

Submission of the Government of the United States to the

Inter-American Commission on Human Rights with respect to the Draft Report on Immigration in the United States: Detention and Due Process, OEA/Ser.L/V/III. Doc. 47. 2 August 2010

I. Introduction

The Government of the United States appreciates the opportunity to comment on the draft “Report on Immigration and Due Process in the United States: Detention and Due Process.” We appreciate the Commission’s extensive efforts in preparing this draft report, and would like to express our satisfaction at being able to facilitate the commission's visits to detention facilities and consultations primarily in 2008 and 2009. The United States respects and supports the Commission and the strong sense of integrity and independence which historically has characterized its work.

Since your research was completed, the Obama Administration, and the Department of Homeland Security (DHS or the Department), has launched its own comprehensive review of U.S. Immigration and Customs Enforcement’s (ICE) immigration detention system. This has resulted in important changes in the immigration enforcement policy arena. We are pleased to have the opportunity to share some of this progress with you (see Section III below), and in so doing to address many of the concerns cited in your draft report. We also address some of these concerns more directly and specifically in Section IV of this document. Before proceeding to address these subjects, however, and in order to frame our substantive response to the Commission’s draft report, we believe it important to offer some reflections on the legal framework the Commission has used to frame its discussion and analysis of the U.S., immigration detention and enforcement programs.

II. Relevant International Legal Framework

The United States is proud of its history as a nation of immigrants. As the Commission recognizes, the United States hosts more immigrants than any other country. Of the more than 190 million migrants in the world today, one out of five reside in the United States, and we value the contributions they make to our economy, our culture and our social fabric.

Immigration is an issue of critical importance to the United States, and accordingly is extensively addressed by U.S. law and policy. International law recognizes that every state has the sovereign right to control admission to its territory, and to regulate the admission and expulsion of foreign nationals consistent with any international obligations it has undertaken. This principle has long been recognized as a fundamental attribute of state sovereignty. Immigration detention can be an important tool employed by States in exercising their sovereignty, as they ensure public safety and remove as expeditiously as possible individuals who may pose a threat to the security of the country or the safety of its citizens and lawful residents. Accordingly immigration detention, provided it is employed in a manner consistent with a State's international human rights obligations, is permitted under international law.

In this regard, we must note at the outset that contrary to the Commission's assertions, neither the American Declaration of the Rights and Duties of Man nor international law generally establish a presumption of liberty for undocumented migrants who are present in a country in violation of that country's immigration laws. Instead, States are generally only bound under the international human rights obligations or commitments they have assumed to extend the right of freedom of movement to persons *lawfully* within a State's territory. For example, Article VIII of the American Declaration's protection of freedom of movement extends only to nationals. Article XXXIII of the Declaration also recognizes "the duty of every person to obey the law and other legitimate commands of the authorities of his country and those of the country in which he may be." Non-nationals seeking to enter a state are bound to respect the state's immigration laws and may be subject to penalties, including detention where appropriate, for failure to obey the law.

As our response in Section III demonstrates, the United States places significant import on the necessity that immigration laws and policies, including those pertaining to immigration detention, must be enforced in a lawful, professional, safe, and humane manner that respects the human rights of migrants regardless of their immigration status.

As noted above, we agree with the Commission that the “United States has an obligation to ensure the human rights of all immigrants, documented and undocumented alike.” At the same time, the United States notes that many of the sources referred to by the Inter-American Commission do not give rise to binding legal obligations on the United States or are not within the Commission’s mandate to apply with respect to the United States.

The United States has undertaken a political commitment to uphold the American Declaration on the Rights and Duties of Man (“American Declaration”), a non-binding instrument that does not itself create legal rights or impose legal obligations on signatory states.¹ Article 20 of the Statute of the Inter-American Commission on Human Rights (“IACHR Statute”) sets forth the powers of the Commission that relate specifically to OAS member states which, like the United States, are not parties to the legally binding American Convention on Human Rights (“American Convention”), including to pay particular attention to observance of certain enumerated human rights set forth in the American Declaration, to examine communications and make recommendations to the state, and to verify whether in such cases domestic legal procedures and remedies have been applied and exhausted.

¹ Because the American Declaration is non-binding, the United States interprets any assertions regarding alleged violations of the American Declaration as allegations that the United States has not lived up to its political commitment to uphold the Declaration. Furthermore, as the IACHR Statute makes clear, the powers of the Commission to issue recommendations as set forth in Article 20 to states not party to the American Convention are strictly advisory. Article 18 of the IACHR Statute sets forth enumerated powers of the Commission with respect to member states of the OAS including preparing “such studies or reports as it considers advisable for the performance of its duties,” making “recommendations to the governments of the states on the adoption of progressive measures in favor of human rights,” and conducting “on-site observations in a state, with the consent or at the invitation of the government in question.”

The United States wishes to reiterate its respect of and support for the Commission and the strong sense of integrity and independence which historically has characterized its work. The United States appreciates the work of the Commission in researching and compiling its draft report on immigration detention and due process in the United States. We request, however, that in keeping with its mandate under Article 20 of the IACHR Statute, the Commission center its review of applicable international standards on the American Declaration and U.S. observance of the rights enumerated therein.

