ONE DOLLAR PER DAY:

THE SLAVING WAGES OF IMMIGRATION JAIL WORK PROGRAMS

A History and Legal Analysis, 1943 - present

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Working Paper, v. 2 (May 15, 2014)

Abstract

This Paper evaluates the legality of the $1 per day payments for work performed by those in custody under immigration laws as well as its genesis. In 1941, President Franklin Roosevelt issued an order moving the Immigration and Naturalization Service (INS) out of the Department of Labor and into the Justice Department. During this same time frame, the U.S. Government established internment camps for "enemy aliens," i.e., civilians in the United States and other countries in Latin America who were or were imagined to be citizens of Axis powers. In 1943, the Justice Department paid those so held 80 cents per day for their work performed in the camps; the average daily cost of each person's detention in 1943 was one dollar. This was the origins of the 1950 law authorizing paying those in custody under immigration laws for work performed. If those in immigration custody today were paid at the ratio from 1943, they would be earning about $80 per day. This paper draws on government documents and contracts obtained under the Freedom of Information Act as well as the program's implementation and history as the basis for a statutory analysis of the Government's defense of its legality. The Paper argues that under a reading of the relevant laws' plain meaning, legislative history, and purpose, the program appears to violate various labor laws and the Fifth, Sixth, and Fourteenth Amendments.

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1 Thanks to Attorney Andrew Free for his comments on previous drafts and his litigation on my behalf to procure documents on this program ICE and the private firms are withholding in violation of the Freedom of Information Act. Thanks also to Professor Terry Maroney for arranging a workshop for this Paper at Vanderbilt University Law School, and her generous assistance in pointing me to relevant sources for understanding statutory construction. Her colleagues Nancy King, Beverly Moran, Rebecca Haw, Chris Serkin, and Lisa Bressman, as well as Sonia Lin and Joseph White also provided extremely helpful comments and suggestions. Thanks to Samuel Niiro for his assistance preparing this for publication.

PART ONE

THE PROBLEM

Robinson Martinez

Following several years of prison in Michigan and Texas for convictions on drug related crimes, Robinson Martinez was taken into custody in March, 2012 by Immigration and Customs Enforcement (ICE), which held him at a Houston facility owned by the Corrections Corporation of America (CCA). Shortly after his arrival, CCA hired Mr. Martinez to work for them for $1 per day. In a September 12, 2013 letter to me, Mr. Martinez wrote[2]:

> 'Volunteer Work Program', the way I describe it, is basically doing the same as working in the outside world. But with a chip labor with no benefits. For e.g., I am assign as 'Dorm Porter', meaning that I do the sweeping and mopping the floors of the dorm we (detainees) are house in or assign to. I clean and scrub the toilets, urinals, showers and sinks, clean tables, windows, and have trash ready for pick-up by 'Hall Porters.' I perform other tasks, if necessary at the direction of a CCA staff member, such as working both shift, day and nights, although I am assigned to work at nights, only 8 hrs I'm assign to work.... During the past 3 month I have been assign to work night shift, stating from 600pm to Breakfast, which is about 4:00am or at times about 5:00am. Out of those hrs. I approx work 4 hrs. because I refuse to work the whole 8 hrs.[3] There's many different jobs

2 This section is transcribed verbtaim, with portions cut.

3 Mr. Martinez must be constantly available to his supervisor during the period of his shift, and beyond, even if he is not exerting himself the entire period.

and hours, but some of them are the same job title, some are call 'Hall Porters', 'Recreation Porters', 'Dorm Porters', 'Kitchen Workers' ect... The function of Recreation work is cleaning up the rack room, gather the all balls left out-side, bring-in the water jar (5 gallons), sweep and mop the restroom and other duties directed by the staff. There's also kitchen workers where you prepare food trades for the male detainees, wash dishes, although a machine washes the dishes...just as working in a restaurant. You clean-up the kitchen area, by sweeping and moping the floor and other work requested by the staff. Basically the kitchen work is as working out-side. Hours, I have an understanding they work from 8:00am to 2:00pm, from 2pm to 7:00pm and from 3:00am to 7:00am.

Now there's also 'Hall Porters', they work the hall ways, do painting at times, sweep and mop the hall way floors, buffing and waxing , help out with the commissary cards by pushing them to the dorms to be deliver accompanied with staff and any other job as directed by the staff, clean offices, take care of the trash, bring-in cleaning supply, ect.. . Basically they perform more of the work than any other job mention above...All jobs are paid $1/day except Kitchen workers, I believe they get paid differently from the rest of the job.

There is also laundry workers, they work in the laundry but are call 'Hall Porters', they work 8 hrs and perform the watching of detainee's cloth, (uniforms), sheets, blankets ect.. . They perform other duties at the direction of staff, e.g., if staff needs the detain to some type of cleaning and that detainee is close by, the staff will ask him to do that cleaning.

Though dozens of men in his dorm were available for these and other jobs, Mr. Martinez estimated that in September, 2013 only about 6 on any particular day actually were working, a ratio that is well below the levels reported elsewhere in the Houston CCA facility, perhaps because of their security level.[4] Or perhaps it was because those in his dorm, many long-time legal residents with green cards, had friends and family on the outside keeping their commissary accounts in decent shape.

"They don't give me a helper," he reported, "there used to be a whole bunch for the day shift, but they're already deported."[5] Lacking the staffing necessary for their contractual commitments to keep the facility clean and maintained, CCA guards ordered Mr. Martinez to take on additional tasks during his shifts, as well as work beyond them. On one occasion a guard woke him at 3 a.m. and ordered him to clean:

> She is also the officer who have given us detainees problems with shorten of making available 'toilet paper'. She says that we are wasting it...[S]he approach me [after my shift was over] and said I had to clean up since I we [sic] were the only porters on the list left, that we needed to clean-up and do the work. I can't remember what the other detainee answer to her, but I said 'I do not have to work because this is a 'volunteer work' and I am not obligated to work.
>
> She responded by saying 'well then I will right you up'... If a detainee is not doing what they suppose to , and depends the officer you get write-up meaning you can get off the

4 Robinson Martinez, Telephone interview, September 17, 2013. "High security detainees are not assigned to work with low security detainees. The majority of the work assignments off the housing unit i.e. Food Service,are performed by low security detainees." CCA Contract for Stewart Detention Facility, Lumpkin, Georgia, 2008, p. 23, on file with author (stewartdetentioncenterlumpkinga0513152008).

5 *Ibid*.

> volunteer work program...That's what I was told by Officer C. Huddleston. Now, if you accumulate several offense you can be put in segregation and also if you do something real bad...I've not been in segregation but I have been told by other detainees that It's afoul. It's not clean and very cold in the cell. What is my understanding of why people decides to sign for the volunteer program. Well, for some is that they don't have nobody that send them money to purchase, hygiene, mailing, stamps and writing material, commissary, such as coffee, soups, coke, ect. Detainees have trouble obtaining writing material so at times is hard.

On the occasions he is ordered to work beyond his shift, Mr. Martinez cleans as ordered.

Mr. Martinez's work is inspected by his CCA supervisors. Sometimes Mr. Martinez's work detail included cleaning the dorm showers, including the floors, walls, and toilets of a dank, humid area that had never been exposed to fresh air. He recalled being called back to revisit a particularly difficult patch of mildew that had seemingly been there for years. When he explained that the company needed a specialized janitorial service and equipment for the task he was told he would be fired. Mr. Martinez cleaned as best he could, but much of the stain remained.[6]

In mid-September, 2013 he requested gloves for cleaning tasks requiring the use of highly concentrated chlorine bleach. "If you pour it on the [cement] floor, it leaves a white spot," he explained. His supervisor handed him the same pair of gloves used and reused by the employees delivering food from the kitchen to his dorm. Concerned about the numerous sanitary deficiencies of such a procedure he requested a new pair of gloves but was rebuffed. The guard

6 Robinson Martinez, Interview, Houston CCA.

said, "Why do you care?" implying that because Mr. Martinez would not be immediately eating the food served from the next person to use these gloves, the dual uses should not bother him. The guard ignored as well Mr. Martinez's concerns that they might already contain bacteria to which he would be exposed if he wore them. Contagious infections are a constant problem, Mr. Martinez said, and several residents had severe, untreated skin staph infections.[7]

Mr. Martinez used the gloves, and then he filed a grievance. A few days later, in September, 2013, CCA guards moved him to a different dorm and no longer allowed him to work. On October 28, 2013, he wrote, "Here you find me writing you this speedy letter to inform you that I have been transfer[ed] to another facility here in Livingston, Texas. I do believe that my transfer was not made [for a] legitimate reason. It was done out of retaliation of writing to[o] many grievances against CCA officials and the way it's being operated. Listen, Jacki[e], this place is worse than CCA."[8] Mr. Martinez reported that on arriving the guards had thrown away his legal papers, the law library was not available, and guards refused to let him file grievances about these and other matters.[9]

Mr. Martinez subsequently was returned to Houston CCA for immigration hearings, and remains there as of April, 2014. The Board of Immigration Appeals remanded his case back to the immigration court for further consideration of Mr. Martinez's evidence of his U.S. citizenship.

7 *Ibid*.
8 Robinson Martinez to Jacqueline Stevens, letter, Oct. 19, 2013.
9 *Ibid*.

PART TWO: OVERVIEW

Those familiar with prison work programs may find Mr. Martinez's experiences unexceptional. They understand, correctly, that those in custody for *purposes of punishment* are subject by statute and regulation to working conditions and compensation that may be exempt under the Fair Labor Standards Act and other state and federal employment laws. But exemptions on this basis apply exclusively to those in the custody for criminal charges, not those in custody for a civil infraction and awaiting an immigration or citizenship status determination or removal from the country. The statutes, codes, and jurisprudence for those in deportation proceedings and criminal custody are largely distinct.[10] *Wong Wing v. U.S.* 163 U.S. 228 (1896), the precedent cited by Rep. Sam Hobbs during 1950 hearings on the bill that became codified as the potential authorization for paying those in ICE custody today,[11] instructs Congress that work requirements that would be legal when construed as a condition of punishment for criminals is forbidden under the Constitution for those in custody under immigration laws. In *Wing* the Supreme Court struck down an 1892 statute mandating hard labor under a legal theory and fact pattern that holds true today for ICE residents today.[12] The decision establishes that penal

10 For a foundational, and still influential, statement on this division, see *Wong Wing v. United States* 163 U.S. 228 (1896) ("[T]he fourth section of the act of 1892, which provides that 'any such Chinese person, or person of Chinese descent, convicted and adjudged to be not lawfully entitled to be or remain in the United States, shall be imprisoned at hard labor for a period not exceeding one year, and thereafter removed from the United States.' inflicts an infamous punishment, and hence conflicts with the Fifth and Sixth Amendments of the Constitution...") at 233-34.

