US policies and practices, innocent children will forever bear the scars inflicted upon them by the pain and anxiety of forced separation. I pray this nation can change course before more children are forced to endure this literal torture."*[276]

Standards of Care

The Flores Agreement and Other Applicable Standards

The following is a summary of various detention standards that are referenced throughout this chapter. Different legal standards exist for the detention of migrant children, families, and single adults. An overview of the standards are provided here and discussed in more detail under the applicable sections below.

The *Flores* agreement is a 1997 court-ordered consent decree that established standards detailing how children should be treated in the immigration detention system, and it has been upheld by federal courts as enforceable.[277] The *Flores* agreement mandates all detention facilities that house immigrant children must be safe and sanitary, complete with suitable toilets, sinks, drinking water, food, medical assistance for emergencies, adequate temperature control and ventilation, adequate supervision to protect minors, and contact with all family members with whom the child was detained.[278] Additionally, Department of Homeland Security must segregate each minor from

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[275] Ibid.

[276] Kari Hildreth, Written Statement for the Public Comment Session on Immigration Detention before the U.S. Commission on Civil Rights, May 13, 2019, at 1 (hereinafter Hildreth Statement).

[277] Stipulated Settlement Agreement, *Flores v. Reno*, No. CV 85-4544-RJK (C.D. Cal. Jan. 17, 1997) (hereinafter *Flores* agreement). Parties in the case reached a settlement after the Supreme Court held that the circumstances of immigrant children's confinement were better described as "legal custody rather than detention" because they are not in correctional institutions but "facilities that meet state licensing requirements for the provision of shelter care, foster care, group care, and related services to dependent children." *Reno v. Flores*, 507 U.S. 292, 298 (1993).

[278] *See Flores* agreement.

unrelated adults, place him/her in the least restrictive setting possible that is appropriate for the child's age and special needs, and provide notice of his/her rights.[279] The *Flores* agreement also requires that Department of Homeland Security treat each child with dignity, respect, and with special concern for their particular vulnerabilities as children.[280]

Under the *Flores* agreement, Department of Homeland Security may detain migrant children only to secure their timely appearance before a Department of Homeland Security, Department of Health and Human Services, or Immigration Court, or to ensure their safety or the safety of others.[281] A 2015 court ruling set the presumptive reasonable transition time to release detained children from family immigration detention centers in compliance with the *Flores* agreement to 20 days.[282] If parents cannot be released with the children, the children are treated as unaccompanied children and transferred to the custody of the Department of Health and Human Services, Office of Refugee and Resettlement. The Homeland Security Act of 2002 charged the Office of Refugee and Resettlement with providing temporary care and placement of unaccompanied minors[283] and the Trafficking Victims Protection Reauthorization Act of 2008 demands that children be "promptly placed in the least restrictive setting that is in the best interest of the child.[284] Moreover, when children are initially detained by Border Patrol, they may not be held for longer than seventy-two hours, except under exceptional circumstances.[285]

If detaining an unaccompanied migrant child is not required, then that child must be released to a parent, legal guardian, adult relative (brother, sister, aunt, uncle, or grandparent), an adult individual or entity designated by the parent or legal guardian as capable and willing to care for the minor's well-being through a declaration or other documentation, a licensed program willing to accept legal custody, or an individual or entity willing to accept legal custody after a suitability statement has been conducted and an affidavit of support has been created.[286] Previously, *Flores*

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[279] *Id*.

[280] *Id*.

[281] *Id.*

[282] *Flores v. Lynch*, 212 F.Supp.3d 907, 914 (2015).

[283] 6 U.S.C § 279(g)(2).

[284] Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. 110-457, 122 Stat. 5044 (codified as 22 U.S.C. § 7101).

[285] Dep't. of Homeland Security, Office of the Inspector General, *Special Review*, p. 8 (citing 8 U.S.C. § 1232(b)(3) (2008)).

[286] *Flores* agreement (Some portions have been codified at 8 C.F.R. § 263.3).

was mainly applicable to unaccompanied minors but since zero tolerance, it has also applied to children who arrived with their parents or other guardians.[287]

In 2017, a federal court found the Obama Administration was in breach of the *Flores* agreement due to "egregious conditions" in border patrol facilities and for detaining children longer than necessary, and required their release.[288] In June 2019, the Department of Justice attempted to argue that the 2017 findings went too far and added additional requirements, such as soap and toothbrushes, that were not required under the original guidelines of what qualifies as "safe and sanitary."[289] These arguments were met incredulity by Ninth Circuit judges, including Senior Judge A. Wallace Tashima, who was held in a Japanese Internment Camp as a child during WWII, who stated, "It's within everybody's common understanding that if you don't have a toothbrush, if you don't have soap, if you don't have a blanket, it's not safe and sanitary. Wouldn't everybody agree to that? Do you agree to that?"[290]

The current Administration's defense of what it believes falls within the "safe and sanitary" guidelines continues to raise questions about the conditions of detainment at the southern border. Further, Immigration and Customs Enforcement's own standards require that: "Each detainee shall receive, at a minimum, the following items: 1. One bar of bath soap, or equivalent; 2. One comb; 3. One tube of toothpaste; 4. One toothbrush; 5. One bottle of shampoo, or equivalent; and 6. One container of skin lotion."[291]

The newest set of immigration policies undermines *Flores* by separating children from their parents in order to hold the adults indefinitely, and seeks to deter immigrants, namely those coming from Mexico and Central American countries, from pursuing entry into the U.S.[292] The

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[287] *Flores v. Lynch,* 828 F.3d 898 (9th Cir. 2016).

[288] Order Re Plaintiffs' Motion to Enforce and Appoint a Special Monitor, *Flores v. Sessions*, No. 85-cv-04544, 2017 WL 6060252 (C.D. Cal. June 27, 2017).

[289] Helen Christophi, "Feds Tell 9th Circuit: Detained Kids 'Safe and Sanitary' Without Soap," *Courthouse News*, June 18, 2019, https://www.courthousenews.com/feds-tell-9th-circuit-detained-kids-safe-and-sanitary-without-soap/.

[290] Ibid.

[291] Immigration and Customs Enforcement, *Performance-Based National Detention Standards 2011*, Revised December 2016, pp. 328-330.

[292] Nicholas Wu, "What is the *Flores* Agreement, and What Happens if the Trump Administration Withdraws from It?," *Just Security*, Oct. 18, 2018, https://www.justsecurity.org/61144/flores-agreement-trump-administration-withdraws-it/; *see also* "Update on Separated Children & the *Flores* Agreement," *NPR*, Sept. 9, 2018, https://www.npr.org/2018/09/09/646018019/update-on-separated-children-and-the-flores-agreement; *see also*, Congressional Research Service, *The "Flores Settlement" and Alien Families Apprehended at the U.S. Border: Frequently Asked Questions,* by Sarah Herman Peck and Ben Harrington, Sept. 17, 2018, p. 11, https://fas.org/sgp/crs/homesec/R45297.pdf.

Administration issued a notice of draft regulation to withdraw the *Flores* agreement in September 9, 2018.[293] A total of 98,208 public comments were received.[294] Reviewing the first 100 shows that the overwhelming majority oppose the federal government ending or withdrawing from the *Flores* agreement.[295] Groups opposed withdrawal of the *Flores* agreement, include the American Immigration Lawyers' Association, which commented that the proposed new regulations would not guarantee safe conditions for children, would result in their indefinite detention and therefore be patently inhumane, and would require continued family separation.[296] The President of the American Bar Association and 18 State Attorney Generals expressed similar concerns.[297]

On August 21, 2019, two federal agencies, the Department of Homeland Security and the Department of Health and Human Services, released regulations "implementing the relevant and substantive terms of the *Flores* Settlement Agreement (*Flores*)."[298] At the time of the release, the agencies provided a description of the regulations, summarized generally as:[299]

- Implementing the provisions of *Flores* and thereby terminating the *Flores* Settlement Agreement
- Implementing the standards for how federal agencies care for accompanied and unaccompanied minors
- Allowing federal agencies to hold families in third-party licensed family facilities

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[293] Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children, 83 Fed. Reg. 45486 (proposed Sept. 7, 2018) (to be codified at 8 C.F.R. 212 and 236 & 45 C.F.R. 410), https://www.federalregister.gov/documents/2018/09/07/2018-19052/apprehension-processing-care-and-custody-of-alien-minors-and-unaccompanied-alien-children.

[294] *See* "Apprehension, Processing, Care, and Custody of Alien Minors," *Regulations.gov*, https://www.regulations.gov/docketBrowser?rpp=25&so=DESC&sb=commentDueDate&po=0&dct=PS&D=ICEB-2018-0002 (accessed Aug. 12, 2019).

[295] Ibid.

[296] *See* American Immigration Lawyers Association and American Immigration Council, letter to Debbie Seguin, Assistant Director, Office of Policy, Immigration and Customs Enforcement, Nov. 6, 2018, https://www.aila.org/infonet/aila-council-submit-comments-opposing-flores.

[297] *See* Lorelei Laird, "ABA President Opposes Proposed Rule that Would Reduce Rights of Immigrant Minors," *ABA Journal*, Nov. 7, 2018, http://www.abajournal.com/news/article/aba_president_opposes_proposed_rule_that_would_reduce_rights_of_immigrant_m.

[298] Dep't. of Homeland Security, "DHS and HHS Announce New Rule to Implement the Flores Settlement Agreement; Final Rule Published to Fulfill Obligations under Flores Settlement Agreement," press release, Aug. 21, 2019, https://www.dhs.gov/news/2019/08/21/dhs-and-hhs-announce-new-rule-implement-flores-settlement-agreement.

[299] Ibid.

- Implementing provisions of the Trafficking Victims Protection Reauthorization Act of 2008, including the transfer of unaccompanied children to Department of Health and Human Services within 72 hours, absent exceptional circumstances.

Section VI of *Flores* provides conditions for a "general policy favoring release,"[300] and provides that the agency "shall release a minor from its custody without unnecessary delay" if detention is not required to ensure safety or make a legal appearance.[301] The agreement also provides that within five days of initial detention, the agencies must transfer a child to a licensed program, except in the event of an emergency of influx of children into the US, in which case the placement shall be made "as expeditiously as possible."[302] A licensed program refers to a program, agency or organization "that is licensed by an appropriate State agency" to provide care for minor children.[303] A later court decision from the 9th Circuit clarified that *Flores* applied to children accompanied by an adult and, based on the arguments made by the parties, established a 20 day standard for the release of accompanied children.[304]

The new regulation [305] differs from *Flores* in several notable ways. First, the regulation has several new barriers to the release of children that are not present in *Flores*. The regulation eliminates the opportunity for release on humanitarian or public interest parole for children in expedited removal proceedings.[306] The regulation limits access to bond hearings allowing Department of Health and Human Services to determine whether certain children will be released.[307] The regulation will also permit the ongoing detention of accompanied children with their parents, with no set limits for release.[308]

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[300] *Flores* agreement.

[301] *Id*.

[302] *Id*.

[303] *Id*.

[304] *Flores v. Lynch*, 212 F.Supp.3d 907, 914 (2015).

[305] Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children, 84 Fed. Reg. 44392 (proposed Sept. 7, 2019) (to be codified at 8 C.F.R. § 212 and 236 & 45 C.F.R. § 410), https://www.federalregister.gov/documents/2018/09/07/2018-19052/apprehension-processing-care-and-custody-of-alien-minors-and-unaccompanied-alien-children.

[306] *Id.*

[307] *Id.*

[308] *Id.*

Second, the regulation allows for children to be released into facilities that are not licensed by a state, and instead creates the option for the federal agencies to develop a separate licensing system. Third, in its statement announcing the publication of the regulation, the Administration stated that the regulation was "closing the key loophole in Flores—the new rule will restore integrity to our immigration system and eliminate the major pull factor fueling the current crisis." [309] However, using family detention as a deterrent for legal migration has been found by the courts to be an illegitimate basis for civil detention.[310] Finally, under *Flores*, attorneys representing the best interests of the children were able to ask a court to determine whether delays were "necessary" and whether the placements were being made "as expeditiously as possible."[311]

Immigration and Customs Enforcement at the Department of Homeland Security may detain families at family detention centers. Immigration and Customs Enforcement also established guidelines that govern detention as family detention centers.[312] These standards cover many aspects of being detained including safety, security, care (medical, food, and hygiene), visitations, recreation, and access to legal counsel.[313]

Standards for detaining adult migrants are established by Immigration and Customs Enforcement, and are primarily based on correction incarceration standards.[314] Since 2000, Immigration and Customs Enforcement has implemented three sets of detention standards throughout all Immigration and Customs Enforcement detention facilities,[315] the National Detention Standards

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[309] Dep't. of Homeland Security, "Acting Secretary of Homeland Security Kevin K. McAleenan on the DHS-HHS Federal Rule on Flores Agreement," press release, Aug. 21, 2019, https://www.dhs.gov/news/2019/08/21/acting-secretary-mcaleenan-dhs-hhs-federal-rule-flores-agreement.

[310] *R.I.L-R, et al., v. Johnson*, 80 F.Supp.3d 164, 181-82 (D.C. Cir. Feb. 20, 2015), https://www.aclu.org/legal-document/rilr-v-johnson-memorandum-opinion.

[311] *See Flores* agreement.

[312] "Family Residential Standards," Dep't. Of Homeland Security, Immigration and Customs Enforcement , http://www.ice.gov/detention-standards/family-residential (accessed June 1, 2019); Lazaro Zamora, "What You Need to Know: Immigrant Family Detention," *Bipartisan Policy Center*, Aug. 27, 2015, https://bipartisanpolicy.org/blog/what-you-need-to-know-immigrant-family-detention/.

[313] Dep't. Of Homeland Security, "Family Residential Standards."

[314] National Immigrant Justice Center, *Immigration Detention Oversight and Accountability Tool Kit*: *A Guide for Members of Congress Visiting Ice Jails*, May 2019, p. 5, https://www.immigrantjustice.org/research-items/toolkit-immigration-detention-oversight-and-accountability, (hereinafter *A Guide for Members of Congress*).

[315] "Ice Detention Standards," Dep't of Homeland Security, https://www.ice.gov/factsheets/facilities-pbnds (accessed July 26, 2019).

2000,[316] the Performance-Based National Detention Standards 2008,[317] and the Performance-Based National Detention Standards 2011.[318] Respectively, they contain 38, 41, and 43 standards pertaining to detainee care, services, and facility operations.[319] These standards also govern private contracted detention facilities and intergovernmental service agreement detention facilities.[320] Although the standards generally dictate uniformity, contract and intergovernmental facilities follow the detention standards stated in their contract,[321] which can sometimes create variation among Immigration and Customs Enforcement facilities.[322]

Finally, detainees retain basic civil rights as well as substantive due process rights granted to them by the U.S. Constitution.[323] Supreme Court case law also sets standards for the provision of medical care for adults in immigration detention facilities.[324]

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[316] Immigration and Customs Enforcement, *Performance-Based National Detention Standards, 2000 Detention Operations Manual,* https://www.ice.gov/detention-standards/2000.

[317] Immigration and Customs Enforcement, *Performance-Based National Detention Standards, 2008 Detention Operations Manual*, https://www.ice.gov/detention-standards/2008.

[318] Immigration and Customs Enforcement, *Performance-Based National Detention Standards, 2011 Detention Operations Manual*, https://www.ice.gov/detention-standards/2011.

[319] *See supra* notes 315-318.

[320] Contract detention facilities are "owned by private companies and contracted directly with ICE." See 79 Fed. Reg. 13100, 13104 (March 7, 2014); Intergovernmental service agreement (IGSA) detention facilities are detention "facilities [that] are provided to ICE by States or local governments through agreements and may be owned by the State or local government, or a private entity. *See* 79 Fed. Reg. 13100, 13104 (Mar. 7, 2014).

[321] *See, e.g.*, Dep't. of Homeland Security, Immigration and Customs Enforcement, *Inter-governmental Service Agreement between DHS ICE, Office of Detention and Removal, and Collier County, Naples, Florida*, http://www.ice.gov/doclib/foia/isa/r_droigsa070024colliercountyfl.pdf.

[322] U.S. Gov't Accountability Office, *Immigration Detention: Additional Actions Needed to Strengthen Management and Oversight of Facility Costs and Standards*, GAO-15-153, Oct. 2014, pp. 1-2, 5, https://www.gao.gov/assets/670/666467.pdf. For example, if Immigration and Customs Enforcement contracted with a Contract Detention Facility prior to 2008, that Contract Detention Facility would only be required to implement the National Detention Standards 2000. According to the 2014 Government Accountability Office report, Immigration and Customs Enforcement officials have stated that "they were in the process of requesting that additional facilities authorized to hold detainees for 72 hours or longer implement the most recent 2011 [Performance-Based National Detention Standards], and documenting that change in facility contracts." Ibid., 32; In 2015 Kevin Landy, in his official capacity as Immigration and Customs Enforcement Assistant Director for the Office of Detention Policy and Planning (ODPP), sent the Commission additional comments in response to Commission staff inquiry. This information is available at the U.S. Commission on Civil Rights Headquarters located at 1331 Pennsylvania N.W., Washington D.C., 20425.

[323] *See infra* notes 609-614; 618-620 (due process discussion).

[324] *See infra* notes 452-453 (legal standard for medical care discussion).

Detention of Children

Current Conditions

There have been civil rights issues with the initial detention of children by Border Patrol (before they are transferred to larger facilities like the South Texas Family Residential Center in located in Dilley, Texas, or to Department of Health and Human Services shelters). The Department of Homeland Security, Office of the Inspector General found that Border Patrol held children many days past the statutory limit of seventy-two hours, which may only be exceeded under "exceptional circumstances."[325] From May 5—June 20, 2018, among hundreds of children held by the Border Patrol, 32.9 percent were held for more than seventy-two hours, and some were held from twelve to twenty-five days.[326]

While the number of minors detained has reached a record high, the conditions in which they are housed has hit a disturbingly low standard. Thousands of children have been held by Department of Homeland Security in cages in former warehouses, in buildings with little if any natural light, forced to sleep on cement floors in cold temperatures, with only aluminum blankets issued to cover them.[327] The conditions of the shelters to which these children are transferred after being detained by Department of Homeland Security are similarly concerning. The shelters are run by Department of Health and Human Services' Office of Refugee Resettlement.[328] At the shelters, many children are not able to speak to their parents, hug their siblings who are also in custody, or know when they will be released, and there are a troubling number of allegations of abuse.[329]

Furthermore, undocumented children in the United States are entitled to equal access to public education. In 1982, in the case of *Plyler v. Doe*, the Supreme Court held that Equal Protection is a right enjoyed by all *persons* within the territory of the United States,[330] and that a state could not

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[325] Dep't. of Homeland Security, Office of the Inspector General, *Special Review*, p. 8 (citing 8 U.S.C. § 1232(b)(3) (2008)).

[326] Ibid.

[327] Manny Fernández, "Inside the Former Walmart That Is Now a Shelter for Almost 1,500 Migrant Children," *New York Times*, June 14, 2018, https://www.nytimes.com/2018/06/14/us/family-separation-migrant-children-detention.html.

[328] For more information on agency coordination (or lack thereof), *see supra* notes 142-147; 265-267.

[329] *See* American Civil Liberties Union of Texas, letter to John V. Kelly, Acting Inspector General, Dep't. of Homeland Security, Cameron Quinn, CRCL Officer, and Matthew Klein, Assistant Commissioner for Office of Professional Responsibility, Mar. 30, 2019, (hereinafter American Civil Liberties Union of Texas letter) https://www.aclutx.org/sites/default/files/pdn_border_patrol_abuse_oig_complaint.pdf.

[330] *Plyler v. Doe*, 457 U.S. 202, 211-12 (1982).

deny undocumented children the right to public education, because that "imposes a lifetime hardship on a discrete class of children not accountable for their disabling status. The stigma of illiteracy will mark them for the rest of their lives."[331] The Court added: "We are reluctant to impute to Congress the intention to withhold from these children, for so long as they are present in this country through no fault of their own, access to a basic education."[332] However, access to education as required by the *Flores* agreement for six hours a day has been at issue for migrant children at some detention camps,[333] and their indefinite detention only contributes to the negative impact of lesser access to public education during detention.

On February 28, 2019, the American Immigration Council reported that there were at least nine infants under one year of age detained by Department of Homeland Security in Dilley, Texas where there was an alleged lack of access to medical care.[334] American Immigration Council and other immigrant rights groups wrote to the Department of Homeland Security's Office for Civil Rights and Civil Liberties and the Inspector General of the Department of Homeland Security, voicing "grave concerns about the lack of specialized medical care available in Dilley for this vulnerable population,"[335] and "long documented the limited access to adequate medical care in family detention centers."[336] A few days later, Immigration and Customs Enforcement confirmed there were sixteen babies in Department of Homeland Security custody at Dilley, and that twelve had been released.[337] Immigration and Customs Enforcement also reported that another baby detained at the Texas Karnes detention center, which is about an hour from the nearest hospital, and that

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[331] *Id.* at 223.

[332] *Id.* at 227.

[333] *See, e.g.*, Dana Goldstein and Manny Fernández, "In a Migrant Shelter Classroom, It's Always Like the First Day of School," *New York Times*, July 6, 2018, https://www.nytimes.com/2018/07/06/us/immigrants-shelters-schools-border.html ("[A]ccording to lawyers and educators with firsthand knowledge of the child detention system, the education offered inside the facilities is uneven and, for some children, starkly inadequate. Teachers at the schools are sometimes not state-certified as teachers, according to these accounts. Some shelter instructors cannot communicate effectively in Spanish, and in other cases the curriculum is so limited and classes are so wide-ranging in age groups that students seem bored and disengaged.").

[334] American Immigration Council, letter to Ms. Cameron Quinn, Office for Civil Rights and Civil Liberties, Dep't. Of Homeland Security and Mr. John V. Kelly, Acting Inspector General, Dep't. Of Homeland Security, Feb. 28, 2019,https://www.americanimmigrationcouncil.org/sites/default/files/general_litigation/complaint_urges_immediate_release_of_infants_from_immigration_detention.pdf.

[335] Ibid., 1.

[336] Ibid.

[337] Kate Smith, "12 Detained Babies Have Been Released From ICE Custody in Dilley, Texas," *CBS News*, Mar. 4, 2019, https://www.cbsnews.com/news/immigrant-children-detained-12-babies-released-from-ice-custody-detention-center-dilley-texas-2019-03-04/.

the status of four babies remaining in custody at Dilley was still unclear.[338] Compounding this and other civil rights issues arising in immigration detention, Office for Civil Rights and Civil Liberties does not have authority to remedy individual complaints but instead focuses on systemic issues."[339]

Child Deaths

After over a decade with no child deaths in federal immigration custody,[340] at least six migrant children have died while in custody since September 2018 based on public reports.[341] During the month of December 2018, two young Guatemalan children who were held in Border Patrol custody passed away.[342] Both seven-year-old Jakelín Caal Maquín and eight-year-old Felipe Gómez Alonso left impoverished indigenous villages with their respective fathers.[343] Then Secretary of Department of Homeland Security Kirstjen Neilsen reportedly stated that they were the first migrant children who had died in Department of Homeland Security custody in over a decade, and called for Central American families to stop migrating.[344] Customs and Border Protection Commissioner Kevin K. McAleenan stated that the border facilities where these children were intercepted and detained for days were "not built for that group that's crossing today. They were built 30, 40 years ago for single adult males and we had a different approach."[345] Since the death of Felipe on Christmas Eve of 2019, border patrol has begun hiring emergency medical technicians

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[338] Ibid.

[339] *See* Susan Ferriss, Alison Kodjak, and Joshua Phillips, "Homeland Security's Civil Rights Unit Lacks Power to Protect Migrant Kids," *NPR*, Aug. 2, 2019, https://www.npr.org/sections/health-shots/2019/08/02/746982152/homeland-securitys-civil-rights-unit-lacks-power-to-protect-migrant-kids.

[340] Contrary to the documented deaths of children in Dep't. Of Homeland Security custody, Border Patrol Commissioner McAleenan recently stated in an interview that it had been "more than a decade" since a "child pass[ed] away anywhere in a [Customs and Border Protection] process." "'We Need a Different Approach,' Says Border Protection Chief After 2nd Migrant Child Dies in U.S. Custody," *CBS News*, Dec. 26, 2018, https://www.cbsnews.com/news/customs-and-border-protection-chief-kevin-mcaleenan-on-migrant-child-death/.

[341] Dianne Gallagher and Kate Sullivan, "Feds Say a Sixth Migrant Child Died While in the Care of Authorities in September," *CNN*, May 23, 2019 5:32 PM, https://www.cnn.com/2019/05/22/politics/sixth-migrant-child-dies/index.html.

[342] Miriam Jordan, "'A Breaking Point': Second Child's Death Prompts New Procedures for Border Agency," *New York Times*, Dec. 26, 2018, https://www.nytimes.com/2018/12/26/us/felipe-alonzo-gomez-customs-border-patrol.html.

[343] Ibid.

[344] Ibid.

[345] Ibid.

and paramedics to screen children and adults who are detained at the border.[346] Both Jakelín and Felipe's parents speak Mayan languages, but the fathers were reportedly questioned about their children's health in Spanish, which they do not fully understand, and signed forms asking about their children's health in English.[347] Both fathers stated that their children seemed healthy before they were picked up by Border Patrol.[348] In both cases, when their children became violently ill, Border Patrol brought them to hospitals that were over 30 miles away, but it was too late to save them.[349]

In 2019, three more Guatemalan minors died while in Department of Homeland Security custody.[350] In April, a sixteen-year-old, Juan de León Gutiérrez, fell ill with a rare condition and died several days later after being transferred roughly 160 miles from the migrant shelter in which he was detained to a hospital.[351] In May, a two-year-old (unnamed), detained with his mother, died after about a month of hospitalization, and another sixteen-year-old, Carlos Gregorio Hernández Vásquez, similarly passed away after becoming sick while in U.S. custody.[352] Carlos was confined for twice as long as federal law ordinarily allows, and was moved to a different holding facility after a diagnosis of the flu.[353] Though prescribed with the medicine Tamiflu, Carlos was never hospitalized.[354] In May 2019, the death of an unnamed Salvadoran child in Department of Health and Human Services custody came to light.[355] Though she died in September of 2018, her passing

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[346] Ibid.

[347] Simon Romero, "Father of Migrant Girl Who Died in U.S. Custody Disputes Border Patrol Account," *New York Times*, Dec. 15, 2018, https://www.nytimes.com/2018/12/15/us/migrant-girl-border-patrol-jakelin.html (father speaks Q'eqchi' and did not fully understand Spanish or English); Maria Sacchetti, "Official: Guatemalan Boy Who Died in U.S. Custody Tested Positive for Influenza B, Final Cause of Death Remains Under Investigation," *Washington Post*, Dec. 28, 2018, https://www.washingtonpost.com/local/immigration/father-whose-son-died-in-custody-knew-bringing-him-would-ease-entry-into-us/2018/12/27/4c210bfc-0a1d-11e9-85b6-41c0fe0c5b8f_story.html?utm_term=.21b9eacc3dac (father speaks only the Mayan language Chuj).

[348] Romero, "Father of Migrant Girl Who Died."; Sacchetti, "Official: Guatemalan Boy Who Died."

[349] Ibid.

[350] Nomaan Merchant, "Fifth Migrant Child Dies After Detention by US Border Agents," *AP News*, May 20, 2019, https://www.apnews.com/5a49d65213b54043825acc282830b139 (hereinafter Merchant, "Fifth Migrant Child Dies.").

[351] Nomaan Merchant and Sonia Pérez D., "US Won't Answer New Questions About Migrant Teen's Death," *AP News*, May. 9, 2019, https://www.apnews.com/1d7d00f710ab4eb8979143717c94fab0.

[352] Merchant, "Fifth Migrant Child Dies."

[353] Ibid.

[354] Ibid.

[355] Graham Kates and Angel Canales, "A 10-Year-Old Migrant Girl Died Last Year in Government Care, Officials Acknowledge," *CBS News*, May 22, 2019, https://www.cbsnews.com/news/migrant-children-death-a-10-year-old-

was not reported until eight months later.[356] She entered the United States at an Office of Refugee Resettlement facility in Texas in a "medically fragile" state and was transferred by Department of Homeland Security between multiple medical facilities across multiple states for a number of months before she finally passed away.[357]

In addition to the five children who have died while in custody, Mariee Juárez, a one and a half year old migrant child from Guatemala, died just a few weeks after being released from Immigration and Customs Enforcement custody in 2018.[358] Her mother, Yazmín Juárez, is now suing the U.S. government in connection to her daughter's death.[359] Juárez testified before Congress that while she and her daughter were in the custody of Immigration and Customs Enforcement, they were kept in a cage with 30 other people, including sick and coughing children.[360] After a week, Mariee also became sick and was given only Tylenol and honey even though she was vomiting, had diarrhea, a fever, and stopped eating.[361] Mariee lost 8 percent of her body fat in 10 days and upon release, spent six weeks in hospitals with a respiratory infection, on a ventilator, before passing away just a few months before her second birthday.[362]

The deaths of these innocent minors demonstrate the devastating consequences of the dangerous conditions of border custody and child detention policies. According to relevant civil rights standards, any child, whether they arrived with an adult family member or as an unaccompanied minor, should not be held in detention for long periods, or subject to abusive conditions, or without proper care, including medical treatment.[363]

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migrant-girl-died-last-year-in-government-care-officials-acknowledge-exclusive/?ftag=CNM-00-10aab7e&linkId=67929241.

[356] Ibid.

[357] Ibid.