For example, the Commission has cited jurisprudence of the Inter-American Court of Human Rights (“Inter-American Court”) interpreting the American Convention. The United States has not accepted the jurisdiction of the Inter-American Court, nor is it party to the American Convention. Accordingly, the jurisprudence of the Inter-American Court interpreting the Convention does not govern U.S. commitments under the American Declaration. Likewise, advisory opinions of the Inter-American Court interpreting other international agreements, such as the International Covenant on Civil and Political Rights (ICCPR) are not relevant.²

III. Overview of United States’ Efforts and Accomplishments Regarding Detention Reform

In October 2009, the Department of Homeland Security issued a report (the Report) identifying some of the same concerns you raise. This report — available for review at http://www.ice.gov/doclib/091005_ice_detention_report-final.pdf — relies

² The Commission cites the Inter-American Court’s advisory opinion *Juridical Condition and Rights of the Undocumented Migrants*, OC-18/03 (Sept. 17, 2003) as “describing the basic principles of human rights that must inform the immigration policies of the OAS member states.” The United States wishes to reiterate that it has not accepted the jurisdiction of the Inter-American Court and does not accept the Court’s statement in that case that its advisory opinion on the rights of undocumented migrants applies to OAS member states that have signed the OAS Charter, the American Declaration, or the Universal Declaration, or have ratified the ICCPR regardless of whether they have ratified the American Convention or its optional protocols. (OC-18/03 ¶ 60). Finally, the United States is not a party to the Convention on the Rights of the Child or the International Covenant on Economic, Social and Cultural Rights, and it would therefore be inappropriate to transplant the meaning of provisions of these agreements onto the commitments of the United States under the American Declaration.

on: information gathered from 25 separate facility tours; discussions with detainees and employees; meetings with over 100 non-governmental organizations, and Federal, State, and local officials; and the review of data and reports from governmental agencies and human rights organizations.

The report describes the unique challenges associated with the rapid expansion of ICE's detention capacity from fewer than 7,500 beds in 1995 to over 30,000 today, as the result of congressional and other mandates. It outlines core findings and key recommendations for building a new ICE detention system designed to hold, process, and prepare individuals for removal — as compared to the punitive purpose of criminal incarceration.

In follow up to this report, the Secretary of Homeland Security and the ICE Director announced that ICE would undertake a series of sweeping reforms to transform the immigration detention system based on several key principles:

- ICE will prioritize efficiency throughout the removal process to reduce detention costs, minimize the length of stays, and ensure fair proceedings;
- ICE will detain aliens in settings commensurate with the risk of flight and danger they present;
- ICE will be fiscally prudent when carrying out detention reform;
- ICE will provide sound medical and mental health care to detainees;
- ICE will provide the necessary Federal oversight of detention facilities; and
- ICE will ensure Alternatives to Detention (ATD) are cost-effective and promote a high rate of compliance with orders to appear and removal orders.

Office of Detention Policy and Planning

In order to develop and institutionalize meaningful reform, the Office of Detention Policy and Planning (ODPP) was created within ICE to coordinate the agency-wide detention reform effort and transform the vision

for reform into concrete and measurable actions and goals. ICE has made significant progress translating the principles of reform into innovative, practical, and timely solutions. In fact, this month marks the first anniversary of DHS's detention reform effort, and we are pleased to have this opportunity to share our progress on key reform initiatives. For additional information, we also direct you to the website of DHS/ICE at www.ice.gov.

Overview – Detention Reform Accomplishments

Since the initiation of its detention reform efforts one year ago, ICE has accomplished the following significant achievements:

- Created ODPP to coordinate the overall reform effort. ODPP also acts as the Government chair of the two new advisory groups that have helped us achieve unprecedented stakeholder engagement;
- Designed and tested a new risk assessment tool and intake process to inform and systematize nationwide decision making about who is detained and who is released;
- Prepared comprehensive policies and guidance and created important efficiencies in our ATD program allowing us to enroll more potentially successful participants;
- Drafted a new set of detention standards—currently under review by our Union—that will make conditions of confinement in our facilities less penal in the short term for more than half of our detainees;
- Eliminated delays associated with detainees health care by revising our Treatment Authorization Process;
- Developed a new Medical Classification Scheme by working with members of the Director's Advisory Group on Health Care;
- Launched an Online Detainee Locator System (ODLS); and
- Stood up and trained a corps of more than 40 new Federal employees posted at each of our major detention facilities who take the following actions on a consistent and reoccurring basis:
 - Ensure that our contractors are meeting their obligations, and

- Report findings to the newly established Detention Management Council

In addition, ICE Director John Morton has issued four nationwide policies that have significantly impacted how ICE uses and prioritizes its resources consistent with reform principles. These include:

- **Civil Immigration Enforcement Memorandum**
This policy directs resources toward apprehending, detaining, and removing individuals who pose the most risk to national security, public safety, or are fugitives or recent border crossers;
- **Parole of Arriving Aliens with A Credible Fear of Persecution**
This policy weighs in favor of release from detention so long as an alien's identity is reasonably known and the alien does not present a danger to the community or a significant flight risk;
- **National Fugitive Operations Program: Priorities, Goals, and Expectations**
ICE issued new guidance that prioritizes criminal fugitives over non criminal fugitives, and clarifies that except for extraordinary circumstances, the policy prohibits detaining aliens who are seriously ill, disabled, pregnant, nursing, or are sole caretakers of minor children or the infirm; and
- **Guidance Regarding the Handling of Removal Proceedings of Aliens with Pending or Approved Applications or Petitions**
Under this guidance, ICE should request expedited adjudication of an application or petition (Form I-130) for an alien in removal proceedings that is pending before U.S. Citizenship and Immigration Services (USCIS) if the approval of such an application or petition would provide an immediate basis for relief for the alien.

Commitment to Transparency

ICE is committed to providing transparency, consistency across facilities, and efficiency in the resolution of disputes. To that end, ICE has continually updated its website with policy reform announcements, newly issued policy memoranda, and statistics, and has posted draft policy guidance to solicit public feedback. For example, the website has a link to

our revised policy for granting parole to arriving aliens found to have a credible fear of persecution. This new policy was also a product of extended engagement with our stakeholders.