11 "Immigration Service expenses Appropriations now or hereafter provided for the Immigration and Naturalization Service shall be available for payment of ... (d) payment of allowances (at such rate as may be specified from time to time in the appropriation Act involved) to aliens, while held in custody under the immigration laws, for work performed..." (8 USC 1555).

12 Contemporary statutes and ICE's Performance Based National Detention Standards (PBNDS) reference "detainees," not "residents." From 1903, when Congress first established the Bureau of Immigration through at least 1918 Congressional reports and bills refer to immigrants in government custody as "aliens" or "immigrants," not "detainees." They also are referred to in the 1940s as "internees." Contemporary ICE and private prison firm internal documents also refer to "residents," per their civil status. I use the word "residents" because thousands of

conditions imposed on those afforded the protections of the Sixth Amendment right to a trial before a jury are not suitable for those held based on the determinations of federal employees.[13]

Mr. Martinez's experiences as a CCA employee raise several questions. First, what are the official government policies for "work performed by those in custody under immigration laws"? Second, what is the extent and character of ICE resident labor in practice? And, finally, is this legal under our statutes, the U.S. Constitution, and international law?

To address these questions means engaging with several statutes, regulations, rules and their interpretations by agencies and judges working at the intersection of immigration, employment, and prison law; laws and rules on appropriations and budgeting; the Fifth, Sixth, and Fourteenth Amendments; and international conventions and treaties for paying those in detention for their work.

Before going into the relevant statutes and their legislative and case histories, it bears note that perhaps the most salient fact is the program's obscurity, and thus its failure to receive any sustained attention by scholars, policy-makers, or judges. ICE mentions the "Volunteer

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people in ICE custody in recent years are U.S. citizens and because "detainees" is a more recent concept for those held under immigration laws. "Detainee" connotes a one-sided condition of the government's determination, one that assumes a condition of Respondent abjection inconsistent with the lawful implementation of our country's immigration policy. ICE, CCA, GEO and other prison firm contracts and other documents refer to those in ICE custody as "residents." (See Parts III and VII.) The use of "resident" in many of these contexts is admittedly Orwellian double-speak. But rather than concede to the collapse of lawful, rights-bearing U.S. immigrant residents and U.S. citizens into the constellation of "convict," "inmate," and "prisoner" effected by the dehumanizing category of "detainees" this Paper uses a vocabulary that tries to push the government to be accountable to the due process rights afforded Respondents to a Notice to Appear in an immigration court. There are several steps pursuant to that order's execution. These steps and additional classifications as well are part of a system of the rule of law that requires prioritizing restraints on egregious, systemic and often criminal misconduct by the government over those of implementing civil penalties, i.e., detaining and deporting people based only on violations of the immigration laws.

13 See *Zadvydas v. INS* 185 F.3d 279, 289 (1999) ("The *Wong Wing* court distinguished between the unconstitutional act before it--which made illegal presence in the country summarily punishable by a sentence to being 'imprisoned at hard labor' for not more than a year and provided that the alien would be '**thereafter** removed from the United States)-- and detention pending deportation," emphasis added by the Court.)

Detainee Work Program" in its Performance Based National Detention Standards (PBDNDS) but misstates its scope and payments. Moreover, the authorizing legislation delegates to Congress and not ICE the authority to set the compensation. Hence, the program's invisibility to Congress is of special note. It is not referenced in the budgets Department of Homeland Security (DHS) submits to Congress, nor does it appear among the exceptions for the employment of aliens by the federal government in the General Accountability Office (GAO) "Red Book" on appropriations,[14] nor is it referenced in a recent Congressional Research Service (CRS) report surveying immigration detention issues of interest to legislators.[15]

The PBNDS description of the program[16] would lead readers to conclude that it is an insignificant aspect of immigration detention. It provides no hint at the centrality of ICE resident labor to the maintenance and management of the private contractors' facilities. Yet in recent years the GEO Group, Inc., CCA, AKAL Security, Ahtna Technical Services, Community Education Centers (CEC) and several other security firms will have employed ICE residents for millions of shifts of four to eight hours and longer at $1 per day. For 2012, GEO brought in an estimated $33 to $72 million profits from labor savings, and CCA an estimated $30 to $77 million from its labor savings, or about 25% of the company's total profits.[17] The irony is apparent. Firms contracted for detention in service of a policy providing pseudo-protection for the U.S. labor market are increasing their profits hundreds of millions of dollars each year by failing to pay the federally mandated minimum wage, much less that required under the Service

14 Principles of Federal Appropriations Law: Third Edition, Red Book, GAO-04-261SP (2004), http://www.gao.gov/products/GAO-04-261SP, and on file with author.
15 Alison Siskin, Immigration-Related Detention: Current Legislative Issues," January 12, 2012, RL32369. On file with author.
16 The PBDND section on "Volunteer Detainee Work" is discussed below.
17 Please see Tables 1, 2, and 3, below (end of Paper), and accompanying sources.

Contract Act. These funds should be going into the pockets of ICE facility residents or those in the employment sectors of food, janitorial, and housekeeping services as well as painters, plumbers, builders, clerks, librarians, and barbers and beauticians.

The $1 per day wages are so low that the phrase "subminimum wages" is a misnomer. To convey a key characteristic of slavery, in particular the nonnegotiable labor and wage conditions when one party has physical control over the party receiving work orders and compensation, this Paper uses for its legal analysis of the resident worker program the phrase "slaving wages." [18] The phrase "slaving wages" is used hereafter because it evokes the coercion from the monopoly authority of the single employer in the ICE detention facility and is consistent with the terminology of those paid these wages or choosing not to work in the"slave sytem."[19]

In addition to questions about whether the program is just or good economic policy, the"Volunteer Detainee Work Program" prompts questions about its legality: what is the statutory basis for this rate of compensation? This Paper reviews tensions between the policies and employment contracts of ICE and the prison prison firms and relevant portions of the U.S. Code and the Code of Federal Regulations. The specific laws, regulations, and rules under discussion are: Immigration Expenses (8 USC § 1555(d)); the Fair Labor Standards Act (29 USC § 201 et

18 Although there is a general climate of coercion that imbues any request by a guard with the effect of an order, the context for the labor conditions in immigration jails is the monopoly economic power of those managing the ICE facility and the dependence on the commissary to meet basic hygiene and medical needs. While many detention facilities depend on the unpaid work of the residents, I am not aware of corporal punishment used to induce work. This is not just poor optics but also more onerous for the guards than the use of threats, bribes, or the sanctions of segregated housing. ICE residents work at these wages because, unlike respondents who are not detained, they are at the mercy of a single employer, a condition which allows the firm to set wages that are not only in violation of labor and immigration laws but that are a pittance of even slave wages.

19 For example, referring to his work for the CCA Houston ICE detention facility, Frank Serna said of the cooking, cleaning, maintenance done by himself and other workers in detention there: "They slave us." After 14 months of slaving wages, an immigration judge affirmed Serna's U.S. citizenship and terminated his deportation order. Serna EOIR and ICE files, and interview, Houston, July 7, 2013, on file with author. (For other examples, see Part III.)

seq.); Immigration Reform and Control Act (1986) (PL 99-603, and as codified at 8 USC § 1324(a)); Service Contract Compliance Act (41 U.S.C. 351, *et **seq*)**,** as amended Public Law 92-473, as enacted October 9, 1972, and in bold face new or amended language provided by Public Law 94-489, as enacted October 13, 1976; Federal Procurement (42 USC § 6962); Convict Labor Contracts (18 USC § 436; 48 CFR 22 et seq.); 161 FR 31644, June 20, 1996; 28 CFR 94-1(b); Exec. Order 11755, Dec. 29, 1973) [39 FR 779, 3 CFR 1971-1975, p. 837); and the Occupational Health and Safety Act (5 USC § 1101-2013). In addition, budgeting and disbursement laws and rules bearing on the legality of ICE setting the $1 per day rate and paying for this, in at least one instance, through imprest funds (petty cash), also are brought to bear on this analysis.

ICE claims that the payments by CCA and other private prisons are legal garners support from a 1990 Fifth Circuit decision, *Alvarado Guevara v. INS* , 902 F.2d 395 (5th Cir., 1990). This Paper analyzes that opinion in light of three major theories of statutory construction and suggests none overcome the program's *prima facie* violations of laws designed to protect workers and worker wages, health, and safety. Congress in 1950 passed authorization and appropriation bills to pay a relatively small number of residents then held in custody under immigration law for work performed at $1 per day. The program grew out of the work policies for World War Two "enemy alien" and prisoner of war internment camps. Camp residents were paid 80 cents/day and the total cost of their internment was $1 per day, a ratio that approximates that for which this Paper argues for current ICE facility residents.

The authorizing legislation for this portion of Immigration Expenses (8 USC 1555(d))

states that the rate of compensation shall be set "at such rate as may be specified from time to time in the appropriation Act involved." For 29 years Congress did this. But in 1979, a time frame when there were only a handful of detention centers, none privately owned or managed,[20] the Immigration and Naturalization Service (INS), an agency of the Department of Justice (DOJ), deleted the program from the budget it submitted to Congress, and in the last 30 years the program has not appeared in any appropriations acts. Absent any Congressional delegation of authority, ICE and the private prison firms are setting the rate of compensation at 1.7 per cent of the federal minimum wage for an eight hour day,[21] and even less in those states requiring minimum wages above the federal minimum.[22]

Can ICE or its contractors can do so legally? The plain meaning of the relevant statutes suggests ICE noncompliance. The FLSA applies to all employer-employee relations in enterprises that are engaged in interstate commerce and have at least $500,000 in annual gross volume of sales made or business done (29 U.S. C 206(a), 207(a)).[23] 29 U.S.C. 203 (d) defines an "employee" as "any person acting directly or indirectly in the interest of an employer in relation to an employer."[24] The Geo Group, CCA and other prison companies far surpass the

20 For these details, see Part VI.

21 The minimum wage is $7.25, or $58 for eight hours of work, for which $1 is 1.7 per cent. U.S. Department of Labor Wage and Hour Division, *Minimum Wage*, http://www.dol.gov/whd/minimumwage.htm (last accessed 09/22/2013).

22 For instance, the GEO-run facility in Tacoma, Washington should adhere to its minimum wage of $9.32/hour, for a total of $74.56/day, of which $1 is 1.3%.

23 "To employ" "as used in this chapter" is "to suffer or permit to work" (29 USC 203 (g)). The interstate commerce criterion is met when a business purchases goods such as uniforms or cars from another state, which means FLSA obligates most service industries as well as small businesses. Regulations implementing definitions for federal employees are discussed below.

