IMMIGRATION AND CUSTOMS ENFORCEMENT INTRODUCES "FRIENDLY" FEDERAL DETENTION STANDARDS AND NEW, SOFTER DETENTION FACILITIES

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Introduction

In the May 2007 issue of *The Federal Lawyer*, I discussed the policies implementing the government's decision to detain illegal immigrants.[1] Historically, immigrants residing in the United States illegally were treated as criminals. Before President Barack Obama took office, the Department of Homeland Security (DHS), through its principal investigative office, Immigration and Customs Enforcement (ICE), relied on 350 different facilities to house illegal immigrant detainees. Because those facilities were primarily penal institutions, detainees housed by ICE were essentially confined in a local jail setting.

Since 2009, however, ICE has consolidated the number of detention facilities it uses and now uses only about 250 of them. ICE has also closed several Service Processing Centers—relics remaining from the old Immigration and Naturalization Service (INS) days. But consolidation is not the only change in ICE policy. ICE is now introducing "friendlier" detention standards and opening new facilities that are less "penal." These new efforts at a "facelift" for ICE are intended to introduce "civil detention," no longer emphasizing the razor wire surrounding the detainees but focusing on the enhanced programs, food, and medical services provided to detainees.

Background on ICE Detention Efforts

The article that was published in TFL in May 2007 explained that the detention and removal of immigrants historically concentrated on dangerous and criminal immigrants. The Alien and Sedition Action of 1798 was originally passed to empower federal agents to remove all dangerous immigrants. However, it was not until 1933 that Executive Order 6166 created the INS in order to consolidate the immigration and deportation functions of the Bureau of Immigration and the Bureau of Naturalization into one agency.

Congress then expanded the categories of immigrants who could be detained under the Immigration and Nationality Act of 1952. After the passage of that act, immigrants could be routinely detained and deported based on health, moral, economic, seditious, and other grounds. The focus of INS turned to the strengthening of the United States' southern borders as a means of preventing illegal immigrants, Communists, subversives, and organized crime figures from entering the nation. Then Congress passed the Immigration Reform and Immigrant Responsibility Act of 1996 in order to expand the list of crimes that made individuals subject to detention and removal. That act also removed any discretion federal agents had when deciding whether or not to detain certain immigrants. Under the act, virtually any noncitizen was now subject to detention and removal on the basis of a criminal conviction.