DHS Support for Comprehensive Immigration Reform:

Secretary Napolitano and ICE Director John Morton remain fully committed to comprehensive immigration reform. To date, the Secretary and other DHS principals have held dozens of meetings with Members of Congress, participated in more than 40 roundtable discussions and listening sessions across the United States, and met with over 1,000 different immigration stakeholders.

IV. Response of ICE to Particular Issues Raised

Presumption of Necessity of Detention/Provisions for Mandatory Detention

Mandatory Detention of Arriving Aliens and Deportable Immigrants with Criminal Convictions: As a division of a U.S. Government agency, ICE is charged with implementing and enforcing U.S. law within its mandate.

As referenced above, in the last several months, ICE has issued a new policy that squarely addresses the Commission's concerns regarding the detention of arriving aliens. This new policy permits ICE to parole arriving aliens who have a credible fear of persecution, who do not pose a flight risk, or are not believed to be a danger to the community when no additional factors weigh against release of the alien.

Alternatives to Detention

Increased Alternatives to Detention: The goal of ICE's ATD program is to use the least restrictive approach possible to: (1) improve compliance with the conditions of release, to include attendance at immigration hearings and compliance with final orders of removal; and (2) prioritize detention space for those who pose the greatest risk to public safety or are the most likely to flee or evade removal.

Bonds

As to the concerns on immigration bonds, the vast majority of aliens in immigration proceedings are not detained in ICE custody. The vast majority of unauthorized aliens are not detained during their immigration proceedings. If a bond is deemed necessary to ensure the appearance of an alien or to protect the safety of the community, standardized criteria are used to determine the bond amount, including, but not limited to, the alien's criminal history, flight risk, danger to the community or to national security, and family ties.

As noted by the Commission, the average bond is under \$6,000 and therefore is not subject to the automatic stay if the bond determination is appealed. *See* 8 C.F.R. § 1003.19(i)(2) (requiring an automatic stay of any custody order when bond is set by DHS at \$10,000 or more). Accordingly, the automatic stay concern referenced in the Commission's report is likely to affect only the most dangerous aliens whose release into the community is unwise. Moreover, aliens offered release on bond may post it by paying a small percentage of the total amount (generally 10 percent), meaning that the average alien can post bond by paying just \$600.

Custody Determinations and Considerations for Vulnerable Populations

ICE is committed to devising and implementing a new detainee intake process to improve the consistency and transparency of ICE's custody and release decisions. Indeed, ICE is developing a new Risk Assessment and Classification Worksheet, referred to as a "risk assessment tool." The risk assessment tool contains objective criteria to guide decision-making regarding whether or not an alien should be detained or released; the alien's custody classification level, if detained; and the alien's level of community supervision (to include an ICE ATD program), if released.

Using the tool, immigration officers will be more likely to identify any special vulnerabilities that may affect custody determinations. In fact, the risk assessment tool includes the following special vulnerabilities the Commission report had recommended be taken into consideration: disability, advanced age, pregnancy, nursing, sole caretaking responsibilities, mental health issues, or victimization, including aliens who may be eligible for relief related under the Violence Against Women Act (VAWA), as victims of crime (U visa), or as victims of human trafficking (T visa).

ICE is also developing training for our officers to identify vulnerable populations and has consulted with the DHS' Office for Civil Rights and Civil Liberties (CRCL) and NGOs on special training topics. In addition, CRCL has provided specialized training to a corps of new detention managers that included civil rights considerations in the treatment of asylum seekers and recognizing victims of trafficking. The training also covered the special needs of women in detention and mental health issues that our facilities are often called upon to address.

Civil Detention System

Civil Detention: To reform ICE's detention system, the ICE ODPD surveyed each of ICE's detention facilities, met with stakeholders in regional community roundtables, and engaged trade and business stakeholders. This inventory of facilities allowed for ICE to better understand the detention system and areas of possible improvement.

ICE has also drafted a revised version of its national detention standards, referred to more commonly as the 2010 Performance-Based National Detention Standards (PBNDS). Once published, the 2010 PBNDS will supersede the earlier Performance-Based National Standards that were issued in September 2008. The 2008 PBNDS are the standards to which the Commission report cites and through which the Commission criticizes ICE's mechanisms for supervising and ensuring accountability when it comes to providing ICE detainees with safe and humane conditions of detention. The new 2010 standards, developed in close consultation with the agency's advisory groups and with DHS CRCL, have been drafted to address many of the criticisms or alleged shortcomings of the earlier standards cited by the Commission.

The 2010 standards will be more tailored to the unique needs of ICE's detained population, as they maximize access to counsel, visitation, religious practices, and recreation, while improving the agency's prevention and response to sexual abuse or assault that may occur in detention facilities and strengthening standards for quality medical, mental health, and dental care.

Although the Commission report urges ICE to regulate the application of its detention standards, the Department of Homeland Security has determined that implementing the 2010 PBNDS, which are *performance-based* standards, through internal policy publication rather than through a rulemaking, is the best way to ensure appropriate detention conditions for persons in detention. First, the 2010 PBNDS identify specific outcomes and

expected practices to be achieved for each standard. In focusing on expected outcomes and identifying clear practices and objectives, the PBNDS enable the agency to measure specific outcomes over time and evaluate the progress each service provider achieves in meeting the defined service criteria. In addition, the agency has in place and continues to develop strong measures for accomplishing detention oversight and for expediting remediation and modification if standards' requirements are not met.