[358] Sasha Ingber, "Migrant Woman Testifies: My Child Died on What is Mother's Day In My Country," *NPR*, Jul. 10, 2019, https://www.npr.org/2019/07/10/740512246/migrant-woman-testifies-my-child-died-on-what-is-mothers-day-in-my-country.

[359] Ibid.

[360] Ibid.

[361] Ibid.

[362] Ibid.

[363] *See, e.g., Flores* agreement.

Impact of Metering on Children

During the last week of March 2019, reports emerged that the Border Patrol was holding asylum seekers who sought to cross legally in a pen under a highway bridge near the legal border crossing.[364] Over 1,000 migrants, including babies and children, had been held under the bridge surrounded by a chain-link fence and forced to sleep outside in the cold, on gravel with bird droppings and dust falling on them at night.[365] On March 31, federal officials reportedly cleared out the enclosure, and the hundreds of families of asylum seekers were moved to other places, but the *New York Times* reported that they were still using a tent under another site under the bridge.[366]

The American Civil Liberties Union of Texas filed a complaint with Department of Homeland Security's Office for Civil Rights and Civil Liberties and its Office of Inspector General, stating that in addition to keeping families and children outside in the cold sleeping on gravel, there were reports of verbal and physical abuse, lack of clean water, lack of clean toilets and lack of soap, lack of access to medical care, and sleep deprivation as officials woke the families every few hours and many were unable to sleep in the cold on the gravel.[367] The American Civil Liberties Union of Texas alleged that:

> The detention of migrants for multiple nights in outdoor detention pens is an unprecedented and extreme violation. Although [Customs and Border Protection] has long violated the rights of migrants in its custody, the agency's decision to detain migrants, including children, in caged dirt filled outdoor areas is an escalation of this administration's cruelty. [Customs and Border Protection] has an obligation, under its own standards, to ensure that migrants are treated humanely, with dignity, and consistent with U.S. and international law.[368]

Medical Treatment of Children

In *Reno v. Flores*, the Supreme Court held that the circumstances of immigrant children's confinement were better described as "legal custody rather than detention" because they are not in

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[364] *See* Alfredo Corchado, "Border Patrol Closes Ramshackle Migrant Holding Pen Near Where Trump Official Declared Crisis," *Dallas News*, Mar. 31, 2019, https://www.dallasnews.com/news/immigration/2019/03/31/border-patrol-closes-ramshackle-migrant-holding-pen-near-top-trump-official-declared-crisis.

[365] Ibid.

[366] Simon Romero, "Migrants Moved Out of Holding Pen Under El Paso Bridge," *New York Times*, Mar. 31, 2019, https://www.nytimes.com/2019/03/31/us/el-paso-bridge-migrants.html.

[367] American Civil Liberties Union Texas letter.

[368] Ibid., 1.

correctional institutions but "facilities that meet state licensing requirements for the provision of shelter care, foster care, group care, and related services to dependent children."[369] In a settlement reached by the class of plaintiffs in *Flores v. Reno* based on the needs of vulnerable children, both parties laid out the stipulated medical requirements for migrant children being detained in the legal custody of the former Immigration and Naturalization Services, which has now been reorganized into Department of Homeland Security. After acknowledging the particular vulnerabilities of the population being detained, the agreement set out that:

> [Immigration and Naturalization Service] will hold minors in a facility that is *safe and sanitary* and that is consistent with the [Immigration and Naturalization Services]'s concern for the particular vulnerability of minors. Such facilities will have access to toilets and sinks, drinking water and food as appropriate, medical assistance if the minor is in need of emergency services, adequate temperature control and ventilation.[370]

The parties also included specific services and programs that should be made available to migrant children:

> Appropriate routine medical and dental care, family planning services, and emergency health care services, including a complete medical examination (including screening for infectious disease) within 48 hours of admission, excluding weekends and holidays, unless the minor was recently examined at another facility; appropriate immunizations in accordance with the U.S. Public Health Service (PHS), Center for Disease Control; administration of prescribed medication and special diets; appropriate mental health interventions when necessary.[371]

Detention centers must also comply with all applicable state child welfare laws and regulations and must provide for each minor in its care proper physical care and maintenance. [372]

Effective application of these standards have proven to be elusive for thousands of migrant children. As detailed in public testimony heard by the Commission in April of 2019, medical staff are not routinely present at detention facilities and wait times to see a doctor can be weeks long,

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[369] *Reno v. Flores*, 507 U.S. at 298.

[370] *Id.*; Stipulated Settlement Agreement, Exhibit 2, Instructions to Service Officers re: Processing, Treatment, and Placement of Minors, *Flores v. Reno* (emphasis added).

[371] Ibid.

[372] Stipulated Settlement Agreement, Exhibit 1, Minimum Standards for Licensed Programs, *Flores v. Reno*.

regardless of how dire the situation.[373] Facilities lack appropriate medicine and detention staff have been known to deny migrants medication they need for pre-existing illnesses.[374] Due to the negligence of detention staff, multiple children have passed away in detention from illnesses such as the flu, which with proper treatment would not be deadly.[375] The Trump Administration is not complying with the medical requirements of the *Flores* agreement, and is seeking to withdraw from the agreement.[376]

The Director of Litigation at Refugee and Immigrant Center for Education and Legal Services (an organization that provides assistance to migrants at the border) told the Commission that there is a lack of adequate pediatric care in detention facilities, including inadequate or inappropriate immunizations, delayed medical treatment, inadequate educational services and limited mental health services.[377] Moreover, although privately run detention facilities such as Karnes and Dilley are contractually obligated to have a pediatrician on staff, Refugee and Immigrant Center for Education and Legal Services states that these detention facilities do not employ pediatricians.[378]

Lack of Pediatric Care Testimony

> *"[I]fants and children who may be housed in these detention centers are not in optimal health when they arrive and they face immense challenges and trauma from being separated from parents and guardians to being malnourished and dehydrated."*[379]

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[373] Project South, Written Statement for the Public Comment Session on Immigration Detention before the U.S. Commission on Civil Rights, May 13, 2019, at 6-7 (hereinafter Project South Statement).

[374] Margaret Seiler, Volunteer, Don't Separate Families, Testimony, *Public Comment Session,* p. 60; Project South Statement, at 6-7.

[375] Merchant, "Fifth Migrant Child Dies."

[376] Nick Miroff and Maria Sacchetti, "Trump administration to circumvent court limits on detention of child migrants," *Washington Post*, Sept. 6, 2018, https://www.washingtonpost.com/world/national-security/trump-administration-to-circumvent-court-limits-on-detention-of-child-migrants/2018/09/06/181d376c-b1bd-11e8-a810-4d6b627c3d5d_story.html?utm_term=.5fd3169183cf; *see also* Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children, 83 Fed. Reg. 45486 (proposed Sept. 7, 2018) (to be codified at 8 C.F.R. 212 and 236 & 45 C.F.R. 410).

[377] Manoj Govindaia, Litigation Director, Refugee and Immigrant Center for Education and Legal Services, Testimony, *Public Comment Session,* p. 120.

[378] Ibid, 120-21. See also Jeremy Raff, "What a Pediatrician Saw Inside a Border Patrol Warehouse," *The Atlantic*, Jul. 3, 2019, https://www.theatlantic.com/politics/archive/2019/07/border-patrols-oversight-sick-migrant-children/593224/.

[379] Michelle Mabson, Staff Scientist, Earthjustice, Testimony, *Public Comment Session,* pp. 114-15.

"[Department of Homeland Security] has likely not been able and/or will be unable in the future to staff these facilities in a timely manner with qualified pediatricians, psychiatrists, child and adolescent physiatrists, mental health clinicians including those with expertise in treating children and toddlers, and pediatric nurses."[380]

"We were told about children who actually suffered respiratory issues due to the cold temperatures and the lack of any type of warmth or blankets provided to those migrants."[381]

"Another young boy, age 6, was screaming, thrashing, and attempting to bite due to what appeared to be a very high fever. The boy's father stated that his son had never had medicine before but needed it now. After several failed attempts of administering fever reducer, I resorted to applying a cold washcloth to his forehead over the course of two hours, utilizing an office Tupperware bin which was the only container that I could find that could hold water in the facility."[382]

Mental Health and Children

The federal government is not providing adequate mental health resources for migrant children. There is no initial screening at intake and no counseling provided for trauma. Yet there is substantial research available—some of which was provided to the government in advance of implementation of family separation and detention of the children[383]—linking traumas associated with childhood detention with long lasting negative outcomes such as depression, anxiety, and post-traumatic stress disorder.[384] Trauma may have also manifested due to the events that led children to leave their home countries, from the journey, or from being separated from parents and other care givers. Additionally, advocates argue that for children in detention centers, behavioral problems are often the result of trauma-caused mental illness and are exacerbated by the use of

[380] Government Accountability Project, Written Statement for Public Comment Session before the U.S. Commission on Civil Rights, May 13, 2019, at 6 (hereinafter Government Accountability Project Statement).

[381] Chelsea James, College Student, Howard University, Testimony, *Public Comment Session,* p. 62.

[382] Briones Bedell, High School Student, California, Testimony, *Public Comment Session,* p. 67.

[383] Government Accountability Project Statement, at 29.

[384] American Psychiatric Association Statement, at 2.

discipline as opposed to treatment.[385] Detention centers have also reportedly placed children with mental health issues in solitary confinement.[386]

Further, the American Academy of Pediatrics released a study finding that the physical and mental health needs of migrant children were not being met, finding that "Department of Homeland Security facilities do not meet the basic standards for the care of children in residential settings[;]" and emphasizing that: "From the moment children are in the custody of the United States, they deserve health care that meets guideline-based standards, treatment that mitigates harm or traumatization, and services that support their health and well-being."[387] Child detention and family separation are part of and exacerbate mental health issues arising from trauma the children fled and/or experienced in their journey to the border. The Department of Homeland Security Advisory Committee on Family Residential Centers conducted a year-long investigation of current immigrant detention conditions for children and recommended that:

> [Department of Homeland Security]'s immigration enforcement practices should operationalize the presumption that detention is generally neither appropriate nor necessary for families—and that detention or the separation of families for purposes of immigration enforcement or management are never in the best interest of children.[388]

Not only children, but also their parents or guardians, may be severely traumatized in detention because of family separation and concern for the well-being of their children.[389]

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[385] Washington Lawyers' Committee for Civil Rights and Urban Affairs, Written Statement for the Public Comment Session on Immigration Detention before the U.S. Commission on Civil Rights, Apr. 12, 2019, at 11 (hereinafter Washington Lawyers' Committee Statement).

[386] Washington Lawyers' Committee Statement, at 6-7.

[387] American Academy of Pediatrics, *Detention of Immigrant Children*, April 2017, p. 1 https://pediatrics.aappublications.org/content/pediatrics/139/5/e20170483.full.pdf.

[388] Dep't. of Homeland Security, Immigration and Customs Enforcement, *Report of the ICE Advisory Committee on Family Residential Centers*, Oct. 7, 2016, p. 2 https://www.ice.gov/sites/default/files/documents/Report/2016/acfrc-report-final-102016.pdf.

[389] *See, e.g.*, Associated Press, "'Suicide' of Migrant Separated From his Wife and Child Casts Harsh Light on Donald Trump's Immigration Policy," *South China Morning Post*, Jun. 11, 2018, https://www.scmp.com/news/world/united-states-canada/article/2150137/suicide-migrant-who-separated-his-wife-and-child; *see also* Prelim. Inj., *Ms. L. v. ICE*, 310 F. Supp. 3d 1133 (S.D. Cal. 2018).

Lack of Mental Health Screening Testimony

> *"[P]roblems exist with mental health treatment at the family detention centers. The [Department of Homeland Security] Federal Advisory Committee reported a lack of mental health screening for children and adults at the family detention centers. And Human Rights First reported that any period of incarceration can cause significant psychological harm and can exacerbate mental health trauma in children."*[390]

Trauma in Children Testimony

> *"Th[e] two-year-old was named Margarita. . . [and she] was part of . . . the family of 14. I soon came to the understanding that the family of 14 actually used to be a family of 16 but Margarita's parents were brutally shot in front of her on the trek from Honduras to the border, yet there was no sense of counseling or emotional support whatsoever provided to anyone in the family."*[391]

> *"These migration-related and postmigration stressors can produce demoralization, grief, loneliness, loss of dignity, and feelings of helplessness as normal syndromes of distress that impede refugees from living health and productive lives."*[392]

> *"Having studied trauma and the effects of trauma on the young brain, not like adults who can recover, children's brains flooded by cortisol and inflammatory agents typical of the traumatic responses we were seeing, cannot recover and are permanently damaged. This form of trauma has been likened to great incidences of mental health and physical health problems as well as exacerbated bouts of abnormal and antisocial behaviors as a result of the trauma."*[393]

Use of Physical Restraints and Juveniles Testimony

> *"Between June 2015 and May 2018, [Shenandoah Valley Juvenile Center] documents reveal that physical restraints were used on immigrant children on well over 100 occasions; senior Shenandoah Valley Juvenile Center staff*

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[390] Govindaia Testimony, *Public Comment Session*, p. 125.

[391] Amidha Washwa, High School Student, California, Testimony, *Public Comment Session,* pp. 75.

[392] American Psychiatric Association Statement, at 2.

[393] Black Statement, at 1.

> *acknowledged that physical restraints are used on these children even when a child's behavior is not "immediate[ly] threaten[ing]" Between November 2015 and November 2017, the restraint chair was used over 40 times on immigrant children, often in excess of Shenandoah Valley Juvenile Center's two-hour limit policy; on one occasion, one youth suffering from serious mental health problems was placed in the restraint chair for over 6 hours in a day and for nearly 9 hours the very next day, while John Doe 1 was put in the chair 11 times over a 16 month period for between 25 minutes and 2 hours at a time."*[394]

Use of Solitary Confinement, Juveniles and Mental Health Testimony

> *"[Name omitted], for example – a 17-year-old youth with severe mental health needs – was placed in isolation for approximately 2,400 hours (a cumulative 100 days) during the less than two years he was detained at Shenandoah Valley Juvenile Center."*[395]

> *"There is also the particular psychological harm being perpetrated against the youngest detained people. The fact that 17 year-olds are picked up at midnight on their 18th birthdays to be transferred to adult facilities seems like yet another deliberate cruelty.."*[396]

Sexual and Physical Violence Against Detained Children

Department of Homeland Security's policies resulting in the forced stay of immigrant children in shelters has further resulted in widespread allegations of sexual abuse, particularly among contractors. The largest contractor, Southwest Key, provided housing in Arizona, California, and Texas for over 5,000 children, who were not free to leave.[397] It received more than $1.3 billion in government contracts for housing immigrant children, from 2013-2018. Of the many allegations, the following is elucidating:

> A ProPublica report in August [2018] detailed the charges against Levian Pacheco, a former Southwest Key employee who is accused of molesting eight boys at a Mesa shelter over an 11-month period. Pacheco, who is HIV-positive, [was hired]

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[394] Washington Lawyers' Committee Statement, at 6-7.

[395] Ibid., 6.

[396] Julie Schwietert Collazo, Co-Founder of Immigrant Families Together, Written Statement for Public Comment Session on Immigration Detention before the U.S. Commission on Civil Rights, Apr. 27, 2019.

[397] Topher Sanders and Michael Grabbel, ""Humanitarian Crisis" Looms as Arizona Threatens to Revoke Immigrant Children Shelter Licenses," *ProPublica*, Sept. 21, 2018, https://www.propublica.org/article/southwest-key-arizona-threatens-to-revoke-immigrant-children-shelter-licenses.

> without a background check [and allowed to work] for nearly four months. He was convicted earlier this month of 10 sex offenses connected to the molestation.
>
> In response to media attention and complaints, Arizona health officials reviewed records on background checks at every Southwest Key facility across the state. Of the 13 shelters, the state found two additional facilities also had problems with background checks. . . .
>
> Arizona health officials also found that Southwest Key hadn't vetted all employees by interviewing their previous employers and hadn't ensured all employee files contained proof of tuberculosis testing. At some facilities, officials discovered bedroom and bathroom doors missing and problems with the size of residents' rooms.[398]

These issues are highly problematic under the Prison Rape Elimination Act, which is applicable to privately-run federal facilities.[399] In other Southwest Key shelters run under federal government contracts in Arizona, videos show physical abuse, including staff at the shelters dragging and slapping Latino migrant children.[400] As far as the Commission knows based on the limited information available from Department of Homeland Security, the federal government did not undertake any related enforcement actions. However, the state of Arizona did take action under state child welfare laws and revoked Southwest Key's permits, after which the company was forced to close two shelters.[401]

Testimony

> *"Because Homestead (detention center) is a federal facility on an old Air Force base, they are not accountable to Florida State Regulations. The employees who work with the children are not vetted properly to screen out past prior sexual offenses. . . . And state agencies, like child and protective services, are not allowed to inspect the premises because it is on federal property."*[402]

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[398] Ibid.

[399] 28 C.F.R. § 115.

[400] Janice Williams, "Video Shows Migrant Children Physically Abused by Staffers at Arizona Shelter," *Newsweek*, Dec. 30, 2018, https://www.newsweek.com/southwest-key-migrant-child-abuse-1274796.

[401] Agnel Philip, "Southwest Key to Close 2 Phoenix-area Migrant Shelters, Pay Fine to State," *Arizona Republic*, Oct. 24, 2018, https://www.azcentral.com/story/news/politics/immigration/2018/10/24/southwest-key-close-2-phoenix-area-child-immigrant-shelters-pay-fine-arizona-settlement/1754460002/.

[402] Hinebauch Statement, at 2.

> *"Although the children are conditioned to report sexual abuse and told that these reports maintain their anonymity, I learned that they all knew the hotline was not confidential and that none of their complaints were anonymous. This, I was told, was enough for some children to not report if other children bullied them."*[403]

Length of Stay in Detention Facilities

Under the *Flores* Agreement, the federal government cannot detain migrant children for more than 20 days,[404] and in 2015, a federal court held that this limit applies to both unaccompanied minors as well as to minors being detained as part of a family unit.[405] A subsequent request by the Department of Justice to modify the Agreement to allow detention of minors beyond the 20 day limit was rejected in 2018 by the same Court.[406] The Trump Administration has since sought to make similar modifications to the Agreement through federal regulation.[407] As of publication of this report, the *Flores* Agreement remains in effect, however, given the conditions of migrant detention facilities, the federal government is likely not in compliance with the Agreement as alleged in a lawsuit filed in California on June 26, 2019.[408] According to public testimony to the Commission, most detainees in immigration detention facilities are held in prison like conditions with no idea when they will be released.[409] Although the *Flores* Agreement limits the confinement of children to 20 days, public testimony stated that at the Homestead detention facility on a military base in Florida the average length of stay for a child is 67 days.[410] Public testimony pointed out that at privately owned, for-profit detention facilities, there may be a monetary incentive to detain

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[403] Nancy Hernández, Written Statement for Public Comment Session before the U.S. Commission on Civil Rights, May 12, 2019, at 2 (hereinafter Hernandez Statement).

[404] *Flores* Agreement.

[405] *Flores v. Johnson,* 212 F.Supp.3d 864 (C.D. Cal. 2015).

[406] *Flores v. Lynch*, No. 85-4544, 2017 WL 6049373 (C.D. Cal. Jan. 20, 2017); Laura Jarrett, "Federal Judge Rejects Trump Administration's Bid to Alter Rules on Detaining Minors," *CNN*, July 10, 2018, https://www.cnn.com/2018/07/09/politics/federal-judge-trump-administration-detaining-children/index.html.

[407] *See supra* notes 298-299; 305-308.

[408] *Flores v. Barr*, No. 85-04544 (C.D. Cal. 2019); Alejandro Lazo and Jacob Gershman, "Lawsuit Alleges Government Mistreatment of Migrant Children," *Wall Street Journal*, June 27, 2019, https://www.wsj.com/articles/lawsuit-alleges-government-mistreatment-of-migrant-children-11561608969.

[409] Seiler Testimony, *Public Comment Session*, p. 58.

[410] Hinebauch Statement, at 1.

immigrants for as long as possible.[411] Corporations are paid $775 per day for each migrant child in detention.[412]

On March 13, 2019, Refugee and Immigrant Center for Education and Legal Services of Texas sent a complaint to Office for Civil Rights and Civil Liberties alleging that despite its announcement to the contrary, Department of Homeland Security was still holding children separated from their parents for more than 20 days and taking other actions contrary to the rules of the *Flores* agreement upheld by federal courts to govern conditions of migrant child detention.[413] Refugee and Immigrant Center for Education and Legal Services documented that at Karnes Detention Center in Texas, children, the youngest of whom was 5, were being held "between 41-58 days with no word from [Immigration and Customs Enforcement] about their release [to their parents]."[414] In discussing the *Flores* settlement and subsequent court rulings about it, Refugee and Immigrant Center for Education and Legal Services clarifies that 20 days is the maximum time that children may be held under extenuating circumstances, and that it does not believe that ongoing border crossings by Central American families seeking asylum qualify as "extenuating circumstances."[415] Citing the American Academy of Pediatrics, Refugee and

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[411] Sula Howell, Written Statement for the Public Comment Session on Immigration Detention before the U.S. Commission on Civil Rights, May 13, 2019, at 2 (hereinafter Howell Statement).

[412] Julia Ainsley, "Trump Admin's 'Tent Cities' Cost More than Keeping Migrant Kids with Parents," *NBC News*, June 20, 2018, https://www.nbcnews.com/storyline/immigration-border-crisis/trump-admin-s-tent-cities-cost-more-keeping-migrant-kids-n884871?utm_source=newsletter&utm_medium=email&utm_campaign=newsletter_axiosam&stream=top.

[413] *See generally Flores* Agreement (Settling as enforceable law, in 1997 and updated in 2001 by the federal government, that migrant children may not be held more than 20 days, and the conditions of their detention must be safe and appropriate, including proper medical care and an education plan. Furthermore, settles that the Dep't. of Homeland Security should make every attempt to locate the parents, and children should be released to their parents (or other guardians if parents cannot be located); *See generally* Dep't. of Homeland Security and Dep't of Health and Human Services, *Proposed Rule: Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied* (Dep't. of Homeland Security proposing to modify the agreement; the proposed rules have been subject to public comment but a final rule has not been issued); Abbie Gruwell, "Unaccompanied Minors and the *Flores* Settlement Agreement: What to Know, National Conference of State Legislatures" *National Conference of State Legislatures*, Oct. 30, 2018, http://www.ncsl.org/blog/2018/10/30/unaccompanied-minors-and-the-flores-settlement-agreement-what-to-know.aspx (Reporting that the new rules would permit migrant children to be held indefinitely, and exempt federal facilities from state licensing agreements.); Caitlin Dickerson, "Trump Administration Moves to Sidestep Restrictions on Detaining Migrant Children," *New York Times*, Sept. 6, 2018, https://www.nytimes.com/2018/09/06/us/trump-flores-settlement-regulations.html?login=email&auth=login-email (Reporting the Trump Administration's proposed withdrawal from the agreement).

[414] Refugee and Immigrant Center for Education and Legal Services of Texas, letter to Cameron Quinn, Officer for Civil Rights and Civil Liberties, Dep't. of Homeland Security, and John V. Kelly, Acting Inspector General, Dep't. of Homeland Security, Mar. 13, 2019, (hereinafter Refugee and Immigrant Center for Education and Legal Services of Texas letter) https://www.raicestexas.org/2019/03/13/raices-urges-ice-to-release-families-currently-detained-in-violation-of-flores-agreement/?ms=raices_tw_hungerstrike.

[415] Ibid., n. 1 stating:

Immigrant Center for Education and Legal Services' current Complaint to Office for Civil Rights and Civil Liberties emphasizes that:

> Expert consensus has concluded that even brief detention can cause psychological trauma and induce long-term mental health risks for children. . . . there is no evidence indicating that any time in detention is safe for children." Clinical evidence from the study of detention of unaccompanied, asylum-seeking minors shows "forced detention is associated with a high risk of posttraumatic stress disorder, anxiety disorder, depression, aggression, psychosomatic complaints, and suicidal ideation.[416]

Refugee and Immigrant Center for Education and Legal Services therefore asks the Office for Civil Rights and Civil Liberties "to compel [Immigration and Customs Enforcement] to follow its obligations under *Flores* and release these children to their fathers expeditiously;" and "to investigate other past and present violations of the *Flores* norm of releasing children and parents within 20 days at the Karnes Detention Center," and to "review any written decisions by the Department of Homeland Security to continue detention despite the existing *Flores* requirements and any records documenting changes in Department of Homeland Security policy in adhering to *Flores*."[417]

Immigration and Customs Enforcement is not the only federal actor holding children in its custody for legally impermissible periods of time. Customs and Border Patrol appears, by its own limited,

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> [Refugee and Immigrant Center for Education and Legal Services] does not concede that *Flores* allows [Department of Homeland Security] to detain children at the Karnes Detention Center for 20 days. Rather, [Refugee and Immigrant Center for Education and Legal Services] uses 20 days as a benchmark because this is a timeframe Judge Gee found may be acceptable under *Flores*, specifically when [Department of Homeland Security] acts under extenuating circumstances, in good faith, and with due diligence. *See* Order re Response to Show Cause, *Flores v. Lynch*, Case No. CV 85-04544 DMG (Ex), 10-11 (C.D. Cal. Aug. 21, 2015) ("At a given time and under extenuating circumstances, if 20 days is as fast as Defendants, in good faith and in the exercise of due diligence, can possibly go in screening family members for reasonable or credible fear, then the recently-implemented [Department of Homeland Security] polic[i]es may fall within the parameters of Paragraph 12A of the Agreement.") (emphasis added)

https://www.aila.org/File/Related/14111359p.pdf ; *see also Flores* agreement; Stipulation Extending Settlement Agreement and for Other Purposes; and Order Thereon, *Flores v. Reno*, No. CV 85-4544-RJK (Px), (C.D. Cal. Dec. 7, 2001) (providing guidance on the care and custody of minor non-citizens in government custody); *see also* Order Re Plaintiffs' Motion to Enforce and Appoint a Special Monitor, *Flores v. Sessions*, No. 85-cv-04544-DMG-AGR, 2017 WL 6060252 (C.D. Cal. June 27, 2017), Collectively, Refugee and Immigrant Center for Education and Legal Services refers to these sources of law as the "FSA." It is not Refugee and Immigrant Center for Education and Legal Services' position that the arrival of asylum-seeking families at the southern border is an "extenuating circumstance" that requires the detention of families.").

[416] Refugee and Immigrant Center for Education and Legal Services of Texas letter, p. 3.

[417] Ibid., 7.

disclosed numbers, to have held more than a quarter of the children in its custody longer than the generally-legally permissible 72 hours allowed prior to transferring them to the Office of Refugee Resettlement.[418] Customs and Border Protection has moved children among its facilities before turning them over to Office of Refugee Resettlement.[419] Further, Office of Refugee Resettlement has reportedly held some separated-at-the-border children in its custody for over eighteen months.[420] Office of Refugee Resettlement has also moved children among facilities while having them in its custody,[421] including to its now-closed, "notorious emergency influx facility" of Tornillo, Texas, also known as a "tent city."[422] Worse yet, as of July 2019, many children who had been court-ordered to be reunified with a parent or allowed to be in the care of a sponsor continue to languish in federal custody.[423]

Indefinite Detention for Children Testimony

> *"The Flores Settlement would limit the confinement of these children to 20 days in what the settlement calls the least restrictive environment. Children would stay only long enough for contact to be established with their families and friends and they would be placed appropriately. But here, at such places like in Homestead, Florida, and what was at Tornillo, Texas, the stays of these children are as long as ten months, and the children, aged 13 to 17, have the IDs hanging from their necks scanned as they move from place to place, tent to building, in single file."*[424]
>
> *According to a Complaint filed with [Office for Civil Rights and Civil Liberties] by [Refugee and Immigrant Center for Education and Legal Services], migrant parents and children who have been detained beyond the legal limits "provide stark examples as to the absolute necessity of Flores protections which guarantee a child's right to leave detention 'without unnecessary delay':*

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[418] *Staff Report on Child Separations*, *supra,* note 242, p. 16.

[419] Ibid., p. 19.

[420] Ibid., pp. 17 – 18.

[421] Ibid., p. 19.

[422] Ibid., p. 20.

[423] Ibid., p. 23.

[424] Seiler Testimony, *Public Comment Session*, p. 58.

> ● ____ *says his 15-year-old son is not accustomed to having his freedom limited.* _____*explains his son becomes 'sad and desperate' when seeing other families leave the detention center. His son is also sad because he has not been able to speak to his mother or little sister. His son is not eating much and has developed indigestion.* _____ *is concerned that his son will only become sicker if their detention continues.*
>
> ● _____ *'s 5-year-old son has had indigestion, chicken pox, the cold, and a continuous cough since he and his father arrived at the Karnes Detention Center. His son is taking medicine for the cough, but it simply will not go away. His son a coughing fit any time he tries to run and play. When* _____*'s son had the chickenpox, he and his father were taken to medical isolation for four days. Since they have been detained,* _____*'s son always tells his dad, 'let's go dad, let's get out of here.'*
>
> ●_____ *'s 6-year-old son acts differently than he did before being detained.* _____ *explained his son 'used to be a very active and friendly boy,' but since their detention his son 'seems very depressed . . . [he] sees and feels the heaviness of this place.' He always wants to cry.* _____ *believes his son will be traumatized and will have psychological problems. Now that they have been separated between two detention centers, worries even more about his son.* _____ *is suffering: 'sometimes I feel like my head might explode and I'll suffer an aneurysm,' he says.* _____*'s son has had stomach aches, a fever, and an allergic rash on his neck, and the medicine he has been given is only temporarily effective.*
>
> ● _____*'s 16-year old son is anxious and distracted from school because of his long detention. His dream is to be a mechanic. He says that in the detention center, 'I cannot concentrate at school and can't stop worrying about what will happen to my father and I.'*[425]

Migrant Children Sent to Foster Care

An Associated Press investigation found that migrant children who had arrived with their parents and were separated and sent to private shelters subject to state law have been placed in foster care, and that some deported parents may lose their children to adoption.[426] Although foster care is apt to be much better for migrant children than being detained in a shelter, it can have damaging

[425] Refugee and Immigrant Center for Education and Legal Services of Texas letter, p 17.