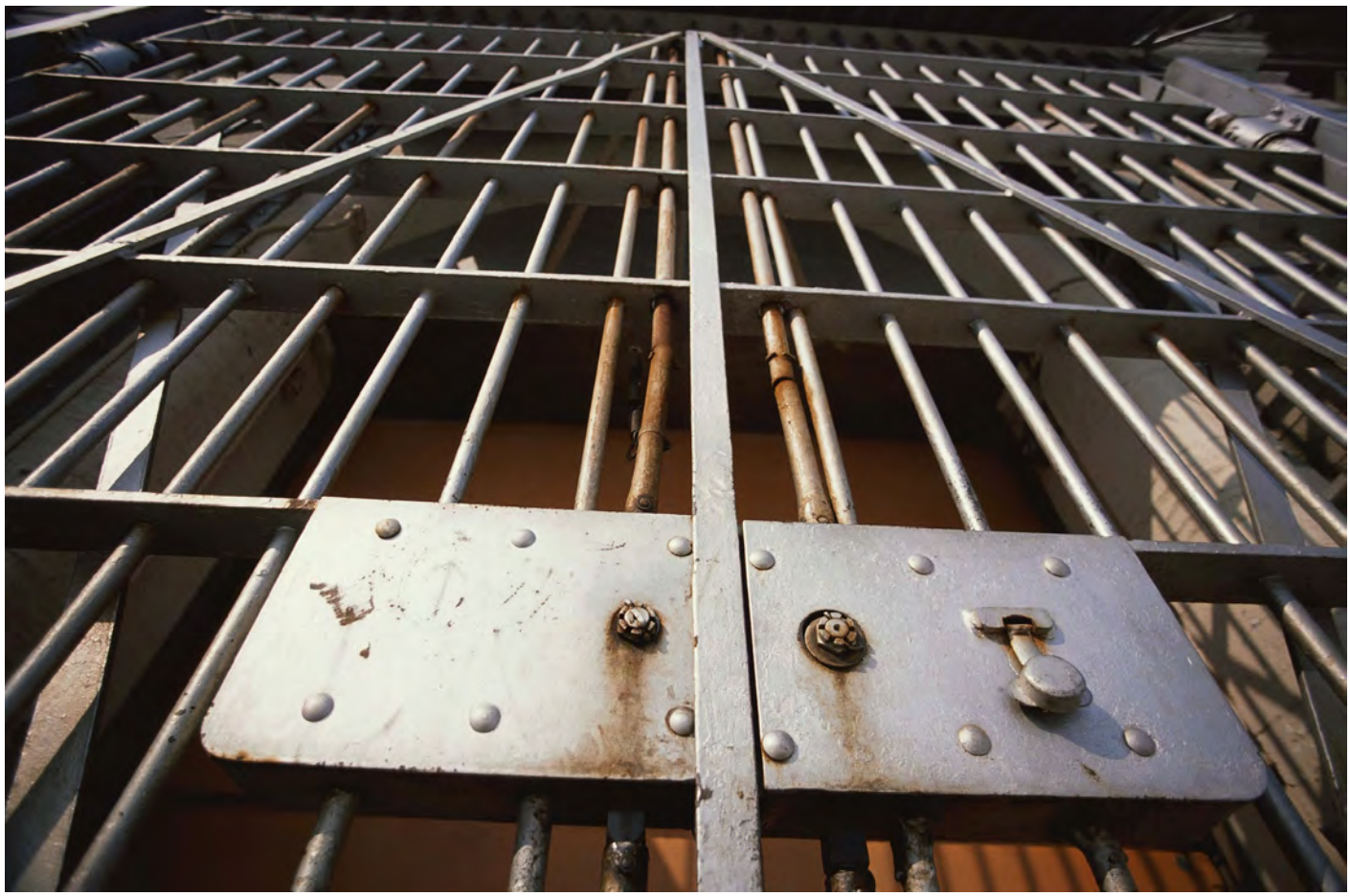
The Homeland Security Act of 2002 resulted in the creation of ICE, dismantled the INS, and placed that agency's duties under the administration of the new DHS. The goal of the legislation was to combine the law enforcement arms of the former INS and the former U.S. Customs Service. ICE's mission is to target illegal immigrants, as well as the people, money, and material that support terrorism and other criminal activities.

Within ICE, the job of acquiring bed space for detainees is the responsibility of the Office of Enforcement and Removal (ERO). The ERO sets out to identify local jail space that can be used to detain aliens who present a high risk of absconding from the country. Initially, ICE entered into Intergovernmental Service Agreements (IGSAs) with more than 350 local and state facilities. Those state and local facilities held approximately 52 percent of ICE's detention population, while 19 percent of the population was held pursuant to procurement contracts with private prison operators, 18 percent were managed through ICE-owned Service Processing Centers, and 11 percent were managed through Federal Bureau of Prison facilities.

Changes Between the 2008 and 2011 Performance-Based National Detention Standards

In 2008, ICE issued Performance-Based National Detention Standards (PBNDS) to create symmetry in detention service throughout the nation. In 2011, the agency revised those standards in order to reflect a new "gentler" ICE. There are a number of differences between the 2008 and 2011 PBNDS, but this article will address only those changes that demonstrate how the agency is trying to soften its image.

First, the 2011 PBNDS mandate a new system to classify



incoming detainees to include a review of their potential for victimization. During this new classification process, consideration will be given to any detainees who may be at risk for victimization or assault. For example, detainees who are transgendered, elderly, pregnant, physically or mentally disabled, suffering from a serious illness, or victims of torture, human trafficking, abuse, or other violent crimes will be given special attention. In particular, classification and housing decisions for a transgender detainee will be made with regard to the detainee's gender self-identification as well as an assessment of the effects of placement on his or her mental health and well-being. Placement and housing will not depend solely on identity documents or physical anatomy. Throughout this special consideration for transgender detainees, medical and mental health professionals will be consulted for review as soon as possible. This new classification system is applicable in all facilities housing ICE detainees.

Second, the 2011 PBNDS has significantly changed the detainee search policy from the policy set in the 2008 PBNDS. According to the 2011 PBNDS, pat-down searches, in addition to strip searches, must be performed by a staff member of the same gender as the detainee. An exception is provided if, and only if, a staff member of the same gender is not present in the facility when a pat-down search is required. The 2008 PBNDS required that an emergency strip search by a staff member of the opposite gender be conducted in private with two staff members present, whereas the 2011 PBNDS require that a staff member of the same gender as the detainee be present during the search. The new standards also require that transgender detainees be searched in a private setting.