24 And see, e.g., *Goldberg v. Whitaker House Coop.,* 366 U.S. 28, 33 (1961) ("The management...can hire or fire the homeworkers...[T]hese powers make the device of the cooperative too transparent to survive the statutory definition of 'employ' and the Regulations governing homework. In short, if the 'economic reality' rather than technical concepts' is to be the test of employment (*United States v. Silk*, 331 704, 713; *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 729), these homeworkers are employees.")

cut-off for gross sales;[25] ICE residents to work at a range of jobs in the detention facilities under conditions that meet the definition of an "employer-employee."

The FLSA applies to the federal government as well as the private sector. Pay Administration Under the Fair Labor Standards Act (5 CFR §551.103) states:

> (a) *Covered.* Any employee of an agency who is not specifically excluded by another statute is covered by the Act. This includes any person who is:
>
> (1) Defined as an employee in section 2105 of title 5, United States Code;
>
> (2) A civilian employee appointed under other appropriate authority; or
>
> (3) Suffered or permitted to work by an agency whether or not formally appointed.

Those in ICE custody are "suffered or permitted to work" and not excluded from coverage by any other statute. In addition to federal employment laws, ICE and its contractors must comply with federal procurement laws as well as occupational health and safety laws.[26] Under a reading of the plain meaning of these statutes, none provide exemptions from wage or other employment laws for work performed by those housed by ICE under immigration laws, nor does any other law or regulation.

Under 5 USC 707 (C) (2000) in assessing the legality of agency actions, "the reviewing court shall"

> (1) compel agency action unlawfully withheld or unreasonably delayed; and (2) hold unlawful and set aside agency action, findings, and conclusions found to be—

25 In 2012, CCA alone generated revenues of $1.7 billion. Lee Fang, *How Private Prisons Game the Immigration System*, The Nation, Feb. 27, 2013, *available at* http://thenations.com/article/171320/how-private-prisons-game-immigration-system. The industry as a whole generated $22.7 billion in 2010. D.M. Levine, *What's Costlier than a Government Run Prison? A Private One*, CNNMoney, (August 18, 2010), http://money.cnn.com/2010/08/17/news/economy/private_prisons_economic_impact.fortune/.

26 5 USC 41 §§ 1101-2013 (2011). Labor costs comprise the vast majority of expenditures for ICE detention contracts and union negotiations for the Collective Bargaining Agreeements (CBAs) to which the federal procurement laws obligate contractors can significantly increase costs. At El Centro, a renegotiation of wages with the Security, Police, and Fire Professionals of America union "increased the contract by $11,828,485.76 from $21,795,300.80 to $33,623,786.56" at different annual renewals. Department of Homeland Security, *ICE Contract Number ACL-0-R-0003*, 329, on file with author.

> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
> (B) contrary to constitutional right, power, privilege, or immunity;
> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
> (D) without observance of procedure required by law;
> (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
> (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.
> In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

Although there is an approach to statutory interpretation that could accommodate the $1 per day payments (a "purposive" construction that defers to intuitions of the judges and not statutory text or its legislative history), the one most favored today-- the plain meaning rule, requiring deference to the ordinary meanings of the words in the statute and an implied repeal analysis the reconciliation of apparently conflicting statutes to effect each to the fullest extent possible[27] -- seems to require implementation along lines quite different from ICE's present procedures.

Absent Congressional action, the implementation of the program that still would follow the plain text of the laws at present, including protecting wages of those employed by federal contractors would require ICE paying those an hourly wage at the rate set by the FLSA, and limiting the number of hours ICE residents were allowed to work. The scenario closest to that contemplated by the intersection of the relevant laws would allow ICE residents to work at minimum wage for up to two hours per day, with the balance of the work performed by the U.S. labor force per the conditions of the Service Contract Act (SCA). Such limits would accommodate the goals of the SCA-mandated adherence to the FLSA and also IRCA, all of which are incorporated into each ICE contract. In brief, the remedy suggested by a plain

27 "By far the most important rule of statutory construction is this: You start with the language of the statute." Red Book, 2-74.

meaning of the statutes at hand entails:

1) Payments to ICE facility residents for all work performed for ICE contractors at a rate no less than the federal minimum wage (which requires deference to higher state minimum wages);

2) Potentially capping the number of hours worked by ICE facility residents, in deference to IRCA, passed 36 years after 8 USC 1555 (d) ;

3) Full coverage under OSHA, including grievance procedures entirely separate from the demonstrably unregulated and inadequate ones currently in place.

Further context counseling this approach is the Convict Labor Contracts Act (setting for penalties if U.S. employees or agents "hire out the labor of any prisoners,"18 USC § 436), and the Convict Labor regulations, Subpart 22.2 of 48 CFR et seq., the federal regulation implementing the SCA, designed to constrain the effect of prison work programs on the labor market,[28] the purpose as well of the regulations implementing the Prison Industries Fund through the Inmate Pay and Benefit regulations (18 USC § 4126, 28 CFR Part 345, Subpart F). These effect the Congressional efforts to maintain prevailing wages in a community and provide some employment protections for prisoners in federal custody. Under the interpretive strategy proposed here, there would be a cap on the hours of work by those in ICE custody and the balance of work now performed would be done under the terms of federal procurement and immigration emplyment laws.

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The scholarly field of statutory interpretation is dense and rich with opportunities for

28 See *infra,* Parts IV-VII.

considering competing political theories of governance and jurisprudence. The approaches to the questions evaluated herein are: 1) the plain meaning of the statutory texts; 2) Congressional intent based on legislative history; and 3) Congressional purpose, as construed by the judge based on criteria and evidence largely distinct from those in the first two approaches. While in a specific decision, any one of these approaches on closer inspection may dissolve into another,[29] the approach here favors the first on the grounds that it is most amenable to citizens holding their government accountable. To the extent that the statute's current meaning is informed by a 1990 Fifth Circuit decision relying on Congressional intent and purpose, and not the plain meaning of the statutes, this Paper reviews the history of the relevant laws and shows that the guess work among the Fifth Circuit district court and appellate judges has no basis in the historical record.

The plain text of the FLSA does not exempt those working for private prison firms, including those in immigration custody, nor does 8 USC § 1555 (d). The government's defense, reviewed below, is the 1978 appropriation Act, which expired in October of 1979. This Paper reviews the relevant authorities for this claim. The most important legislative fact is that in 1979 the INS removed the program from the Congressional appropriations process and delegated to themselves the authority to set these wages, in violation of the clear language of the authorizing statute. After 1982, the INS under the DOJ ,and now ICE under the DHS, have failed to reference the payments in any of their budget submissions or public expenditures. 8 USC § 1555 (d) does not exempt the government or its contractors from paying the minimum wage, nor does

29 The GAO Red Book, explaining the "plain meaning" approach states, "The law as it passed is the will of the majority of both houses, and the only mode in which that will is spoken is in the act itself; and we must gather their intention from the language there used..." (*Aldridge v. Williams*, 44 U.S. (3 How.) 9, 24 (1845)). As another example of the first approach, the Red Book goes on to state, "'There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes." *United States v. American Trucking As'ns*., 310 U.S. 534, 543 (1940)."

it exempt ICE from 8 USC § 1324a. If Congress, INS, or ICE prefers a policy of funding a program that pays workers profiled, correctly or incorrectly, as illegally in the country at a rate below minimum wage then this requires passage through an appropriations Act. Furthermore, were Congress today to authorize a rate below the minimum wage, this could be challenged as well for violating rates established the Department of Labor (DOL) as it implements the FLSA, under the Constitution's Sixth and Thirteenth Amendments.[30]

Those familiar with administrative law will recognize the scenario anticipated by the case law adjudicating between the prerogatives of the legislative and executive branches. While the Court has carved out areas of deference to administrative discretion, it also has set aside from this discretion certain laws and actions. *Chevron v. National Resources Defense Council*, 467 U.S. 837 (1984), according to the American Bar Association, does not empower agencies to ignore statutes and regulations that apply across departments: "*Chevron* principles do not apply to agency interpretations (a) of statutes that apply to many agencies and are specially administered by none, such as the APA, FOIA, or the National Environmental Policy Act."[31] Furthermore, "In the event of conflict between the provisions of a statute and an administrative regulation, the former prevails" *Colgate Palmolive-Peet Co. v. NLRB* 338 U.S. 355 (1949). Finally, there is a general practice of courts interpreting remedial statutes broadly.[32] (A more complete discussion of relevant cases appears in Parts IV-VII.)

To take these considerations in turn: 1) the Service Contract Act, which requires agencies

30 *United States v. Langston* 118 U.S. 389 (1886), overturning appropriation of $5,000 for salary of representative to Haiti in conflict with authorizing statute setting the level at $7,500. A more complete legal analysis appears in Part III.

31 "Blackletter Statement of Administrative Law," prepared by the Section of the Adminsitrative Law and Regulatory Practice of the ABA, Administrative Law Review 54:1 2002. p. 39

32 Lawrence Solon, Language of Statutes: Laws and their Interpretation (2010), at 190.

to abide by the FLSA, applies to all agencies and is referenced in ICE contracts; 2) the ICE PBNDS is an agency manual, not a regulation and thus is an object of statutory interpretation and not its basis; and 3) the FLSA and OSHA are remedial laws and the implementing language of the former explicitly invites broad application.

While the plain meaning of the laws in question and favored practices of statutory construction would seem to require a complete revamping of contracting work for ICE detention facilities, empirical research suggests judges are likely in such circumstances to intervene based on their political commitments[33] and could invoke less favored approaches, especially those relying on the imputations to the statutes in play of imagined Congressional intent, purpose, or, in the case of Richard Posner, "pragmatism."[34] This Paper argues the norms animating judges construing statutes more broadly than logically or physically necessary in the area of prison and immigration detention work bears note and is a cause for concern. The approach favored here is consistent with an interpretation following the doctrine of analysis relying on the rule of implied repeal, an approach that cautions against weakening any portion of a law absent express statutory statements authorizing this.

One of the classic cases illustrating this approach is *TVA v. Hill*, 437 U.S. 153 (1978), a case in which the Court was faced with a tension between a Congressional appropriation for a dam, on the one hand, and Congress's recently passed Endangered Species Act (ESA), a lawsuit that elevated the "snail darter" to iconic status in the annals of U.S. political discourse. The Court ruled that despite the Congressional authorization and appropriation for a dam, the

33 Tom Miles and Cass Sunstein, "Do Judges Make Regulatory Policy?" An Empirical Investigation of Chevron" University of Chicago Law Review, 73: 823-81 (2006).