The steps ICE has taken to enhance monitoring of conditions in detention centers and to ensure compliance with the new standards, as further detailed in the next section of this response, provides the agency the necessary framework for enforcing the standards. On the other hand, overly stringent rulemaking could impede the agency's ability to expeditiously respond to changed circumstances, emergency situations, and crises to protect the health, safety, and welfare of detained aliens, agency personnel and contractors, and to ensure compliance with the standards. Moreover, ICE policy is, like regulations, binding upon the agency and its partners.

Conditions of Detention

ICE Supervision and Accountability: As ICE stated in its reform announcement in August 2009, the agency has consolidated contracting functions. The agency appointed new leadership of the Office of Acquisitions, and instituted an Acquisitions Working Group which meets weekly to review contracting activity, develop new and consistent contracting templates, develop Statements of Work which reflect new detention reform principles and maximize collaboration with our Federal partners including the OFTD. Our collaboration includes using the new OFDT Electronic Intergovernmental Service Agreement (EIGSA) system which expedites Federal contracting.

As pledged, ICE has established and trained a corps of more than 40 new Federal Detention Site Monitors (DSMs) posted at each of our major detention facilities who, on a consistent daily, weekly and monthly basis, inspect to ensure that our contractors are meeting their obligations, respond to and report on problems, and collaborate with contracting officers regarding cost adjustments as appropriate.

ICE provides in-depth training to DSMs. As noted above, DHS CRCL has provided training on civil rights considerations that arise in detention. Topics included: Red Flags that Signal Victims of Human Trafficking; Effectively Managing a Culturally Diverse Detention Setting,

Detainee Access to Counsel; Limited English Proficiency and Disability Considerations; Religious Practices; Women's Issues in Detention; The Violence against Women Act; Asylum Seekers in Detention; Preventing and Responding to Sexual Abuse of Detainees, and Mental Health.

The DSMs provide ICE headquarters with a weekly report that documents problems identified within the facilities and the corrective actions taken to remedy them. These reports, along with other useful compliance tools, are then analyzed by the agency's newly established Detention Monitoring Council. This Council engages ICE senior leadership to ensure remedial plans are implemented and to determine whether ICE should continue to use a particular facility.

ICE agrees that transparency and oversight must guide our detention reform efforts. Since its establishment in August of 2009, the ICE Office of Detention Oversight (ODO) serves as an independent office within the agency, conducting inspections and investigating allegations. ICE has also conducted a comprehensive review of grievance procedures and designed a pilot project to ensure direct involvement of ICE officers in both formal and informal grievances. ICE is also exploring the feasibility of posting all facility inspection reports and corrective plans of action on the Internet.

Partnership with State and Local Law Enforcement

Arizona S.B. 1070: The Obama Administration is committed to advancing comprehensive immigration reform, which is a lasting solution to a patchwork of state laws regarding immigration enforcement. Secretary of Homeland Security Napolitano, ICE Director John Morton and other senior leaders have advocated for comprehensive immigration reform during meetings with, and in written letters and statements to, advocacy groups, nongovernmental organizations, members of the media, and members of Congress. Comprehensive immigration reform would provide lasting and dedicated resources to secure our borders and make our communities safer.

Current Federal immigration laws reflect a careful and considered balance of national law enforcement, foreign relations, and humanitarian interests. DHS and the Department of Justice enforce and administer these immigration-related laws. In doing so, the U.S. government takes into account the complex—and often competing—objectives that animate the Federal immigration scheme.

As the Commission has noted, in April of 2010, the state of Arizona enacted Senate Bill 1070 (S.B. 1070) a law which, among other things, required police to make a reasonable attempt, when practicable, to determine the immigration status of a person when in the course of a lawful stop, detention, or arrest a reasonable suspicion exists that the person is an alien who is unlawfully present in the United States, unless that determination may hinder or obstruct an investigation. On July 6, 2010 the Department of Justice (DOJ) filed a legal challenge to S.B. 1070 in the United States District Court for the District of Arizona on grounds that it is preempted under the Constitution and federal law, because it unconstitutionally interferes with the federal government's authority to set and enforce immigration policy. In particular, DOJ submitted that the law's mandate on Arizona law enforcement to verify immigration status is preempted because it will result in the harassment and detention of foreign visitors and legal immigrants, as well as U.S. citizens, who cannot readily prove their lawful status, and impermissibly burden federal resources and impede federal enforcement priorities. The suit, which requested that the court issue a preliminary injunction to enjoin enforcement of the law, was filed on behalf of DOJ, DHS, and the Department of State, which share responsibilities in administering federal immigration law. On July 28 a federal judge issued an preliminary injunction blocking sections of the law, including those which raised most concern about potentially discriminatory effects. The injunction has been appealed, and the Justice Department will continue to challenge the law. The United States continues to maintain a firm position against racial profiling in all of its enforcement activities, including in the delegation of immigration authority to its State and local partners.

Delegation of Civil Law Enforcement Efforts to State and Local Law Enforcement (287(g) program): The 287(g) program, which cross-designates state and local officers to enforce immigration law as authorized through section 287(g) of the Immigration and Nationality Act, has been raised by the Commission and by civil society representatives as a program of particular concern. DHS continues to add and incorporate safeguards, which will aid in the prevention of racial profiling and civil rights violations and improve accountability for protecting human rights under the program. In July 2009, ICE revised the memoranda of agreement with State and local law enforcement agencies to narrow the scope of the delegated authority, improve oversight and performance review, and require that all ICE partners commit to the new standards and use the authority consistent with ICE priorities. In addition, ICE will soon issue guidance to partners on how to

create and sustain local steering committees to solicit the input from a variety of audiences on how to improve the program in the area. This guidance is currently under review by the agency's NGO advisory groups in order to ascertain their feedback before final implementation. These reforms are designed to ensure that State and local officers who exercise 287(g) authority focus on convicted criminal aliens and those who endanger our communities.