Third, the 2011 PBNDS also forbid facilities from permitting strip searches of detainees after contact visits without reasonable suspicion, unless detainees are given the option to choose noncontact visitation in lieu of contact visitation. Unless staff can articulate reasonable suspicion that contraband may have been transferred to a detainee, strip searches cannot be conducted after visits with consular representatives, attorneys, legal assistants, or other accredited visitors. The 2008 PBNDS explained that reasonable suspicion should not "ordinarily" be based only on a detainee's convictions for minor or nonviolent offenses, whereas the 2011 PBNDS strongly assert that minor and nonviolent offenses "shall not" be the only basis for reasonable suspicion. The 2011 PBNDS also state that the lack of identity documents does not necessarily constitute reasonable suspicion, amending the slightly stricter 2008 PBNDS, which indicate that the lack of identity documents may be cause for reasonable suspicion. In addition, the 2011 PBNDS altered the 2008 PBNDS language regarding searches of body cavities, requiring that these searches to take place in private, away from other detainees and facility staff.

Fourth, the policies regarding religious practices in detention facilities were also amended with the issuance of

the 2011 PBNDS. The most exceptional change in religious practice policy in the 2011 PBNDS is that detainees are permitted to perform any and all practices of their religious faiths, even if the practice is not "deemed essential" to that faith. According to the 2011 PBNDS, this standard is applicable to all immigrant detention facilities.

Fifth, the 2011 PBNDS made numerous changes to the grievance system in ICE facilities. For example, the 2011 PBNDS require that an independent panel be established to review grievances that have been denied and that detainees with disabilities or whose second language is English be offered assistance in filing grievances. In addition, the 2011 PBNDS modified the formal grievance process in place in ICE detention facilities. The 2008 PBNDS required a minimum of one level of appeal, whereas the 2011 PBNDS call for a three-tier grievance review process, which includes reviews by a grievance officer, a grievance appeals board (GAB), and an appellate body. With the 2008 PBNDS, the first level of grievance review was conducted by a staff member, such as a shift supervisor, and the appeals were handled by a grievance officer, a grievance committee, or the administrator of the facility. The 2011 PBNDS also require all facilities housing ICE detainees to report dissatisfaction with the way a facility handles a grievance directly to ICE/ERO.

Sixth, the 2011 PBNDS also make the time line for filing grievances more flexible. The 2008 PBNDS allowed detainees to file formal grievances "within a reasonable timeframe" after the event, the conclusion of an informal grievance, or once the detainee has decided to bypass the informal grievance process. The new standards modify that language and allow detainees to file a grievance "at any time" after the event takes place. Detainees can also file a grievance before, in addition to, or in lieu of filing an informal complaint. In contrast to the more liberal treatment accorded to deadlines applicable to detainee grievances, the 2011 PBNDS outline a much shorter time line for the GAB and facility administrators to review and make a decision in the appellate process. The 2008 PBNDS provided that detainees must receive written decisions regarding their appeals "within reasonable and specified time limits." The 2011 PBNDS make that time line more rigid and tangible, requiring that decisions be issued "within five days of receipt of the appeal."

Seventh, the 2011 PBNDS encourage the facility's staff to provide language assistance to detainees who may have concerns or may wish to file grievances. This differs from the 2008 PBNDS, which required that the detainee be provided language assistance upon request. Also, the 2011 PBNDS have updated the record keeping procedure for grievances. Whereas the 2008 PBNDS required the use of a grievance log, the 2011 PBNDS provide that grievance logs are subject to inspection by the field office director or ICE headquarters staff. According to the 2011 PBNDS, emergency grievances must also now be documented in grievance logs.

Finally, additions to the "Retaliation Prohibited" section of the 2011 PBNDS provide that actions are considered retaliatory "if they are in response to an informal or formal grievance that has been filed and the action has an adverse effect on the resident's life in the facility." Also added to the 2011 PBNDS was a requirement that a facility, as well as ICE/ERO, commence investigations of allegations of retaliation and remedy any substantiated allegations of retaliation immediately. The final change in grievance procedures between the 2008 PBNDS and the 2011 PBNDS is the addition of a review process of detainees' grievances. According to the new standards, detainees' grievances should be reviewed during ICE/ERO-initiated facility inspections and the ICE Office of Professional Responsibility will conduct periodic reviews using a statistical sampling of detainees' grievances. This process will ensure that final decisions in grievance and appeals decisions are reasonable and that they generate trends regarding grievance and appeals decisions.