34 How Judges Think (2008).

project's threat to the survival of the snail darter, in violation of the ESA, took precedence. The Court acknowledged that most members of Congress may have preferred the dam over the reptile, but did not move to interpret the issue based on this hunch:

> ...we are urged to find that the continuing appropriations for Tellico Dam constitute an implied repeal of the 1973 Act, at least insofar as it applies to the Tellico Project. In support of this view, TVA points to the statements found in various House and Senate Appropriations Committees' Reports...Since we are unwilling to assume that these latter Committee statements constituted advice to ignore the provisions of a duly enacted law, we assume that these Committees believed that the Act simply was not applicable in this situation. But even under this interpretation of the Committees' actions, we are unable to conclude that the Act has been in any respect amended or repealed.
>
> There is nothing in the appropriations measures, as passed, which states that the Tellico Project was to be completed irrespective of the requirements of the Endangered Species Act. (at 189)[35]

Absent any specific exclusion of the Tellico Dam from the ESA, the Tennessee Valley Authority was obligated to follow the ESA, just like any other agency.[36]

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35 For an excellent discussion of the case, see Daniel Farber *Statutory Interpretation and Legislative Supremacy* , 78 Geo. L.J. 281 (1989),
Available at: http://scholarship.law.berkeley.edu/facpubs/1533/.

36 Further context illustrates the advantages of this example. First, the Burger court was known for its moderation. The majority opinion was authored by Chief Justicer Burger and joined by William Brennan, Thurgood Marshall, Potter Stewart, John Paul Stevens, and Byron White (4 Republican appointees, 2 Democrat appointees). Charles Lamb and Stephen Halpern, "The Burger Court and Beyond," The Burder Court: Political and Judicial Profiles, ed. Charles Lamb and Stephen Halpern (University of Illinois Press: Champaign-Urbana, 1991), pp. 433-462. Moreover, the dissent by William Rehnquist eschews attention to the text of the ESA and advocates a more open-ended "equities" approach to statutory construction: "This Court has specifically held that federal court can refuse to order a federal official to take a specific action, even though the action might be required by law, if such an order "would work a public injury or embarrassment" or otherwise "be prejudicial to the public interest." *TVA v. Hill* at 213, citing *United States ex rel. Greathouse v. Dem*, 289 US 352 (1933)

In the case of the wages for those held in custody under immigration laws, only ICE, not Congress, has set the wage and it is by no means obvious that Congress would support the $1 per day rate; additional Constitutional concerns about rights under the Fifth, Sixth, Thirteenth, and Fourteenth amendments also might favor deference to the FLSA minimum wage requirements. *TVA v. Hill* and other cases, discussed below, suggest that on an implied repeal analysis, the only way to evade the statutory requirements under the FLSA and OSHA would be if Congress were to exempt those in custody under immigration laws in the respective statutes, although this would invite various Constitutional challenges, discussed below.

The implied repeal approach offered here is on behalf of a legislative supremacy view of these cases that emphasizes the larger goal of citizens being able to meaningfully engage the laws their representatives pass, an objective foiled once judges stop relying on the laws' ordinary meanings.[37] Rather, the insistence on statutory construction based on the plain meanings of the statutes, regulations, and rules is on narrower grounds: this is the approach most conducive to citizens holding their government accountable to the laws they pass. There is a well-developed literature on statutory interpretation premised on the observation that in certain contexts the plain meaning of the statute would, if implemented, lead to "absurd" results,[38] including those not

(petitioners not entitled to harbor rights against the federal government's authorization of public highway). Finally, in response to the lawsuit, Congress drafted an amendment to the ESA and it passed shortly after the Supreme Court decision, a course of events that protected the rule of law if not the snail darter. Chris Clarke, "The Endangered Species Act: 40 Years of Compromise," Rewild, Commentary, January 2, 2014, http://www.kcet.org/news/redefine/rewild/commentary/the-endangered-species-act-40-years-of-compromise.html/. This implies a) the judge-crafted equities approach lost; and b) Congress is capable of weighing equities itself and does not need judges to intervene.

37 For a fuller explanation of this approach and its stakes, see Hanna Pitkin, Wittgenstein and Justice: On the Significance of Ludwig Wittgenstein for Social and Political Thought (1973).

38 The foundational case for this doctrine is *Church of Holy Trinity v. United States*, 143 U.S. 457 (1892). For an excellent review of its role in statutory construction and new historical information, see Adrian Vermeuele, The Untold Story of Holy Trinity Church 50 Stanford Law Review 1833 (1998). And see more generally John Manning The Absurdity Doctrine, 116 Harvard Law Review 2388 (2003).

contemplated by Congress. However, on closer inspection many of the paradigmatic apparent hard cases, including those brought to the fore by Judge Posner in his academic writings and published opinions, yield non-absurd outcomes to a plain meaning analysis, including the implied repeal variant of this.[39] Importantly for the analysis that follows, the apparently "absurd" exceptions vanish after those laws obligating law enforcement officials to perform their duties are considered. Since Posner himself has authored a recent decision dismissing as absurd an FLSA lawsuit brought by those housed under post-conviction orders it is especially important to assess his jurisprudence on this point.[40] Highlighting this explicitly in an implied repeal analysis allows for focused attention on the duties of those whom the public obligates to enforce our laws. Attending to the moving pieces of democratic self-rule makes explicit the underlying weighting of different laws and procedures, unlike a vaguer, judge-imposed equities analysis that is driven by general outcomes.

In addition to allowing citizens a more transparent and accountable government, a cautious, text-based implied repeal approach also highlights its tacit use by government prosecutors, who may, for instance, decline to prosecute each other for possessing pornography evidence[41] and foregrounds how a citizen attorney general might use the rule of law to check the government, including the prosecutors themselves, when the government proves unable to check itself. That is, Congress and the Court have through various laws, including the Federal Torts

39 The classic case of *The Church of Holy Trinity* responsible for the "absurdity doctrine" itself could have been resolved on behalf of the Irish minister if the Court had used the statute's exception for the class of "lecturers," of which ministering is one example, as Laurence Tribe has argued (cited in Adrian Vermeule, n Vermeule, Legislative Hisotry and the Limits of Judicial Competence: The Untold Story of Holy Trinity Church, Stanford Law Review, 50 (1998) at 1896.

40 See Part VII.

41 Solon, Language of Statutes, p. 173.

Claims Act (28 USC § 2674) and *Bivens*[42] relief, implied the repeal of the government's sovereign immunity and put in place various standards for assessing its availability.

The underlying political theory behind this preference for a plain meaning approach emerges from considerations of importance of transparency in protecting citizens from the government, artfully summarized by John Locke on the occasion of him criticizing the monarchists for overreaching the prerogatives of their sovereignty:

> To ask how you may be guarded from harm, or injury, on that side where the strongest hand is to do it, is presently the voice of faction and rebellion: as if when men quitting the state of nature entered into society, they agreed that all of them but one, should be under the restraint of laws, but that he should still retain all the liberty of the state of nature, increased with power, and made licentious by impunity. This is to think, that men are so foolish, that they take care to avoid what mischiefs may be done them by *pole-cats* or *foxes*; but are content, nay think it safety, to be devoured by *lions*. (II, sec. 93).

It is certainly the case that laws may be passed that favor lions, but the Bill of Rights favors pole-cats. This translates into a jurisprudence that would argue against narrow literalism for cases challenged under the Constitution, and counsel a different approach to statutory interpretation.

Part III Voluntary Work Program: Policy and Practice

42 *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971).

The Performance Based National Detention Standards (PBNDS) is the contemporary government document defining the work program discussed in this Paper.[43] Five and a half pages, set in two columns of large type and without any citations to legal authorities, Section 5.8 of the PBDNDS is the only publicly available government document characterizing the "Voluntary Work Program" affecting hundreds of thousands of people being paid $1 per day or less in service of one of the most profitable sectors of the economy. The document's key statements characterizing the program are repetitive, vague, internally inconsistent, and not followed in practice. It provides only *pro forma*, i.e., largely informal and unenforceable, standards for worker protections. The PBNDS indicates as an authority for the work program a code authored by the American Correctional Association (ACA),[44] even though the ACA is a professional association of corrections officers and the purpose of ICE custody is not to punish, reform, or otherwise "correct" their residents.

Part III Section A quotes and analyzes the portions of the PBNDS most relevant to assessing the program's legality. Section B compares the program on paper with its implementation across ICE detention facilities. Section C reports on how ICE documents shared with Congress omit reference to the program and mischaracterize the safeguards for ICE resident workers.

Section A quotes and analyzes the portions of the PBNDS most relevant to assessing the program's legality. Section B compares the program on paper with its implementation across

43 The original "National Detention Standards" came about in the aftermath of yet another hearing on the poor conditions in the INS detention centers in the 1970s and 1980s. The "Performance Based" nomenclature is consistent with a shift required by new budgeting procedures, whereby agencies were required to elaborate quantifiable metrics of outcome-based, and not procedural, performance.

44 American Correctional Association, Performance-based Standards for Adult Local Detention Facilities, 4th Edition, 4ALDF-5C-06, 5C-08, 5C-11(M), 6B-02 (2004).

ICE detention facilities. Section C reports on how ICE documents shared with Congress omit reference to the program and mischaracterize the safeguards for ICE resident workers.

A. Policy stated in Performance Based National Detention Standards (PBNDS)

Highlights (Portions in italics duplicate the ICE style indicating changes from 2008 PBNDS):

Legal Work and Safety Obligations:
a) "While not legally required to do so, ICE/ERO affords working detainees basic Occupational Safety and Health Administration (OSHA) protections." (p. 382)
b) "Detainee working conditions shall comply with all applicable federal, state, and local work safety laws and regulations." (p. 382)
c) "All detention facilities shall comply with all applicable health and safety regulations and standards." p. 386
d) "1. The voluntary work program shall operate in compliance with the following codes and regulations: a. Occupational Safety and Health Administration (OSHA) regulations; b. National Fire Protection Association 101 Life Safety Code; and c. International Council Codes." p. 387

Non-dedicated IGSAs:
a) "Non-dedicated IGSA [Intergovernmental Service Agreement] facilities must conform to these procedures or adopt, adapt, or establish alternatives, provided they meet or exceed the intent represented by these procedures." (p. 382)
b) "*Non-dedicated IGSAs will have discretion on whether or not they will allow detainees to participate in the program.*" (p. 383)

Program availability:
a) "Detainees shall be able to volunteer for work assignments but shall not be required to work, except to do personal housekeeping." (p. 382)
b) "Detainees who are physically and mentally able to work shall be provided the opportunity to participate in a voluntary work program." (p. 383)
c) "Non-dedicated IGSAs will have discretion on whether or not they will allow detainees to participate in the program." (p. 383)

Program purposes:

a) "Essential operations and services shall be enhanced through detainee productivity." (p. 382)
b) "The negative impact of confinement shall be reduced through decreased idleness, improved morale, and fewer disciplinary incidents." (p. 382)