[426] The Associated Press, "Deported Parents May Lose Kids to Adoption," *NBC News*, Oct. 9, 2018, https://www.nbcnews.com/news/latino/deported-parents-may-lose-kids-adoption-investigation-finds-n918261.

impacts. A 60 Minutes investigation documented some cases of children placed in foster care, including the case of a 5-year old boy from Honduras as follows:

> Immers and his father crossed the border illegally but presented themselves to the Border Patrol and requested asylum. Ever, the father, says he was shot in the back in Honduras, a country at war with gangs and drug cartels. As asylum applicants, they're permitted by law to stay until their hearing, usually in two or three months. Before, most asylum seekers were released at that point, but under the Trump administration they were arrested and charged with a crime. Because children can't be incarcerated, Immers was sent to a foster family in Michigan.[427]

After being in foster care for 73 days, when he was reunited with his mother, Immers was withdrawn and moody, and his mother said, "It felt like he wasn't my son anymore. It felt like a nightmare. Like I was dead."[428] As discussed above, the government may not take custody from a parent without adjudication that the parent is unfit.[429]

Legal Representation of Unaccompanied Minors

According to its website, Office of Refugee Resettlement has the responsibility under law to ensure, "to the greatest extent practicable, that all unaccompanied children in custody have access to legal representation or counsel[.]"[430] However, the government is not specifically required to pay for this representation[431] and the law is not clear on what legal services the government must provide.[432] Under the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Department of Health and Human Services was assigned the duty to help unaccompanied

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[427] Scott Pelley, "The Chaos Behind Donald Trump's Policy of Family Separation at the Border," *60 Minutes*, Nov. 26, 2019, https://www.cbsnews.com/news/trump-family-separation-policy-mexican-border-60-minutes-investigation-greater-in-number-than-trump-administration-admits/.

[428] Ibid. (interview with Gladys).

[429] *County of Sacramento v. Lewis,* 523 U.S. 833, 850 (1998)*; Ms. L v. ICE,* 310 F.Supp.3d 1133, 1143 (S.D. Cal. 2018).

[430] "About the Program," U.S. Dep't of Health and Human Services, Office of Refugee Resettlement, https://www.acf.hhs.gov/orr/programs/ucs/about (accessed May 18, 2019).

[431] Jacob Soboroff and Julia Ainsley, "Federal Funds for Legal Help to Child Migrants at Border Are Running Out," *NBC News*, June 26, 2019, https://www.nbcnews.com/politics/immigration/federal-funds-legal-help-child-migrants-border-are-running-out-n1021976.

[432] Patrick Michels, "The Government Pays for Migrant Children's Lawyers. Challenge the Government, and They Can Lose Their Funding," *Reveal*, Nov. 14, 2018, https://www.revealnews.org/article/th-government-pays-for-migrant-childrens-lawyers-challenge-the-government-and-they-can-lose-their-funding/.

minors receive legal representation.[433] To perform this obligation, Office of Refugee Resettlement funds a grant program for legal service providers, which is administered by the nonprofit Vera Institute of Justice.[434] Though the Vera Institute of Justice runs the majority of Office of Refugee Resettlement's legal aid program and serves 50,000 children a year, the federal grants they receive are not guaranteed and are in increasing danger of getting cut.[435] If their federal funding is cut, unless an unaccompanied minor can independently afford legal representation, children as young as infants will be forced to represent themselves in asylum proceedings.[436]

Detention of Adults: Oversight and Transparency of Conditions

Lack of Transparency and Incomplete Oversight

In 2015, the Commission reported that:

> Both a lack of binding regulations and standards create confusion and a lack of clarity in the application of detention standards in the immigration detention system. The National Detention Standards 2000 and Performance-Based National Detention Standards 2008 and 2011 are intended to be "contractually binding upon detention facilities used by [Department of Homeland Security] through their incorporation into individual facility contract agreements." Different standards also apply to different facilities depending on when they created their respective contracts with [Immigration and Customs Enforcement]. Additionally, because these standards do not have enforcement mechanisms, facilities are not held accountable when they fail to maintain or meet these standards - at times with tragic results.[437]

At the Commission's public comment session, many also raised concerns about the detention of adults in immigration detention facilities. One category of concern includes internal oversight of detention facilities. The Department of Homeland Security has issued guidance on detention

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[433] 8 U.S.C. § 1232.

[434] Michels, "The Government Pays for Migrant Children's Lawyers."; "Legal Services for Accompanied Children Overview," *Vera Institute of Justice*, https://www.vera.org/projects/legal-services-for-unaccompanied-children/overview.

[435] Soboroff and Ainsley, "Federal Funds for Legal Help."

[436] Ibid.

[437] 2015 Report, 15.

standards. These standards apply to all detention facilities—including privately contracted detention facilities—and govern detainee care, services provided, and facility operations. The most recent detention standards were issued in 2011 and include standards for medical and mental health services, access to legal services and religious opportunities, communication with detainees with limited English proficiency, the process for reporting and responding to complaints, and recreation and visitation.[438] The Department of Homeland Security provides oversight and accountability through inspections as to whether the facilities are following these detention standards, and at times this is through unannounced inspections.[439] The Office of Inspector General has recently issued a series of extremely troubling reports about detention conditions, sharing photos of serious overcrowding and also reporting prolonged detention in apparent violation of federal detention standards.[440] Congressional visits have confirmed the same.[441]

But according to testimony to the Commission, the majority of these internal inspections are announced beforehand and do not have proper checklists, often overlooking major problems in these facilities.[442] When an inspection does identify a defect in a detention center, the facility is able use a waiver on the issue that gives them the freedom to ignore the problem and not fix it.[443] Furthermore, the Department of Homeland Security Office for Civil Rights and Civil Liberties reported to the Commission that the Office for Civil Rights and Civil Liberties received thousands of complaints about family separation and the conditions of children in detention that they were unable to process except through samples of a small fraction of such complaints, and that the office does not have authority to remedy individual complaints.[444]

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[438] Immigration and Customs Enforcement, *Performance-Based National Detention Standards 2011.*

[439] *See, e.g.*, Dep't. of Homeland Security, Office of Inspector General, *Concerns About ICE Detainee Treatment at Four Detention Facilities*, OIG-19-47, June 3, 2019, https://www.oig.dhs.gov/sites/default/files/assets/2019-06/OIG-19-47-Jun19.pdf (summarizing findings of unannounced inspections of detention facilities).

[440] Dep't. of Homeland Security, OIG-19-51, *Management Alert*.

[441] *See e.g.*, Congressional Hispanic Caucus, "Congressional Hispanic Caucus Leads Investigation at Immigrant Detention Facilities in Texas," press release, July 2, 2019, https://congressionalhispaniccaucus-castro.house.gov/media-center/press-releases/congressional-hispanic-caucus-leads-investigation-at-immigrant-detention; Leigh Ann Caldwell, "Senators Who Visited Border Asked DHS for Improved Care of Migrants," *NBC News*, July 26, 2019, https://www.nbcnews.com/politics/congress/senators-who-visited-border-asked-dhs-improved-care-migrants-n1034806; Molly Hennessee-Fiske, "Q&A: California Congresswoman Describes Tour of Border Patrol Detention Center," *Los Angeles Times*, July 20, 2019, https://www.latimes.com/world-nation/story/2019-07-19/california-congresswoman-describes-tour-of-border-patrol-detention-center.

[442] Mary Small, Policy Director, Detention Watch Network, Testimony, *Public Comment Session,* p. 140.

[443] Ibid., 141.

[444] Deputy Officer, Office for Civil Rights and Civil Liberties, Veronica Venture testified at the Commission's November 2018 briefing on federal civil rights enforcement that Office for Civil Rights and Civil Liberties received thousands of complaints about immigrant family separation and detention, but due to resource constraints, Office of Civil Rights and Civil Liberties is investigating only a small portion (23 out of over 3,000). Veronica Venture,

As reported to the Commission, the problem of transparency in detention facilities stem from many different causes. First, some detention facilities are on federal land, making them not subject to state regulations.[445] Because of this, many employees at detention facilities are not properly vetted.[446] In addition to little reports getting produced from detention facilities, detention facilities have also sometimes been hostile towards federal and local officials who have attempted to enter these facilities.[447]

Transparency and Oversight Testimony

> *"Homestead detention center "has no jurisdiction. While it's called Homestead, it's in a no man's land. It's not actually in Homestead. So even the workers are not being held accountable. They're not screened properly."*[448]
>
> *"There must be greater transparency and oversight. The current system of announced inspections and toothless [Office of International Health] investigations are not improving the system."*[449]
>
> *"Immigration and Customs Enforcement "inspections are not independent, they're announced ahead of time. They're based on an inadequate checklist, they're often based on conversations with staff but not people who are*

Deputy Officer, Office for Civil Rights and Civil Liberties, Dep't. of Homeland Security, November 27, 2018 Briefing Transcript, unedited, at 125-26; *see also* Ferriss et al., "Homeland Security's Civil Rights Unit."

[445] Hinebauch Statement at 2; *see also* Graham Kates, "Some Detention Centers for Migrant Children Not Subject to State Inspections," *CBS News*, July 5, 2018, https://www.cbsnews.com/news/some-detention-centers-for-immigrant-children-wont-be-subject-to-traditional-inspections/.

[446] *See* Kates, "Some Detention Centers for Migrant Children."

[447] Kathy Hersh, Written Statement for the Public Comment Session on Immigration Detention before the U.S. Commission on Civil Rights, May 7, 2019, at 1 ("Congresswoman Debbie Mucursal-Powell was denied entry for the second time in spite of a federal law which grants automatic access to members of Congress with no notice required… No press, Congressional representation or local officials have been allowed to talk to the children.") (hereinafter Hersh Statement); Vanessa McDougal, Written Statement before the U.S. Commission on Civil Rights, at 1 ("I was not permitted inside the facility, nor was anyone else. Speaking to the Texas Tribune, Tornillo schools Superintendent Rosy Vega-Barrio stated 'we have the same access that the whole world has, which is none.' The facility was surrounded by chain-link fences covered with thick black tarp to make it hard to see in. However, there were holes in the tarp through which I was able to peek.") (hereinafter McDougal Statement).

[448] Francine Tatu Slaton Testimony, *Public Comment Session*, p. 157.

[449] Detained Migrant Solidarity Committee Statement, at 10 (citing: National Immigrant Justice Center, "ICE's Failed Monitoring of Immigration Detention Contracts"; National Immigrant Justice Center, "Lives in Peril: How Ineffective Inspections Make ICE Complicit in Immigration Detention Abuse.").

detained. And they consistently fail to identify even well documented deficiencies."[450]

"Over a three-year period, even [Immigration and Customs Enforcement]'s own sub-par inspections found 14,003 deficiencies. [Immigration and Customs Enforcement] imposed financial penalties on its contractor in two instances. But even worse, [Immigration and Customs Enforcement] consistently abuses a waiver process to waive the failed standard rather than address the underlying problem. According to the [Office of the Inspector General], there is almost no protocol for these waivers, 96 percent of which are granted, many of them indefinitely."[451]

Legal Standard for Medical Care

There is currently an open legal question as to what the standard is for the provision of medical care for adults in immigration detention facilities. The answer to this question turns primarily on the purpose of the detention.[452] In *Youngberg v. Romeo*, the Supreme Court held that where a person's confinement is for the purpose of providing "reasonable care and safety" they are "entitled to more considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish."[453] Inversely, when a person is detained for criminal acts, the detainment is punitive in nature and the standard of care is held at a lower bar. The majority of courts have held that immigration detention centers are similar in purpose to prisons, and therefore apply the deliberate indifference standard.[454] Courts that liken immigration detention centers to facilities meant for care and safety apply the professional judgment standard.[455] The professional judgement standard is typically used in cases involving defendants who are involuntarily committed to state institutions for intellectual impairment.[456] Those courts that apply the professional judgement standard liken the involuntary nature of those committed to state

[450] Small Testimony, *Public Comment Session*, p. 140.

[451] Ibid, 141.

[452] *See Newbrough v. Piedmont Regional Jail Authority*, 822 F. Supp. 2d 558, 575 (E.D. Va. 2011) (stating that the Supreme Court's decision "indicated that differently situated detainees are entitled to different standards of care from their custodians").

[453] *Youngberg v. Romeo,* 457 U.S. 307, 320 n. 27 (1982).

[454] *Charles v. Orange County*, 925 F.3d 73, 85 (2d Cir. 2019).

[455] *Youngberg*, 457 U.S. at 321-22; *see also Jones v. Blanas*, 393 F.3d 918, 934 (9th Cir. 2004) (civil detainee awaiting adjudication need not prove "deliberate indifference").

[456] *Youngberg*, 457 U.S. at 321.

institutions for their intellectual impairments to those who are involuntarily confined in state institutions.

The deliberate indifference standard is used in criminal cases involving pre-trial detainees and determines how much medical care personnel must provide while the detainee is in their custody. Under the "deliberate indifference" standard, in order for a detainee to show that personnel have failed to provide adequate treatment, they must (1) show that they had a serious medical need, and (2) show that personnel acted with deliberate indifference to such needs.[457] Personnel's behavior must be so egregious that the court would find that it "shocked the conscience."[458] Need for care must be urgent, meaning the lack of care must result in death, degeneration, or extreme pain.[459] Even under this low standard, the Supreme Court has held that an inmate must also prove that prison officials have violated "contemporary standards of decency."[460] Standards of decency as determined by the courts have changed over time.[461]

To determine the differences between pre-trial detainees and those in question, courts have often examined (1) the purpose of the confinement; (2) the nature of the facility where the individual is confined; and (3) the length of the confinement.[462] Various courts around the country have applied such factors and have sided with both interpretations.

The U.S. Court of Appeals for the 2nd Circuit is among the group of courts that categorizes immigration detention facilities as those similar to prisons, applying the deliberate indifference standard.[463] Those critical of this interpretation argue that deliberate indifference is a fairly high standard of proof to meet, making it fairly easy for those who may have failed to give care to evade accountability.

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[457] *Charles*, 925 F.3d at 86-87.

[458] *Id*.

[459] *Id.* at 86.

[460] *Hudson v. McMillian*, 503 U.S. 1, 8-9 (1992).

[461] *See, e.g.*, Michael B. Mushlin, The Rights of Prisoners § 3:13 (5th ed. 2018). For example, in 1994 the Supreme Court extended standards of decency to include protection of a transgender inmate from abuse from other inmates. *Farmer v. Brennan*, 511 U.S. 825, 833 (1994) ("prison officials have a duty ... to protect prisoners from violence at the hands of other prisoners.").

[462] *Patten v. Nichols*, 274 F.3d 829, 840 (4th Cir. 2001).

[463] *See Charles*, 925 F.3d at 85-86.

Performance-Based National Detention Standards 2011 sets forth medical standards for providing care to detainees in Immigration and Customs Enforcement-owned facilities.[464] It provides the following, in relevant part:

- Detainees shall be able to request health services on a daily basis and shall receive timely follow up.
- A detainee who is determined to require health care beyond facility resources shall be transferred in a timely manner to an appropriate facility.
- 24-hour emergency medical and mental health services shall be available to all detainees.
- Detainees with chronic conditions shall receive care and treatment as needed, that includes monitoring of medications, diagnostic testing, and chronic care clinics.
- Prescriptions and medications shall be ordered, dispensed, and administered in a timely manner and as prescribed by a licensed healthcare professional.[465]

Medical Resources and Improper Care

Based on public testimony to the Commission, the state of medical care in federal immigrant detention facilities is highlighted by a lack of medical resources, primarily trained doctors and appropriate medicine.[466] Clinics in detention facilities are often not open when detainees need treatment, and detainees frequently have to wait weeks before they are able to visit the clinic, no matter how urgent the matter.[467] The Commission also received testimony that detention facilities also lack proper medication, and instead resort to providing over-the-counter medications to treat all illnesses.[468] According to public testimony from Human Rights Watch, since March 2010,

[464] While Performance-Based National Detention Standards may be acceptable if faithfully and fully implemented, they do not create a basis for a legal claim but may be used by a court to as a guide to minimum detention standards; moreover, any standard must meet Constitutional standards. Jack Rockers and Elizabeth Troutman, "Dangerous Detention: Human Rights Standards and Enforcement in Immigration Detention," *Univ. of North Carolina School of Law, Immigration and Human Rights Policy Clinic*, May 2009, https://www.law.unc.edu/documents/clinicalprograms/dangerousdetention.pdf (discussing 2008 Performance-Based National Detention Standards).

[465] Immigration and Customs Enforcement, *Performance-Based National Detention Standards 2011*, 4.3 Medical Care, pp. 257-59.

[466] Project South Statement, at 6-7.

[467] Ibid.

[468] Seiler Testimony, *Public Comment Session*, p. 60; Bedell Testimony, *Public Comment Session*, p. 65.

Immigration and Customs Enforcement has reported 80 deaths in adult detention centers.[469] Of those, Immigration and Customs Enforcement completed and released 52 death reviews and determined that inadequate care contributed to 23 of the deaths.[470] Along with having inadequate medication, there are reports that detainees who need daily medication, even if they enter detention facilities with their own medications, have their medications withheld from them without reason.[471] The Commission also received testimony questioning the medical competency of staff in detention centers and whether or not they either have the knowledge on how to care for sick detainees, or if they have the desire to help those in need.[472]

Lack of Medical Care Testimony

> *"They moved me to Essex, another detention center in New Jersey. There, I got very sick one night. My body was swollen. I told the guards that I needed to go to the clinic but they did not take me. They told me that the clinic was closed. When the guards took me to the clinic the next day, I stayed there for a week but the staff only gave me tranquilizers to sleep. They did not diagnose me or treat me."*[473]

> *"Irwin employs only two or three on-duty medical staff. . . As a result, outbreaks of illnesses like rashes, flues, and stomach illnesses remain rampant throughout the facility. One detained immigrant at Irwin told us that 'there is a lag time around weeks between the request to visit the medical ward and when you are allowed to visit the medical ward, even if it is an emergency.'"*[474]

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[469] Jasmine Tyler, Advocacy Director, Human Rights Watch, *Public Comment Session,* p. 153; According to a 2018 Human Rights Watch 2018 report, since March 2010, Immigration and Customs Enforcement has reported a total of 74 adult deaths in immigration detention. "Code Red: the Fatal Consequences of Dangerously Substandard Medical Care in Immigration Detention," *Human Rights Watch*, June 20, 2018, https://www.hrw.org/report/2018/06/20/code-red/fatal-consequences-dangerously-substandard-medical-care-immigration.

[470] "Code Red: the Fatal Consequences of Dangerously Substandard Medical Care in Immigration Detention," *Human Rights Watch*.

[471] Project South Statement, at 6-7.

[472] Ibid., 7; Human Rights Watch, Written Statement for the Public Comment Session on Immigration Detention before the U.S. Commission on Civil Rights, Apr. 12, 2019, at 2 (hereinafter Human Rights Watch Statement).

[473] Robin A. Testimony, *Public Comment Session*, p. 108.

[474] Project South Statement, at 6-7.

"Doctor was on-site for only a minimal amount of time each week."[475]

"Awful health care: one doctor for 1,000 immigrants working 24 hours a week!"[476]

"Even when they are able to access healthcare, many detained immigrants at Stewart and Irwin reported that they were only given painkillers in response to serious injuries and illnesses."[477]

"[T]he stock [Immigration and Customs Enforcement] sickbay prescription seems to be a Tylenol and water."[478]

"Many [detainees] were showing signs of dehydration and, in place of ChapStick, I was forced to prepare Q-Tips with Aquaphor for the cracked and bleeding lips of almost everyone that I talked to."[479]

Withholding Medication Testimony

"Nowhere near enough of the money goes to providing for the care of the people the Government has put in its custody. Medical facilities are severely under-resourced. A client with Type 1 diabetes [name omitted] was hospitalized with diabetic shock after jailers failed to provide the insulin he needed each day."[480]

"In addition, immigrants with severe health problems including breast cancer, diabetes, and hypertension have reported not receiving their medication consistently. One detained immigrant at Irwin reported that she did not get her breast cancer medication for 6 weeks when she initially arrived at Irwin even though she had it with her. In addition, her breast

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[475] Rabbi Doug Alpert, Written Statement for the Public Comment Session on Immigration Detention before the U.S. Commission on Civil Rights, May 10, 2019, at 1 (hereinafter Alpert Statement).

[476] Suzanne Singer, Written Statement for the Public Comment Session on Immigration Detention before the U.S. Commission on Civil Rights, May 12, 2019, at 1 (hereinafter Singer Statement).

[477] Project South Statement, at 7.

[478] Seiler Testimony, *Public Comment Session*, p. 60.

[479] Bedell Testimony, *Public Comment Session*, p. 65.

[480] Laura Rivera, staff attorney, Southern Poverty Law Center, Testimony, *Public Comment Session,* pp. 92-93.

cancer medication was randomly stopped for a month afterwards and has not been consistently administered to her."[481]

"A man pleaded with me to give him blood pressure medicine, saying that they took his medication in detention."[482]

Competency of Staff in Providing Medical Care Testimony

"On the morning that Jose Azurdia died in 2015, an officer at the Adelanto Detention Facility told a nurse Mr. Azurdia was ill and vomiting. The nurse told him 'she did not want to see Azurdia because she did not want to get sick.' This began a series of unconscionable delays for what turned out to be a fatal heart attack."[483]

"Violations included . . . delayed and grossly inadequate medical care, including doctors signing off on medical assessments that never happened; and a dentist refusing to fill cavities while suggesting detainees floss with strings pulled from their socks."[484]

"Common stories of detention told to us: extreme distress of not feeling they could trust [Immigration and Customs Enforcement] to have their wellbeing in mind through taking blankets from them or not providing blankets in extremely cold holding cells . . .."[485]

"Others report that officers and medical staff at Stewart do not listen to detained immigrants when they complain about their pain and illnesses. One detained immigrant at Stewart noted 'the officers are the ones who can get you to the medical unit, but the problem is that the officers don't listen to you . . .they just don't listen to you or believe that you are in pain.'"[486]

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[481] Project South Statement, at 6-7.

[482] Bedell Testimony, *Public Comment Session*, p. 66.

[483] Human Rights Watch Statement, at 2.

[484] Asian Americans Advancing Justice, Written Statement for the Public Comment Session before the U.S. Commission on Civil Rights, May 13, 2019, (quoting Dep't. of Homeland Security, Office of Inspector General, OIG-18-86, *Management Alert – Issues Requiring Action at the Adelanto ICE Processing Center in Adelanto, California*, Sept. 27, 2018, p. 3 https://www.oig.dhs.gov/sites/default/files/assets/2018-10/OIG-18-86-Sep18.pdf.

[485] Black Statement, at 1.

[486] Project South Statement, at 7.

Mental Health and Adults

Mental health services are severely lacking in detention facilities, despite the fact that the inherent traumatic nature of detention causes many detainees to suffer in their mental health.[487] The Commission received testimony indicating a lack of mental health professionals for children and adults in detention centers, and that solitary confinement is frequently used to segregate those afflicted with mental illness.[488] Human Rights Watch and Project South submitted testimony and documentation showing that even individuals who have a history of mental illness and suicide attempts have been put in solitary confinement while in detention facilities and tragically, this has led to the deaths of multiple detainees.[489]

Mental Health and Adults Testimony

> *"Food, hygiene, infrastructure, and healthcare are all substandard, and there is virtually no access to mental healthcare in a setting in which mental illness is a statistical inevitability. Any attempts to protest these conditions are often met with mistreatment, discipline, and punishment through solitary confinement."*[490]

> *"Those suffering serious mental afflictions are placed in handcuffs and helmets and put in solitary confinement . . . Similar fear of segregation bars detained immigrants' access to mental health care at Irwin: instead of receiving any emotional support, detained immigrants suffering from serious mental illnesses are drugged and segregated. Individuals placed on suicide watch are strapped into a straightjacket and placed in solitary confinement."*[491]

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[487] Government Accountability Project Statement, at 6.

[488] Project South Statement, at 8.

[489] Human Rights Watch Statement, at 2-3; Project South Statement, at 8.

[490] Project South Statement, at 5.

[491] Ibid., 8.

Segregation of Individuals with Mental Illness Testimony

> *"Many of the cases we examined indicate a particularly troubling failure to provide adequate mental health care, as well as the over use of solitary confinement, for people with serious mental health conditions."*[492]
>
> *"JeanCarlo Alfonso Jimenez Joseph, 27, died by suicide at Stewart Detention Center in May 2017. [Immigration and Customs Enforcement] still has not released a death report for him, but the Georgia Bureau of Investigations found he had been in solitary confinement for 19 days as punishment for an act he described as an attempt to harm himself. He was identified as a suicide risk early on, but he was never put on suicide watch nor provided the upward adjustment on his anti-psychotic medication he begged for days before his death."*[493]
>
> *"Efrain Romero de la Rosa, a 40-year-old immigrant detained at Stewart with bipolar disorder died of suicide [i]n July, 2018, after 21 days in solitary confinement. This comes about a year after Jeancarlo Jiménez-Joseph, a 27-year-old immigrant detained at Stewart, died of suicide on May 15, 2017 by hanging himself while in solitary confinement. He had been held in solitary for 19 days. [Immigration and Customs Enforcement] standards require all detained immigrants in solitary confinement to be observed every thirty minutes, and every fifteen minutes (or more often) if they are suicidal. In the hours before his death, officers went over the thirty-minute requirement twice (with forty-six and thirty-two minutes between checks). Further, a private officer logged three visits to Jiménez' cell that never happened. An advocate volunteer attempted to visit Jiménez, at his mother's request, on May 14th but was denied access. Jiménez was a clear suicide risk: he had told nurses that voices were telling him to kill himself, he had been seen banging on the mirror in his cell, and he had jumped off a second-floor walkway in the detention center weeks before. He should have been receiving treatment, not been isolated and forgotten in solitary."*[494]

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[492] Tyler Testimony, *Public Comment Session*, p. 154.

[493] Human Rights Watch Statement, at 2-3.

[494] Project South Statement, at 8.

Pregnancy

According to testimony, pregnant women in detention are not given appropriate medical care or nutritious diets to support their pregnancies.[495] In December 2017, the Trump Administration pulled back a previous policy that instituted a presumption against detaining pregnant women.[496] In addition, according to testimony, the number of women who have miscarried in Immigration and Customs Enforcement custody nearly doubled from FY 2017 to FY 2018.[497]

Pregnancy Testimony

> *"[T]en women who were detained by [Immigration and Customs Enforcement] while pregnant, suffered inadequate medical care, poor nutrition, in some cases miscarriages, and yet remained detained for no reason other than that [Immigration and Customs Enforcement] chose not to release them."*[498]

> *"We had the opportunity to see a woman who was seven months pregnant and almost in her eighth month. She told us she was always very hungry and she'd lost weight in detention. [Immigration and Customs Enforcement] told us that she received a high-protein diet. We learned that the high-protein diet was just an extra piece of bread and cheese in addition to the three daily substandard meals she could barely eat."*[499]

Lack of Transparency in Providing Medical Care

The Commission also received testimony that there is little transparency about what goes on in immigration detention centers and those that are privately run are even harder to access and gain

[495] Losmin Jiménez, Esq. Project Director, Advancement Project, Testimony, *Public Comment Session,* p. 51.

[496] Maria Sacchetti, "Trump administration Ends Automatic Release From Immigration Detention for Pregnant Women," *Washington Post*, Mar. 29, 2018, https://www.washingtonpost.com/local/immigration/trump-administration-ends-automatic-release-from-detention-for-pregnant-women/2018/03/29/8b6b1bc0-3365-11e8-8abc-22a366b72f2d_story.html?utm_term=.94dc1a6acd18.

[497] Obser Testimony, *Public Comment Session*, p. 135.

[498] Ibid.

[499] Losmin Jiménez Testimony, *Public Comment Session*, p. 51.

information from.[500] Commenters were concerned that there is very little official reporting on the state of medical care in these facilities, and detainees have become ill while in these centers with no documentation on what happened to them.[501] In some tragic incidents, detainees have died and their families are not informed what happened to the detainees.[502]

According to Immigration and Customs Enforcement, it operates under requirements to review any instance where an individual dies in Immigration and Customs Enforcement custody to determine if the individual received appropriate health services.[503] Immigration and Customs Enforcement is supposed to make "official notifications to Congress, non-governmental organization (NGO) stakeholders and the media and post[] a news release with relevant details on the public website . . . within two business days, per agency policy."[504] Beginning in Fiscal Year 2018, Congress required Immigration and Customs Enforcement "to make public all reports regarding an in-custody death within 90 days."[505] Per this new public reporting requirement, based on the reports listed on Immigration and Customs Enforcement's website, since March 2018 there have been 12 deaths in Immigration and Customs Enforcement custody.[506]

Deaths while Detained Testimony

> *"José was detained by [Immigration and Customs Enforcement] earlier in January this year . . . [L]ater, his wife found out that he had been placed in a medical facility, and she didn't understand why. No explanation was provided by the officials at [Immigration and Customs Enforcement] . . . It then turns out that he suffered a hemorrhage and entered a coma. Days after, he actually had to be pulled out of life support and he passed away. Within those days, [Immigration and Customs Enforcement] agents then delivered a letter and walked away without an explanation. The letter then*

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[500] Isabel Sánchez, National Policy Advocate, Coalition for Humane Immigrant Rights, Testimony, *Public Comment Session,* pp. 121-122; Tyler Testimony, *Public Comment Session*, p. 155.