THIS FRIENDLIER ENVIRONMENT INCLUDES HIGHER QUALITY MEDICAL AND MENTAL HEALTH SERVICES, ENHANCED RELIGIOUS AND CONSULAR SERVICES, INCREASED ACCESS TO IMMIGRATION LAWYERS AND ADVOCATES, AND FLEXIBLE VISITATION POLICIES AND ACCESS TO RECREATIONAL SPORTS FACILITIES.

Hui v. Castaneda

In May 2010, the U.S. Supreme Court issued a landmark ruling in immigration policy in *Hui v. Castaneda,* 130 S. Ct. 1845 (2010). In *Hui,* Francisco Castaneda was detained by ICE in the San Diego Correctional Facility (SDCF). Castaneda immediately reported to medical personnel at SDCF that he had a lesion that had been bleeding and emitting a discharge. Over the period of Castaneda's detention, the lesion continued to grow in size and to interfere with routine activities. Castaneda was persistent in seeking medical attention for the lesion but was denied a biopsy even after several outside specialists emphasized the need for one in order to determine if the lesion was cancerous. SDCF personnel took the position that a biopsy for Castaneda was "elective" and treated him with ibuprofen and antibiotics.

A biopsy was approved for Castaneda in January 2007, but he was released from detention in February 2007 and

did not undergo the medical procedure until after his release. A week after his release, a biopsy determined that Castaneda was suffering from cancer and that the tumor had metastasized to other areas of his body. Chemotherapy was unsuccessful, and Castaneda died a year later. In the last year of his life, Castaneda raised medical negligence claims against the United States under the Federal Torts Claims Act and claims under *Bivens v. Six Unknown Named Agents,* 91 S. Ct. 1999 (1971), against SDCF staff for their alleged deliberate indifference to his dire medical needs and to his rights under the Fifth, Eighth, and Fourteenth Amendments. After Castaneda's death, his sister and daughter amended the complaint to substitute themselves as plaintiffs.

Motions to dismiss the claims were filed on the grounds that 42 U.S.C.A. § 233(a) provided absolute immunity from *Bivens* actions by making a suit against the United States under the Federal Torts Claims Act the exclusive remedy for harms caused by U.S. Public Health Service personnel in the course of their government duties. The district court rejected that argument, and the U.S. Court of Appeals for the Ninth Circuit affirmed that. The U.S. Supreme Court, however, reversed the ruling and remanded the case, holding that the defendants' alleged negligence occurred in the course of performing their duties. The Court recognized and upheld the statutory immunity and ruled that U.S. Public Health Service officials cannot be held individually liable for inadequacies in medical care provided to detainees.

Since 2003, more than 110 detainees have died while they were in ICE custody, many because of inadequate medical care. As a result, nongovernmental organizations (NGOs) and civil and human rights groups have attacked ICE's detention policy, demanding reform and more humane and civilized treatment of immigrants in detention. The ruling in *Hui v. Castaneda* fueled this fire, sparking more outrage among NGOs and civil and human rights advocates, and almost certainly contributing to the issuance of the new 2011 ICE PBNDS.

New Detention Facilities for a New Era

In March 2012, ICE announced the opening of its first civil detention center in Karnes County, Texas, which can house up to 608 adult male, low-risk, minimum security ICE detainees.[2] This new type of detention facility is the result of the Obama administration's effort to house ICE detainees in a friendlier environment. Detainees at the Karnes County facility have increased access to higher quality medical and mental health services, enhanced religious and consular services, and increased access to immigration lawyers and advocates. In addition, detainees in these "soft" centers will have more generous and flexible visitation policies, including opportunities for contact visitation. Detainees in a civil detention center will have more access to recreational activities, which at the Karnes County facility, for example, include a library with free Internet access, basketball courts, soccer fields, and sand and nets for beach volleyball. The *San Antonio Current* described the dining hall at the Karnes County facility as being reminiscent of a "suburban megaschool" and stated that the "quad dorm areas are named after trees—Cedar Hall, Oak Hall, merging the summery and more autumnal thoughts of school. A private college perhaps."[3]

Many suggest that these new civil detention facilities will resemble college dormitories, with relaxed restrictions on movement throughout a facility's grounds and unarmed "resident advisers" dressed in khakis and polo shirts patrolling the area. These civil detention centers will specifically house "noncriminal" aliens—that is, those immigrants who have not been convicted of a crime or those seeking asylum in the United States. As explained by Gary Mead, the executive director of ICE, "We just feel the obligation to treat them according to their history, and, as I said, by their risk of flight."[4] Despite the "softness" of the new standards, some civil and human rights groups still believe that that the administration has not gone far enough and have suggested that perhaps individuals who are considered low-security and are seen as posing little threat should not be detained at all.