Additionally, comprehensive civil rights instruction and training are provided to all State and local law enforcement officers prior to, and during, their assumption of immigration authority. For example, all law enforcement officers authorized to perform 287(g) functions must attend and graduate from a 4-week training course at the ICE Academy which includes courses in civil rights and civil liberties and racial profiling. DHS CRCL has also worked with the Federal Law Enforcement Training Center (FLETC) to strengthen the training provided to all initial entry trainee federal law enforcement officers, and DHS has developed training materials for in-service personnel entitled, "Guidance Regarding the Use of Race for Law Enforcement Officers." These training materials, which are provided to all employees in web-based and CD-ROM format, provide a tutorial on DOJ guidance and DHS policy, as well as practical tips drawn from real life situations on how law enforcement personnel can avoid engaging in racial profiling. This thorough preparation specifically addresses ICE's stance against racial profiling and the constitutional concerns regarding the use of race in domestic law enforcement activities.

ICE also has developed an inspection program to audit the agreements of ICE's State and local partners. The ICE Office of Professional Responsibility (OPR) conducts these inspections and reports the results to ICE management for any corrective actions.

Also, the 287(g) program has a detailed complaint process in place that is articulated in each agreement. Complaints are accepted from any source and can be directed to the DHS Office of the Inspector General or to ICE OPR. In addition, any complaints that ICE receives directly are immediately forwarded to DHS CRCL.

As the Commission notes, in March 2009, DOJ announced an investigation into the Maricopa County, Arizona Sheriff's Office to determine whether law enforcement officials have engaged in "patterns or practices of discriminatory police practices and unconstitutional searches

and seizures.” The Sheriff of Maricopa County had been the subject of a number of complaints, including some from local city majors and members of the U.S. Congress. On September 2, 2010, the United States filed a suit against Maricopa County, the Maricopa County Sheriff’s Office and Sheriff Joseph Arpaio (“Defendants”) to enforce Title VI of the Civil Rights Act of 1964, the Title VI implementing regulations issued by the United States Department of Justice, and related contractual assurances.³ Since March 2009, the United States has attempted to secure Defendants’ voluntary cooperation with the United States’ investigation of alleged national origin discrimination in Defendants’ police practices and jail operations. Despite notice of their obligation to comply in full with the United States’ requests for information, Defendants have refused to do so. Defendants’ refusal to cooperate with reasonable requests for information regarding the use of federal funds is a violation of Defendants’ statutory, regulatory, and contractual obligations. The United States accordingly is seeking a judgment granting declaratory and injunctive relief for Defendants’ violations of the law.

The Commission may be assured that DHS is fully committed to enforcing the nation’s immigration laws while respecting the rights of all individuals encountered during such enforcement efforts.

Federal Enforcement Programs

Worksite Enforcement: ICE is pleased that the Commission mentions ICE’s new worksite enforcement strategy, as the agency is committed to strengthening the integrity of our nation’s immigration system by conducting enforcement actions in an appropriate manner. ICE’s Worksite Enforcement program is focused on creating a culture of compliance by holding employers accountable for obeying the law. To that end, ICE is aggressively pursuing criminal prosecution of employers who knowingly hire undocumented aliens. ICE’s investigations of such employers often uncover other criminal violations and widespread abuses, such as money laundering, alien harboring, alien smuggling, document fraud, and other forms of worker

³ Accountability for taxpayer funds is a fundamental element of Title VI, its implementing regulations, and the contractual assurance agreements that all recipients sign as a condition of receiving federal financial assistance. As recipients of federal financial assistance, defendants are required by law, regulation, and contract to provide the United States with access to documents, other sources of information, and facilities in connection with Title VI investigations or compliance reviews.

exploitation. ICE is particularly sensitive to allegations of exploitation and underpayment of wages.

Along with criminal prosecutions of employers, ICE will continue to fulfill its responsibility to arrest and process for removal unauthorized workers encountered during worksite enforcement operations, which are conducted in support of a criminal investigation of an employer. However, when encountering unauthorized workers, ICE continues to employ existing humanitarian guidelines. These guidelines require ICE to develop a comprehensive plan to identify, at the earliest possible point, any individuals arrested on administrative charges who may be sole care givers or who have other humanitarian concerns, including those with serious medical conditions that require special attention, pregnant women, nursing mothers, parents who are the sole caretakers of minor children or disabled or seriously ill relatives, and parents who are needed to support their spouses in caring for sick or special needs children or relatives. These special vulnerabilities are then carefully assessed prior to any decision on whether or not an unauthorized worker should be detained or released.

Fugitive Operations Teams: The focus of the National Fugitive Operations Program is the apprehension and removal of fugitive aliens, with a particular focus on criminals and national security threats. An ICE fugitive is defined as an alien who has failed to leave the United States based upon a final order of removal, deportation, or exclusion; or who has failed to report to ICE as requested.

Secure Communities Program: Through the Secure Communities program, ICE deploys technology to state and local agencies. The technology allows ICE to identify aliens who are booked on criminal charges. The system relies on fingerprints.

ICE would like to address the Commission's concerns that this program can lead to discriminatory practices in the communities where it is deployed. This perception is not accurate. In fact, Secure Communities reduces the potential for racial or ethnic profiling because, as it relies on biometric—not biographic—information. The program is neutral and does not target people based on physical appearance or other considerations which could lend themselves to concerns over racial profiling. Indeed, the program checks the fingerprints of all people arrested and booked, whether U.S. citizen, lawful permanent resident, visa holder, or person unlawfully present.