[501] Sánchez Testimony, *Public Comment Session*, pp. 121-122.

[502] Ibid.; Tyler Testimony, *Public Comment Session*, p. 154.

[503] "Death Detainee Report." Dep't. of Homeland Security, Immigration and Customs Enforcement, https://www.ice.gov/death-detainee-report (accessed July 29, 2019).

[504] Ibid.

[505] Ibid.; 164 Cong. Rec. H2551 (March 22, 2018), https://www.congress.gov/crec/2018/03/22/CREC-2018-03-22-bk2.pdf (directing Immigration and Customs Enforcement to comply with H.R. Rep. No. 115-239, at 33 (2017) regarding death-in-custody reporting).

[506] Ibid.

stated that he was now released from custody. Because he was released from custody, no report has been found on what really caused his death."[507]

"[Jeancarlo Alfonso, who died by suicide at Steward Detention Center] had been in solitary confinement for 19 days as punishment for an act he described as an attempt to harm himself. He was identified as a suicide risk early on, but he was never put on suicide watch nor was he provided with the upwards adjustment of his anti-psychotic medication that he begged for four days before his death. No death report has been released."[508]

"Early in 2018, Congress required that [Immigration and Customs Enforcement] publicly release all reporting on each in custody death within 90 days. But [Immigration and Customs Enforcement] has failed to meet this reporting requirement for 2018. Once they finally began to release detainee death reports, these reports were nothing like they had been. They were merely notifications rather than summaries of investigations."[509]

"[Department of Homeland Security]'s own medical and mental health experts whose own investigative reports are referenced . . . are rightly, and deeply, concerned that scientific advice and evidence is being dismissed and ignored with the effect of knowingly endanger children to serve political ends."[510]

"Trauma informed care was implemented only briefly then abandoned. Adequate screening for trauma was never implemented. HQ and facility staff at Dilley failed to develop an adequate plan for typical parenting challenges like two-year-old's biting or hitting peers and instead placed toddlers (with parent) in medical isolation for days. This practice is abusive and demonstrates how medical authority can be subverted in the confusion created by the numerous "authorities" controlling bits of facility operations while answering to Headquarters hundreds of miles away."[511]

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[507] Sánchez Testimony, *Public Comment Session*, pp. 121-122.

[508] Tyler Testimony, *Public Comment Session*, p. 154.

[509] Ibid., 155.

[510] Government Accountability Project Statement, at 2.

[511] Ibid., 7.

Basic Needs: Nutrition, Hygiene and Clothing

Performance-Based National Detention Standards 2011 sets forth food-related standards for detainees in Immigration and Customs Enforcement-owned facilities. It provides the following, in relevant part:

- All detainees shall be provided nutritionally balanced diets that are reviewed at least quarterly by food service personnel and at least annually by a qualified nutritionist or dietitian.
- Detainees, staff, and others shall be protected from harm, and facility order shall be maintained, by the application of sound security practices in all aspects of food service and dining room operations.
- Detainees, staff, and others shall be protected from injury and illness by adequate food service training and the application of sound safety and sanitation practices in all aspects of food service and dining room operations.[512]

The Commission received testimony from advocates and whistleblowers that the quality of food in detention centers is substandard in quality, provides little to no nutritional value, and often has already gone to waste when it is served to detainees.[513] Portions are small and facility staff withhold food as punishment.[514]

The 2011 Performance Based Detention Standard 4.5 Personal Hygiene, "ensures that each detainee is able to maintain acceptable personal hygiene practices through the provision of adequate bathing facilities and the issuance and exchange of clean clothing, bedding, linens, towels and personal hygiene items."[515] It specifically requires that: "Each detainee shall have suitable, clean bedding, linens, blankets and towels;" and "Each detainee shall have sufficient clean clothing that is properly fitted; climatically suitable, durable and presentable;" and that: "Each detainee shall receive, at a minimum, the following items: 1. one bar of bath soap, or equivalent; 2. one comb; 3. one tube of toothpaste; 4. one toothbrush; 5. one bottle of shampoo, or equivalent; and 6. one container of skin lotion."[516]

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[512] Immigration and Customs Enforcement, *Performance-Based National Detention Standards 2011*, II Expected Outcomes, p. 228.

[513] Project South Statement, at 6; Losmin Jiménez Testimony, *Public Comment Session*, p. 53.

[514] Robin A. Testimony, *Public Comment Session*, p. 107; Black Statement, at 1.

[515] Immigration and Customs Enforcement, *Performance-Based National Detention Standards 2011*, p. 327

[516] Ibid., 328; *see also supra* note 289 (discussing Trump Administration argument soap not included under "safe and sanity" provisions of the *Flores* agreement).

In contrast to these requirements, public commenters discussed an extreme lack of privacy in detention center, particularly surrounding hygiene and clothing.[517] Shower and toilet areas are often open spaces and used clothes are distributed to detainees still stained from their previous user.[518] In addition, privacy is often violated as detainees are crammed together in small spaces and these spaces are under constant surveillance by facility staff.[519]

Food in Detention Testimony

> *"The meals were very small portions and sometimes we were hungry. Many people got sick from the food they gave us."*[520]
>
> *"What I experienced was the worst experience in my life. I was not allowed to eat for weeks."*[521]
>
> *"Detained immigrants at Stewart consistently report that food and water conditions at the facility posed serious health risks: meat is rarely served, food is often undercooked or rancid, the quantity of food is insufficient to a point that most detained immigrants experience weight loss, and the water is often green, and has reportedly caused headaches and rashes. At Irwin, all detained immigrants we interviewed unanimously reported finding objects in the food, being forced to eat rancid food, and needing to supplement their diet by purchasing additional food at the commissary. Many detained immigrants at Irwin also reported that they found rocks and nails in their food, and further stated that they experienced significant weight loss since their detention at Irwin."*[522]

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[517] Singer Statement, at 1; Losmin Jiménez Testimony, *Public Comment Session*, p. 54; Christie Stewart Stein, Written Statement for the Public Comment Session on Immigration Detention before the U.S. Commission on Civil Rights, May 12, 2019, at 1 (hereinafter Stein Statement).

[518] Losmin Jiménez Testimony, *Public Comment Session*, pp. 53 – 54.

[519] Olivia Huerta, Written Statement for the Public Comment Session on Immigration Detention before the U.S. Commission on Civil Rights, Apr. 21, 2019, at 6 (hereinafter Huerta Statement); Hernández Statement, at 4.

[520] Robin A. Testimony, *Public Comment Session*, p. 107.

[521] Eduardo Jiménez Testimony, *Public Comment Session*, p. 116.

[522] Project South Statement, at 6.

"We heard stories of rancid bread, expired food, putrid water, and medicine that seemed like it came from a dollar store."[523]

"[L]ack of food, food that had worms or mold; stale and inedible ham and cheese sandwiches; lack of water given and refused upon request; dehydration signs were common especially among the children."[524]

Hygiene and Clothing Testimony

"[W]e heard about people having to wear, because that's what's provided, yellow, dingy, sometimes bloodstained underwear as part of their daily existence at this prison."[525]

". . . I was not allowed to bathe. I lost my dignity as a human being there."[526]

"I was appalled at the condition of those incarcerated for the crime of seeking asylum. 50 men to a dorm room, sleeping in what can hardly be called beds: flimsy slabs of plywood nailed together as bunk beds, with what could hardly be called mattresses, they were so thin. Open toilets and showers."[527]

"Not only are all of the beds in the open, but so are the toilets and showers. There are no curtains, there is no privacy, meaning everyone who's detained has to urinate, defecate and bathe in full view of everyone else."[528]

"Simple human dignity is disregarded for instance in the face that there are no doors, and therefore no privacy in the women's bathrooms."[529]

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[523] Losmin Jiménez Testimony, *Public Comment Session*, p. 53.

[524] Black Statement, at 1.

[525] Losmin Jiménez Testimony, *Public Comment Session*, p. 53.

[526] Eduardo Jiménez Testimony, *Public Comment Session*, p. 116.

[527] Singer Statement, at 1.

[528] Losmin Jiménez Testimony, *Public Comment Session*, p. 54.

[529] Stein Statement, at 1.

"[T]here was merely a giant room with sixty bunk beds out in the open in which everyone slept. . . The people imprisoned at this facility had to sleep, eat, bathe, and relieve themselves all in the same giant open room."[530]

"The dorm areas consist of pods. In the center of each pod sits a tower of sorts, that is about 9-10 feet in height and contains an area for a staff member to watch over the dorms located on either side of the pod. This offers whoever is sitting in the watch tower an opportunity to view who is showering as the showers are only a little over 6-7 feet in height and are located behind a desk that a staff member sits and watches the common area. Women have complained of 'cameras' watching them in the showers. I wasn't sure how this was ethical or possible but I believe this is the 'cameras' they speak of."[531]

"In the compound, there was no library - no place to sit by yourself. No corners with beanbags or couches. There is no way to escape constantly being surrounded by your peers and the ever-present teachers and guards. There is no place to pray and no access to spiritual or religious services. The children ask for more phone calls to family and for a chance to go to church to practice their faith or to have religious and spiritual comfort."[532]

"I saw children held at the Franklin Institute who were under constant (24-hour) direct surveillance and were being cared for in a facility with bards [sic] on the doors and windows. And I saw adult men, fleeing from desperate situations, treated like animals."[533]

Prison-like Conditions in Facilities

The Commission also received testimony that the overall conditions detention facilities are like prisons,[534] where individuals in detention are stripped of their humanity and often treated like prisoners, even those who are legally trying to claim asylum.[535] In addition, individuals who are

[530] Losmin Jiménez Testimony, *Public Comment Session*, p. 54.

[531] Huerta Statement, at 9.

[532] Hernández Statement, at 3.

[533] Wechterman Statement, at 1.

[534] Carmen Werder, Written Statement for the Public Comment Session on Immigration Detention before the U.S. Commission on Civil Rights, May 13, 2019, at 1 (hereinafter Werder Statement).

[535] Wechterman Statement, at 1.

detained are only able to work for $1 a day while, advocates argue, the private corporations who own the private facilities make thousands of dollars from the U.S. government for detaining these individuals.[536] Individuals in detention are also forced to spend money on basic goods and food at commissary for inflated prices, and it is almost impossible for them to see visitors.[537] In addition, the Department of Homeland Security Inspector General has published reports of extreme overcrowding in Border Patrol migrant holding facilities,[538] which may also be cause for constitutional concerns.[539]

Working Conditions Testimony

> *"[D]etainees are forced to work for $1 a day to maintain the facility while GEO Group pockets the profits. Detainees are forced to purchase their every need at inflated prices. The system for allowing visitors is unnecessarily complicated and utterly inflexible which leaves detainees isolated and in despair. Some detainees have become so desperate they have gone on hunger strike, and one detainee has died."*[540]

> *"A local immigration attorney, who has a detailed understanding of the conditions there [at Northwest Detention Center], simply refers to it now as the Northwest Detention 'prison.' The people being held are having to eat disgusting food and are working for a despicable $1 a day while having to buy any necessities from the on-site store at unreasonably high prices. They are unable to sustain even a minimal level of cleanliness, not to mention what it is doing to their basic sense of humanity."*[541]

> *"We saw people in detention . . . working to clean, to paint, to cook, to landscape in the hot desert sun. These voluntary jobs are paid $1 a day while the corporation gets over $73 a day from [Immigration and Customs Enforcement]."*[542]

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[536] Werder Statement, at 1; Human Rights Watch Statement, at 3.

[537] Werder Statement, at 1.

[538] Dep't. of Homeland Security, OIG-19-51, *Management Alert*.

[539] *See Gates v. Collier*, 501 F.2d 1291, 1300 (5th Cir. 1974) (describing facilities that were in such disrepair they created a fire hazard); and *Pugh v. Locke*, 406 F. Supp. 318, 322, 325 (M.D. Ala. 1976) (finding that overcrowding may exacerbate other prison conditions).

[540] Stein Statement, at 1.

[541] Werder Statement, at 1.

[542] Losmin Jiménez Testimony, *Public Comment Session*, p. 53.

Solitary Confinement as Punishment

According to the Performance-Based National Detention Standards 2011 standards, as revised in 2016, individuals in detention may be placed in what it terms the Special Management Unit, colloquially known as solitary confinement, for administrative, protective, or disciplinary reasons.[543] Among other parameters, disciplinary segregation is only allowed "when alternative dispositions may inadequately regulate the detainee's behavior;" health care personnel are to conduct, at minimum, a daily assessment of detainees; and detainees can only be held in disciplinary segregation for 30 days "except in extraordinary circumstances."[544]

The Commission received testimony that solitary confinement is frequently used as punishment in immigration detention facilities.[545] Solitary confinement causes harm to individuals in detention and is likely to be disproportional to legitimate security needs.[546] According to testimony, solitary confinement was used as punishment for infractions as small as hugging and comforting one another.[547] Also, individuals in detention have been sexually and physically abused while in solitary confinement.[548]

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[543] Immigration and Customs Enforcement, *Performance-Based National Detention Standards 2011*, 2.12 Special Management Units, p. 171 (incorporating revisions on the basis of ICE Directive 11065.1: Review of the Use of Segregation for Immigration and Customs Enforcement Detainees, Sept. 4, 2013, https://www.ice.gov/doclib/detention-reform/pdf/segregation_directive.pdf). The revisions to the Performance-Based National Detention Standards for solitary confinement were described in a Dep't. of Homeland Security report to Congress on the progress of implementing the Performance-Based National Detention Standards at detention facilities. *See* Dep't. of Homeland Security, *Progress in Implementing 2011 PBNDS and DHS PREA Requirements at Detention Facilities, Fiscal Year 2017 Report to Congress*, Mar. 19, 2018, p. 7, https://www.dhs.gov/sites/default/files/publications/ICE%20-%20Progress%20in%20Implementing%202011%20PBNDS%20Standards%20and%20DHS%20PREA%20Requirements_0.pdf (hereinafter Dep't. of Homeland Security, *Progress in Implementing 2011 Performance-Based National Detention Standards, Report to Congress*).

[544] Immigration and Customs Enforcement, *Performance-Based National Detention Standards 2011*, 2.12 Special Management Units, p. 172.

[545] Huerta Testimony, *Public Comment Session*, p. 129; Detained Migrant Solidarity Committee Statement, at 5.

[546] Spencer Woodman, Maryam Saleh, Hannah Rappleye, Karrie Kehoe, "Solitary Voices: Thousands of Immigrants Suffer in Solitary Confinement in ICE Detention," *The Intercept*, May 21, 2019, https://theintercept.com/2019/05/21/ice-solitary-confinement-immigration-detention/.

[547] Ibid.

[548] Huerta Testimony, *Public Comment Session*, p. 129; Detained Migrant Solidarity Committee Statement, at 4; Eduardo Jiménez Testimony, *Public Comment Session*, p. 117.

Solitary Confinement Testimony

> *"Just like [Department of Homeland Security][Office of the Inspector General], [Detained Migrant Solidarity Committee] found that [Otero County Processing Center] staff: make inappropriate retaliatory use of solitary confinement; often do not explain to detained individuals the reason they are being disciplined; and verbally assault, harass, and abuse individuals detained at the facility."*[549]

> *"They [detained women] have told me that there is a very strict policy for no touching, and if they do touch each other, even if it's just a hug, they're put in solitary confinement where, in solitary confinement, some of these women have claimed that they have been raped which is very disturbing."*[550]

> *"When individuals complained about the chronic sexual harassment, facility staff placed the victims in solitary confinement and threatened others with similar isolation if they spoke up. [Advocate Visitors with Immigrants in Detention] volunteers are currently visiting two of the transgender women detained at [Otero County Processing Center], and both are held in solitary to this day. Neither individual is receiving the hormone therapy they have repeatedly request."*[551]

> *"When I appeared in front of an immigration judge, I was handcuffed, I had chains on my waist and on my feet. I was treated as a criminal. When I testified, when I said what happened to me, [Immigration and Customs Enforcement] punished me. They put me in solitary confinement with people who don't even have good mental health. They tortured people in front of my. They broke their arms, and they threatened me, telling me that if I said something there were going to do the same thing to me."*[552]

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[549] Detained Migrant Solidarity Committee Statement, at 4.

[550] Huerta Testimony, *Public Comment Session*, p. 129.

[551] Detained Migrant Solidarity Committee Statement, at 5.

[552] Eduardo Jiménez Testimony, *Public Comment Session*, p. 117.

Sexual Violence and Application of Prison Rape Elimination Act to Detention Facilities

The Prison Rape Elimination Act of 2003[553] protects prisoners/detainees against sexual abuse and assault while in prison or detention.[554] The Prison Rape Elimination Act also protects those detained at immigration detention centers.[555] On March 7, 2014, Department of Homeland Security implemented the Prison Rape Elimination Act[556] by issuing a Final Rule entitled "Standards to Prevent, Detect, and Respond to Sexual Abuse and Assault in Confinement Facilities."[557] The Final Rule provided "provisions spann[ing] eleven categories . . . to discuss and evaluate prison rape elimination standards; prevention planning, responsive planning, training and education, assessment for risk of sexual victimization and abusiveness, reporting, official response following a detainee report, investigations discipline, medical and mental care . . . [etc.]."[558]

Department of Homeland Security, Prison Rape Elimination Act regulations for Immigration and Customs Enforcement (codified at 6 CFR Pt. 115, Subpart A) (which applies to Immigration and Customs Enforcement as well as Contracted Detention Facilities), Section 115.11 mandates that:

> (a) The agency shall have a written policy mandating zero tolerance toward all forms of sexual abuse and outlining the agency's approach to preventing, detecting, and responding to such conduct.
>
> (b) The agency shall employ or designate an upper-level, agency-wide Prevention of Sexual Assault Coordinator (PSA Coordinator) with sufficient time and authority to develop, implement, and oversee agency efforts to comply with these standards in all of its immigration detention facilities.
>
> (c) Each facility shall have a written policy mandating zero tolerance toward all forms of sexual abuse and outlining the facility's approach to preventing, detecting,

[553] Prison Rape Elimination Act of 2013, Pub. L. No 108-79, 117 Stat 972 (codified as 42 U.S.C. § 15601).

[554] *Id*.; *see also* "National Prison Rape Elimination Commission Report," *National Prison Rape Elimination Commission*, June 2009, https://www.ncjrs.gov/pdffiles1/226680.pdf (hereinafter National Prison Rape Elimination Commission June 2009 Report).

[555] "National Prison Rape Elimination Commission June 2009 Report," p. 176.

[556] *See* 2015 Statutory Report, pp. 68-71 (discussing the complete regulatory history regarding the implementation of the Prison Rape Elimination Act).

[557] Standards to Prevent, Detect, and Respond to Sexual Abuse and Assault in Confinement Facilities, Final Rule, 79 Fed. Reg. 13,100 (March 7, 2014) (codified at 6 C.F.R. § 115.)

[558] *Id*.

> and responding to such conduct. The agency shall review and approve each facility's written policy.[559]

In May 2014, Immigration and Customs Enforcement issued a revised Directive on Sexual Abuse and Assault Prevention and Intervention that was built from the requirements of the 2011 Performance Based National Detention Standards on Sexual Abuse and Assault Prevention.[560] The combination of these regulations along with other Immigration and Customs Enforcement policies regarding staff responsibilities is supposed to "ensure an integrated and comprehensive system of preventing and responding to sexual abuse or assault of individuals in Immigration and Customs Enforcement."[561] Consistent with Prison Rape Elimination Act requirements, Immigration and Customs Enforcement's policies, specifically Performance-Based National Detention Standards 2011 and the 2014 Directive, mandate zero tolerance for all forms of sexual abuse and assault.

As the Commission noted in its 2015 Report, "[a]lthough in some cases [Immigration and Customs Enforcement] finds that some contract detention facilities already incorporate many of [the Prison Rape Elimination Act]'s standards, [Department of Homeland Security] does not have the legal power to coerce facilities into complying with [Prison Rape Elimination Act] standards without altering existing contractual obligations."[562] As an Immigration and Customs Enforcement representative stated at the time, "With respect to the private contractor facilities . . . all of them are not yet governed contractually by [Prison Rape Elimination Act] in that [Prison Rape Elimination Act] is rolled out gradually. It has to be applied through contract modifications. It is not immediately applicable to our private contract facilities[.]"[563] In March 2018, Immigration and Customs Enforcement reported that it implemented Prison Rape Elimination Act standards through contract modifications at all detention facilities that exclusively hold Immigration and Customs Enforcement-detainees and at 11 facilities that do not exclusively hold Immigration and Customs Enforcement-detainees.[564]

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[559] 6 C.F.R § 115.11 (2014).

[560] *See* Immigration and Customs Enforcement, *Performance-Based National Detention Standards 2011*; ICE, *Directive No. 11062.2*: *Sexual Abuse and Assault Prevention and Intervention*, May 22, 2014, http://www.ice.gov/doclib/detention-reform/pdf/saapi2.pdf (hereinafter Immigration and Customs Enforcement, *Directive No. 11062.2*: *Sexual Abuse and Assault*).

[561] Immigration and Customs Enforcement, *Directive No. 11062.2*: *Sexual Abuse and Assault*.

[562] 2015 Report, p.75.

[563] 2015 Report, pp. 85–86.

[564] *Progress in Implementing 2011Performance-Based National Detention Standards, Report to Congress*, p. 11.

Allegations of Sexual Abuse

According to a Freedom of Information Act request as part of a 2018 investigation by *The Intercept*, the Department of Homeland Security Office of Inspector General provided 1,224 complaints (out of approximately 33,000) of abuse that took placed in Immigration and Customs Enforcement custody from January 2010 to September 2017.[565] According to *The Intercept*:

> But the sheer number of complaints as well as the patterns they reveal about mistreatment in facilities nationwide — suggest that sexual assault and harassment in immigration detention are not only widespread but systemic and enabled by an agency that regularly fails to hold itself accountable. While the reports obtained by The Intercept are only a fraction of those filed, they shed light on a system that operates largely in secrecy, and they help hint at the magnitude of the abuse, and the incompetence and complicity of the agency tasked with the safety of the 40,000 women, men, and children it detains each day in more than 200 jails, prisons, and detention centers across the country.[566]

In response to the article, Immigration and Customs Enforcement told *The Intercept* it had received 1,448 allegations of sexual abuse between fiscal years 2012 and March 2018, including 103 recorded so far for fiscal year 2018 (starting in October 2017).[567]

According to testimony, sexual violence is a problem in detention facilities and it is perpetrated by facility staff and detainees alike.[568] Many individuals in detention do not report incidents of sexual violence for fear of retaliation and punishment.[569] In 2017, according to written testimony, there were 237 allegations of sexual abuse in detention facilities.[570]

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[565] Alice Speri, "Detained, Then Violated," *The Intercept*, Apr. 11, 2018, https://theintercept.com/2018/04/11/immigration-detention-sexual-abuse-ice-dhs/.

[566] Ibid.

[567] Ibid.

[568] Huerta Statement, at 2; Project South Statement, at 10 (quoting a male immigrant from El Salvador).

[569] Nancy Hernández Statement, at 2.

[570] Helen McDonald, Domestic and Sexual Violence Advocate, Written Statement for the Public Comment Session on Immigration Detention before the U.S. Commission on Civil Rights, May 13, 2019, at 1 (citing data on sexual and physical assault obtained from a Dep't of Homeland Security, Office of the Inspector General, Freedom of Information Request).

Sexual Violence Testimony

> *"Sexual violence is about power and control. That the U.S. government is allowing – and by the virtue of allowance, encouraging – paid staff to sexually violate women and children demonstrates the lack of scruples this administration and this nation has employed towards the most vulnerable peoples."*[571]

> *"From a person I pardoned out of detention, she stated that several women had been sent to isolation where they were raped by staff. It is unknown to me whether this was by male or female staff specifically."*[572]

> *"'They said they were going to pursue charges against the men who raped me, but I never received notice that charges had been filed. I heard wails in the middle of the night in the male dorms, and I believe other men were being raped. Everyone knew what was going on, but they just made louder sounds to cover the noise up. What's really sad is that no matter what you do, you push the button in the room, those officers will take their sweet time. Something awful could be happening in those rooms, and those officers will take their time. I have never seen anything like that. It's horrible.'"*[573]

Abuse of Authority

The Commission also received public comments relaying that employees in detention facilities reportedly used their position of power to humiliate individuals in detention and treat them like prisoners even though many of them are legally in the United States to claim asylum.[574] According to testimony, detention facility staff abuse their power to punish detainees and use psychological tactics that bring distress to detainees.[575]

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[571] Ibid.

[572] Huerta Statement, at 9.

[573] Project South Statement, at 10 (quoting a male immigrant from El Salvador).

[574] Robin A. Testimony, *Public Comment Session*, p. 106; Asian Americans Advancing Justice Statement, at 2 (citing Garance Burke and Martha Mendoza, "ICE Force-feeding Detainees on Hunger Strike," *AP News*, Jan. 31, 2019, https://apnews.com/c4b201dac8bf48eba17485a5c357b810; Sunita Sohrabji, "Hundreds of Sikh Asylum Seekers Housed in Victorville Federal Prison Illegally Banned From Wearing Turbans," *India West*, July 30, 2018, https://www.indiawest.com/news/global_indian/hundreds-of-sikh-asylum-seekers-housed-in-victorville-federal-prion/article_cfb6f080-9425-11e8-811b-5b3bfd2ed928.html).

[575] Seiler Testimony, *Public Comment Session*, p. 61.

Furthermore, emerging news reports about thousands of Border Patrol officers being members of a Facebook page that included posts with anti-immigrant rhetoric (with reportedly "racist, sexist and violent images"), disparaging Latino families being separated and migrants who have died in the agency's custody, give rise to concerns about a culture of xenophobia, racism, and sexism among Border Patrol personnel.[576] High-level Border Patrol officials reportedly knew about this Facebook page and its contents for "as many as three years," but did not initially investigate based on the belief that the statements may be protected based on the employees free speech rights.[577] Anti-discrimination laws and policy protect migrants from discrimination based on race or national origin, and if the members of the Facebook group discriminated against Latin American migrants, they should be held accountable.[578] Border Patrol has opened investigations into members of the Facebook group.[579]

Misuse of Authority Testimony

> *"The people who are detained there for immigration purposes are treated exactly the same way as people who are there serving their criminal sentence. There is no distinction."*[580]
>
> *"The guards humiliated us. We had to strip in front of one another and put prison clothes on. The officers laughed and made fun of us."*[581]
>
> *"[There are] ice boxes, where detainees are sent to windowless rooms in freezing temperatures to try to get them to waive their claim to asylum."*[582]

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[576] *See, e.g.*, A.C. Thompson, "Inside the Secret Border Patrol Facebook Group Where Agents Joke About Migrant Deaths and Post Sexist Memes," *ProPublica*, July 1, 2019, https://www.propublica.org/article/secret-border-patrol-facebook-group-agents-joke-about-migrant-deaths-post-sexist-memes#; Reis Thebault and Nick Miroff, "CBP Officials Knew About Derogatory Facebook Group Years Ago and Have Investigated Posts From It Before," *Washington Post*, July 5, 2019, https://www.washingtonpost.com/nation/2019/07/06/cbp-officials-knew-about-derogatory-facebook-group-years-ago-have-investigated-posts-it-before/?utm_term=.704be7a3727d.

[577] Thebault and Miroff, "CBP Officials Knew About Derogatory Facebook."

[578] *See* Dep't. of Justice, *Guidance for Federal Law Enforcement Agencies*.

[579] Ginger Thompson, "Revelations About a Secret Facebook Group Spawn Investigation of 70 Current and Former Border Patrol Employees," *ProPublica*, July 15, 2019, https://www.propublica.org/article/revelations-about-a-secret-facebook-group-spawn-investigation-of-70-current-and-former-border-patrol-employees.

[580] Jimiénez Testimony, *Public Comment Session*, p. 54.

[581] Robin A. Testimony, *Public Comment Session*, p. 106.

[582] Wadhwa Testimony, *Public Comment Session*, p. 78.

> *"There is also the issue of psychological mistreatment; of guards who speak Spanish but refuse to speak in detainees' language; of the isolation of detained women who speak only indigenous languages; the prohibitions against detained women touching one another, even to hug or braid each other's hair . . ."*[583]

> *"Violations included improper and overly restrictive use of solitary confinement, including placing detainees in disciplinary segregation without a hearing. . ."*[584]

> *"South Asian asylum seekers protesting their prolonged detention by going on hunger strike have been retaliated against with solitary confinement and abusive forced-feeding practices. South Asian and Sikh detainees have also been denied religious accommodation, including being banned from wearing their turbans, being forced to cut their hair, and not being provided with vegetarian or vegan meals."*[585]

Treatment of LGBT Individuals

The 2011 Performance-Based National Detention Standards also enhanced medical standards related to preservation of LBGT detainees' rights and, in particular, the dignity of LGBT immigrant detainees. Below are some of the standards relating to custody classification, body cavity search, medical and mental health screening of new arrivals, and medical care:

- When making classification and housing decisions for a transgender detainee, staff shall consider the detainee's gender self-identification and an assessment of the effects of placement on the detainee's mental health and well-being. A medical or mental health professional shall be consulted as soon as practicable on this assessment. Placement decisions should not be based solely on the identity documents or physical anatomy of the detainee and a detainee's self-identification of his/her gender shall always be taken into consideration as well. Placement shall be consistent with the safety and security considerations of the facility.[586]

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[583] Seiler Testimony, *Public Comment Session*, p. 61.