Critics of the new "softer" approach argue that, even though individuals detained in "soft" detention facilities are considered low-risk, they may in fact not be low-risk. Some detainees who fall into the "noncriminal" category may truly be criminals. For example, many drunk driving and traffic infractions are dismissed in local courts. Local law enforcement agencies estimate that between 10 percent and 50 percent of the illegal aliens booked into local jails are arrested for drunk driving offenses. In addition, some aliens may have criminal records in their home country but not in the United States. This group of people may include gang members, drug dealers, sexual predators, and prostitutes. Also, because many local court dockets are excessively full, local prosecutors and investigators often drop the charges when ICE issues a detainer and the immigrant is deemed potentially removable. In this way, a local government relieves the pressure on its own prosecutorial resources.

ICE managers have reported a drastic increase in the number of individuals taking advantage of the Obama administration's lenient asylum policies, which took effect in January 2010. When immigration officers apprehend and detain aliens, they are now offered the opportunity to explain the risks involved in being returned to their home country, which often involve domestic violence or fear of violence perpetrated by gangs or drug cartels. Once these fears are expressed, asylum officers evaluate each case to determine whether the fear should be considered "credible." Under new ICE policy, detainees' cases meet the "credible" standard about 80 percent of the time. Once an alien's fear is deemed "credible," he or she receives a Notice to Appear before an immigration judge, becomes eligible to be released from detention, and also becomes eligible for a work permit. Even if an alien has been previously deported from the United States, he or she will be released from detention upon a finding of "credible" fear. Under the new policies, it only takes about 30 days from an alien's claim of fear for him or her to be released on parole. From 2009 to 2010, applications for asylum based

on "credible fear" increased nearly 500 percent, and the number of grants of parole in these cases increased from 71 percent in 2009 to 80 percent in 2011.[5]

In addition to the foregoing, it should be noted that most ICE detainees, particularly those referred to as "noncriminal," spend very little time in detention. That trend poses an additional problem for the new, extremely lenient 2011 PBNDS and the recent construction of "civil" detention facilities. According to ICE statistics, the average length of stay in a detention facility for noncriminal citizens of Mexico or Central America is 10 to 21 days, just enough time to obtain travel documents and arrange flights. Similarly, Mexicans who are apprehended by U.S. Border Patrol agents at the border spend less than a day in detention facilities; they are taken to an ICE detention center, processed, and returned to Mexico. These detentions represent about 20 percent of ICE's total removals in 2011. Those noncriminals who remain in ICE detention for lengthy periods of time are generally there because they are challenging their deportation.

THE SINGLE LARGEST COMPLAINT IS NOT RELATED TO THE DETENTION STANDARDS THEMSELVES, BUT TO THE FEDERAL GOVERNMENT'S DECISION TO DETAIN TOO MANY IMMIGRANTS IN THE FIRST PLACE.

The NGOs' Response to the New Standards and to Civil Facilities

Nongovernmental organizations, along with civil and human rights advocates, have long been outraged over ICE's treatment of detainees. Allegations of human rights violations in ICE facilities have been quite frequent. Hiu Lui Ng, for example, an immigrant from Hong Kong, was detained by ICE when he went to ICE headquarters in Manhattan for the final interview for his green card. Ng had immigrated to the United States 15 years earlier and worked as a computer software engineer. His wife was an American citizen and he had two American-born children. Throughout his ICE detention, Ng complained of severe back pains and, after a while, he could barely walk or stand. Ng died at the age of 34 of undiagnosed and untreated cancer, which was attributed to the inadequate medical care he received while in ICE's custody.[6] The NGO community has concluded that the 2011 PBNDS do not go far enough to stop the type of abuse allegedly suffered by Ng.