Program location

a) "This detention standard incorporates the requirements regarding detainees' assigned to work outside of a facility's secure perimeter originally communicated via a memorandum to all Field Office Directors from the Acting Director of U.S. Immigration and Customs Enforcement (ICE) Enforcement and Removal Operations (ERO) (11/2/2004)." p. 383
b) *"In SPCs, CDFs, and dedicated IGSAs, low custody detainees may work outside the secure perimeter on facility grounds. They must be directly supervised at a ratio of no less than one staff member to four detainees. The detainees shall be within sight and sound of that staff member at all times."* p. 383

Work Assignments

a) "Work assignments are voluntary."
b) *"The primary factors in hiring a detainee as a worker shall be his/her classification level and the specific requirements of the job."* p. 384
c) "*Staff shall present the detainee's name to the shift supervisor or the requesting department head.*"
d) "*The shift supervisor or department head shall assess the detainee's language skills because these skills affect the detainee's ability to perform the specific requirements of the job under supervision*."
p. 384
e) "*Inquiries to staff about the detainee's attitude and behavior may be used as a factor in the supervisor's selection."* p. 384
f) "Detainees may volunteer for temporary work details that occasionally arise. The work, which generally lasts from several hours to several days, may involve labor-intensive work." p. 384
g) "Detainees who participate in the volunteer work program are required to work according to a schedule. The normal scheduled workday for a detainee employed full time is a maximum of 8 hours daily, 40 hours weekly."
h) "Unexcused absences from work or unsatisfactory work performance may result in removal from the voluntary work program."
i) "A detainee may be removed from a work detail for such causes as:
1. unsatisfactory performance; 2. disruptive behavior, threats to security, etc.; 3. physical inability to perform the essential elements of the job due to a medical condition or lack of strength; 4. prevention of injuries to the detainee; and/or 5. a removal sanction imposed by the Institutional Disciplinary Panel for an infraction of a facility rule, regulation or policy."
j) "The detainee is expected to be ready to report for work at the required time and may not leave an assignment without permission."

k) "The detainee may not evade attendance and performance standards in assigned activities nor encourage others to do so."

Compensation

a) "Detainees shall receive monetary compensation for work completed in accordance with the facility's standard policy."
b) "The compensation is at least $1.00 (USD) per day." (p. 385)
c) "The facility shall have an established system that ensures detainees receive the pay owed them before being transferred or released." (p. 385)

Procedures for Workers to Challenge "Unfair" Treatment

a) "Detainees may file a grievance to the local Field Office Director or facility administrator if they believe they were unfairly removed from work, in accordance with standard '6.2 Grievance System.'" (p. 385)

2. *Prima Facie* Questions

Work Location Unclear

One section references "work outside of the facility's secure perimeter." Another section states ICE residents may "work outside the secure perimeter on facility grounds" and "may not work outside the secure perimeter of non-dedicated IGSA facilities." The plain language renders it impossible to discern whether ICE facility residents are authorized to work outside facility grounds in dedicated ICE facilities, for instance, to clear trash off highways, as often occurs in prison work programs, or only outside the building, while remaining on facility grounds.

Employment and Immigration Laws

The document uses throughout terms of art that characterize an employer-employee

relation under the FLSA and also IRCA, and also implies OSHA's applicability. But the document ignores the FLSA and IRCA, and specifically exempts ICE from an obligation to protect their rights under OSHA. For instance, the document references "hiring a worker"; the "assessment of language skills because these skills affect the detainee's ability to perform the specific requirements of the job under supervision"; a "require[ment] to work accoridng to a schedule," with failure to do so a cause for firing; and "normal scheduled work day of no more than 8 hours." Having covered all the requirements of the definition of an employee-employer relation in the FLSA and contemplated by IRCA, and providing no legal authority for an exemption, including 8 USC 1555 (d), the PBNDS nonetheless indicates compensation well below the one that is legally available to the agency.

OSHA Legal Obligations[45]

The document tells contractors that the program "shall operate in compliance with OSHA" and also that ICE is not obligated to require this of the contractor. OSHA compliance requires engagement with OSHA's non-discretionary site reviews, assessments, and whistleblowing opportunities, as well as compensation for worker injuries, all of which ICE denies ICE residents. "Compliance with OSHA" means following its mandates for complaints and remediation, the terms of which are violated by the internal and effectively non-existent review of worker grievances set forth in the PBNDS.

45 Occupational Safety and Health Act of 1970, Public Law 91-596, December 29, 1970, as amended, 29 USC 15 et seq., for operational details, please see http://www.osha.gov/.

Non-dedicated IGSAs

The document allows "non-dedicated IGSAs," i.e., typically county jails with a wing rented out to ICE, to "establish alternatives [to the work program], provided they meet or exceed the intent represented by these procedures" (382). However, there is no guidance as to the alternatives. Does this include the current ICE resident participation in the "chain gangs" of Butler County, Ohio?[46] How many of the procedures may be ignored? Which ones must be followed? Absent criteria, it is impossible to contemplate either a successful alternative or how it might be evaluated for about half of all ICE residents[47] held among three-quarters of facilities holding people for over 72 hours.

Program availability

The document indicates that detainees are to be availed the opportunity to work, and also requires non-dedicated IGSAs to provide alternatives, both requirements contradicted by the portion of the document stating "Non-dedicated IGSAs will have discretion on whether or not they will allow detainees to participate in the program."

Compensation

46 Butler County Sheriff's Office, Sheriff Richard K. Jones, "BCSO jail 'Chain Gang' makes major haul, 04-10-2009," Press Release, from Butler County website, http://www.butlersheriff.org/, on file with author.

47 ("The other 50 percent of the population is detained primarily in non-dedicated or shared-use county jails through IGSA.") Dora Schrirro, Immigration and Customs Enforcement, Immigration Detention Overview and Recommendations, (October 6, 2009), p. 10; and for data on the absolute number of non-dedicated IGSA facilities, see Federal Register, Vol. 77, No. 244, December 19, 2012, Proposed Rules, Table 1, p. 75320, indicating 74 non-dedicated IGSA, 6 Service Processing Centers (SPC), 7 Contract Detention Facilities (CDF), and 7 Dedicated IGSAs.

The compensation policy in one place states that it is "at least $1 per day," but in another that it is "in accordance with the facility's standard policy." These two sentence can be read as meaning that all facilities compensate people at the rate of at least $1 per day. However, since the non-dedicated IGSAs are not obligated by these requirements, their compensation policies could (and do) mean anything from paying people in food to simply ordering work and locking people up in solitary confinement if they fail to comply, information omitted from these procedures. Also, the fact that the PBNDS allows for a rate higher than the $1 per day last authorized by Congress in 1978 indicates that ICE is not using the fiscal year 1979 appropriation Act -- limiting payments to "no more than $1 per day" -- as the authority for its compensation, a fact with possible legal implications, explored below.

3. Implementation

In addition to questions arising about statements internal to the document, there are significant discrepancies between how ICE represents this program in the PBNDS and the program as implemented.

Program Purpose

Of special relevance to the concerns of this Paper is the discrepancy between program objectives in the PBNDS and those appearing in the ICE contracts and the facilities themselves. The incentives and management for the work programs of the non-dedicated IGSAs appears to be ad hoc. In some locations they are paid $1 per day and this is in the IGSA contract. Or the IGSA facility may provide this payment, despite the program not being mentioned in the IGSA

contract. Elsewhere the ICE resident workers may be paid with food and other perks unavailable the general population. Or, they may simply work, with or without *de minimus* compensation, because they are ordered to do so. (That an IGSA facility might compensate labor through barter arrangements rather than cash payments would not exempt them from either IRCA mandates against hiring undocumented workers nor the requirements of the FLSA.)[48]

The ad hoc nature of the program's implementation suggests that the program's sole objective is to suit the work requirements of the facilities, and not to boost ICE residents' morale. If the latter were the objective, then the work opportunities would be based on the characteristics of the ICE residents and not the preferences of the contractor. An examination of the contracts, Requests for Proposals (RFPs), Requests for Quotations (RFQs), and Requests for Information (ROIs) suggests the prominence of detainee labor as a consideration in budgeting and bidding.

ICE claims the program is for "reduced idleness, improved morale, and fewer disciplinary incidents."[49] If this were the genuine goal then ICE would make sure that all of those in its custody had the benefit of this program. The trigger for coverage would be whether an institution or a segment therein had morale or disciplinary problems and not work requirements of the contractors, as the program's actual implementation reveals. When ICE needs to exploit respondents in ICE custody to save money, it does so, and when it can piggy back through its IGSAs on the legal exploitation of prisoners, then ICE drops the pretense of concern about idleness and morale or simply orders residents to work for pay in kind or no pay at all.

To accurately reflect the imperative to make explicit the availability of labor at slaving

48 Their possible legal defense of the reference to the Volunteer Work Program in the PBNDS is discussed in Parts IV-VI.

49 Department of Homeland Security Immigration and Customs Enforcement, *Performance-Based National Detention Standards 2011, available at* http://www.ice.gov/detention-standards/2011/ (2011).

wages in those contexts where bidding is occurring, the PBNDS would need to state that the $1 per day payments[50] are to provide information required by firms and counties needing to calculate their bids based on assurances that the labor costs of plumbing, carpentry, painting, cleaning services, laundry, food preparation, barber and beautician services, and miscellaneous kitchen work (food preparation, kitchen cleaning, busing trays to dorms),[51] will be at $1 per day.

To show how much firms save through these arrangements, this section reviews the disparities between federal contract and wage laws and actual outlays on ICE resident labor for 2009 to 2010 at one facility and then connects this with the terms of additional contracts, including the exchange of bidding firm questions and ICE responses. Payments for resident labor varies by the staffing needs of the facilities. Inferring from amounts budgeted and spent at various facilities in recent years, as well as interviews with those who have been in ICE detention, it appears as though approximately 30% of those at facilities that do not house prisoners labor at shifts central to the facility's contracted Scope of Work each day, and that about 50% of all those held in such conditions for more than a few days[52] will be so employed at some point .[53]

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50 The ACLU indicated that a barber at Stewart CCA was paid $3 per day, see *supra* Cole at p. 57. This discrepancy may have legal significance and is discussed in Part IV.

51 Also of note are the substantially lower per diem charges for running the facilities that appear consistently in the non-dedicated IGSA contracts, about 40% to 60% less than the payments to CDFs, SPCs, or dedicated IGSA facilities, These disparities are consistent with kick-backs and hard otherwise to explain. I have no evidence this has occurred at the federal level, though I have received specific and plausible allegations of this in one city. (Personal communications with a citizen concerning the efforts of a major private prison firm to build a dedicated ICE facility, alleging bribery of elected officials. The plan was eventually withdrawn following sustained protests from various stakeholders.)