[584] Asian Americans Advancing Justice Statement, at 3; Dep't. of Homeland Security, OIG-18-86, *Management Alert*, p. 3 https://www.oig.dhs.gov/sites/default/files/assets/2018-10/OIG-18-86-Sep18.pdf.

[585] Asian Americans Advancing Justice Statement, at 2.

[586] Immigration and Customs Enforcement, *Performance-Based National Detention Standards 2011*, p. 73.

- Whenever possible, transgender detainees shall be permitted to choose the gender of the staff member conducting a body-cavity search.[587]

- Inquire into a transgender detainee's gender self-identification and history of transition-related care when a detainee self-identifies as transgender.[588]

- Transgender detainees who were already receiving hormone therapy when taken into Immigration and Customs Enforcement custody shall have continued access to treatment. All transgender detainees shall have access to mental health care, and other transgender related health care and medication based on medical need. Treatment shall follow accepted guidelines regarding medically necessary transition-related care.[589]

According to testimony, LGBT individuals, particular transgender individuals in detention, have been discriminated against by facility employees and other detainees.[590] Human Rights Campaign told the Commission that LGBT individuals have been victims of sexual, physical and verbal abuse.[591] They are denied necessary hormone treatment, and face humiliating circumstances in front of other detainees.[592]

The Commission heard testimony about how assaults against LGBT individuals often go unreported for fear of punishment or retaliation.[593] Guidelines were provided to detention facilities on how to care for transgender individuals while they are detained, but according to testimony they are frequently ignored.[594] In addition, transgender individuals are detained for twice as long as the average detainee and one in eight transgender individuals has been placed in solitary confinement.[595] Immigration and Customs Enforcement has reported that transgender individuals account for as little as 0.1% of all detainees, but account for 12% of all sexual assaults reported in

[587] Ibid., 72.

[588] Ibid., 289.

[589] Ibid., 296.

[590] Ishalaa Ortega, Activist, Immigration Equality, Testimony, *Public Comment Session,* p. 85.

[591] Ibid., 88.

[592] Human Rights Campaign, Written Statement for the Public Comment Session on Immigration Detention before the U.S. Commission on Civil Rights, May 13, 2019, at 4 (hereinafter Human Rights Campaign Statement).

[593] Ibid., 3.

[594] Sara Hallock, College Student, University of California, Los Angeles, *Public Comment Session,* pp. 144-145.

[595] Ibid., 145-146.

detention centers.[596] The Prison Rape Elimination Act has special provisions for the protection of LBTQ individuals, including transgender individuals.[597]

Treatment of Transgender Detainees Testimony

> *"Transgender people are exposed to the verbal and physical abuse of other inmates and officers."*[598]
>
> *"First, I was taken into a little room, where a female officer touched me everywhere. Then she went to bring in male officers, who touched my genitalia area over and over again, trying to find out if I underwent sex reassignment surgery without believing the information I provided them."*[599]
>
> *"They asked me about my health and gender identity. I told him I was a transgender woman. Then he asked, are you afraid of being in the male bunk? I said, yes. Then, he told me don't say that or I will have to put you in solitary confinement."*[600]
>
> *"Inside the prison, they call everybody by their last name but transgender people are called by their first name so just to make sure to let everybody know our first name, which usually legally is a male name."*[601]
>
> *"[Roxsana] Hernández (a transgender woman) traveled to the United States in 2018, seeking asylum. She would die just weeks later in [Immigration and Customs Enforcement] custody. [Immigration and Customs Enforcement] officials denied responsibility for the woman's death, but autopsy reports would confirm that before she died, Hernández was subject to "blows, and/or kicks, and possible strikes with a blunt object." Her wrists showed injury from use of handcuffs and there were contusions on her back and ribcage. In addition to the physical abuse she was subject to, fellow migrants from her caravan stated that Hernández had*

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[596] Ibid., 145.

[597] Standards to Prevent, Detect, and Respond to Sexual Abuse and Assault in Confinement Facilities, Final Rule, 79 Fed. Reg. 13,100 (March 7, 2014) (codified at 6 C.F.R. § 115).

[598] Ortega Testimony, *Public Comment Session*, p. 88.

[599] Ibid., 85.

[600] Ibid., 87.

[601] Ibid.

been placed in an 'icebox,' a holding cell which received its name because of the low temperatures detainees were forced to endure once inside."[602]

"In detention [transgender detainee] suffered significant physical illness, yet despite requesting medical attention six times, was unable to see a doctor until her lawyer intervened."[603]

"Transgender immigrants are also routinely denied hormone-treatment in [Immigration and Customs Enforcement] custody, leading them to experience withdrawal and other severe physical symptoms, such as suicidal ideation and gender dysphoria."[604]

Physical and Sexual Assaults of LGBT Testimony

"Noelia (identifies as a gay man) was detained in a private detention center for six months in Georgia, where he experienced sexual harassment and assault that he said was 'happening every day.' On one frightening occasion, he was sexually assaulted in a bathroom by several other men. Afraid of being placed in solitary confinement or disbelieved by staff, Noelia did not report the assault right away. When Noelia worked up the courage to share his story with a psychologist, his claim was marked 'unsubstantiated' and he received no assistance."[605]

"Despite identifying as a woman, she was housed in an all-male unit in the detention center. While there, Guzmán-Martínez was continuously harassed and then sexually abused by a guard under threat of deportation. Although she reported the officer, she remained in the same unit and was sexually assaulted by a male detainee less than a year later. This time, Guzmán-Martínez was afraid of retaliation and like other detainees in her position, waited to report the incident."[606]

"In 2015, [Immigration and Customs Enforcement] released the Transgender Care Memorandum which provided a guideline for [Immigration and Customs Enforcement] officials to adhere to when

[602] Human Rights Campaign Statement, at 4.

[603] Amnesty International, Written Statement for Public Comment Session on Immigration Detention before the U.S. Commission on Civil Rights, Apr. 12, 2019, at 1 (hereinafter Amnesty International Statement).

[604] Human Rights Campaign Statement, at 4.

[605] Ibid., 2.

[606] Ibid., 3.

> *detaining and processing transgender immigrants. . . The memo states in the beginning that detainees should not be housed in solitary confinement for more than 72 hours but contradicts itself later on to say that transgender detainees may be housed . . . in general housing with their biological sex, in general housing consistent with their gender identity, in protective custody, solitary confinement, or medical or administrative segregation, also forms of solitary confinement."*[607]

> *"Executive Order Enhancing the Public Safety in the Interior of the US, signed in January 2017, outlines that [Immigration and Customs Enforcement] is no longer supposed to be giving any special protections to vulnerable populations that are being detained in their facilities. It is fair to assume that even the most limited protections outlined in the Transgender Care Memorandum are no longer being practiced by [Immigration and Customs Enforcement] officials in an effort to discontinue the wasting of resources."*[608]

Due Process

The Commission heard many concerns over the violation of detainees' basic due process and civil rights. Like undocumented immigrants in the U.S., these detainees retain basic civil rights as well as substantive due process rights granted to them by the U.S. Constitution.[609] In *Zadvydas v. Davis*,[610] the Supreme Court acknowledged that "indefinite detention" posed a "serious constitutional problem" given a non-citizen's due process rights.[611] In that case, the Court determined that "unless it is imposed as punishment in a criminal proceeding" or "in certain special and narrow non-punitive circumstances" it was wrong to impose indefinite detention.[612] Except in such narrow circumstances, the Court determined that it was unreasonable to detain undocumented

[607] Hallock Testimony, *Public Comment Session*, pp. 143-44.

[608] Ibid., 145.

[609] Leslie Brown, Co-Organizer, Teachers Against Child Detention, Written Statement for Public Comment Session before the U.S. Commission on Civil Rights, May 12, 2019, 1 (hereinafter Brown Statement).

[610] *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001).

[611] *Id.*; *see also* Project South Statement, at 2.

[612] *Zadvydas*, 533 U.S. at 690.

immigrants for over six months.[613] In addition, detainees' Eighth Amendment rights are violated by imposing onto them unreasonably high bonds.[614]

Due Process Testimony

> *"I strongly emphasize to you that the mass incarceration of asylum seekers, families, unaccompanied minors, and their children, which is occurring without due process and without basic child protection and welfare standards being enforced, is a violation not only of their civil rights, but their basic human rights."*[615]

> *"One of the things I teach my law students and future lawyers is that the Undocumented have human rights because they are human beings. These rights are all set out here in the Universal Declaration of Human Rights."*[616]

> *"Many immigrants at Stewart and Irwin (detention centers in Georgia) have been detained without a reasonable prospect of securing release or even deportation for years on end. The immigration courts at Stewart and Irwin are also notorious for setting prohibitively high bonds for detained immigrants, effectively precluding any possibility for release, and curtailing their Eighth Amendment right to a reasonable bond. At least one detained immigrant we interviewed reported that his bond was set at $10,000, an unaffordable rate for that individual, as well as for most persons who are likely to be held at Stewart and Irwin."*[617]

Length of Stay in Detention Facilities & Withholding Release

As discussed above, in *Zadvydas v. Davis*, the Supreme Court held that "unless it is imposed as punishment in a criminal proceeding" or "in certain special and narrow non-punitive

[613] Project South Statement, at 2.

[614] Ibid., 3.

[615] Brown Statement, at 1.

[616] Francis Boyle, Written Statement for the Public Comment Session on Immigration Detention before the U.S. Commission on Civil Rights, May 10, 2019, at 1 (hereinafter Boyle Statement).

[617] Project South Statement, at 3.

circumstances" it was wrong to impose indefinite detention.[618] Except in such narrow circumstances, the Court determined that it was unreasonable to detain undocumented immigrants for over six months.[619] Most detainees in immigration detention facilities are held in prison like conditions with no idea when they will be released.[620] The Commission received testimony that at privately owned, for-profit detention facilities, there is monetary incentive to detain immigrants for as long as possible.[621]

Indefinite Detention of Adults Testimony

> *"At the time of their detentions, [Immigration and Customs Enforcement] was detaining nearly 100 percent of all parole requests for asylum seekers with credible claims across five of its busiest field offices. Just five years ago though, these same offices were granting upwards of 90 percent of these parole requests in accordance with a 2009 policy. The report concluded in June 2018 that these blanket parole denials violated [Immigration and Customs Enforcement]'s own policies."*[622]

> *"Whereas the 2016 [Immigration and Customs Enforcement] policy presumed release for most pregnant women, the Agency superseded that policy with a March 2018 directive ending all presumption of their release and eliminating stricter oversight of their care and regular review of their custody."*[623]

> *"They are prisoners. Although they have committed no crime, they live under conditions considerably worse than any other prisoners. There are no regular visits. They cannot send or receive mail. They have no idea about the length of their sentence. And we have learned from interviews with released children, they are threatened with more time, longer prison terms if they misbehave."*[624]

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[618] *Zadvydas*, 533 U.S. at 690 (citing *United States v. Salerno*, 481 U.S. 739, 746 (1987) and *Foucha v. Louisiana*, 504 U.S. 74, 80 (1992)).

[619] *Id.*

[620] Seiler Testimony, *Public Comment Session*, p. 58.

[621] Howell Statement, at 2.

[622] Krishnaswami Testimony, *Public Comment Session*, p. 126.

[623] Obser Testimony, *Public Comment Session*, p. 135.

[624] Seiler Testimony, *Public Comment Session*, p. 58.

"This vague guidance about how long families can be detained is concerning and has the potential to impose long-lasting trauma on detained children and their parents."[625]

Legal Representation in Immigration Proceedings

The Fifth Amendment to the U.S. Constitution mandates that "no person . . . shall be deprived of life, liberty, or property. . ." without due process of law.[626] According to *Reno v. Flores*, "[i]t is well established that the Fifth Amendment entitles" noncitizens "to due process of law in deportation proceedings."[627] Additionally, federal courts have held that the removal process implicates an undocumented immigrant's liberty interest.[628] Therefore, federal courts have considered access to counsel – at one's own expense – a requirement that assures fundamental fairness during removal proceedings.[629] For example, in *United States v. Charleswell*, the Third Circuit characterized a detained immigrant's right to counsel during removal proceedings as "so fundamental to the proceeding's fairness" that denying this right "rise[s] to the level of fundamental unfairness."[630] Furthermore, the Fifth Amendment is not the only law that grants undocumented immigrants the right to counsel at their own expense. The Immigration and Nationality Act guarantees undocumented immigrants with access to counsel at their own expense.[631] Additionally, the Immigration and Nationality Act provides detained immigrants other rights in removal proceedings, such as:

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[625] American Psychiatric Association Statement, at 1.

[626] U.S. Const., amend. V.

[627] *Reno v. Flores*, 507 U.S. 292, 306 (1993).

[628] *See e.g*., *Zadvydas*, 533 U.S. at 690 (establishing that a detained immigrant's liberty interest is implicated when a federal statute mandates that captured undocumented immigrants be detained).

[629] *Biwot v. Gonzales*, 403 F.3d 1094, 1098 (9th Cir. 2005) ("The right to counsel in immigration proceedings is rooted in the Due Process Clause."); *Dakane v. U.S. Attorney Gen.*, 399 F.3d 1269, 1273 (11th Cir. 2005) ("It is well established in this Circuit that an alien in civil deportation proceedings . . . has the constitutional right under the Fifth Amendment Due Process Clause . . . to a fundamentally fair hearing."); *Borges v. Gonzáles*, 402 F.3d 398, 408 (3d Cir. 2005) ("The Fifth Amendment entitles aliens to due process of law in deportation proceedings."); *Rosales v. ICE*, 426 F.3d 733, 736 (5th Cir. 2005) ("[D]ue process requires that deportation hearings be fundamentally fair."); *Brown v. Ashcroft*, 360 F.3d 346, 350 (2d Cir. 2004) ("The right . . . under the Fifth Amendment to due process of law in deportation proceedings is well established.").

[630] *United States v. Charleswell*, 456 F.3d 347, 360 (3d Cir. 2006).

[631] The Immigration and Nationality Act, as amended, Pub. L. 104-208, 66 Stat. 235 (Sept. 30, 1996) (codified as 8 U.S.C. § 1362).

- promulgates rules that grant detained immigrants ample opportunity to obtain counsel by placing restrictions on the removal proceeding's timing;[632]
- mandates that undocumented immigrants are furnished with a list of pro bono attorneys when removal proceedings have begun;[633] and
- establishes additional protections for unaccompanied minors, mentally incompetent individuals, and others.[634]

Although the Immigration and Nationality Act describes these provisions as a "privilege," several federal courts have construed the Immigration and Nationality Act as establishing a statutory right to counsel at a detained immigrant's own expense.[635]

Furthermore, in 2015 the Commission heard that the success rate of detained immigrants with counsel is strongly linked to an immigrant's ability to comprehend complex immigration law, making legal representation crucial for detained immigrants seeking asylum or entry into the United States.[636] According to testimony submitted to the Commission in 2015, statistics show that detained immigrants who obtain counsel are more successful in their asylum claims, and therefore released from detention more often, than those without counsel.[637] According to the National Immigration Justice Center, detained immigrants who had obtained counsel were six times more likely to succeed in removal proceedings.[638]

While the Immigration and Nationality Act mandates that the federal government furnish detained immigrants with legal materials and attorney contact information, the actual procedures Immigration and Customs Enforcement uses to process detained immigrants is not conducive to affording them adequate opportunity to obtain counsel. For example, Immigration and Customs Enforcement initially detains undocumented immigrants in a facility where they were apprehended. Immigration and Customs Enforcement transfers these detainees to remote detention

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[632] *See* Immigration and Nationality Act § 239(b)(1) (codified at 8 U.S.C. § 1229(b)(1)).

[633] *See* Immigration and Nationality Act § 239(b)(2); 8 U.S.C. § 1229(b)(2); 8 C.F.R. § 238.1(b)(2)(iv).

[634] *See* 6 U.S.C. § 279(b)(1)(A).

[635] See *Castro-O'Ryan v. INS*, 847 F.2d 1307, at 1312 (9th Cir. 1987) (indicating Section 292 of the Immigration and Nationality Act, as well as its legislative history, "confirms that Congress intended to confer a *right*").

[636] 2015 Report at 108 (citing Karen Grisez, American Bar Association, Statement, at 4).

[637] Ibid.

[638] Charles Roth and Raia Stoicheva, "Order in the Court: Commonsense Solutions to Improve Efficiency and Fairness in the Immigration Court," *National Immigrant Justice Center*, Oct. 2014, http://immigrantjustice.org/sites/immigrantjustice.org/files/Order%20in%20the%20Courts%20-%20Immigration%20Court%20Reform%20White%20Paper%20October%202014%20FINAL2.pdf.

centers within hours of their apprehension. This immediate transfer affects a detained immigrant's ability to secure legal representation because his/her transfer location is generally unknown.[639] Additionally, a detained immigrant may be transferred to a facility located over 100 miles away from where he/she was initially apprehended.

Under Executive Order 13,166, federal agencies are required to examine the services they provide, identify any need for services to those with limited English proficiency (LEP), and develop and implement a system to provide those services so LEP persons can have meaningful access to them.[640] Language barriers make it extremely difficult for detainees to learn about the legal process and communicate with employees at facilities.[641] The Commission heard testimony that often times, documents and legal resources are only in English and detainees will sign documents without understanding what they are signing.[642] For detainees who only speak indigenous languages, there are very few interpreters available to translate and assist them while in detention.[643] Moreover, in July 2019, the Trump Administration announced plans to no longer provide in-person interpreters at immigrants' first immigration hearings, and will instead only provide in-language videos to provide information to asylum seekers and other immigrants facing deportation of their rights.[644]

Limited English Proficiency and Legal Representation Testimony

> *"The limited language proficiency means that detained immigrants who do not speak English are unable to communicate with their deportation officers, while some detained immigrants were explicitly denied the opportunity to speak with the officers for months on end."*[645]

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[639] The Commission learned that immigrants detained at Port Isabel Detention Facility and Karnes Family Detention Facility were apprehended from various places near the Rio Grande Valley and throughout Texas.

[640] "Frequently Asked Questions," LEP.gov, https://www.lep.gov/faqs/faqs.html (accessed July 13, 2019).

[641] Project South Statement, at 3.

[642] Project South Statement, at 4; Detained Migrant Solidarity Committee Statement, at 8.

[643] Slaton Testimony, *Public Comment Session*, p. 158.

[644] *See* Tal Kopan, "Trump Administration Ending In-Person Interpreters at Immigrants' First Hearings," *San Francisco Chronicle*, July 3, 2019, https://www.sfchronicle.com/politics/article/Trump-administration-ending-in-person-14070403.php; *see also* Stephen Franklin, Miriam Annenberg, and Ankur Singh, "Video hearings in immigration court are harming immigrants' cases," *Pacific Standard*, July 2, 2019, https://psmag.com/social-justice/video-hearings-in-immigration-court-are-harming-immigrants-cases.

[645] Project South Statement, at 3.

> *"In addition, detained immigrants at both facilities also encounter constant problems accessing the law libraries for legal information. Many detained immigrants at Stewart reported that they were unable to access any legal resources in their native languages, effectively precluding their ability to fill out complex legal documents such as asylum applications. At Irwin, detained immigrants are required to submit a written form, only available in English and Spanish, to request library use."*[646]

> *"Often times, people are asked to sign documents. They have no idea what they're signing."*[647]

> *"In reviewing notifications sent to dozens of Spanish speaking detained migrants, most of the documents (if provided at all) were English only."*[648]

> *"Children are also made to go before a judge without representation. In a language they don't speak. Civil Rights are being breached and broken left, right, and center by the US government."*[649]

> *"Many of the refugees that I met spoke no Spanish when I tried to speak Spanish with them. They were indigenous."*[650]

Access to Legal Representation Testimony

> *"I had to represent myself in court almost the entire time I was detained because I could not afford a private lawyer. . . I tried to call the numbers of pro bono lawyers but no one answered my calls. I don't know if the numbers worked but very few detainees could get pro bono lawyers."*[651]

> *"While both Stewart and Irwin allow detained immigrants to meet with attorneys, in many ways the facilities physically bar the detained immigrants' right to substantive consultation and representation. Detained immigrants and attorneys have reported that they had to meet through*

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[646] Ibid., 4.

[647] Slaton Testimony, *Public Comment Session*, pp. 158-59.

[648] Detained Migrant Solidarity Committee Statement, at 8.

[649] Eli Beller, Written Statement for the Public Comment Session on Immigration Detention before the U.S. Commission on Civil Rights, May 13, 2019, at 1 (hereinafter Beller Statement).

[650] Slaton Testimony, *Public Comment Session*, p. 158.

[651] Robin A. Testimony, *Public Comment Session*, pp. 108-09.

Plexiglas with malfunctioning phones or videoconferencing equipment. The conversations are not private, as the rooms are not sound-insulated, and the attorneys and clients often need to shout at each other over the television or other white noise in order to understand each other."[652]

Detention Centers in Remote Locations Testimony

"Detained immigrants have a harder time accessing legal help since many detention facilities are located in remote, rural areas. About 30 percent of detained immigrants are held in [Immigration and Customs Enforcement] facilities more than 100 miles from the nearest government-listed legal aid provider, and for immigrants in detention the representation rate plummeted to an abysmal 14 percent."[653]

"Many of our clients are in facilities that are housed in rural areas far away from any type of support, legal advocacy organizations, or removal defense immigration attorneys."[654]

Understanding the Legal Process

The Commission received testimony that the legal process is very complex and difficult to navigate without legal assistance, especially considering that migrants have entered a legal system that is foreign to them, but many detainees must represent themselves.[655] The limited resources available in detention center legal libraries are not readily available to detainees, making the process of learning their rights even more difficult.[656]

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[652] Project South Statement, at 3.

[653] Asian Americans Advancing Justice Statement, at 2 (citing Kyle Kim, "Immigrants Held in Remote ICE Facilities Struggle to Find Legal Aid Before They're Deported," *Los Angeles Times*, Sept. 28, 2017, https://www.latimes.com/projects/la-na-access-to-counsel-deportation/; Ingrid Eagly and Steven Shafer, "Access to Counsel in Immigration Court," Sept. 28, 2016, https://www.americanimmigrationcouncil.org/research/access-counsel-immigration-court).

[654] Sánchez Testimony, *Public Comment Session*, p. 120.

[655] Krishnaswami Testimony, *Public Comment Session*, p. 127.

[656] Ishalaa Ortega, Written Statement for the Public Comment Session on Immigration Detention before the U.S. Commission on Civil Rights, Apr. 12, 2019, at 2 (hereinafter Ortega Statement).

Navigating Immigration Proceedings Without Representation Testimony

> *"[T]he vast majority of detained asylum seekers proceed without legal assistance."*[657]
>
> *"That we routinely require survivors of trauma to navigate a bureaucratic maze of proceedings daunting for licensed attorneys, all while behind bars- proceedings that could culminate in their return to countries where they fear grave harm, even death- is a travesty."*[658]
>
> *"There are only 30 minutes outside for recreational time, which inmates constantly lose in order to go to the legal library to prepare their cases. Most of the inmates endure the process by themselves without legal representation."*[659]

Lack of Independence for Immigration Courts

Immigration courts are housed under the Department of Justice, Executive Office for Immigration Review, and thus part of the executive branch and not the judicial branch.[660] Many organizations, including the American Bar Association, American Immigration Lawyers Association, Federal Bar Association, and the National Association of Immigration Judges have all urged Congress to create an immigration court system that is independent of the Department of Justice.[661] They point out that there is a conflict of interest when immigration courts are housed in the same department that is responsible for prosecuting immigrants in federal court, and this concern is exacerbated because immigration judges are Department of Justice employees, which leaves them vulnerable to political pressures and politicized interference into their duties.[662] Immigration courts also face massive backlogs, which result in delays, and commenters argue Executive Office for Immigration Review policies meant to address the backlog have actually worsened the backlog and threatened

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[657] Krishnaswami Testimony, *Public Comment Session*, p. 127.

[658] Amnesty International Statement, at 2.

[659] Ortega Statement, at 2.

[660] "About the Office," *Dep't of Justice*, Aug. 14, 2018, https://www.justice.gov/eoir/about-office.

[661] American Bar Association, American Immigration Lawyers Association, Federal Bar Association, and the National Association of Immigration Judges, letter to Congress, July 11, 2019, https://www.naij-usa.org/images/uploads/publications/ABA_-_Congress_Should_Establish_an_Independent_Innigration_Court.pdf.

[662] Ibid.

the independence of immigration judges.[663] These policies include implementing case quotas to measure performance for immigration judges and reducing immigration judges' discretion to grant hearing continuances to ensure the fair administration of justice.[664] In 2018, the Commission majority issued a statement denouncing this practice.[665]

Location of Detention Facilities

The Commission also received testimony that immigration detention facilities are often located in rural areas, making it difficult for families to visit their detained loved ones, for lawyers to get in contact with their clients, and keeping issues that occur within their walls far away from the public eye.[666] Many people who submitted public comments also raised concern about how federal money has been allocated away from oversight of detention facilities.[667]

Commenters also raised issues with locating detention facilities at military bases.[668] EarthJustice staff told the Commission that the proposed sites of some new detention facilities at military bases pose serious health risks due to high levels of toxic chemicals in the soil.[669] In addition there are concerns regarding issues of access for family members who may be undocumented and attorneys

[663] Ibid.; American Immigration Lawyers Association, "American Immigration Lawyers Association's Policy Brief: FOIA Reveals EOIR's Failed Plan for Fixing the Immigration Court Backlog American Immigration Lawyers Association," Feb. 21, 2019, p. 3, https://www.aila.org/PolicyBriefEOIRPlan (discussing EOIR plan obtained through FOIA request which undermines due process in immigration courts and contributed to backlog in some instances).

[664] "American Immigration Lawyers Association's Policy Brief," p. 3.

[665] U.S. Comm'n on Civil Rights, "U.S. Commission on Civil Rights Denounces Imposition of Immigration Judge Quotas," Apr. 20, 2018, https://www.usccr.gov/press/2018/04-20-Immigration-Quota-Statement.pdf.

[666] Seiler Testimony, *Public Comment Session*, p. 58; Sánchez Testimony, *Public Comment Session*, p. 120.

[667] Lannan Statement, at 1; Human Rights Watch Statement, at 3; Small Testimony, *Public Comment Session*, p. 142.

[668] *See* Amy Toran Perry, Military Families for Families, Written Statement for Public Comment Session on Immigration Detention (discussing environmental concerns and citing Open Letter from Retired U.S. Military General and Flag Officers on the Use of Military Bases to Detain Immigrant Families, Aug. 1, 2018, https://americasvoice.org/press_releases/retired-general-and-flag-officers-sign-letter-in-opposition-to-housing-immigrants-and-asylum-seekers-on-military-bases/).

[669] Mabson Testimony, *Public Comment Session*, pp. 111-12.

at military bases.[670] This may also implicate heightened due process concerns for migrant children, if they are no longer protected by state child custody laws.[671]

Opening Detention Centers on Potentially Hazardous Sites Testimony

> *"Harmful contaminants like lead have been detected in both soil and groundwater and at levels that are shockingly well above the EPA's threshold that would trigger and require immediate remediation. . . There is a special concern for the infants and young children who may be housed on the site, as they may be harmed by both acute and chronic contact with lead. Lead exposure is known to cause brain damage, learning disabilities, stunted growth, and behavior problems, among other serious debilitating health effects."*[672]
>
> *"[M]oreover, a number of other chemicals have been identified on-site, including benzene, arsenic, and methylene chloride, all of which increase a child's likelihood to develop cancer and can cause long-lasting severe neurological, immunological, and developmental impacts."*[673]
>
> *"Due to a number of physiological differences children-especially infants-are more susceptible to the harms caused by toxic chemicals, particularly lead and per- and poly- fluoroalkyl substances, (PFAS), which have been*

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[670] For example, an undocumented immigrant working to deliver pizza to the Fort Hamilton Army base was detained and held for 53 days. Felipe De La Hoz, "Military bases enforcing U.S. immigration laws may be exceeding their authority," *Documented*, Sept. 4, 2018, https://documentedny.com/2018/09/04/military-bases-enforcing-u-s-immigration-laws-may-be-exceeding-their-authority/; *See* Spencer Ackerman, "Ready, Fire, Aim: Military Rushes Into Detention Camp Plan," *Daily Beast*, July 10, 2018, https://www.thedailybeast.com/ready-fire-aim-military-rushes-into-detention-camp-plan ("Military bases are by necessity restricted areas, yet the thousands of undocumented people envisioned for detention on them need access to their lawyers for deportation proceedings. They also need secure areas to discuss their cases with attorneys, advocates or relatives, another factor complicated by the camps' operation on military bases."); Jana Lipman, "Detaining Refugee Children At Military Bases May Sound Un-American, But It's Been Done Before," *Government Executive*, June 19, 2019, https://www.govexec.com/management/2019/06/detaining-refugee-children-military-bases-may-sound-un-american-its-been-done/157799/ ("It is unclear whether the young migrants sent to Fort Sill will have access to lawyers, education or social services.").

[671] *See supra* notes 15-16 (discussing *Reno v. Flores*, 507 U.S. at 302) (Justice Scalia reasoned that full substantive due process rights did not apply because migrant children were housed in conditions in which state child custody rules contractually applied).