To date, ICE has not received any formal complaints or allegations of racial profiling as a result of the Automated Biometric Identification System/Integrated Automated Fingerprint Identification System (IDENT/IAFIS) interoperability activation. Existing processes are in place at the local, State and Federal levels to report allegations of racial profiling or abuse occurring in local law enforcement agencies. Because DHS is serious about responding to reported allegations of racial profiling, due process violations, or other violations of civil rights or civil liberties relating to Secure Communities, DHS CRCL expanded the existing complaints process to include Secure Communities. Information on the complaint process, including how a claimant can file a complaint, is readily available to the public and can be found on the Secure Communities website at: http://www.ice.gov/secure_communities/complaint_process.htm

Due Process Rights

Right to Legal Counsel: ICE understands and appreciates the Commission's concerns regarding the detention of aliens in ICE custody in rural locations. ICE is working to secure detention space that is located near to the cities or towns where people are most frequently arrested. This will allow ICE to detain people near where their family or attorneys reside. Access to counsel is a key component of ICE's detention reform.

As a result, we have begun to consolidate the number of detention facilities in which we detain aliens in ICE custody—from more than 300 to approximately 250 facilities, several of which were more rural facilities—and we expect additional reductions in the number of our detention facilities in the near future. In addition, the agency is also looking into opening larger facilities in urban areas including opening large facilities to meet consistent detention needs in the Northeast and California. Finally, we are in the process of revising our current detention standards and preparing policy initiatives that we expect will, in practice, limit the frequency with which ICE transfers its detainees, so that they can remain close to their family and/or counsel.

For those individuals who are unable to obtain representation, ICE's National Detention Standards and 2008 PBNDS require that the agency's detention facilities ensure that an alien has access to immigration courts, counsel (where possible and at no expense to the government), and comprehensive legal materials. In accordance with the requirements of these standards, aliens detained in ICE custody—regardless of their geographic

location—should be provided with access to law libraries, names and contact information for pro bono counsel, confidential access to attorneys, and access to computerized legal databases or law libraries, among other resources.

Some facilities have made arrangements with local legal service organizations, such as The Florence Project, which provides free legal services to individuals detained in ICE custody in Arizona and seeks to educate aliens concerning ways to defend removal charges and seek relief from removal. ICE appreciates and supports the mission and role of nonprofit legal service organizations like the Florence Project and for several years has provided access to the facility and its detainees for the organization. ICE also partners robustly with DOJ to provide access to the facilities for their legal orientation programs (LOP). To that end, ICE fully supports DOJ’s expansion of LOP programs in additional facilities.

Stipulated Orders of Removal: The entry of removal orders upon stipulation by the parties is authorized by section 240(d) of the Immigration and Nationality Act (Act or INA). The Commission report highlights a concern regarding unrepresented aliens not understanding their rights. This concern is addressed in the regulations and in the Executive Office of Immigration Review’s procedural memoranda which provide: “[i]f the alien is unrepresented, the Immigration Judge must determine that the alien’s waiver is voluntary, knowing, and intelligent” and that “the stipulated request and required waivers shall be signed on behalf of the government and by the alien...” 8 C.F.R. § 1003.25(b).

In addition, the standard stipulation form advises the alien that by signing it, they may be barred from returning to the United States for up to 20 years or even permanently barred.

Notice to Appear (NTA): The Commission should be aware that it is not ICE policy to delay the issuance of an NTA to facilitate a transfer. Rather, ICE policy dictates that a determination whether to charge an alien shall be made within 48 hours of an alien’s arrest and that the NTA shall be served upon a detained alien within 72 hours.

Transfers: ICE has spent the last several months evaluating best and current practices nationwide with respect to issues affecting detainee transfers. In light of its findings, the agency is currently drafting a transfer policy that we expect will limit the frequency of detainee transfers nationwide with a goal of keeping detained aliens near their family and

counsel and address many of these concerns, including mandating a timeline by which agents/officers must file Notices to Appear with the immigration court. Although there are times when transferring a detainee is in the best interests of the individual, we hope to develop a national transfer policy which meets at least some of the needs of all interested parties, including the individual in our custody and his/her counsel (if any).

Transferring a detainee is not used as a punitive measure, nor will it be under the new policy. To the contrary, ICE appreciates the significant benefit that staying in a facility near family members and attorneys can have on an individual detainee. Therefore, ICE will make detainee transfer determinations after thoroughly taking account of all information currently available to the agency.

Other Concerns Raised in the Report

Right of Asylum Seekers to Expedited Removal Proceedings: In January 2010, ICE issued the revised policy, “Parole of Arriving Aliens Found to Have a Credible Fear of Persecution or Torture.” This policy allows ICE to address and prioritize the use of detention resources and respond to the needs of this vulnerable population. Under the new policy, aliens who arrive in the United States at a port of entry and are found to have a credible fear of persecution or torture will automatically be considered by ICE for parole. This is a change from the prior policy, which required aliens to affirmatively request parole in writing.

In addition, the new policy adds heightened quality assurance safeguards, including monthly reporting by ICE field offices and headquarters analysis of parole rates and decision-making, as well as a review of compliance rates for paroled aliens. Further, while the prior policy allowed ICE officers to grant parole based on a determination of the public interest, it did not define this concept. By contrast, the new directive explains that the public interest is served by paroling arriving aliens found to have a credible fear who establish their identities, pose neither a flight risk nor a danger to the community, and for whom no additional factors weigh against their release.

Indefinite Detention of Non-Citizens who Cannot be Deported: ICE proactively attempts to remove aliens following the entry of a final removal order by an immigration judge. The removal process, however, can take up to several months to complete, depending on several factors, including but not limited to, the country of removal, whether or not the alien is cooperative

throughout the removal process, and/or whether or not the alien has any ongoing appeals.