52 During FY2010, 90% of the ICE detainee population was housed for two months or less; 51% of that population were housed for two weeks or less, and 25% were housed for one to three days. Less than one percent of the population remained for more than one year. Source: Department of Homeland Security, Denver Request for Proposals, Statement of Objectives, p. 2. On file with author.

53 In October, 2010, $6,081was disbursed by Asset Protection and Security Services, Ltd (APSS) for its "Detainee Pay-Work Program" at the El Centro Service Processing Center, a 450 bed capacity facility about a two hour

Extrapolating from this to the entire 34,000 people Congress has required ICE to lock up each night[54] would mean about 7,500 per day working for the private prison firms for one dollar per day,[55] a figure that does not encompass the non-monetized forced labor across all facilities, and discussed below.[56] The numbers here are just a guideline; even when ICE releases the data the law obligates, these numbers will not capture the exchanges of work for food and other perks

drive east from San Diego. 2011FOIA13921, 10 (Sep. 11, 2011), *available at* http://www.governmentillegals.org/2011FOIA13921SlaveLabor.pdf and on file with author. APSS contract was to manage the El Centro facility and to pay those in its custody "1.00 per day per detainee." Department of Homeland Security, *Detention Services Solicitation Number: HSCEDM-09-R-00008*, 003 (2009), *available at* https://www.fbo.gov/index?s=opportunity&mode=form&id=bab95d17227113f8db7e219f9df5fc06&tab=core&_cview=1. Mathematically, it is possible that for the $6,081 spent on resident labor between 196 and 6,081 individuals were paid $1 day for from one to 31 days of labor in October ($6,081/31 days = 196 people and $6,081/$1 per day = 6,081 days of individual employment). However, the low end is unlikely for several reasons. First, ICE standards prohibit more than 5 days of work/week; second, ICE data indicate turnover among the population inconsistent with this. It is mathematically possible that the legally minimum 304 people (6081/20) who started work on October 1, 2010 would all be detained on October 31, 2010 but practically unlikely. This range is consistent with the ACLU's 2012 study. Of the 28 Stewart CCA residents interviewed, 12 or 43% reported working there. Alexandra Cole, Prisoners for Profit, ACLU, Georgia (May, 2012), p. 15. In 2010 the ADP for El Centro was 457, yielding 43% average daily employment for October, 2010 ([6081/31]/457], although the average ADE for the year is closer to 30% (see Table 3). For the ADP for El Centro and other facilities from 2007-12, see ICE, ERO LESA Statistical Tracking Unit, FY2008-FY2012, Average Daily Population by Requested Facilities, FOIA 14-06388, available at http://deportationresearchclinic/.

54 Department of Homeland Security Appropriations Act of 2014, H.R. 2217, 113th Cong. § 544 (2013), *available at* http://thomas.loc.gov/cgi-bin/query/F?c113:3:./temp/~c113KIDRKP:e13952 / or on file with author. Note that ICE in recent years has been detaining people in numbers approximating this target (34,000 fy2013; 34260 fy2012; 33,360 fy 2011), source: DHS, Annual Report, 2012-2014, at p. 46 of ICE section and 1388 of pdf.)

55 Assuming approximately 25,000 ICE residents in private facilities each day, and the average time in detention in ICE data, as well as a maximum $20/month available for each individual so employed and .30 ADE. (Sources: Cody Mason, Dollars and Detainees, Appendix A (2012), p. 22, at http://sentencingproject.org/doc/publications/inc_Dollars_and_Detainees.pdf/ (data on ADPs by private firm); Department of Homeland Security, Denver Request for Proposals, Statement of Objectives, p. 2 (51 per cent released before 2 weeks); PBNDS 5.8 (prohibits more than 5 paid shifts/week) and El Centro disbursements often are in increments of $20, consistent with one individual's monthly pay; and .30 ADE is average across firms with amounts in contracts or disbursements. These are estimates and not restatements of government data for three reasons. First, much of the labor in these facilities is coerced, especially among ICE residents in spaces leased in dual-use prison or criminal jail facilities. Second, ICE field agents have ignored their FOIA analysts's requests for this information, see Jacqueline Stevens v. United States Immigration and Customs Enforcement 1:14-cv-03305 (May 6, 2014). Finally, the agency officials regularly lie to the press and Congress to avoid embarrassment; thus any aggregate numbers the agency may release are inherently unreliable. (See, e.g., Jacqueline Stevens, U.S. Government Unlawfully Detaining and Deporting U.S. Citizens as Aliens, Virginia Journal of Social Policy and the Law, 18:3 (2011), note 37 (quoting and citing ICE agents in 2008 and 2009 denying the agency deports U.S. citizens); John Morton letter to The New Yorker (May 27, 2013) (stating ICE no longer detains or deports U.S. citizens); and Department of Homeland Security, *U.S. Department of Homeland*

or threats and thus significantly understates the actual work performed.

Nonetheless using just the data on the payments ICE has made shows us that if Asset Protection and Security, SVC[57] were paying its El Centro facility workers per the SCA, the firm would have paid about ***$583,000 for October, 2010, not $6,081***. Over the course of June, 2009 to May, 2010, the payments to thousands of immigrants and U.S. citizens held in El Centro alone, paid at just minimum wage and not at California's minimum wage (per the FLSA and the Service Protection Act), the firm's expenditures would be *between* ***$1.93 million*** (at four hours per day) and ***$3.86 million*** (at eight hours per day) *and* ***not the $66,552*** actually spent on wages during that period.[58] For payments consistent with the FLSA, SCA, and IRCA, the total expenditures would have been over $5 million (see end of Paper, Table One--note that differences are from different parameters and also months calculated).

The DHS 2013 Request for Proposal (RFP) inviting bids for providing guard and food

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Security Annual Performance Report for Fiscal Years (FY) 2012 – 2014 (stating it is committed to new standards that will improve conditions above those of criminal confinement) and ICE March, 2014 Response to Questions on Port Isabel contract (indicating ICE is aware that facility does not comply with American Correction Association standards for bed space), available at http://deportationresearchclinic.org/PIDC_Site_Visit_Questions_Final.docx/.

56 I estimate about 83,700 people receive one dollar per day under this program and an additional 114,000 work for no pay at all for work performed during their time in the mixed-population IGSA facilities. The calculations assume an annual detained population of 400,000, of whom 62% are held in private prisons, 75% of whom are available for the program (because they are held for four days or longer) and 45% of whom participate at some point. The balance are 114,000 people held in the IGSA mixed use facilities for four days or longer, all of whom will be forced to work at least once/week and often induced to work much more than this. This is a population of about 114,000.

57 APSS is exploiting workers but at least this company and the ICE ERO officers supervising it are compliant with the Freedom of Information Act, unlike CCA. CCA consistently flaunts the reporting and document release policies required by 5 USC § 552 and its interpretations by agencies and the courts, including the omission of the similar records requested of Stewart CCA.

58 2011FOIA13921, 008 (Sep. 11, 2011), *available at* http://www.governmentillegals.org/2011FOIA13921SlaveLabor.pdf and on file with author. Note that the lower four hour range is hypothetical because shifts typically are longer than this and also it would be logistically if not legally challenging, because of the security and federal contracting requirements, to hire outside workers on a part-time basis for this work.

services at the Krome Detention Facility in Miami, Florida provides recent data on how ICE Enforcement and Removal Operations (ERO) and firms running the ICE facilities see those in deportation proceedings as key to maintaining their essential operations of laundry, food service, and numerous other services.[59] A plain reading of the Krome contract and many others suggests the purpose of the ICE resident work program is to ensure private firms bidding for government contracts that most of the labor can be performed for $1 per day.

The Krome Operational Parameters for Food Service details the shifts, hours of meal service, and the number of seatings per meal.[60] It also indicates the number of individuals per shift who are paid according to federal laws, and those employed for $1 per day, so that firms bidding might anticipate labor demand and supply going forward. Table I of the Krome Attachment (Appendix I) shows that in 2012 Akal Security was paying eight workers, including two supervisors, for the 4:30 - noon shift, and six for the 11 a.m. to 7 p.m. shift according to the requirements of the Service Protection Act. But Akal Security also was employing at $1 per day for its Food Service 10 ICE residents for each of the three shifts, a *ratio of 14:30 of SCA*

59 DHS ICE RFPs are online documents specifying the detention services required for specific regions or existing facilities. They are publicly available, per federal procurement laws, and authorized by regional offices. The contracts bear many similarities but also have some differences, including for the funding of the detainee work program and the level of details about it which are released online. Some regions do not release the contract attachments online, even though they are part of contract. An ICE FOIA response to a request for the ICE contracts since 2008 with the City of Adelanto unlawfully withheld these attachments; following an repeal the request has been remanded for the purpose of removing these redactions ("Upon a complete review of the information withheld as a result of the initial determination of your FOIA request by the ICE FOIA Office, we have determined that there could potentially be additional information that may be released to you. In addition, ICE has also determined that it is likely that additional responsive records may be found in locations the agency has not yet searched. We are therefore remanding your appeal to ICE FOIA ..." Abby Meltzer, Chief, Government Information Law Division, ICE, letter to author, OPLA Case No. 14-961, October 28, 2013, on file with author. The contracts typically stretch out out for several years; the Krome contract has renewals through 2024. One method to locate these contracts is the Service Contract Inventory, which lists all DHS contracts. Department of Homeland Security, *FY2012 Service Contract Inventory*, http://www.dhs.gov/sites/default/files/publications/Service_Contract_Inventory_DHS_2012_0.xls (2013), on file with author.

60 See Appendix I.

compliant: SCA non-compliant employees for its Krome CDF food service each day.[61]

Also, the 30 food workers employed by Akal Security at $1 per day are calculated into the contract itself at a cost of exactly $10,950,[62] or $30 per day (30 x $1 per day x 365 days in a year). This and other statements make it clear that firms are negotiating contracts based on the availability of the employment at slaving wages of those in ICE custody, and thereby restricting from competing for these jobs local labor, a practice prohibited for those designated by a final removal order as in the country without legal authorization under 8 USC § 1324a[63]and in violation of the SCA and FLSA.

Similarly, the 2009 El Centro RFP listing the employment positions and number of shifts per week indicates the government's detention facility requirements for guards and transportation, maintenance, janitorial work, housekeeping, food services, barber services, painting, and admitting detainees. The RFP states that each week the contractor would compensate 1221 shifts at the wages determined either by Collective Bargaining Agreements or federal rules on wages[64] and 763 individual days/week of work by detainees at $1 per day.[65] The El Centro "Imprest Reports"[66] indicate compensation for the following categories of work, in

61 See Table I, ICE/ERO Food Service, pp 1-2.

62 See Department of Homeland Security Immigration and Customs Enforcement Office of Acquisition Management, *Request for Proposal: Detention Management, Transportation and Food Services for the Krome Service Processing Center (SPC), Miami, FL, section A-B,* 13 (2012), *available at* https://www.fbo.gov/utils/view?id=789f1944a87d9e65662896c1b43495af.