[672] Mabson Testimony, *Public Comment Session*, p. 111-112.

[673] Ibid., 112.

identified in intolerable high amounts in both soil and groundwater on GAFB (Goodfellow Air Force Base) and FBAB (Fort Bliss Army Base)."[674]

Allocation of Federal Monetary Resources Testimony

"Not only is this policy inhumane, it is costing taxpayers more than $775 dollars per day per child. With almost 3000 children being held in Homestead alone, that cost is close to $3 million per day."[675]

"In February of this year, [Immigration and Customs Enforcement] held a record 49,000 people in detention on average per day. The administration has asked Congress to allocate US$2.7 billion for Fiscal Year 2020 to lock up a daily average of 54,000 people per day, with the stated goal of detaining 60,000 people per day, including 10,000 family detention beds through an additional 'Border Security and Immigration Enforcement Fund.' At the same time, the Trump administration has requested less money for Department of Homeland Security oversight of detention – oversight which is intended to ensure that conditions of confinement are safe."[676]

"In the last two administration budget requests, the Agency has been clear about a desire to lower detention standards even further in order to facilitate entering into contracts with facilities that even they acknowledge can't meet current standards."[677]

"As a tax-paying citizen I am outraged that my tax dollars are funding a private prison in Homestead, FL for children of families seeking asylum."[678]

"As the granddaughter of a WWII veteran, I absolutely abhor the use of my tax dollars to detain innocent immigrants and asylum-seeking refugees."[679]

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[674] Earthjustice, Written Statement for the Public Comment Session on Immigration Detention before the U.S. Commission on Civil Rights, May 13, 2019, at 3.

[675] Lannan Statement, at 1.

[676] Human Rights Watch Statement, at 3.

[677] Small Testimony, *Public Comment Session*, p. 142.

[678] Priscilla Cobb, Written Statement for the Public Comment Session on Immigration Detention before the U.S. Commission on Civil Rights, May 12, 2019, at 1.

[679] Lisa Dameron, Written Statement for the Public Comment Session on Immigration Detention before the U.S. Commission on Civil Rights, Mar. 23, 2019, at 1.

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CHAPTER 4: FINDINGS AND RECOMMENDATIONS

Findings

I. Creating a Humanitarian Crisis

A. The Trump Administration's changes to asylum, the detention of children, and certain other immigration policies, practices, and procedures have created an unnecessary human and civil rights crisis at the southern border. The institution of the Zero Tolerance policy and decision to forcibly and deliberately separate children, including infants and toddlers, from parents or adult family members on a mass scale is a gross human and civil rights violation.

B. The Departments of Homeland Security and Health and Human Services did not have a plan or coordinate procedures to reunite children with their families. The Zero Tolerance policy, despite having been piloted for a year prior to its announcement, resulted in forcible and needless separation of children, including infants and toddlers, from parents or adult family members.

C. The sharp rise in 2018-2019 in immigrant families traveling with children attempting to enter the United States and to claim asylum has created extreme and challenging conditions at the border. The serious humanitarian needs of arriving families have not been addressed, and these concerns have instead been exacerbated by Administration policies.

D. The absence of planning and resulting confusion and chaos led to many children being sent up to thousands of miles from their parents who were typically given no information about the whereabouts of their children; nor were the children given any information about their parents.

E. The Trump Administration's metering policy and Migration Policy Protocols forced asylum seekers at the southern border to risk crossing the border illegally, including via more dangerous and remote crossings. Wait periods for migrants can extend past a week outside ports of entry with no shelter, food, or water and expose them to further risk of harm. In one case, the Commission heard of a migrant husband and wife who waited 30 days in Calexico, a city near the Mexican border, before they were permitted to make their claim of asylum. The Administration has obligations under the Immigration and Nationality Act to ensure that any third countries to which migrants seeking asylum in the United States are removed or returned are countries where they would not be subject to threat on account of race, religion, or nationality, and where they "would have access to a full and fair procedure" for determining a claim to asylum. 8 U.S.C.§ 1158(a)(2)(A).

F. The Commission investigated immigration detention center conditions in 2015 and found noncompliance with various detention laws and standards, and detention conditions have significantly deteriorated under the Trump Administration's policies.

G. On April 12, 2019, the Commission heard testimony from the public, from numerous stakeholder organizations including nonprofit and immigrant rights groups who testified to the appalling conditions of immigrant detention centers, including lack of medical care, and basic human needs including food, water, and sanitary conditions. Commissioners heard from experts on the mental and physical consequences of detention and irreversible trauma associated with separating families and the effects of long-term confinement especially for children. Migrants offered testimony about being detained, inhumane treatment from Department of Homeland Security officials, their journeys migrating from their home countries where they escaped persecution, violence, and gangs, and their heroic stories of survival and triumph in the face of despair.

H. Despite the Trump Administration's claims to the contrary, Zero Tolerance and the resulting mass family separation is a policy that was initiated by that Administration. It was never a policy during the Obama, Bush, Clinton, Reagan, Carter, Ford, Nixon or Johnson Administrations, for example, and accordingly was not found to be a policy or practice in the Commission's 2015 report, *With Liberty and Justice for All: The State of Civil Rights at Immigration Detention Facilities*. Moreover, children were not routinely separated from family during prior Administrations and that policy or practice was not found to exist in the Commission's 2015 report.

I. Despite the Administration's issuance of an Executive Order halting family separations, there still remain credible allegations that children continue to be separated from their families and held in substandard facilities and conditions. The Young Center testified that the policy continues to be used as a tool to deter migrants from crossing the border and seeking asylum. Many parents abandoned their legitimate asylum claims because they were told that doing so would accelerate the family reunification process or benefit their children. Parents were deported and children believed their parents willingly left the behind and abandoned them.

II. Discriminatory Immigration Policies

A. The history of U.S. immigration policy includes discriminatory national origin quotas that permitted large numbers of immigrants from Europe, while limiting immigration from other regions of the world including Asia, Africa, and Latin America. Following the Immigration and Nationality Act of 1965, which abolished discriminatory national origin quotas, immigration has changed from largely European to non-European. Despite that change in the law, discriminatory treatment of non-European migrants persists today in other forms.

B. The Trump Administration's current immigration detention policies focus mainly on immigrants who are Latinx.

C. The Trump Administration's rhetoric and characterizations of certain countries and immigrants coming from those countries reflects animus against Latinos, Latino immigrants, and other immigrants of color. Because the Trump Administration's immigration and indefinite policies have appear to be aimed at claimants for asylum from Latin America , taken together with the nature and tone of comments characterizing the

people from these countries, the policies and practices raise concerns under the 14th Amendment.

D. Separated children were, in fact, housed in substandard facilities and conditions, were not apprised of their rights with regard to their parents, and stranded after their parents were deported, the practices raise concerns about due process under the Equal Protection and Due Process Clauses of the 14th Amendment, and whether any of the actions were on the basis of national origin.

III. Trauma as a Result of Family Separations

A. The impact of separating immigrant families and indefinite detention is widespread, long-term, and perhaps irreversible physical, mental and emotional childhood trauma. Immigrant children, as well as adults, experienced trauma as a result of the Administration's policies. At the Commission's Public Comment Session on April 12, 2019, Commissioners heard from a number of trauma experts and interested organizations on the effects of trauma. The Commission also heard directly from immigrant detainees who confirmed traumatic experiences as a result of not only being separated from their families, and also the trauma they suffered as a result of enduring inhumane conditions at detention facilities and sometimes on account of the cruel treatment by Department of Homeland Security personnel.

B. Miriam Abaya from The Young Center Policy Team testified that the Administration was fully aware of the trauma that would ensue if the Zero Tolerance Policy was implemented prior to implementation. They chose to ignore the advice and warnings from trauma experts, stakeholder organizations, and even experts within the Administration. Nearly a year before the policy was implemented, in a letter to the Administration, the Young Center, along with 500 other child health and welfare organizations, laid out the specific harms that family separations would inflict on children and families.

C. The American Psychiatric Association (APA), the national medical specialty society representing more than 38,500 psychiatric physicians nationwide, wrote to the Commission in response to its *Request for Public Comment on Immigration Detention Centers and Treatment of Immigrants.* The APA, also previously expressed concern regarding the long-lasting trauma on detained migrant children and their families that a result from the Administration's proposed modifications to the *Flores* agreement. The link between the trauma of childhood detention, stated the APA, and lasting unfavorable outcomes is backed by scientific evidence. Trauma from childhood detention has a proven association with "an increased risk of mental illness, such as depression, anxiety, and post-traumatic stress disorder." Migrants can "experience disabling post-traumatic stress disorder or other consequences that adversely impact their medical, psychological, social, and spiritual well-being. These consequences can range from demoralization to various sequelae, involving simple and complex trauma complicated by the migratory journey and resettlement process. These migration-related and post-migration stressors can produce demoralization, grief, loneliness, loss of dignity, and feelings of helplessness as normal syndromes of distress that impede refugees from living healthy and productive

lives." By prolonging the detention period for this at-risk population only serves to exacerbate the already significant mental health challenges that they face.

IV. Inhumane Detention Conditions for Children and Adults

A. Some child detention facilities lack basic hygiene and sleeping arrangements; they sometimes lack soap, blankets, dental hygiene, potable water, sufficient showering days, clean clothing, and nutritious food.

B. Under the Trump Administration's policies, U.S. Customs and Border Patrol staff and migrant holding facilities used to house separated children were and continue to be woefully unprepared, untrained, and understaffed to handle the detention of migrants, including separated and unaccompanied minors. This has resulted in overcrowding and dangerous, substandard conditions. These conditions violate not only Department of Homeland Security detention standards but challenge and degrade legal norms regarding the respect for human life and humane treatment of immigration detainees.

C. Separated and unaccompanied migrant children have been detained in border patrol holding facilities in these unacceptable conditions for extended periods of time, and Department of Homeland Security has continuously failed to comply with the *Flores* agreement that requires Border Patrol to transfer unaccompanied minors to the Department of Health and Human Services within 72 hours of making the determination that a child either arrived, or due to family separation became, an unaccompanied child.

D. The regulations released by Department of Homeland Security and Department of Health and Human Services on August 21, 2019 appear to be an attempt to subvert rules meant to protect migrant children under the *Flores* Settlement Agreement. While it states there is a general policy favoring release, it appears to be an attempt to gain agency discretion to allow some children to be detained indefinitely. The regulation runs the risk of subjecting children and their families, including those who have already been referred for immigration proceedings due to a credible fear of persecution, to prolonged—and indefinite—detention. The regulation strips parents of their ability to entrust their child with a friend or relative, rather than remain in detention. The regulations also remove the requirement that children be housed at state-licensed facilities, and instead create an alternative option for private third-party licensing. In so doing, the regulations do not maintain sufficient accountability mechanisms for ensuring housing of adequate quality for children.

E. The Refugee and Immigrant Center for Education and Legal Services, Refugee and Immigrant Center for Education and Legal Services, based in San Antonio, Texas, testified to the vulnerability of families housed at the family detention facilities. Most of the detainees are asylum seekers and have experienced traumatic events in their home counties; they arrive at the border having completed a taxing and dangerous journey escaping violence. Because of their onerous journey, and due to the fact that many of the migrants are children, they require specialized services. The detention facilities do not address these needs as they are not equipped with the proper resources, including professional personnel.

F. Refugee and Immigrant Center for Education and Legal Services also testified about visiting the Karnes Detention Center on a daily basis and observing their client's health deteriorate due to untreated and undiagnosed illnesses and mental trauma. Medical care is delayed, immunizations are inadequate, sometimes given inappropriately, and often delayed leading to communicable diseases in the child population. There are very limited mental health services. Despite many of the obvious signs of mental health trauma observed in children at these facilities, such as bedwetting, isolation, regressive behavior and self-injurious behavior, basic medical history and physical examinations are not completed and mental health screenings are overlooked.

G. The Office of Inspector General for Department of Homeland Security has issued two management alerts warning of dangerous overcrowding at Border Patrol facilities. Many media and eyewitness reports also corroborate the inhumane treatment of both children and adults, including overcrowding, lack of access to showers, basic health care, and nutritious meals in many detention facilities across the country.

H. The Commission received evidence and testimony that child detention facilities lack appropriately trained medical personnel and medicine, medical staff are not routinely present at detention facilities, and wait times to see a doctor can be weeks long, regardless of how dire the situation. The Commission also received testimony that child detainees who need daily medication, even if they enter detention facilities with their own medications, have their medications withheld from them without reason.

I. Language barriers pose an immense hurdle to staff's ability to offer adequate and appropriate medical and mental health treatment to children while detained.

J. The Commission is aware of investigations into the deaths of six migrant children from Guatemala and El Salvador who have died either in federal immigration custody or shortly after their release. These children's names and ages are:

- Jakelín Caal Maquín (7), died December 2018
- Felipe Gómez Alonso (8), died December 2018
- Juan de León Gutiérrez (16), died April 2019
- Unnamed (2), died May 2019
- Carlos Gregorio Hernández Vásquez (16), died May 2019
- Mariee Juárez (1), died May 2019, weeks after being released from Immigration and Customs Enforcement custody.

Media reports indicate at least some of these children showed signs of medical distress while in custody and may have been delayed proper medical care. Language barriers may have also played a role in these tragedies, as two of the children only spoke indigenous languages and their parents were unable to properly communicate their children's needs to detention staff.

K. At some detention facilities guards and other employees are not properly vetted and do not receive background checks.

L. The Commission received evidence and testimony regarding abuse of authority including excessive use of force in detention centers, sharp increases in allegations of sexual assault, and improper use of solitary confinement as punishment.

M. Children have reported they are not allowed to hug and comfort each other while detained.

N. There are serious concerns with siting detention facilities on military bases, including exposure to toxic chemicals, heightened limitations on attorney access to detainees, and concerns such facilities may not be subject to state legal protections such as child welfare and licensing rules.

V. Barriers to Access to Justice

A. The Supreme Court has repeatedly found noncitizens within the United States' jurisdiction are entitled to substantive due process protections under the Fifth Amendment. Under U.S. law, once a child is physically present in the U.S., the individual may apply for asylum whether or not the individual entered at a designated port of entry.

B. The resulting enforcement of criminal sanctions against asylum seeking border crossing families between points between points of entry as a result of the Zero Tolerance policy transforms the civil immigration enforcement system into one that permanently physically and mentally damages children. These criminal prosecutions served as the legal mechanism for children to be separated from their parents.

C. The use of untrained Border Patrol agents rather than asylum officers to conduct interviews and initial credible fear determinations as part of the Migration Protection Protocols policy also raises due process concerns. Recent data show that asylum applicants who have been forced to remain in Mexico have less access to counsel than those who have not.

D. Child asylum seekers are not guaranteed a bond hearing with an immigration judge, and those who have shown a credible fear continue to be detained even if there is no proof that they are dangerous and even if they have relatives of others in the country who will care for them.

E. In 2015, the Commission documented practices at immigration detention centers that inhibited detainees' due process rights. These concerns remain and have been exacerbated under the Trump Administration. Detained migrants do not have proper access to legal representation because they are not provided with the contact information for immigration lawyers and because detention facilities are in remote locations.

F. There are very few interpreters to translate legal and detention information for detainees who speak indigenous languages, hindering many child migrants who don't speak English or Spanish from gaining access to information about the legal process and access to legal representation. The lack of language assistance for these individuals also limits their ability to communicate with detention facility staff.

G. Detainees face massive backlogs in understaffed immigration court and sometimes delays resolution of their cases. The housing of immigration courts under the Department of Justice creates a conflict of interest because the Department is also responsible for prosecuting immigrants in federal court and also subjects immigration courts to political interference. Department of Justice policies have exacerbated the backlog and threatened the judicial independence of immigration judges.

VI. Lack of Transparency and Accountability

A. It is difficult to have a truly independent inspection of detention facilities in part because inspections of facilities by Department of Homeland Security and other entities are announced beforehand. Members of Congress have been denied access to inspect facilities on short notice.

B. The Commission received testimony that some children's deaths in detention centers are not investigated in compliance with Congressional reporting requirements. Moreover, the Administration in some cases, has not provided explanations to immigrant families regarding the deaths of spouses and/or children. The Coalition for Humane Immigrant Rights (CHIRLA), an immigrant rights organization in California, testified to the Commission about a man named Jose who was detained separately from his pregnant wife in an Immigration and Customs Enforcement facility while awaiting deportation. Upon the birth of his first child, he was forbidden to see the child. When Jose was subsequently placed in a medical facility, officials could not explain to his wife the reason for the move and when he died shortly after as a result of a hemorrhage and subsequent coma, officials offered the wife a letter stating that the husband was now released from custody. Agency officials did not conduct an investigation into the cause of Jose's death.

C. As the Commission found in its 2015 report, the lack of binding regulations and standards create confusion and a lack of clarity in the application of detention standards in the immigration detention system. Additionally, because these standards do not have enforcement mechanisms, facilities are not held accountable when they fail to maintain or meet these standards.

D. The Department of Homeland Security Office for Civil Rights and Civil Liberties reported to the Commission that Office for Civil Rights and Civil Liberties received thousands of complaints about family separation and the conditions of children in detention that they were unable to process except through samples of a small fraction of such complaints, and that the office does not have authority to remedy individual complaints.

Recommendations

I. Addressing Family Separations

A. The Trump Administration must immediately reunify any remaining children with their parents, including parents who were deported before, during, and after Zero Tolerance,

unless there is a proven serious risk to the best interests of the child. In doing so, if the deported parents wish to file a petition for asylum, they should be allowed to return to the United States and make that claim on behalf of themselves and their children. Unless there is a clear and exigent danger based on assessment of an individual, all families should remain together and be allowed into the communities while awaiting their asylum determinations, and their asylum determinations should be immediately reviewed.

B. Congress should pass legislation which would end family separation at the border except when authorized by a state court or child welfare agency, or when Customs and Border Protection and an independent child welfare specialist agree that a child is a trafficking victim, is not the child of an accompanying adult, or is in danger of abuse or neglect.

II. Addressing Detention Conditions for Children and Adults

A. The Administration should immediately remedy the conditions detailed in the Department of Homeland Security Inspector General report regarding overcrowding, food, and sanitation so as not to further traumatize children forced to flee their homes whether unaccompanied, separated from their parents or adult guardians, or together with their families.

B. The safe and humane treatment of detainees is already required under the Constitution, as well as various laws, regulations, and federal court settlements, and Department of Homeland Security should already be working to uphold these standards at all government- and privately-run facilities. Due to the inconsistent and inhumane treatment of children. Congress should pass legislation that sets minimum safe, sanitary and humane detention conditions, and provide sufficient funding to address the crisis in detention facilities for both children and adults. Because the purpose of immigration detention is not punitive, the standard of care should be based on providing reasonable care and safety, and not on incarceration standards. Instead, requirements should include the following:

    1. Adequate and appropriate medical care in detention facilities, including increased doctors, nurses, pediatricians, and mental health care professionals who work at the facilities fulltime, an appropriate stock of medicine, access to hospitals and more advanced medical care. The standard of medical care should be professional judgment and not deliberative indifference.

    2. Ensure medical staff are given appropriate language training or provide reliable translation services so patients can communicate their needs.

    3. Mental health screening and medical history and physical exam for every detainee upon admittance to a detention facility. In addition, the medical and mental health policies and record keeping at family detention centers must comply with Immigration and Customs Enforcement's family residential standards and relevant state child welfare standards.

4. Hygiene products including toothbrushes and toothpaste, diapers, and soap, beds, blankets, daily access to showers, access to laundry, feminine hygiene products, and nutritious and appetizing food.

5. Thorough background checks for security and other detention staff.

6. Ensure children have access to schooling while they are detained.

7. Allow children to interact with one another on a humane level, including actions such as hugging and comforting one another where no safety rationale, such as the prevention of abuse, requires otherwise.

8. Adequate medical standards related to preservation of LBGT detainees' rights and, in particular, the dignity of LGBT immigrant detainees.

C. Prohibiting the detention of pregnant persons.

D. Prohibit housing immigration detainees at prisons and jails.

E. Department of Homeland Security should ensure that personal medicines are not be taken and withheld from migrants.

F. Because they do not comply with the terms and spirit of the *Flores* settlement agreement, Department of Homeland Security and Department of Health and Human Services should immediately withdraw their *Flores* regulations.

G. Department of Homeland Security should ensure there is adequate staffing at border patrol stations and places of detention so that detainees are not being asked to take care of other detainees and that there are a sufficient number of adults to monitor the health and care for young children.

H. As the Commission recommended in its 2015 report, Congress should promote increased reliance on alternatives to detention and less reliance on immigration detention. There should be no for-profit child detention centers.

I. Immigration detention facilities should not be located on military bases. Any existing detention facility on military bases should be closed.

III. Ensuring Due Process

A. Congress must provide sufficient funding to address the need for hiring, full training, and retention of experienced and qualified administrative law judges to process asylum and other immigration claims, as well as, sufficient funding for law clerks, interpreters and other administrative support staff to ensure asylum seekers and other immigrants are accorded full due process.

B. Congress should pass legislation to ensure asylum seekers who present themselves at border crossings are entitled to a bond hearing before an immigration judge.

C. The Commission agrees with the recommendation of the American Bar Association, American Immigration Lawyers Association, Federal Bar Association, and the National Association of Immigration Judges that Congress should create an immigration court system that is independent of the Department of Justice. Congress should also eliminate the requirement of case quotas for immigration law judges.

D. The Administration should adhere to the requirement of federal law providing that third countries designated as safe for returning those seeking asylum in the United State are limited to those where asylum seekers would not face threats on account of race, religion, or nationality and where they would have access to a full and fair procedure for their asylum claims. The Administration should not return asylum seekers from the United States to countries that do not meet these criteria. Congress should take all measures needed to ensure that the Administration does not designate a third country that is not safe for persons seeking asylum in the United States. Congress should require Department of Homeland Security to use trained asylum officers to conduct interviews under any iteration of the MPP policy, rather than using individuals who are not trained in making credible fear determinations.

E. Congress should require that no funds should be used for the detention of any asylum seeker who has been found to establish a credible fear of persecution, except in reliance of specific evidence supporting a finding that the asylum seeker poses a risk to the community or a flight risk.

F. Department of Homeland Security should provide translation services in detention facilities for indigenous languages so that migrants who do not speak English or Spanish have the ability to communicate with detention staff and have equal access to legal information and representation.

G. Department of Homeland Security should provide detainees with the contact information of immigration lawyers and create better access to detention facilities by either moving detention facilities to higher populated areas, implementing transportation systems, or expanding video conferencing.

IV. Increasing Accountability

A. Congress should pass legislation allowing members of Congress and members of this Commission to conduct independent inspections of detention facilities with minimal notice (no more than 24 hours) and be given full access to detainees to interview them.

B. The Department of Homeland Security should conduct greater oversight and inspection of detention centers, specifically those relating to child detention centers, and should enforce detention center standards up to and including the closure of a detention facility for violating detention center standards and other applicable laws.

C. Congress and federal agencies, including the Office of Inspector General for Department of Homeland Security, should conduct full investigations into the deaths of detainees, and Congress should require all federal agencies and contractor facilities to cooperate fully in any investigation. Furthermore, next of kin must be appropriately and promptly notified of a death, offered grief counseling, and access to the record of the investigation and any medical files.

D. Congress should expand the authority of Department of Homeland Security Office for Civil Rights and Civil Liberties to respond directly to complainants and enforce civil rights protections. New immigration policies should be precleared by Office for Civil Rights and Civil Liberties or another independent body to ensure they do not violate civil rights, prior to causing harm.

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COMMISSIONERS' STATEMENTS AND DISSENTS

Statement of Commission Michael Yaki

In the spring of 2018, the revelation that the Administration's Zero Tolerance policy[1] at the southern border was separating young children – some as young as infants – from their parents, shocked the conscience of this nation and this Commission. According to information this Commission has obtained, over 14,000 children may have been separated from their parents.[2] Worse, the conditions of this separation exacerbated the trauma felt by children already fleeing violence or dangerous crossing conditions. In a report issued by the Office of the Inspector General for HHS – issued after the main body of this Report was finalized – the OIG found:

> "[S]eparated children exhibited more fear, feelings of abandonment, and post-traumatic stress than did children who were not separated. Separated children experienced heightened feelings of anxiety and loss as a result of their unexpected separation from their parents after their arrival in the United States."[3]

> "Facilities reported that children with longer stays experienced more stress, anxiety, and behavioral issues, which staff had to manage. Some children who did not initially exhibit mental health or behavioral issues began reacting negatively as their stays grew longer. . . . longer stays resulted in higher levels of defiance, hopelessness, and frustration among children, along with more instances of self-harm and suicidal ideation."[4]

To this day, there is still tremendous uncertainty over the number of children who are still separated from their parents and who are yet to be reunified.[5]

In hindsight, the subject matter of this Report, particularly its findings, should come as no surprise to anyone who has followed the Administration's rhetoric. Beginning in 2013, the current

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[1] U.S. Comm'n on Civil Rights, *Trauma at the Border: The Human Cost of Inhumane Immigration Policies,* 2019, p. 29 (hereinafter "Report").

[2] Ibid., 43.

[3] U.S. Department of Health and Human Services Office of Inspector General, *Care Provider Facilities Described Challenges Addressing Mental Health Needs of Children in HHS Custody* (2019), p. 10, https://oig.hhs.gov/oei/reports/oei-09-18-00431.pdf (hereinafter U.S. HHS IG 2019).

[4] Ibid.

[5] Report, p. 48.

President made no secret of his animus toward immigrants from Central America[6]. During 2018, when the Administration began taking the actions that impelled the action of the Commission and the production of this latest report, the language took an even darker tone.

In May of 2018, the President referred to the border surge of immigrant applicants as "animals" during a White House meeting attended by the press:

> "You wouldn't believe how bad these people are. These aren't people, these are animals, and we're taking them out of the country at a level and at a rate that's never happened before."[7]

In June 2018, Trump tweeted:

> "They don't care about crime and want illegal immigrants, no matter how bad they may be, to pour into and infest our Country."[8] "We cannot allow all of these people to invade our Country."[9]

Later that year, Trump ramped up his rhetoric by equating responding to the "invasion" with war-time language.

> "But, you know, it's like liberating, like a war, like there's a foreign invasion."[10]

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[6] *See, e.g.,* February 24, 2015, Twitter. "The Mexican legal system is corrupt, as is much of Mexico. Pay me the money that is owed me now - and stop sending criminals over our border[.]" https://twitter.com/realDonaldTrump/status/570384640281870337?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E570384640281870337&ref_url=https%3A%2F%2Ftime.com%2F4473972%2Fdonald-trump-mexico-meeting-insult%2F; March 30, 2015, Twitter. "The border is wide open for cartels & terrorists." https://twitter.com/realDonaldTrump/status/582645393227419648?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E582645393227419648&ref_url=https%3A%2F%2Ftime.com%2F4473972%2Fdonald-trump-mexico-meeting-insult%2F; and "When Mexico sends its people, they're not sending their best. They're not sending you. They're not sending you. They're sending people that have lots of problems, and they're bringing those problems with us [sic]. They're bringing drugs. They're bringing crime. They're rapists." "Full Text: Donald Trump Announces a Presidential Bid," *The Washington Post*, June 12, 2015, https://www.washingtonpost.com/news/post-politics/wp/2015/06/16/full-text-donald-trump-announces-a-presidential-bid/?noredirect=o.

[7] Julie Hirschfeld Davis, "Trump Calls Some Unauthorized Immigrants 'Animals' in Rant," *The New York Times*, May 16, 2018, https://www.nytimes.com/2018/05/16/us/politics/trump-undocumented-immigrants-animals.html.

[8] June 19, 2019, Twitter, https://twitter.com/realDonaldTrump/status/1009071403918864385.

[9] June 24, 2019, Twitter, https://twitter.com/realdonaldtrump/status/1010900865602019329.

[10] Tim Marcin, "Donald Trump Claims American Towns are Celebrating Liberation from Violent Immigrants Like They're in 'World War II Movies.'" *Newsweek*, Oct. 26, 2018, https://www.newsweek.com/donald-trump-claims-american-towns-celebrating-liberation-violent-immigrants-1188953.

> "This is an invasion of our Country and our Military is waiting for you!"[11]
>
> "It's like an invasion. They have violently overrun the Mexican border... This is an invasion, and nobody is even questioning that . . . . All we know is they're pretty tough people when they can blast through the Mexican military and Mexican police."[12]
>
> "No nation can allow its borders to be overrun. And that's an invasion. I don't care what they say. I don't care what the fake media says. That's an invasion of our country."[13]

The language of the President sets the tone for his Administration. Rather than understanding that those coming here are seeking, for many reasons, a better life, the President equates them as invaders, as sub-human, unworthy of any response other than as a direct military threat to our country. Is it any wonder that his Administration's treatment of children and families, detailed in our Report, shows deliberate indifference and reckless neglect towards their well-being?

In many ways, this is worse than the casual racism that has permeated the President's actions since he took office. By usage of imagery invoking invasion, of infestation, of a people who are animals or sub-human, the President has recycled and repeated tropes of racism that were used in some of the darkest days of our country's history and our world's experience.

The world just observed the 75th anniversary of D-Day, the event that was the beginning of the end of Hitler's grip on Europe. But for the 5 years of war that preceded, Hitler had been able to move apace to construct the machinery of genocide, a machine greased and fueled by mass hatred led by the Nazi propaganda state that labeled Jews, Gypsies, LGBT people, and disabled people as "Untermenschen" – literally, subhuman.[14]

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[11] Oct. 29, 2019, Twitter, https://twitter.com/realdonaldtrump/status/1056919064906469376?lang=en.