The U.S. Supreme Court, in its decision in *Zadvydas v. Davis*, 533 U.S. 678, 701 (2001), understood this possibility, and consequently found that six months is a presumptively reasonable period for the agency to complete the removal process on behalf of a given alien. However, the Court also noted in its decision that “[t]his 6-month presumption, of course, does not mean that every alien not removed must be released after six months. To the contrary, an alien may be held in confinement until it has been determined that there is no significant likelihood of removal in the reasonably foreseeable future.” *Zadvydas v. Davis*, 533 U.S. 678, 701 (2001). In order to ensure that the agency remains diligent throughout the removal process, the agency regularly conducts post-order custody reviews in accordance with the regulatory requirements in 8 C.F.R. § 241.4; ICE also regularly releases aliens when the agency has determined, upon its completion of such reviews, that there is no significant likelihood of removal in the reasonably foreseeable future. It is not necessary, as suggested by the Commission report, for aliens to file a habeas petition “in order to be released after 180 days of post-order detention have expired.”

Many aspects of the removal process are beyond ICE’s control. For example, some countries hesitate to issue travel documents for their citizens and nationals such that ICE cannot repatriate them. Moreover, upon receipt of a final order of removal, aliens in ICE custody have frequently themselves delayed the removal process by, including but not limited to, failing to sign documentation that is required to complete the removal process or cooperate with investigations of their citizenship; or by refusing to cooperate with interviews and requirements for return to their home nation. *See United States v. Jang*, 2009 WL 1856198, No. 08-10616 (5th Cir. 2009). Such delays, however, typically have only a limited impact on whether or not one is significantly likely to be removed in the reasonably foreseeable future.

Detention of Families: As to family and female detention, ICE has discontinued the use of family detention at the T. Don Hutto family residential facility in Texas. In place of housing families, the Hutto Texas facility is now used solely as a female detention center.

Medical Care and Mental Health Care: ICE has made clear that providing individuals in ICE custody with sound health care and access to appropriate medical services is a guiding principle of our reform. In our

2009 reform announcement, we pledged to hire a medical expert to provide an independent review of medical complaints and denials of requests for medical services. In January 2010, ICE Division of Immigration Health Services (DIHS) assigned regional clinical directors to provide ongoing case management of complex medical cases and to expeditiously review denials of requests for medical services.

At that time, ICE also committed to the goal of devising and implementing a medical classification system to support immigration detainees with unique medical or mental health needs. The agency is therefore pleased to inform the Commission that a new Medical Classification Instrument had been developed in close collaboration with members of our non-governmental organization (NGO) Medical Advisory Group. This new Medical Classification Instrument is expected to inform agency decisions regarding appropriate housing for detainees with medical or mental health needs. To date, we have completed a draft survey instrument that will soon be sent to field sites for review and comment; ICE hopes to initiate field testing of the survey tool in the near term. We anticipate that the classification system will be implemented system-wide by mid-2011.

ICE has also made substantial progress on our coordination efforts with DHS CRCL to systemize and expedite the medical complaints review process. CRCL has been an active participant in ICE working groups focused on revisions to the PBNDS on Medical Care and related standards, the development of the medical classification system, and the risk assessment tool. ICE consults regularly with CRCL on a range of issues related to medical and mental health care.

As an example of this collaboration, ICE and CRCL jointly hosted a mental health care forum in September 2010, in which we brought together NGO partners, mental health experts, and representatives of numerous government agencies to discuss important mental health issues related to immigration detention. Regarding specific medical complaints, complaints and inquiries to CRCL about significant medical issues are raised directly to ICE leadership to ensure these matters are promptly reviewed. Recently, CRCL and ICE developed new processes to promote collaboration in mortality reviews. Finally, CRCL will have a role in training programs for medical personnel and other key personnel.

ICE has developed robust training programs for medical staff regarding the potentially complex medical and mental health issues of detained immigrants. For example, senior ICE clinical directors participated in the National Commission on Correctional Health Care (NCCHC) medical directors' boot camp and the NCCHC mental health conference in July 2010 in preparation for further development of training programs for medical staff to occur over the course of the coming year. Also, as part of the drafting process for the 2010 PBNDS, all medical care standards were reviewed and updated in consultation with our NGO Advisory Groups. During this process, we placed particular focus on mental health issues and the development of new Women's Medical Care Standard to address the unique medical needs of the female detainee population.

ICE agrees that access to mental health care is a critical element in providing humane conditions of confinement. The ICE Mental Health Program provides direct patient care for acute and chronic conditions, training of Public Health Services and ICE staff on mental health issues, and other mental health related matters as requested by ICE. The ICE Mental Health Program provides, among other services: mental health screenings and evaluations; consultation services; referrals for psychiatric evaluations, psychotropic medications, and inpatient psychiatric treatment; forensic psychiatric evaluation; mental health treatment at designated facilities, development of continuity of care plans, identification of substance abuse difficulties, and stabilization of individuals identified as victims of sexual assault.

The goal of this program is to have multi-disciplinary mental health teams composed of psychiatrists, psychologists, and/or social workers to provide mental health services to ICE detainees across the nation, either directly or through our expanding telehealth system. The Mental Health Services program works closely with counterparts in other mental health facilities and providers in the community. The DIHS Mental Health Services program oversees the clinical aspects of the mental health treatment in IGSA's and shelters that house detainees. This program also supports other needs requested by ICE such as emergency mental health consultations, facilitating mental health services, responding to Freedom of Information Act requests, and coordination with courts and community based agencies.