63 "(a) Making employment of unauthorized aliens unlawful (1) In general It is unlawful for a person or other entity -- (A) to hire, or to recruit or refer for a few, for employment in the United Stats an alien knowing the alien is an unauthorized alien... or (B) to hire for employment in the United States an individual without complying with the requirements of subjection (b) of this section or (ii)[hiring agricultural workers]" 8 USC § 1324a.

64 Department of Homeland Security Immigration and Customs Enforcement Office of Detention and Management, *El Centro SPC, Solicitation Number ACL-0-R-0004*, *available at* http://www.ice.gov/doclib/foia/contracts/acl2c0003asofp00027akalsecurity.pdf.

65 *Ibid.*

66 See 2011FOIA13921.

descending order of frequency mentioned: Detention, Kitchen, Diesel Shop.

In addition to the accounting data for reimbursements from ICE, the"Questions and Answers" between the government and firms[67] reveal the relevance of the resident work force to the corporations' bidding calculations.[68]

From the third set of RFP questions, sometime after January 14, 2009[69]:

11. Does the contractor provide managers/workers for any facility maintenance functions?

A. No.

12. Assuming detainee cleaning crews (in addition to detainees) clean housing units, there does not appear to be a post associated with 'houskeeping'. Does the contractor provide any janitorial labor/equipment/supplies, or a detainee labor supervisor?

A: The offeror is responsible for providing a solution to the requirements in the RFP. Equipment and supplies are provided by the Government. The contractor is responsible for oversight of the detainee workforce.

The government states it will not be responsible for maintenance and that the private firms are to

67 These often occur for large, multi-year contracts to help the bidding companies clarify the government's expectations and the terms of the contracts; they may also lead to RFP revisions, as was the case for the descriptions of the detainee work force availability discussed below.

68 See Department of Homeland Security Immigration and Customs Enforcement Office of Detention and Management, *El Centro SPC, Solicitation Number ACL-0-R-0004*, 407-462 (2001), *available at* http://www.ice.gov/doclib/foia/contracts/acl2c0003asofp00027akalsecurity.pdf. Please note that these pages include three sets of questions and answers. The first set refers to "QUESTIONS AND ANSWERS FROM 4-24-01 PRE-PROPOSAL CONFERENCE AND SITE VISIT FOR SOLICITATION ACL-0-R-0004 and appears to have been submitted in 2000. The first set has 19, the second 95 (it has a cover sheet dated June 4, 2001), the third, 110 (titled HSCEDM-09-R-00008, the RFP for which was issued Jan14, 2009 and modified 2/2/2009, 2009), and the fourth 100 (no date or other reference, the numbering is contiguous with previous questions and includes a question referencing the 2009 Collective Bargaining Agreement Health and Welfare increase, indicating they were posed in the same time frame as the previous questions. These documents are not clearly organized. For instance, the government inadvertently included information from the Florence SPC RFP in the materials for the El Centro RFP.

69 HSCEDM-09-0008 Questions and Answers, Set 3, 2009, on file with author.

supervise the residents and enlist them for the entirety of this work.[70]

Facility Coverage

In some places even the $1 per day payments are not provided, and ICE residents work in exchange either for small perks or to avoid "the hole." Although one portion of the PBNDS indicate that non-dedicated IGSAs must develop a work program, many do not, or develop programs that are even more humiliating and coercive than those appearing in the PBDNS. A study prepared for Congress by Professor Craig Haney in 2005 found 19 of 21 ICE detention facilities responding to survey questions indicated "detainees were allowed to work." But only 12 provided pay and among these it was all at $1 per day.[71]

None of the non-dedicated IGSA contracts reviewed for this study make a provision for the $1 per day payments,[72] though the facilities may provide these payments for work performed nonetheless. Other non-dedicated IGSA facilities have no ICE work program, but largely rely for food service and laundry on the labor of the criminal inmates.[73] At Houston CCA in January

70 For more from these exchanges, see Appendix Two. Further evidence of the detainees as a component of the facility's labor force is a form to indicate the residents' completion of training a requirement that is consistent with a facility's systematic reliance on resident labor for its staffing needs. There are 11 such forms, one for each "barrack of workers," e.g., "Alpha North Barrack Workers. The form states, "The Worker Roster must be turned into the Detainee Funds Manager daily." The form has at the top left hand corner the logo for ATSI and has the form number QAM20111022. El Centro's "Detainee Worker Roster" form states: "THE DETAINEES LISTED BELOW PERFORMED WORK FOR THE U.S. GOVERNMENT ON: August 31, 2011. 2011FOIA13921, 10 (Sep. 11, 2011), *available at* http://www.governmentillegals.org/2011FOIA13921SlaveLabor.pdf,

71 Craig Haney, *Conditions of Confinement for Detained Asylum-seekers Subject to Expedited Removal*, *in* Study on Asylum Seekers in Expedited Removal, as authorized by Section 605 of the International Religious Freedom Act of 1998, 178 (2005). Submitted February 2005, Appendix C, Committee on the Judiciary, House, Interior Immigration Enforcement Resources, Hearing before the Subcommittee on Immigration, Border Security, and Claims, 109th Congress, First Session, March 10, 2005, Serial No. 109-5. 47.

72 These include those with Pinal County, Arizona (Sheriff operated); Polk County, Texas (CEC operated);

73 The difference between the CDFs and the IGSAs is noted in a 2008 inspection checklist for the IGSA governing the ICE operations at the CCA Stewart facility: "Detainees in CDFs are paid in accordance with the 'Voluntary Work Program' standard. Detainee workers at IGSAs are subject to local and state rules and regulations regarding detainee pay." The legal basis for this qualification is unclear. Among the many regulations referenced

2014, Mr. Martinez reports perks for paid and unpaid dorm porters of "three or four pieces of chicken on chicken day," instead of the standard one piece per resident.[74] An IGSA contract signed in 2011 for York County, Pennsylvania states, "Food will never be used as a reward or punishment,"[75] indicating that while this violates policy, it has been a de facto practice.

A form accompanying an ICE facility contract as well as a checklist indicate that ICE has no problem with IGSAs opting out of the work program, despite this violating requirements in the PBNDS.[76] Someone held at the Florence Service Processing Center in southern Arizona could be paid for janitorial cleaning or a variety of jobs in the kitchen, but less than a mile away in a wing at the Pinal Adult Detention Center rented out to ICE through an IGSA, the janitorial cleaning would be done on the order of the guards by the ICE wing residents on a rotating basis, while the kitchen work is performed by outside workers and the criminal inmates housed in the same facility.[77] Failure to work as ordered results in infraction points and confinement in

in the ICE contracts is Federal Acquisition Requirement, Convict Labor Subpart 22.2 instructing the contractor that "The rates of pay and other conditions of employment will not be less than those for work of a similar nature in the locality where the work is being performed." It also states: "The development of the occupational and educational skills of prison inmates is essential to their rehabilitation and to their ability to make an effective return to free society." However, this requirement does not explain the discrepancy: it is a regulation that should apply across facilities and not only those owned or managed by non-federal agencies. The reference to the regulation is moot; ICE residents are not "convicts," one of a litany of inconsistencies in the program *de jure* and its *de facto* rules and practices

74 Martinez, Telephone Interview.

75 York County IGSA, 2011, available at yorkcountyprison-igsa-11-0007.pdf, at p. 40.

76 Detainee Volunteer Work Program Training Form (If detainees are used) (HSCEDM-09-R-00008, April 9, 2008 through December 31, 2011, attachment 6, p. 1k.

77 The specific examples were noted by Esteban Tiznado in 2013, held at both facilities, and confirmed by ICE in its contract materials. The PCAD held on behalf of ICE a daily average of 300 men and 158 women for the 12 months preceding the inspection on August 5-7, 2008. The form includes a list of 13 "Detainee Services," from "Admission and Release" to "Voluntary Work Program," for which the inspectors are to check among the following boxes: "1. Acceptable; 2. Deficient; 3. At Risk; 4. Repeat Finding and 5. Not Applicable." This last box is the one checked for assessing the "Voluntary Work Program." Department of Homeland Security Immigration and Customs Enforcement, *ICE Detention Facility Inspection Form for Pinal Adult Detention Facility*, 2 (2008), *available at* http://www.ice.gov/doclib/foia/dfra-ice-dro/pinaladultdetentionfacilityflorenceazaugust572008.pdf. A similar practice seems in place at the Salt Lake City Henderson Detention Center ("Inmate workers provide assistance. ICE detainees do not work in food service.") Department of Homeland Security Immigration and Customs Enforcement Office of Professional

cramped quarters with no sunlight, a cold temperature, little recreation, and minimum contact with other residents.[78] The ACLU report on Stewart noted retaliation against Omar Ponce in the form of segregation (solitary confinment) "for refusing to work and for organizing a work strike in 2010."[79] The report noted as well kitchen workers punished en masse when they "wanted to stop working."[80]

As alternatives to payment at the Mira Loma, California, non-dedicated IGSA, an American Bar Association memorandum noted "special privileges" of "living in special barracks with large screen televisions and vending machines, a special meal at least once a week, and extended visiting hours."[81] It also noted that a resident "likened the unpaid work structure to slavery."[82] Kenneth Danard, a Canadian citizen, held in Florence SPC in 2008, reported that his wife sent funds for his commissary account. Absent financial necessity, "I refused to participate in their slave labor."[83]

Frank Serna was held in Houston CCA for 14 months, until his deportation order was

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Responsibility, *Compliance Inspection, Enforcement and Removal Operations, Salt Lake City Field Office, Henderson Detention Center*, 18 (2011), *available at* http://www.ice.gov/doclib/foia/odo-compliance-inspections/2011hendersondetentioncenter-henderson-nv-oct25-27-2011.pdf.

78 Esteban Tiznardo, telephone interviews and documents reviewed during 2013 and 2014. On file with author.

79 Cole, *Prisoners for Profit*, p. 57

80 *Ibid*.

81 American Bar Association. Commission on Immigration, Latham and Watkins, Mira Loma Detention Center Delegation, confidential file no. 502130-0018, August 27, 2004, on file with author. ICE failed to renew its contract and in 2012 the residents were all moved to Victorville, California, a prison-industrial area over two hours from San Diego, the nearest city. ICE has a dedicated IGSA contract with the city of Adelanto for the new facility. A federal employee who worked at the Mira Loma site explained that ICE was not willing to pay the union wages for Los Angeles County and found GEO, Inc offered a better deal.