[12] The White House, "Remarks by President Trump on the Illegal Immigration Crisis and Border Security," Nov. 1, 2018, https://www.whitehouse.gov/briefings-statements/remarks-president-trump-illegal-immigration-crisis-border-security/.

[13] October 29, 2018, Twitter, https://twitter.com/realDonaldTrump/status/1056919064906469376?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E1056919064906469376&ref_url=https%3A%2F%2Fthehill.com%2Fhomenews%2Fadministration%2F413624-trump-calls-migrant-caravan-an-invasion.

[14] Talk of the Nation, "'Less Than Human': The Psychology of Cruelty," March 29, 2011, *National Public Radio,* https://www.npr.org/2011/03/29/134956180/criminals-see-their-victims-as-less-than-human.

In our nation's history, the racism felt by immigrant communities has been well documented. Fervor against Asian Americans began in the 1800s, where anti-Chinese agitation resulted in the passage of the Page Act, the Chinese Exclusion Act of 1882, and the California Alien Land Law of 1913[15], culminating in the inevitable and war-like animus, Executive Order 9066, the order that interned Japanese Americans during World War 2.[16] In all these instances, the language clamoring for and justifying these actions were couched in terms of "invasion" and, in all instances, characterizations of the Asians as having characteristics and traits inferior to whites.[17]

On a personal note, the legacy of the Chinese Exclusion Act was felt personally by my mother's family. My mother's father was a diplomat for the Chinese government, one of the first generation of their home-grown intelligentsia that went overseas and represented the fledgling country that had struggled to throw off the decades of colonial rule that had suppressed Chinese sovereignty. As part of China's mission to the League of Nation, he had warned about the dangers of Japanese expansion in Asia. In 1942 he found himself and his family stranded in the United States while traveling back from his post in Europe. As a diplomat, he found himself exempted from the Exclusion Act – until the war ended, and despite the repeal of the Exclusion Act during the War, the number of Chinese immigrants allowed was set so low that it took a private bill of Congress to allow them to stay.

Ironically, just some miles away, a second-generation Japanese American family found itself being forcibly removed from the business and the land that they owned, targeted by the nation of their citizenry because of their national origin. The exploitation of anti-Japanese fervor was directed inward, at our own citizens, families, children, and resulted in the incarceration of my father and his family in the Arizona desert. It is precisely this kind of anti-"other" rhetoric and actions that the present day Administration reiterates, on a daily basis, against Central Americans, against immigrants from Africa and the Middle East, against persons whose culture and skin color are not, as the President has said, from Norway.[18]

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[15] The Act barred Asians, primarily directed at Japanese Americans, from owning or having long-term leases of agricultural land in California.

[16] *See, e.g.,* Ben Zimmer, "Where Does Trump's 'Invasion' Rhetoric Come From?," *The Atlantic,* Aug. 6, 2019, https://www.theatlantic.com/entertainment/archive/2019/08/trump-immigrant-invasion-language-origins/595579/.

[17] *See, e.g.,* Steven Heller, "The Artistic History of American Anti-Asian Racism," *The Atlantic,* Feb. 20, 2014, https://www.theatlantic.com/entertainment/archive/2014/02/the-artistic-history-of-american-anti-asian-racism/283962/.

[18] *See, e.g.,* Dawsey, Josh, "Trump Derides Protections for Immigrants from "Shithole" Countries," *The Washington Post,* https://www.washingtonpost.com/politics/trump-attacks-protections-for-immigrants-from-shithole-countries-in-oval-office-meeting/2018/01/11/bfc0725c-f711-11e7-91af-31ac729add94_story.html.

There are legitimate debates to be had over the issue of border security. There can be legitimate debates on the issues regarding allocation of resources and processes at the border. Our 2015 report raised these same issues. These are issues that should and must be debated and decided by our Executive and Legislative Branches. This report contains recommendations designed to alleviate the conditions to both prevent and reduce the need for and time for detention.

But once an individual or family who has either surrendered to, or been detained by, our border personnel, they come under the jurisdiction of the United States, and because of that, the jurisdiction of the U.S. Commission of Civil Rights is undisputed. Contrary to the beliefs of this Administration's Department of Homeland Security and the Department of Health and Human Services[19], these families and individuals are covered by our law and our Constitution. At the instant of detention, an individual within the custody of border enforcement personnel not only deserves to be but is expected to be treated humanely, with respect, and the compassion that any person seeking the comfort and climes of our shores should be provided. Ripping families apart as a means of intimidation, as a means of coercion, is contrary to everything our country stands for in the world. Characterizing these families and individuals from Central America as invaders, as people who are less than human, harkens back to day of discrimination past that we choose to bury – rightfully – in our past. Demonizing immigrants who have endured hardship is contrary to our founding mythology of the Pilgrims, contrary to the origin stories of millions of Americans whose ancestors sailed from distant points of the compass to our welcoming shores.

Perhaps Trump, who seems to be fond of a past that does not and cannot exist anymore, should go back in time just over two decades ago, when another President made these remarks that stand in stark contrast to the hateful rhetoric of the last two years:

> A man wrote me and said: ``You can go to live in France, but you cannot become a Frenchman. You can go to live in Germany or Turkey or Japan, but you cannot become a German, a Turk, or a Japanese. But anyone, from any corner of the Earth, can come to live in America and become an American."
>
> Yes, the torch of Lady Liberty symbolizes our freedom and represents our heritage, the compact with our parents, our grandparents, and our ancestors. It is that lady who gives us our great and special place in the world. For it's the great life force of each generation of new Americans that guarantees that America's triumph shall continue unsurpassed into the next century and beyond. Other countries may seek to compete with us; but in one vital area, as a beacon of freedom and opportunity that draws the people of the world, no country on Earth comes close.

[19] Report, p. 15.

> This, I believe, is one of the most important sources of America's greatness. We lead the world because, unique among nations, we draw our people -- our strength -- from every country and every corner of the world. And by doing so we continuously renew and enrich our nation. While other countries cling to the stale past, here in America we breathe life into dreams. We create the future, and the world follows us into tomorrow. Thanks to each wave of new arrivals to this land of opportunity, we're a nation forever young, forever bursting with energy and new ideas, and always on the cutting edge, always leading the world to the next frontier. This quality is vital to our future as a nation. If we ever closed the door to new Americans, our leadership in the world would soon be lost.[20]

This is the America I believe in. This is the America that most Americans believe in. This is the future of a country that will soon be majority-minority, but one where we are all, at our core, Americans who believe in the ideals that have made the country the beacon of liberty throughout the world. The faces may change, part of our culture may change, but the essence of our Republic, our democracy, will always remain a constant. And that is our ultimate strength as one nation, indivisible.

In the face of an American ethos and history that have rejected and apologized for our past misdeeds with regard to our immigrant communities, the Trump Administration stands in dark, cold contrast for its choice of deliberate cruelty. The purposeful policies of this Administration in its characterization and treatment of Central American refugee families, in its deliberate cruelty and intentional infliction of trauma on the most vulnerable amongst us – children -- stands as a moral low for an Administration seeking to outdo itself in moral lows.

[20] President Ronald Reagan, "Remarks at the Presentation Ceremony for the Presidential Medal of Freedom," January 19, 1989, https://www.reaganlibrary.gov/research/speeches/011989b.

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.

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[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

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[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

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[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

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[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

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[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 (March7, 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.

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 errors[1], 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

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[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 peron'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

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> 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:

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[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]

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[15] Andrew R. Arthur, *Trump Baits 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 Baits 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 Baits 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

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[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

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[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

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[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

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[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 bewailing 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 Pachedo, 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 Security[768] whose primary mission is to promote homeland security and public safety

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[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/homesec/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 functions[775], 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

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[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.).

has jurisdiction over unaccompanied minor asylum applications pending in immigration court, the Board of Immigration Appeals, or in federal court if applicable.[777]

Department of Justice—Executive Office for Immigration Review

Executive Office for Immigration Review is a Department of Justice component agency created on January 9, 1983, by combining the Board of Immigration Appeals and Immigration and Naturalization Service.[778] Executive Office for Immigration Review's primary mission is to adjudicate immigration cases in a fair, expedient, and uniform manner.[779] Executive Office for Immigration Review conducts immigration court proceedings, appellate reviews, and administrative hearings under the authority of the Attorney General.[780]

Department of Health and Human Services

In 2003, Congress transferred responsibilities for the care and placement of unaccompanied children from the Department of Homeland Security to the Director of the Department of Health and Human Services Office of Refugee Resettlement.[781] Since then, Office of Refugee Resettlement has cared for more than 150,000 children, incorporating child welfare values as well as the principles and provisions established by the *Flores* Agreement[782] in 1997, the Trafficking Victims Protection Act of 2000[783] and its reauthorization acts, Trafficking Victims Protection Reauthorization Act of 2005 and 2008.[784]

According to Office of Refugee Resettlement's website, unaccompanied alien children apprehended by the Department of Homeland Security immigration officials are transferred to the

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[777] Congressional Research Service, *Unaccompanied Alien Children*, p. 10.

[778] "Executive Office for Immigration Review, About the Office," Dep't. of Justice, https://www.justice.gov/eoir/about-office (updated Aug. 14, 2018).

[779] "Executive Office for Immigration Review," Department of Justice, https://www.justice.gov/eoir (accessed Sept. 36, 2019).

[780] Ibid.

[781] Pub. L. No. 107–296, § 462, 116 Stat. 2135.

[782] *Flores* Agreement, *supra* note 19.

[783] Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106–386, 114 Stat. 1464 (codified at 22 U.S.C. § 7101).

[784] William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110–457, 122 Stat. 5044 (2008) (as amended by the Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, § 1201, 127 Stat. 54 (2013)).

care and custody of Office of Refugee Resettlement.[785] Office of Refugee Resettlement states it promptly places an unaccompanied child in the least restrictive setting that is in the best interests of the child, taking into consideration danger to self, danger to the community, and risk of flight.[786] According to Office of Refugee Resettlement it takes into consideration the unique nature of each child's situation and incorporates child welfare principles when making placement, clinical, case management, and release decisions that are in the best interest of the child.[787]

[785] "Unaccompanied Alien Children," Dep't Health and Human Services, Office of Refugee Resettlement, https://www.acf.hhs.gov/orr/programs/ucs (accessed Sept. 26, 2019).

[786] Ibid.

[787] Ibid.

Appendix B: Copy of Department of Homeland Security Discovery Request

UNITED STATES COMMISSION ON CIVIL RIGHTS

1331 PENNSYLVANIA AVENUE NW, WASHINGTON, DC 20425
www.usccr.gov

August 16, 2018

Secretary Kirstjen Nielsen
U.S. Department of Homeland Security
Washington, DC 20528

Dear Secretary Nielsen:

Congress has tasked the United States Commission on Civil Rights with investigating allegations of discrimination because of color, race, religion, sex, age, disability, or national origin. *See* 42 U.S.C. § 1975a(a)(2). In 2015, the Commission published a report on immigration detention facilities. The Commission recently reopened this investigation to examine the detention conditions of children and families, and the policies, practices, and procedures governing the detention and separation of families.

Per 42 U.S.C. § 1975a(e)(4), please find enclosed a set of Interrogatories and Document Requests being issued to your office by the U.S. Commission on Civil Rights (the "Commission"). Please respond to these Interrogatories and Document Requests within 30 days of service; *i.e.*, by Monday, September 17, 2018.

Please note that Congress has also given the Commission subpoena authority, *see* 42 U.S.C. § 1975a(e)(2), and directed that "[a]ll federal agencies shall cooperate fully with the Commission to the end that it may effectively carry out its functions and duties." *See* 42 U.S.C. § 1975b(e).

Please also designate a member of your staff to coordinate and facilitate our research, meetings, and your responses to our interrogatories and document requests. Commissioner Michael Yaki, chair of the Commission's discovery subcommittee on this matter, will be the Commission's contact person on this project. Please have your representative contact Commissioner Yaki at (415) 601-4008 or myaki@usccr.gov.

Thank you for your attention to this matter.

Sincerely,

Maureen E. Rudolph
General Counsel

Copy (with enclosures):
Cameron Quinn, Officer for Civil Rights and Civil Liberties

DATE: **August 16, 2018**
TO: **Kirstjen Nielsen, Secretary**
U.S. Department of Homeland Security

FROM: **Mauro A. Morales, Staff Director**
Maureen E. Rudolph, General Counsel
U.S. Commission on Civil Rights

SUBJECT: **Interrogatories and Document Requests in Support of the U.S. Commission on Civil Rights' Examination of Separation of Families**

Congress has tasked the United States Commission on Civil Rights with investigating allegations of discrimination. because of color, race, religion, sex, age, disability, or national origin. *See* 42 U.S.C. § 1975a(a)(2). Under this mandate, the Commission is conducting a study to update earlier Commission reporting, from 2015, evaluating the conditions of detention of undocumented immigrant children and their families.[788] This study encompasses, but is not limited to, civil rights issues including whether relevant federal policies and/or practices operate on the basis of race and national origin.

Pursuant to 42 U.S.C. § 1975a(e)(4) and § 1975b(e), the United States Commission on Civil Rights (the "Commission"), through its General Counsel, Maureen E. Rudolph, requests that Kirstjen Nielsen, Secretary of the U.S. Department of Homeland Security, answer fully, in writing and under oath, each of the following Interrogatories and respond to each of the following Document Requests.

We request that the Secretary serve a copy of the answers and objections, if any, along with the requested documents on the counsel for the Commission within thirty days after service, at the offices of the U.S. Commission on Civil Rights, 1331 Pennsylvania Avenue, N.W., Suite 1150, Washington, D.C., 20425.

[788] The Commission's 2015 report is available here: https://www.usccr.gov/pubs/docs/Statutory_Enforcement_Report2015.pdf.

INSTRUCTIONS AND DEFINITIONS

1. These interrogatories request information available to the Secretary and her employees, agents, and representatives, including with respect to any information or persons within the Department of Homeland Security.

2. The United States Commission on Civil Rights is referred to as the "U.S. Commission on Civil Rights," or the "Commission."

3. The Department of Homeland Security is referred to as "DHS." DHS includes not just the department proper, but all agencies under its supervision and management including, but not limited to, the U.S. Customs and Border Protection ("Border Patrol"), U.S. Immigration and Customs Enforcement ("ICE"), and any and all companies, corporations, Limited Liability Companies, or any other type of business entity DHS has under contract and does any work on its behalf, including, but not limited to housing adults and children, providing psychological services, medical services, language services, or any other services touching or concerning immigrants, migrants or other border crossers.

4. The Secretary should state the basis for any objection to answering any interrogatory. In the event that the Secretary objects to a part of an interrogatory, please provide information requested by the interrogatory that is not included within that partial objection. Please state with your objection any and all grounds you are relying on to lodge the objection including, but not limited to the specific statute, case law or constitutional section you are relying on for the objection.

5. These interrogatories are continuing in nature, and to the extent that the Secretary acquires new information on or before October 1, 2018, that is responsive to these interrogatories, please supplement the response.

6. The word "document" or "documents" or words of like or similar import mean, and include correspondence; memoranda; data; letters; books; charts; diagrams; empirical studies; graphs; handwritten notes; telegrams; studies; working papers; tabulations; data sheets; reports; typewritten notes; printed notes; contracts; memoranda of understanding; computer printouts; and electronic mail; photographs: video recordings and audio recordings of any thing and made by any method; and, any other method that creates a record kept by the government or business entity under contract to DHS.

7. The word "parent" or "parents" means parents (by blood or legal relationship), guardians, relatives (by blood or legal relationship), or next friend (as defined by law).

8. If any document responsive to this request was, but is no longer, in your possession, custody, or control, please furnish a description of each such document and indicate the manner and circumstances under which it left your possession, custody, and control and state its present or last known location and custodian, if known.

9. If for any request there are no responsive document(s) in your possession, custody, or control, state whether documents that would have been responsive were destroyed or mislaid, and if so, the circumstances under which they were destroyed or mislaid, and who was responsible for the destruction or loss of the document(s).

10. For any document response for production but withheld pursuant to a claim of privilege, identify:

    a. The author's name and title or position

    b. The recipient's name and title or position

    c. All persons receiving copies of the document

    d. The number of pages of the document

    e. The state of the document

    f. The subject matter of the document; and the basis for the claimed privilege.

11. In lieu of providing a written response to an interrogatory, you may produce a document that fully responds to the interrogatory. Should the document not fully respond to the interrogatory, please state so in your written response and also provide the additional information needed to fully respond or the grounds for withholding such information, as specified in these instructions.

12. When responding to these interrogatories please type the interrogatory as stated hereinbelow and then your responses hereto. At the end of each answer to the interrogatories below state the exhibit number or numbers that the documents produced per the request in the interrogatory and/or mentioned in response to that particular interrogatory as is applicable and upon which you rely as a basis for your answer.

INTERROGATORIES

1. What was DHS's role in the policy decision to separate children at the border from their parents who were being prosecuted under the "zero-tolerance" policy put in place by Attorney General Sessions?

    (a) Please list the names, positions held at the time and presently, business addresses, telephone numbers, email addresses of each and every person who took part in the discussions, either orally or in writing.

    (b) Please list all dates of meetings (in person, telephonically and by video) where the policy was discussed and decisions were made.

    (c) Please produce all notes, documents, memoranda and emails generated from the responses herein pursuant to Request for Documents number 2 hereinbelow.

    (d) How much time elapsed between the date you were notified of the need to develop a policy for the "zero-tolerance policy" and the time the policy was finalized. Please provide the date of notification of the need for a policy and the date the policy was finalized.

    (e) Please provide a true and correct copy of the finalized policy that was completed on the finalization date provided in 1(d) pursuant to this request and the Request For Production of Documents made below.

    (f) Please identify the person most knowledgeable in regard to the information requested in this interrogatory

2. What interest of the United States was promoted by family separation?

3. What pre-implementation evidence supported a conclusion by DHS that family separation was justified under any policy interest of the United States?

    (a) Did you review any evidence, documents, email, scholarly articles, or any other items concerning the best interests of the children during the formation of the policy of family separation, and, if so, please identify each and every such source.

    (b) Please identify the person most knowledgeable in regard to the information requested in this interrogatory

4. Please describe the process or procedure by which the DHS implemented family separations in response to the "zero-tolerance" policy.

    (a) Please list all the persons, including but not limited to government employees and private contractors, both for-profit and not-for-profit (collectively, "private entities") hired by the government to effectuate the process and the positions these

persons held at the time and hold now and all contact information for all people who were involved in developing the process that was used in separating children from their parents, adult guardians and/or next friend(s) and relatives.

(b) Please state the policy used to determine the location the children were sent to after the decision to separate them from their parents, adult guardians and/or next friend(s) and relatives.

(c) Please describe, in detail, how the process was implemented when separating the children from their parents, adult guardians and/or next friend(s) and relatives.

(d) If no regular process was used in the separations, please answer why not?

(e) How much time did it take to develop the written process used in separating children from their families.

(f) How much time elapsed between the date you were notified of the need to develop a written process for the "zero-tolerance policy" and the time the written policy was finalized.

(g) Please provide the date of notification of the need for a process or procedure and the date they were finalized. Please identify any aspect of the process policy or procedure established to provide for reunification of separated children.

(h) Please provide a true and correct copy of the finalized process or procedure that was completed on the finalization date provided in (g) pursuant to this request and the Request For Production of Documents made below.

(i) Please identify the person most knowledgeable in regard to the information requested in this interrogatory

5. Please detail the locations of every office or facility, whether governmental or private, where DHS initially detained families determined to be within the ambit of the "zero tolerance" policy, prior to separating the children from their parents.

(a) Were any DHS offices on the Eastern Seaboard (defined as extending from Maine to Florida) detaining and separating any families under the "zero tolerance" policy?

i. If so, please provide the number, broken down by age, race, ethnicity, national origin, and religion, of families either detained under the "zero tolerance" policy or detained and released between April 1, 2018 and July 31, 2018.

(b) Were any DHS offices on the border with Canada detained and separating any families under the "zero tolerance" policy?

i. If so, please provide the number, broken down by age, race, ethnicity, national origin, and religion of families either detained under the "zero tolerance" policy or detained and released between April 1, 2018 and July 31, 2018.

6. If the response to question 6 shows that the "zero tolerance" policy was not enforced on the Eastern Seaboard or the border with Canada, please provide justification, including any written policies, directives, and including but not limited to supporting documents such as underlying data and information, as to why it was not enforced there and where it was enforced.

   (a) Please identify the person most knowledgeable in regard to the information requested in this interrogatory

7. What were the DHS's written criteria for separating a child from his/her parents, guardian(s), next friend(s) or relative(s)?

   (a) Please describe in detail the process by which individual determinations to separate children from their parents were made.

   (b) Please provide a true and correct copy of the written criteria used by you, your agents, or any private entities to effectuate the separating of the children contemplated by this interrogatory pursuant to Request for Production of Document made below.

   (c) If there were no written criteria for this action or conduct, please state so.

   (d) Absent any written criteria, please state to the best of your knowledge what the criteria that was used to choose which children were to be taken from their parents, guardians, next friend(s) or relatives and which children were allowed to remain unseparated.

   (e) Please identify the person most knowledgeable regarding the information requested in this interrogatory

8. How were children and parents notified that they were to be separated?

   (a) Was the notification, if any, in English, Spanish, or another language spoken by the parents and children?

   (b) Was it provided orally or in written form?

   (c) Were the parents, guardians, next friend(s), or relatives required to sign any paperwork acknowledging the separation and/or any aspect of the separation, including but not limited to where the children were being sent, whose legal custody they would be in, and whose physical custody they would be in.

(d) Were the parents, guardians, next friend(s), or relatives given any information, in writing, informing them as to where the children were being sent, and were they given any information, in writing, as to whose legal custody they would be in and whose physical custody that would be in.

(e) What if any efforts were made to ascertain whether people to whom any notice was provided could read and understand said notice.

(f) Please provide any supporting evidence documenting your response.

(g) Please provide a true and correct copy of any writings used to inform parents, guardians, next friend(s), or relatives as part of the Request for Production of Documents.

(h) At the time of separation, had any government, DHS, and/or private entities have any Court order authorizing a change in custody from the parents, guardians, next friend(s), or relative(s) to the government, DHS, or private entities.

(i) If there was no Court order, under what legal authority did DHS proceed?

(j) Please identify the person most knowledgeable in regard to the information requested in this interrogatory

9. Prior to April 2018, what policies and procedures did DHS have in place to track children and parents after separation?

(a) Which agency was given responsibility, if any, to ensure that children and parents could be reunited, and what means were used to ensure that would happen?

(b) Did any government, DHS or any private entities petition and seek a Court order transferring custody?

(c) If so, did any petition contain any clauses about the rights of the parents to have visitation, be informed of their children's whereabouts, informed of who had custody, and were the custodians of the children required to communicate to the parents the well-being and life progress of the children.

(d) If your answer is no to any part of interrogatory 8 (b) and (c) above please state why DHS did not require a Petition for change of custody to be filed and/or why it did not inform parents of their rights to visitation, their children's whereabouts, or any communication regarding the well-being and life progress of the children.

(e) Please identify the person most knowledgeable in regard to the information requested in this interrogatory.

10. During the period from April 2018 to July 31, 2018, what policies and procedures did DHS have in place governing the physical transfer and transport of children from one location to another?

    (a) Please provide copies of any policies and procedures.

    (b) Did DHS require that any private entity involved in the physical transfer and transport of children from one location to another be in compliance with these policies and procedures? If not why not?

    (c) Please identify the person most knowledgeable in regard to the information requested in this interrogatory.

11. Subsequent to July 2018, what policies and procedures did DHS institute to track children and parents after separation?

    (a) Please identify the person most knowledgeable in regard to the information requested in this interrogatory

12. Prior to April 2018, what was DHS's role in tracking whether parents who were deported had children being detained separately?

    (a) Did DHS notify the government or private entity with physical custody of children that parents of children within their custody were being deported?

    (b) Did DHS provide the parents who were deported with any information, in writing, regarding the status, custody, and location of their children?

    (c) What policies and procedures, if any, were in place to ensure that parents who were deported could be reunited with children being detained separately?

13. Subsequent to July 2018, what has DHS done to track whether parents who were deported had children being detained separately?

    (a) What policies and procedures were instituted to reunite children being detained separately with their detained parent.

14. Prior to April 2018, how did DHS track children and their parents after separation? Please describe the procedures, if any, used to track children and their parents after separation, including but not limited to:

15. who each child's parents are,

16. where each child was placed,

17. where each child's parents were placed, and

18. whether the child had sponsors in the United States with whom the child could be placed.

    (a) If procedures were in writing, please provide a true and correct copy of such as part of the Request for Production of Documents.

19. What was DHS's role in determining where to place children separated from their parents, and in determining where to place the parents after separation? Please list every entity or institution where children separated from their parents were placed.

20. Prior to April 2018, had DHS let, obligated, or executed any contract or executed a supplement, addendum, or modification to an existing contract with any private entity for the detention of children separated or to be separated from their parents?

    (a) If the answer to this question is "yes" please provide true and correct copies of such contracts as part of the Request for Production of Documents.

21. How did DHS determine where to place children separated from their parents, and where to place the parents? Please describe the procedures and criteria used to determine in which facility the children would be placed after separation, and in which facility the parents would be placed.

22. How did DHS coordinate with the Department of Health and Human Services and the Department of Justice on policies, decisions, actions, etc., relevant to separation, placement, and tracking of children and parents?

    (a) Please detail all the tools used to coordinate DHS action with other government agencies or government contractors, including but not limited to, memorandums of understanding, transmittal forms from custody of one entity to another, other relevant policy documents, letters, agreements, etc.

23. What were DHS's case management statistics as of the dates April 30, 2018, May 30, 2018, June 30, 2018, and July 30, 2018 on issues including, but not limited to:

24. the number of families who were separated,

25. the number of children who were separated

26. the age, gender, race, ethnicity, and national origin of these separated children,

27. the facilities, including name, address, and operator at which children were placed

28. the age, gender, race, ethnicity, and national origin of these children at each of these facilities

29. Prior to April 2018, what was DHS's policy for reunifying separated children and parents?

    (a) Please describe all policy details, including but not limited to, who was "eligible" for reunification with their children or parents, who was ineligible for reunification, and what determined eligibility.

30. Are there any instances of DHS personnel coercing or attempting to coerce parents to give up their right to apply for asylum/refugee status in order to be unified with their children?

    (a) Please provide any policies or procedures regarding prohibitions on coercion that existed prior to April 2018, and after July 2018.

31. Were there any instances of parents being told that as a condition of unification with their children, or as a means of reunifying with their children faster, they could give up their right to apply for asylum/refugee status?

32. How many parents were told that as a condition of unification with their children they had to give up their right to apply for asylum/refugee status?

33. Was the conditioning of unification with children applicable to all asylum/refugee applicants or was this applied on a case by case basis?

34. How many cases or instances of coercion or attempted coercion of parents to give up their right of asylum in order to be unified with their children currently exist?

35. What are DHS's current procedures for reunifying children and parents?

    (a) Please detail all procedures regarding reunifying children and parents, including but not limited to, when the process would begin, where reunification would take place, and how long children have been separated before being reunified.

36. What is the DHS's criteria for making eligibility determinations on which children would be reunited with their parents?

    (a) What is the DHS's criteria for continuing the detention of children and parents who have been determined to be eligible for release?

    (b) Please detail all considerations that determined which children and/or parents would be eligible for reunification, and all considerations that determined which children and/or parents would not be eligible for reunification.

37. What policy governed DHS's decision to make eligibility determinations that limited the number of families who qualified for reunification?

38. If eligibility was determined, in whole or in part, on allegations or proof of crimes committed by the parents, how did DHS obtain information related to such crimes?

39. What allegations or proof of crimes were deemed sufficient to deny eligibility? Which specific crimes (whether alleged or proven) were deemed sufficient to deny eligibility?

    (a) If allegations or proof of crimes were based on crimes committed in another country, please describe the procedure for verifying the allegations or proof of crimes.

40. Who made the determination and on what basis was a determination made that there existed sufficient evidence to deny eligibility based on allegations or proof of crimes?

41. Were the parents deemed ineligible given an opportunity to address or respond to the determination?

42. What happens to children whose parents are deemed ineligible for reunification?

43. Does DHS plan to reunify all children and parents who were separated and if so what is DHS's timeline for the reunification of all children and parents who were separated?

44. What are DHS' policies for informing counsel, legal services providers, or other representatives of families regarding information regarding reunification, including final release destinations?

45. What is DHS's plan for finding deported parents and reunifying them with their children who still remain in the United States?

    (a) Please detail the procedure that will be followed to facilitate the reunification of children with parents who have already been deported.

46. How many families, between April 2018 and July 31, 2018, after separation and reunification, have been deported?

47. What are DHS's statistics for the reunification of all children and parents, including but not limited to data on:

    (a) How many families were separated;

(b) How many children were separated from their parents and the age, race, ethnicity, and national origin of each child;

(c) How many children were reunited with their parents and the age, race, ethnicity, and national origin of each child;

(d) How many children remain separated from their parents and the age, race, ethnicity, religion and national origin of each such child;

(e) Where children still separated from their parents are located,

(f) Of these children still separated, their age, race, ethnicity, religion, and national origin.

48. Please detail, for children separated between April and July 30, 2018, the conditions of:

(a) Confinement,

(b) Habitability standards,

(c) Access to education, and availability of physical activity at each stage of detention and/or placement for children,

(d) The availability of interpreters and other materials for language accessibility,

(e) The availability of medical and mental health care personnel

(f) The qualification of medical and mental health care personnel to treat children

(g) How are treatment decisions made regarding the accessibility of available medical and mental health care personnel

(h) Access to communication with separated parents;

(i) Any other information regarding the medical and mental health care of children.