Mary Meg McCarthy, the executive director of Heartland Alliance's National Immigrant Justice Center, testified before the House Judiciary Committee on the new PBNDS.[7] In her statement, she noted the following:

> In 2009, the Obama administration announced a series of reforms to create a more "civil" immigration detention system, recognizing that the vast majority of men and women in DHS custody do not have criminal histories and pose no threat to the community. Today, the administration's commitment to create a "truly civil" immigration detention—one that includes sound medical care, adequate oversight mechanisms, and fiscally prudent detention practices—is yet to be realized.[8]

McCarthy explained that truly meaningful reform must include the following:

- a commitment to setting a time line for implementation of the 2011 PBNDS;
- the requirement that all facilities housing ICE detainees must adopt universal, uniform, and legally enforceable detention standards;
- the implementation of an oversight process to ensure compliance with the standards;
- the creation of an accountability process; and
- access to legal counsel for all detained immigrants.

Without those elements, she believes, the 2011 PBNDS are inadequate.

The NGO community's single largest complaint is not related to the detention standards themselves but, instead, to the federal government's decision to detain too many immigrants in the first place. Ms. McCarthy argues that "[i]t will be virtually impossible to fix the immigration detention system as long as the government continues to arrest and detain record numbers of men and women who pose no threat to society. In achieving true detention reform, the Obama administration must abolish its overly harsh enforcement policies and work to reduce mass immigration detention, which costs taxpayers billions of dollars per year."[9]

With regard to the newly opened civil detention facility in Karnes County, Texas, NGOs have cautiously approved the facility and stated that all facilities in which ICE holds immigrants should be transformed to look like the Karnes County facility. Ruthie Epstein of the Refugee Protection Program at Human Rights First stated that "Karnes County, I hope, will provide a new model for more appropriate detention conditions—a model that will mean little if it is not just a first step in transforming all facilities where ICE holds immigrants."[10]

Conclusion

The Obama administration deported nearly 400,000 immigrants in 2011. Today, ICE is moving toward friendlier and softer detention facilities by developing and implementing policies that provide better protection of immi-

grant detainees' human rights. At the same time, the agency is enforcing the U.S. government's immigration laws. The introduction of new 2011 PBNDS is evidence of the direction in which federal immigration policy is headed. A new softer ICE is also evident in the recent opening of the civil detention facility in Karnes County, Texas—a response to demands for reform from NGOs and group that advocate civil and human rights. However, many NGOs still believe that ICE has not gone far enough to ensure that the human rights and civil liberties of detained illegal immigrants are protected. Implementation of the 2011 PBNDS across the nation of will reveal whether ICE has changed the history of immigrant detention facilities. **TFL**

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Endnotes

[1]Joseph Summerill, *Is Federal Immigration Detention Space Adequate? The Challenges Facing ICE's Custody and Detention Management Efforts*, The Federal Lawyer 38–44 (May 2007).

[2]Similar friendly civil detention facilities have been established in Los Angeles and Newark, N.J., and plans are in place for developing similar civil detention facilities in ICE "hot spots," such as Miami.

[3]S. Andrews, *What Design Elements at Karnes Facility Tell us About the State of Immigrant Detention*, San Antonio Current (March 20, 2012), available at m.sacurrent.com/news/what-design-elements-at-karnes-facility-tell-us-about-the-state-of-immigrant-detention-1.1288370.

[4]L. Salazar, *ICE Opens First "Civil Detention Center" in Karnes City,* WOAI TV News (March 14, 2012), available at www.woai.com/news/local/story/ICE-opens-first-civil-detention-center-in-Karnes/1KB2wcHpN0CCBLw9XgeaFQ.cspx.

[5]Jessica M. Vaughan, Testimony Before the House Judiciary Committee, *Holiday on ICE: The U.S. Department of Homeland Security's New Immigration Detention Standards* (March 2012), available at cis.org/Testimony/Holiday-on-ICE-032812.

[6]N. Bernstein, *Ill and in Pain, Detainee Dies in U.S. Hands*, N.Y. Times (Aug. 12, 2008), available at www.nytimes.com/2008/08/13/nyregion/13detain.html?ref=incustodydeaths.

[7]Mary M. McCarthy, Testimony Before the House Judiciary Committee on the Department of Homeland Security's 2011 Performance-Based National Detention Standards (March 2012), available at www.immigrantjustice.org/testimony-submitted-hearing-department-homeland-security's-2011-performance-based-national-detention.

[8]*See* McCarthy, Testimony, *supra,* n. 7.

[9]*Id.*

[10]Ruthie Epstein, *Authorities Unveil Model Civil Immigration Detention Center* (March 13, 2012), available at www.msnbc.msn.com/id/46725762.