The ICE Mental Health Program has a nationwide tracking system that closely monitors severely mentally ill detainees and ensures that all their

special needs are met. We have a Children and Families Residential Program in Berks, Pennsylvania, as well as a residential program exclusively for female detainees in Taylor, Texas. Both residential centers are equipped with specialized staff to provide treatment programs specifically focused on delivering services to these targeted populations.

Segregation: A brief period of segregation for disciplinary reasons is sometimes necessary for detainees whose behavior does not comply with facility rules in order to provide detainees in the general population a safe and orderly living environment. A detainee may be placed in disciplinary segregation only by order of the Institutional Disciplinary Panel (IDP), or its equivalent, after a hearing in which the detainee has been found to have committed a prohibited act. The maximum sanction is 30 days in disciplinary segregation per violation with a review every seven days. It is very clearly articulated in the standards that placement in a special management unit is based on the amount of supervision required to control a detainee and safeguard the detainee, other detainees and facility staff.

Grievance Procedures: During ICE's reform process, the grievance procedures in PBNDS 2010 Standard have been substantially improved. ICE also has developed a detainee handbook written in clear, plain language. This conveys that detainees are afforded certain protections and rights, including the ability to grieve. The new grievance standard will ensure detainee legal rights are respected, including a detainees right to: (1) due process, including the ability to process a grievance quickly; (2) translation and interpreter services so a detainee can understand and communicate with staff; and (3) aids or services that ensure effective communication between a detainee and facility staff if there is any impediment to communication.

Food Services: ICE notes Commission concerns regarding allegations of insufficient food, water, and the use of antacids to calm hunger pains. Please be assured that these are not tolerated practices and detention services managers have been tasked to review facilities to ensure they are all in compliance with stated ICE food service policies. The Commission should be aware that food services in ICE detention centers ensure that detainees are provided a nutritionally balanced diet that is prepared and presented in a sanitary and hygienic food service operation. The Commission can be assured that all nutritionally balanced diets are reviewed at least quarterly by food service personnel and at least annually by a qualified nutritionist or dietitian. Food service at immigration detention centers also offers special

diets and ceremonial meals for detainees whose religious beliefs require adherence to religious dietary laws.

Recreation: The expansion of outdoor recreation opportunities and hours is an important part of the detention reform initiative. Detainees should have the opportunity to recreate for the most practicable amount of time possible in an environment that supports leisure activities and outdoor sports and exercise. Florence Service Processing center currently serves as a model for recreation space; it has a state-of-the-art outdoor recreation facility, with artificial turf, a re-paved running track around the perimeter, and new workout stations. Outdoor recreation opportunities in other facilities have also expanded, with some facilities providing free movement access to outdoor recreation areas during daylight hours.

Communication: ICE already provides detainees with free calls to pro-bono legal service providers, consular officials, and DHS Office of the Inspector General. In addition to these services, the 2010 PBNDS includes a revised Standard on Telephone Access to ensure that detainees will have reasonable and equitable access to reasonably priced telephone services. The Standard will also ensure that detainees with hearing or speech disabilities have appropriate accommodations to allow for accessible telephone services. At a minimum, there must also be one operable telephone for every 25 detainees, although the optimal level in the Standards provides for one telephone for every ten detainees. Telephones are to be tested daily and placed in strategic locations throughout the facility to afford privacy and minimal distraction for conversations to take place.

One of the new provisions in the PBNDS 2010 encourages facilities to seek out and use emerging telecommunications, voiceover, and Internet protocol technologies to reduce telephone costs. ICE prioritizes reasonably priced telephone services for detainees to maintain contact with family members, friends, and legal representation.

As part of the detention reform initiative, ICE is exploring the options for expanded family visitation. ICE is also exploring the use of video-teleconferencing to allow detainees contact with family members who may not be able to visit the detention facility. Additionally, ICE is working to improve access to legal counsel and legal materials. This includes access to materials that explain State laws that affect custody and family issues.

On July 23, 2010, ICE launched the ODLS, a public, internet-based tool designed to assist family members, attorneys, and other interested

parties in locating detained aliens in ICE custody. The creation and implementation of the ODLs is a concrete example of ICE's commitment to detention reform that is both transparent and meaningful. The ODLs, located on ICE's public website www.ice.gov, provides users with information on the location of the detention facility where a particular individual is being held, a phone number to the facility and contact information for the ICE Enforcement and Removal Office in the region where the facility is located. The rollout of the ODLs also included the translation of the website, system informational brochure, and facility fact sheet in numerous languages. Providing language access to ICE's systems and information to all nationalities is an on-going goal of the agency.

Video Conferencing: Video conferencing is an important tool in ensuring the efficient functioning of immigration proceedings which Congress specifically authorized for immigration proceedings. *See* INA § 240(b)(2)(A)(iii); 8 U.S.C. 1229a(b)(2)(A)(iii). Without video conferencing, proceedings would take longer to complete for several reasons, including, in some instances, the fact that the agency may be required to rely more heavily on detainee transfers to ensure court appearances, and, as a result, detention time would be prolonged as, for example, the time between court dates is extended. One of the uses for video conferencing is to allow immigration proceedings to move forward while criminal aliens are incarcerated and therefore not available to attend immigration proceedings. In addition, allowing video conferencing can provide a forum for distant witnesses (who would otherwise be unavailable) to testify on behalf of an alien and therefore serves to improve the quality and quantity of admissible evidence.

V. Conclusion

We wish to again thank the Commission for the opportunity to comment on this draft report. The United States would welcome the opportunity to meet with representatives of the Commission to further discuss the many changes in U.S. immigration and detention policy being spearheaded by the Department of Homeland Security. In the interim, we respectfully request that the Commission carefully consider the U.S. Government's response to the Commission's draft report as conveyed herein, and assimilate that response into the final report.