49. What are DHS's policies for preventing the sexual abuse of children in detention?

(a) What protections are in place to prevent sexual abuse of children in holding facilities and what were the procedures to report assault and protect victims of sexual abuse occurred in detention?

(b) What policies govern how DHS responds to notice that sexual abuse of children may have occurred for children DHS detains?

(c) Please provide statistics regarding:

50. number of children alleged to have been subject to sexual abuse in DHS detention,

51. where the abuse took place,

52. how many instances DHS has taken disciplinary action of any type regarding allegations that children have been subject to sexual abuse in DHS detention, disaggregated by the age, race, ethnicity, religion, and national origin of each such child.

    1. (d) Please describe measures DHS takes to ensure the safety and rehabilitation of any child subject to sexual abuse while in DHS detention.

53. What are DHS's policies for preventing the physical and/or mental abuse of children in detention?
    (a) What protections are in place to prevent physical and/or mental abuse of children in holding facilities and

    (b) What were the procedures to report assault and protect victims if physical abuse occurred in detention?

    (c) What policies govern how DHS responds to notice that physical and/or mental abuse of children may have occurred for children DHS detains?

    (d) Please provide statistics regarding:

54. number of children alleged to have been subject to physical and/or mental abuse in DHS detention,

55. where the abuse took place,

56. in how many instances DHS has taken disciplinary action of any type regarding allegations that children have been subject to physical and/or mental abuse in DHS detention, disaggregated by the age, race, ethnicity, religion, and national origin of each such child.

    i. (e) Please describe measures DHS takes to ensure the safety and rehabilitation of any child subject to physical and/or mental abuse while in DHS detention.

57. What are DHS' policies regarding the use of psychotropic drugs on children in detention, including policies regarding securing parental or other guardian approval for administration of psychotropic medication on children in detention?

    (a) Who was authorized to make a decision to administer psychotropic drugs to a child in detention?

(b) Who was authorized to administer psychotropic drugs to a child in detention?

(c) When was DHS informed that psychotropic drugs were being administered to children?

(d) Please provide statistics regarding the number of children in DHS detention to whom psychotropic medications have been administered, disaggregated by the age, race, ethnicity, religion, and national origin of each such child and including whether a parent or guardian authorized the administration of psychotropic medications.

58. Please detail all information regarding the national origin, ethnicity, race, and religion of all families affected by the aforementioned policies and procedures of separation of children and parents.

59. How does the DHS respond to reports that it has destroyed records related to family separations?

60. Since the 2018 decision by the Administration not to separate children from families, where are families currently being detained?

(a) Please detail the conditions of confinement at each stage of detention and/or placement for families, including but not limited to:

1. habitability standards,

2. access to education,

3. availability of physical activity,

4. the availability of interpreters and other materials for language accessibility, as well as medical and mental health care personnel;

5. the qualification of medical and mental health care personnel to treat children; treatment decisions regarding the accessibility of available medical and mental health care personnel;

6. any other information regarding the medical and mental health care of families.

61. Since the 2018 decision by the Administration not to separate children from families:

(a) How many families are being detained;

(b) Where are they being detained;

(c) The ages, race, ethnicity, religion, and national origin of each family in detention.

(d) What criteria determines whether a family is detained? Please provide any studies, data, and other supporting evidence documenting policies that underlie a decision to detain a family.

62. How many families at the southern border who were detained, together or separately since April 2018, have been deported because they gave up their right to apply for asylum/refugee status?

(a) Please provide the ages, race, ethnicity, religion and national origin of each family.

63. Under what circumstances can families be released from detention?

(a) Please provide any studies, data, and other supporting evidence documenting policies that underlie a decision to release a family into the United States.

i. How many families have been released from detention since July 2018?

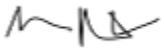
ii. The ages, race, ethnicity, religion and national origin of each family released.

DOCUMENT REQUESTS

1. Please provide any and all historical and current policy guidance, written instructions, or directives, which have been developed or disseminated to local, state, and federal detention centers, advocacy partners, and internally within the U.S. Department of Homeland Security regarding the separation of families and the "zero-tolerance" policy.

2. Please provide any memoranda, documents, or analyses discussing the implementation of the policy of separating children from their parents as part of the Administration's "zero-tolerance" policy.

3. To the extent not covered by the document requests above, please provide any and all documents relied on to prepare responses to the above interrogatories.



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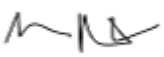
Tel: (202) 376-7622

CERTIFICATE OF SERVICE

I certify that on August 16, 2018, I caused the foregoing United States Commission on Civil Rights' Interrogatories and Document Requests to be served by courier and email upon the following:

Secretary Kirstjen Nielsen
U.S. Department of Homeland Security
Washington, DC 20528



Maureen E. Rudolph
General Counsel

Appendix C: Copy of Department of Health and Human Services Discovery Request

UNITED STATES COMMISSION ON CIVIL RIGHTS

1331 PENNSYLVANIA AVENUE NW, WASHINGTON, DC 20425
www.usccr.gov

December 11, 2018

Secretary Alex M. Azar
U.S. Department of Health and Human Services
200 Independence Ave., S.W.
Washington, DC 20201

Dear Secretary Azar:

Congress has tasked the United States Commission on Civil Rights with investigating allegations of discrimination because of color, race, religion, sex, age, disability, or national origin. *See* 42 U.S.C. § 1975a(a)(2). In 2015, the Commission published a report on immigration detention facilities. The Commission recently reopened this investigation to examine the detention conditions of children and families, and the policies, practices, and procedures governing the detention and separation of families.

Per 42 U.S.C. § 1975a(e)(4), please find enclosed a set of Interrogatories and Document Requests being issued to your office by the U.S. Commission on Civil Rights (the "Commission"). Please respond to these Interrogatories and Document Requests within 30 days of service; *i.e.*, by Monday, September 17, 2018.

Please note that Congress has also given the Commission subpoena authority, *see* 42 U.S.C. § 1975a(e)(2), and directed that "[a]ll federal agencies shall cooperate fully with the Commission to the end that it may effectively carry out its functions and duties." *See* 42 U.S.C. § 1975b(e).

Please also designate a member of your staff to coordinate and facilitate our research, meetings, and your responses to our interrogatories and document requests. Commissioner Michael Yaki, chair of the Commission's discovery subcommittee on this matter, will be the Commission's contact person on this project. Please have your representative contact Commissioner Yaki at (415) 601-4008 or myaki@usccr.gov.

Thank you for your attention to this matter.

Sincerely,

Maureen E. Rudolph
General Counsel

Copy (with enclosures):
Roger Severino, Director of the Office of Civil Rights

DATE: **December 10, 2018**
TO: **Alex M. Ajar, II, Secretary**
U.S. Department of Health & Human Services

FROM: **Mauro A. Morales, Staff Director**
Maureen E. Rudolph, General Counsel
U.S. Commission on Civil Rights

SUBJECT: **Interrogatories and Document Requests in Support of the U.S. Commission on Civil Rights' Examination of Separation of Families**

Congress has tasked the United States Commission on Civil Rights with investigating allegations of discrimination. The Commission is authorized to "study and collect information relating to," and "make appraisals of the law and policies of the Federal Government with respect to," . . . "discrimination or denials of equal protections of the laws under the Constitution of the United States because of color, race, religion, sex, age, disability, or national origin[.]"*See* 42 U.S.C. § 1975a(a)(2)(A)-(B). Under this mandate, the Commission is conducting a study to update earlier Commission reporting, from 2015, evaluating the conditions of detention of undocumented immigrant children and their families.[789] This study encompasses, but is not limited to, civil rights issues including whether relevant federal policies and/or practices operate on the basis of race and national origin.

Pursuant to 42 U.S.C. § 1975a(e)(4) and § 1975b(e), the United States Commission on Civil Rights (the "Commission"), through its General Counsel, Maureen E. Rudolph, requests that Alex M. Ajar, II, Secretary of the U.S. Department of Health and Human Services, answer fully, in writing and under oath, each of the following Interrogatories and respond to each of the following Document Requests.

We request that the Secretary serve a copy of the answers and objections, if any, along with the requested documents on the counsel for the Commission within thirty days after service, at the offices of the U.S. Commission on Civil Rights, 1331 Pennsylvania Avenue, N.W., Suite 1150, Washington, D.C., 20425.

[789] The Commission's 2015 report is available here: https://www.usccr.gov/pubs/docs/Statutory_Enforcement_Report2015.pdf.

INSTRUCTIONS AND DEFINITIONS

1. These interrogatories request information available to the Secretary and his employees, agents, and representatives, including with respect to any information or persons within the Department of Health and Human Services.

2. The United States Commission on Civil Rights is referred to as the "U.S. Commission on Civil Rights," or the "Commission."

3. The Department of Health and Human Services is referred to as "HHS." HHS includes not just the department proper, but all agencies under its supervision and management including, but not limited to, the Office of Refugee Resettlement ("ORR"), and any and all companies, corporations, Limited Liability Companies, or any other type of business entity HHS has under contract and does any work on its behalf, including, but not limited to housing adults and children, providing psychological services, medical services, language services, or any other services touching or concerning immigrants, migrants or other border crossers.

4. The Secretary should state the basis for any objection to answering any interrogatory. In the event that the Secretary objects to a part of an interrogatory, please provide information requested by the interrogatory that is not included within that partial objection. Please state with your objection any and all grounds you are relying on to lodge the objection including, but not limited to the specific statute, case law or constitutional section you are relying on for the objection.

5. These interrogatories are continuing in nature, and to the extent that the Secretary acquires new information on or before January 5, 2019, that is responsive to these interrogatories, please supplement the response.

6. The word "document" or "documents" or words of like or similar import mean, and include correspondence; memoranda; data; letters; books; charts; diagrams; empirical studies; graphs; handwritten notes; telegrams; studies; working papers; tabulations; data sheets; reports; typewritten notes; printed notes; contracts; memoranda of understanding; computer printouts; and electronic mail; photographs: video recordings and audio recordings of anything and made by any method; and, any other method that creates a record kept by the government or business entity under contract to HHS.

7. The word "detain" or "detaining" means receiving children from DHS and placing them in an environment with a parent, guardian, relative, or next friend.

8. The word "parent" or "parents" means parents (by blood or legal relationship), guardians, relatives (by blood or legal relationship), or next friend (as defined by law).

9. If any document responsive to this request was, but is no longer, in your possession, custody, or control, please furnish a description of each such document and indicate the manner and circumstances under which it left your possession, custody, and control and state its present or last known location and custodian, if known.

10. If for any request there are no responsive document(s) in your possession, custody, or control, state whether documents that would have been responsive were destroyed or mislaid, and if so, the circumstances under which they were destroyed or mislaid, and who was responsible for the destruction or loss of the document(s).

11. For any document response for production but withheld pursuant to a claim of privilege, identify:

A. The author's name and title or position

B. The recipient's name and title or position

C. All persons receiving copies of the document

D. The number of pages of the document

E. The state of the document

F. The subject matter of the document; and the basis for the claimed privilege.

12. In lieu of providing a written response to an interrogatory, you may produce a document that fully responds to the interrogatory. Should the document not fully respond to the interrogatory, please state so in your written response and also provide the additional information needed to fully respond or the grounds for withholding such information, as specified in these instructions.

13. When responding to these interrogatories please type the interrogatory as stated and then your responses hereto. At the end of each answer to the interrogatories below state the exhibit number or numbers that the documents produced per the request in the interrogatory and/or mentioned in response to that particular interrogatory as is applicable and upon which you rely as a basis for your answer.

INTERROGATORIES

1. Please state what HHS' role was in the policy decision to detain children at the border separated from their parents who were being prosecuted under the "zero-tolerance" policy put in place by Attorney General Sessions.

   (a) Please list the names, positions held at the time and presently, business addresses, telephone numbers, email addresses of each and every person who took part in the discussions, either orally or in writing.

   (b) Please list all dates of meetings (in person, telephonically and by video) where the policy was discussed and decisions were made.

   (c) Please produce all notes, documents, memoranda and emails generated from the responses herein pursuant to Request for Documents number 2 hereinbelow.

   (d) Please state how much time elapsed between the date you were notified of the need to develop a policy for the "zero-tolerance policy" and the time the policy was finalized. Please provide the date of notification of the need for a policy and the date the policy was finalized.

   (e) Please provide a true and correct copy of the finalized policy that was completed on the finalization date provided in 1(d) pursuant to this request and the Request for Production of Documents made below.

   (f) Please identify the person most knowledgeable in regard to the information requested in this interrogatory

2. Please describe what pre-implementation evidence supported a conclusion by HHS that family separation was justified under any policy interest of the United States?

   (a) Please state if HHS reviewed any evidence, documents, email, scholarly articles, or any other items concerning the best interests of the children during the formation of the policy of family separation in coming to this conclusion, and, if so, please identify each and every such source.

   (b) Please identify the person most knowledgeable in regard to the information requested in this interrogatory

3. Please describe the process or procedure by which HHS implemented or facilitated family separations in response to the "zero-tolerance" policy.

(a) Please list all the persons, including but not limited to government employees and private contractors, both for-profit and not-for-profit (collectively, "private entities") hired by the government to effectuate the process and the positions these persons held at the time and hold now and all contact information for all people who were involved in developing the process that was used in separating children from their parents, adult guardians and/or next friend(s) and relatives.

(b) Please state the policy used to determine the location the children were sent to after the decision to separate them from their parents, adult guardians and/or next friend(s) and relatives.

(c) Please describe, in detail, how the process was implemented when separating the children from their parents, adult guardians and/or next friend(s) and relatives.

(d) Please state if no regular process was used in the separations, and if not, state why not.

(e) Please state how much time it took to develop the written process used in separating children from their families.

(f) Please state how much time elapsed between the date you were notified of the need to develop a written process for detaining children under the "zero-tolerance policy" and the time the written policy was finalized.

(g) Please provide the date of notification of the need for a process or procedure and the date they were finalized. Please identify any aspect of the process policy or procedure established to provide for reunification of separated children.

(h) Please provide a true and correct copy of the finalized process or procedure that was completed on the finalization date provided in (g) pursuant to this request and the Request For Production of Documents made below.

(i) Please identify the person most knowledgeable in regard to the information requested in this interrogatory.

4. Please detail the operator, name, and locations of every office or facility, whether governmental or private, where HHS detained children determined to be within the ambit of the "zero tolerance" policy.

(a) Please state if any HHS offices on the Eastern Seaboard (defined as extending from Maine to Florida) were working with DHS on detaining children under the "zero tolerance" policy.

i. If so, please provide the number, broken down by age, race, ethnicity, national origin, and religion, of children either detained under the "zero tolerance" policy or detained and released between April 1, 2018 and July 31, 2018.

b) Please state if any HHS offices on the border with Canada were working with DHS on detaining and separating any children under the "zero tolerance" policy.

ii. If so, please provide the number, broken down by age, race, ethnicity, national origin, and religion of children either detained under the "zero tolerance" policy or detained and released between April 1, 2018 and July 31, 2018.

5. Please state what HHS's written criteria were for detaining a child separate from his parents, guardian(s), next friend(s) or relative(s).

(a) Please describe in detail the process by which individual determinations to separate children from their parents were made.

(b) Please provide a true and correct copy of the written criteria used by you, your agents, or any private entities to effectuate the separating of the children contemplated by this interrogatory pursuant to Request for Production of Document made below.

(c) If there were no written criteria for this action or conduct, please state so.

(d) Absent any written criteria, please state to the best of your knowledge what the criteria that was used to choose which children were to be taken from their parents,

guardians, next friend(s) or relatives and which children were allowed to remain unseparated.

(e) Please identify the person most knowledgeable regarding the information requested in this interrogatory.

6. Please describe how children and parents were notified that they were to be separated.

(a) Please state if the notification, if any, was provided in English, Spanish, or another language spoken by the parents and children.

(b) Please state if the notification was provided orally or in written form?

(c) Please state if the parents, guardians, next friend(s), or relatives were required to sign any paperwork acknowledging the separation and/or any aspect of the separation, including but not limited to where the children were being sent, whose legal custody they would be in, and whose physical custody they would be in.

(d) Please state if the parents, guardians, next friend(s), or relatives were given any information, in writing, informing them as to where the children were being sent, and were they given any information, in writing, as to whose legal custody they would be in and whose physical custody that would be in.

(f) Please describe what, if any, efforts were made to ascertain whether people to whom any notice was provided could read and understand said notice.

(g) Please provide any supporting evidence documenting your response.

(h) Please provide a true and correct copy of any writings used to inform parents, guardians, next friend(s), or relatives as part of the Request for Production of Documents.

(i) Please state if, at the time of separation, had any government, HHS, and/or private entities have any Court order authorizing a change in custody from the parents, guardians, next friend(s), or relative(s) to the government, HHS, or private entities.

(j) Please state, if there was no Court order, under what legal authority HHS proceeded.

(k) Please identify the person most knowledgeable in regard to the information requested in this interrogatory

7. Please describe what policies and procedures, prior to April 2018, did HHS have in place to track children after separation from their parents.

   a. Please state if any government, HHS or any private entities petition and seek a Court order transferring custody of children to HHS or any private entities/

   b. If so, please state if any petition contained any clauses about the rights of the parents to have visitation, be informed of their children's whereabouts, and be informed of who had custody.

   c. Please state if the custodians of the children were required to communicate to the parents about the well-being and life progress of the children.

   d. If your answer is no to any part of interrogatory 7 (a-c) above please state why HHS did not require a petition for change of custody to be filed and/or why it did not inform parents of their rights to visitation, their children's whereabouts, or the well-being and life progress of the children.

   e. Please identify the person most knowledgeable in regard to the information requested in this interrogatory.

8. During the period from April 1, 2018 to July 31, 2018, please describe what policies and procedures HHS had in place governing the physical transfer and transport of children from one location to another.

   i. Please provide copies of any policies and procedures.

   ii. Please state if HHS required that any private entity involved in the physical transfer and transport of children from one location to another be in compliance with these policies and procedures. If not, please describe why not.

   iii. Please identify the person most knowledgeable in regard to the information requested in this interrogatory.

9. Subsequent to July 31, 2018, please describe what policies and procedures HHS instituted to track children and parents after separation.

    a. Please identify the person most knowledgeable in regard to the information requested in this interrogatory

10. Prior to April 1, 2018, please describe HHS's role in tracking whether parents who were deported had children being detained separately.

    (a) Please state if HHS notified the government or any private entity with physical custody of children that parents of children within their custody were being deported.

    (b) Please state if HHS provided the parents who were deported with any information, in writing, regarding the status, custody, and location of their children.

    (c) Please describe what policies and procedures, if any, were in place to ensure that parents who were deported could be reunited with children being detained separately.

11. Subsequent to July 31, 2018, please describe what HHS has done to track whether parents who were deported had children being detained separately.

    (a) Please describe what policies and procedures did HHS institute to reunite children being detained separately with their detained parent.

12. Prior to April 1, 2018, please describe how HHS tracked children and their parents after separation. Please describe what information was collected and which procedures, if any, did HHS use to track children and their parents after separation, including but not limited to:

13. who each child's parents are;

14. where each child was placed;

15. where each child's parents were placed; and

16. whether the child had sponsors in the United States with whom the child could be placed.

    (a) If procedures were in writing, please provide a true and correct copy of such as part of the Request for Production of Documents.

17. Please describe HHS's role in determining where to place children separated from their parents, and in determining where to place the parents after separation. Please list every entity or institution where children separated from their parents were placed.

18. Prior to April 1, 2018, please state if HHS let, obligated, or executed any contract or executed a supplement, addendum, or modification to an existing contract with any private entity for the detention of children separated or to be separated from their parents.

    (a) If the answer to this question is "yes" please provide true and correct copies of such contracts as part of the Request for Production of Documents.

19. Please describe how HHS determined where to place children separated from their parents? Please describe the procedures and criteria used to determine in which facility the children would be placed after separation.

20. Please describe how HHS coordinated with the Department of Homeland Security and the Department of Justice, and any agencies reporting to or under the supervision of those Departments, on policies, decisions, actions, etc., relevant to separation, placement, and tracking of children and parents.

    (a) Please detail all the tools used to coordinate HHS action with other government agencies or government contractors, including but not limited to, memorandums of understanding, transmittal forms from custody of one entity to another, other relevant policy documents, letters, agreements, etc.

21. Please describe HHS's case management statistics as of the dates April 30, 2018, May 30, 2018, June 30, 2018, and November 30, 2018 on issues including, but not limited to:

22. the number of families who were separated;

23. the number of children who were separated;

24. the age, gender, race, ethnicity, and national origin of these separated children;

25. the facilities, including name, address, and operator at which children were placed; and

26. the age, gender, race, ethnicity, and national origin of these children at each of these facilities.

27. Prior to April 1, 2018, please state what HHS's policy was for reunifying separated children and parents.

(a) Please describe all policy details, including but not limited to, who was eligible for reunification with their children or parents, who was ineligible for reunification, and what determined eligibility.

28. Please state if there are any instances of HHS personnel coercing or attempting to coerce parents to give up their right to apply for asylum/refugee status in order to be unified with their children

29. If the answer is yes, please describe each of those instances.

Please provide any policies or procedures regarding prohibitions on coercion that existed prior to April 1, 2018, and after July 31, 2018.

30. Please state if there are any instances of parents being told that as a condition of reunification with their children, or as a means of reunifying with their children faster, they could give up their right to apply for asylum/refugee status.

(a) If the answer is yes, please describe each of those instances.

31. Please state how many parents were told that as a condition of reunification with their children they had to give up their right to apply for asylum/refugee status.

32. Please state if the conditioning of reunification with children applicable to all asylum/refugee applicants or was any such condition applied on a case by case basis.

33. Please state how many cases or instances of coercion or attempted coercion of parents to give up their right of asylum in order to be reunified with their children currently exist.

34. Please describe what HHS's current procedures are for reunifying children and parents.

(a) Please detail all procedures regarding reunifying children and parents, including but not limited to, when the process would begin, where reunification would take place, and how long children have been separated before being reunified.

35. Please state HHS criteria for making eligibility determinations on which children would be reunited with their parents.

(a) Please state HHS criteria for continuing the detention of children who have been determined to be eligible for release.

(b) Please detail all considerations that determined which children would be eligible for reunification, and all considerations that determined which children would not be eligible for reunification.

36. Please describe HHS policies and procedures for placement of children once their parents are deemed ineligible for reunification.

    (a) Please describe the steps HHS takes to monitor these procedures are being carried out fairly and effectively?

37. Please state if HHS plans to reunify all children and parents who were separated and if so, please state what HHS' timeline for the reunification of all children and parents who were separated.

    (a) Please describe the steps HHS takes to monitor whether children were reunified with their parents.

38. Please describe HHS' policies for informing counsel, legal services providers, or other representatives of families regarding information regarding reunification, including final release destinations.

39. Please describe HHS' plan for finding deported parents and reunifying them with their children who still remain in the United States.

    (a) Please detail the procedure that will be followed to facilitate the reunification of children with parents who have already been deported.

40. Please state how many families, between April 1, 2018 and July 31, 2018, after separation and reunification, were deported.

41. Please provide HHS' statistics for the reunification of all children and parents, including but not limited to data on:

42. how many families were separated;

43. how many children were separated from their parents and the age, race, ethnicity, and national origin of each child;

44. how many children were reunited with their parents and the age, race, ethnicity, and national origin of each child;

45. how many children remain separated from their parents and the age, race, ethnicity, religion and national origin of each such child;

46. where children still separated from their parents are located; and

47. of these children still separated, their age, race, ethnicity, religion, and national origin.

48. Please detail, for children separated between April 1, 2018 and July 30, 2018 the conditions of:

49. Confinement;

50. habitability standards;

51. access to education, and availability of physical activity at each stage of detention and/or placement for children;

52. the availability of interpreters and other materials for language accessibility;

53. the availability of medical and mental health care personnel;

54. the qualification of medical and mental health care personnel to treat children;

55. how are treatment decisions made regarding the accessibility of available medical and mental health care personnel;

56. access to communication with separated parents; and

57. any other information regarding the medical and mental health care of children.

58. Please state the background check requirements for any personnel employed, hired, or contracted by HHS that has contact with or custodial care and treatment of children detained by HHS pursuant to action by the Department of Homeland Security.

59. Please state what role, if any, HHS has in monitoring the
    (a) welfare of children who are being detained by the Department of Homeland Security?

60. Please state what role, if any, HHS has in ensuring that persons hired by HHS or any other federal agency or contractor or subcontractor have background checks for personnel who have contact with or custodial care and treatment of children detained by the Department of Homeland Security?

61. Please state what, if any, are HHS' policies for preventing the sexual abuse of children in detention.

    (a) Please detail what protections are in place to prevent sexual abuse of children in holding facilities and what were the procedures to report assault and protect victims of sexual abuse occurred in detention.

(b) Please detail what policies govern how HHS responds to notice that sexual abuse of children may have occurred for children HHS detains.

(c) Please provide statistics regarding:

62. number of children alleged to have been subject to sexual abuse in HHS detention;

63. where the abuse took place; and

64. in how many instances HHS has taken disciplinary action of any type regarding allegations that children have been subject to sexual abuse in HHS detention, disaggregated by the age, race, ethnicity, religion, and national origin of each such child.

iv. Please describe measures HHS takes to ensure the safety and rehabilitation of any child subject to sexual abuse while in HHS detention.

65. Please detail what HHS' policies are for preventing the physical and/or mental abuse of children in detention?

(a) Please detail what protections are in place to prevent physical and/or mental abuse of children in holding facilities and

(b) Please detail what the procedures to report assault and protect victims are if physical abuse occurred in detention.

(c) Please detail what policies govern how HHS responds to notice that physical and/or mental abuse of children may have occurred for children HHS detains.

(d) Please provide statistics regarding:

66. number of children alleged to have been subject to physical and/or mental abuse in HHS detention;

67. where the abuse took place; and

68. in how many instances HHS has taken disciplinary action of any type regarding allegations that children have been subject to physical and/or mental abuse in HHS detention, disaggregated by the age, race, ethnicity, religion, and national origin of each such child.

v. Please describe measures HHS takes to ensure the safety and rehabilitation of any child subject to physical and/or mental abuse while in HHS detention.

69. Please detail what HHS' policies are regarding the use of psychotropic drugs on children in detention, including policies regarding securing parental or other guardian approval for administration of psychotropic medication on children in detention.

(a) Please state who was authorized to make a decision to administer psychotropic drugs to a child in detention.

(b) Please state who was authorized to administer psychotropic drugs to a child in detention.

(c) Please state when HHS was informed that psychotropic drugs were being administered to children?

(d) Please provide statistics regarding the number of children in HHS detention to whom psychotropic medications have been administered, disaggregated by the age, race, ethnicity, religion, and national origin of each such child and including whether a parent or guardian authorized the administration of psychotropic medications.

70. Please detail all information regarding the national origin, ethnicity, race, and religion of all families affected by the aforementioned policies and procedures of separation of children and parents.

71. Please describe how HHS responds to reports that the federal government has destroyed records related to family separations.

72. Since the June 20, 2018 decision by the Administration not to separate children from families, please state where families are currently being detained.

(a) Please detail the conditions of confinement at each stage of detention and/or placement for families, including but not limited to:

1. habitability standards;

2. access to education;

3. availability of physical activity;

4. the availability of interpreters and other materials for language accessibility, as well as medical and mental health care personnel;

5. the qualification of medical and mental health care personnel to treat children; treatment decisions regarding the accessibility of available medical and mental health care personnel; and

6. any other information regarding the medical and mental health care of families.

73. Since the June 20, 2018 decision by the Administration not to separate children from families, please state:

    (a) how many families are being detained;

    (b) where are they being detained;

    (c) the ages, race, ethnicity, religion, and national origin of each family in detention; and

    (d) what criteria determines whether a family is detained. Please provide any studies, data, and other supporting evidence documenting policies that underlie a decision to detain a family.

74. Please list the locations, agency or entity of jurisdiction, and number of beds for any facility that HHS is considering using to detain families after the June 20, 2018 decision by the Administration not to separate children from families.

    (a) Please list the criteria by which families will be detained.

    (b) Please list the criteria by which families will be assigned to facilities.

    (c) Please list the cost of each facilities, and the additional cost to HHS' budget to establish or expand these facilities.

    (d) For these facilities, please list how families may access legal counsel, while being detained.

75. Please state how many families at the southern border who were detained, together or separately since April 1, 2018, have been deported because they gave up their right to apply for asylum/refugee status.

    (a) Please provide the ages, race, ethnicity, religion and national origin of each family.

76. Please describe under what circumstances families can be released from detention.

77. Please provide any studies, data, and other supporting evidence documenting policies that underlie a decision to release a family into the United States.

    (a) Please state how many families have been released from detention since July 31, 2018.

    (b) Please state the ages, race, ethnicity, religion and national origin of each family released.

DOCUMENT REQUESTS

4. Please provide any and all historical and current policy guidance, written instructions, or directives, which have been developed or disseminated to local, state, and federal detention centers, advocacy partners, and internally within the U.S. Department of Health and Human Services regarding the separation of families and the "zero-tolerance" policy.

5. Please provide any memoranda, documents, or analyses discussing the implementation of the policy of separating children from their parents as part of the Administration's "zero-tolerance" policy.

6. To the extent not covered by the document requests above, please provide any and all documents relied on to prepare responses to the above interrogatories.