82 *Ibid*, p. 20. The memorandum says, "Most detainees did not seem upset with the lack of payment." It is extremely difficult to imagine anyone being sanguine about payments of $1 per day for their work. Leaving aside the questionable accuracy of statements elicited by a group of white shoe lawyers who lack any training in ethnography (and provide no information on the circumstances of their interviews), it is plausible that the perks provided were worth more to these ICE residents than $1 per day, and hence the absence of complaints was relative to a worse alternative.

83 Telephone interview, on file with author.

terminated in 2013 based on the government's lack of evidence of his alienage and his own evidence of U.S. citizenship.[84] Houston CCA employed him for 8 hour shifts for kitchen and hall cleaning duties: "That work was not volunteer [work in the kitchen]. That was mandatory. Other work was volunteer." According to Mr. Serna, once one indicated availability for work, CCA would assign the positions and shifts. ICE residents had no choice but to follow rules and arbitrary orders inconsistent with scope of work and shift hours or face not only the possibility of termination, but also administrative segregation or other punitive treatment.[85] The only bargaining leverage for procuring more desirable positions and shifts was to "volunteer" to do extra work. This was required because CCA did not have sufficient resident labor for janitorial tasks.[86] Serna said that in exchange, CCA gave him food prepared for the guards. Residents preferred the kitchen work because it gave them access to food. For instance, when returning trays Serna said was allowed to keep those milk cartons not consumed by the residents he served,[87] otherwise a violation of facility rules.

Worker Health and Safety Enforcement Procedures

As noted in the case of Robinson Martinez and others, if your employer is your jailer, grievances about working conditions are more likely to yield retaliation than redress.[88] Other

84 Personal interview, Houston, July 7, 2013, and immigration court and ICE records on file with author.

85 The treatment of Robinson Martinez following his request for gloves is an example of this. Martinez and Serna both were held at Houston CCA.

86 Martinez independently reported the lack of custodial labor in some pods. Interview with Robinson Martinez in Houston, Tex. (Jul. 7, 2013).

87 Interview with Frank Serna in Houston, Tex. (Jul. 7, 2013).

88 Esteban Tiznado reports that on filing a grievance after a guard spit in his face and he was placed in segregation, the investigating supervisor informed Mr. Tiznado, who was pleading with her to watch the video, "I don't have to see the video because I'm not on your side. I'm on the side of the guard." Jacqueline Stevens, Armed Dangers Criminal Gang Holding Tucson Man since April, Conditions Worsen, States Without Nations, available at http://stateswithoutnations.blogspot.com/2012_11_01_archive.html/. A 2004 report by an American Bar

anecdotal reports along these lines find confirmation in ICE's internal audits. Extremely low numbers of grievances are recorded as filed, with all decisions favoring the guards. For instance, the CEC-run IGSA facility in Livingston, Texas held over 10,000 for ICE but reported a total of three (3) grievances.[89] This outcome is more consistent with Mr. Martinez's report that in 2013 CEC does not allow its residents to submit written grievances than with there being just three occasions in which those housed there felt moved to express dissatisfaction, legitimate or not, with their conditions of detention.[90] (None of the three grievances submitted in 2008 were resolved in favor of the CEC resident.) The so-called audit by the firm Creative Contractors noted three grievances that year, but flagged no problems with the grievance process, even though facilities with far fewer than the average 651 beds occupied in Livingston, Texas reported receiving complaints in the dozens and hundreds in that same time frame.[91]

Association (ABA) delegation about Krome also noted a detainee who who "says he was placed in segregation for what he believes to have been retaliation for filing a grievance." ABA Delegation to Krome Service Processing Center, Memorandum MIADMS/275246.3, p. 14. On file with author.

89 Creative Corrections, ICE Detention Standards Compliance Review, Polk County IAH Secure Adult Detention Facility, January 27-29, Report date February 6, 2009, on file with author. The average daily ICE bed count for the CEC facility was 651. *Ibid*.

90 The likelihood of CEC failing to note grievances is further buttressed by Creative Contractors, the consulting firm conducting the review, finding numerous deficiencies in the facility, including food and library services, that would justify grievances. *Ibid*.

91 Creative Corrections, *Ibid*. There are wide disparities in how facilities receive and report grievances. For instance, the Henderson Detention Facility, a Nevada IGSA facility, reported 141 grievances in a six month period for a 300 bed ICE wing. The Laredo Processing Center, a dedicated IGSA facility with with 310 bed occupancy during the site visit, reported "two informal grievances were filed in 2011, and to date, one informal grievance has been filed in 2012." The Laredo team found the facility to be in compliance with the grievance procedures. At the ICE IGSA in Kenosha, Wisconsin, with 200 beds filled with ICE residents at the time of inspection there were just 18 grievances filed in a six month period. The Elizabeth City, CCA facility, reported 28 grievances in 2011 for the 300 bed facility, but the 2012 ICE investigating team noted that their interviews revealed additional grievances had been filed and not reported, and noted several other deficiencies in the CCA grievance process, a situation that the report noted had been documented in the prior 2009 report and not corrected. The ICE inspection of the CCA Stewart, Georgia facility noted only that as of August 23, 2012 "no grievances were filed during August 2012," and failed to indicate the number of grievances filed in the previous 11 months, nor their resolution. The report noted that two residents indicated they had filed grievances about CCA prohibiting them from conducting group prayer, as required by their Muslim faith, and also that CCA had not maintained such grievances, but nonetheless said that CCA was fully compliant in its grievance procedures.

None of the reports included outcomes. Despite obvious red flags in this data, only the the team at the

ICE fails to monitor how ICE residents fare in the work program per se. Indeed the only compliance report surveyed for this Paper that mentions the program was one conducted in 2012 at Stewart CCA in Georgia. It omits any discussion of the incidents appearing in a 2012 report published by the American Civil Liberties Union referenced above, nor this one: "when the medical staff give orders for detainees to rest, these order often go unheeded by CCA officers. [Eduardo Zuniga] stated that guards threatened him with 'the hole' if he did not get up and get back to work despite medical orders to rest."[92]

Most obviously, the entire premise of the PBNDS is a Dickensian fantasy. The notion that one might as a result of being paid $1 per day or extra pieces of chicken or unwanted milk cartons have one's morale boosted is at odds with common sense understandings of decency and dignity. Such an individual would be working for someone who realizes the person being supervised is selling his or her labor for $1 per day, or the fast food equivalent, a condition that is debasing if not humiliating. For those individuals who, lacking outside family or friends to fund their commissary accounts, prefer $1 per day to nothing, the decision to work is a testament to the poor quality of life without the small perks these payments provide and not an endorsement of the program's stated purpose.

Elizabeth City facility noted a problem with how grievances were handled, but it would be appear to of no consequences since the same problem was noted in 2009 and not remedied. See Office of Detention Oversight Compliance Inspection, Enforcement and Removal Operations, Salt Lake City Field Office, Henderson Detention Center, Henderson, Nevada, October 25-27, 2011, 32 pages; Office of Detention Oversight Compliance Inspection, Enforcement and Removal Operations, San Antonio Field Office, Laredo Processing Center, Laredo, Texas, January 24 - 26, 2012, 11 pages. Office of Detention Oversight Compliance Inspection, Enforcement and Removal Operations, Chicago Field Offices, Kenosha, Wisconsin, December 13, 15, 2011, 16 pages; Office of Detention Oversight Compliance Inspection, Enforcement and Removal Operations Newark Field Office, Elizabeth Contract Detention Facility, Newark, New Jersey, January 31, February 2, 2012, 27 pages; Office of Detention Oversight Compliance Inspection, Enforcement and Removal Operations, Atlanta Field Office, Stewart Detention Center, Lumpkin, Georgia, August 21 - 23, 2012, 17 pages.

92 Alexandra Cole, Prisoners for Profit: Immigrants and Detention in Georgia, American Civil Liberties Union Foundation, Georgia, May, 2012 (182 pages), p. 58,

Robinson Martinez was born in Mexico and crossed the border into Texas in the lap of his mother, Sara, when he was three months old.[93] They were passengers in a car driven by his grandfather, Gregario. Sara's parents were bringing her back to their home in El Paso. She'd left it a few months earlier. She was 20 years old and ashamed when her pregnancy first showed. They drove through the check point. No one bothered to ask for identification. Her parents, her father a U.S. citizen, and her mother a legal resident, adopted Robinson and raised him as their son. It wasn't until he was in his late 30s and completing his prison sentence in 2010 that he first was put into removal proceedings and learned that his sister was actually his biological mother.[94] In collecting and sharing with me information about the CCA work program for purposes of publication Mr. Martinez was performing work of the sort that would be compensated if performed by student research assistants. Mr. Martinez, however, did not understand us having an employer-employee relationship: "I don't want any money from you. I just want people to know what's happening." In other words, Mr. Martinez volunteered to do this research.[95] The legal difference between our relation--he is working for a non-profit for "civic, charitable, or humanitarian reasons"[96] -- and the pseudo-volunteer employment in the detention facilities is exactly that contemplated by the regulation implementing the FLSA, and is discussed below.

B. ICE Omissions and Misrepresentations to Congress of Facility Conditions

The larger political and legal context in which the ICE facilities' resident work program is managed also is not conducive to worker protections. One safeguard in place for other

93 Martinez ICE, CIS, and immigration files, and interview with Sara.
94 *Ibid*.
95 Telephone interview with Robinson Martinez.
96 29 CFR § 553.101.

institutionalized populations is regulations. But the Obama administration refused a petition by immigration law professors and attorneys to draft detention facility regulations along the lines of those in place for the Bureau of Prisons.[97] Congress, perhaps because of misleading information ICE shares with it, also is not pressing for this. In particular, ICE has been informing Congress that the agency has safeguards and oversight in place that in fact do not exist.

The federal year 2014 DHS budget request highlights statements about ICE's performance evaluation of the detention facilities, and asserts a 97% rate of compliance with the PBNDS. The reader would have the impression that ICE is showing integrity in evaluating its operations and that the results show the facilities are performing well.[98] Omitted from ICE's performance report, or any government document prepared for the public are the instruments for evaluating this compliance and the procedures and personnel assessing this. The evaluation sheet ICE uses for its episodic inspections weights **between "zero" and "five percent"** the portion of the PBNDS that includes the grievance procedures, including those ICE advertises as available for worker grievances.[99]

97 28 C.F.R. 5. The BOP definitions have been in use since 1979; see 28 CFR § 500.1. On January 24, 2007, a group of immigration law professors submitted to the DHS a "Petition for Rulemaking to Govern Detention Standards for Immigration Detainees." The DHS under the leadership of Janet Napolitano denied the petition request ("DHS...concludes that rule-making would be laborious, time-consuming and less flexible," Letter from Deputy Secretary of the Department of Homeland Security Janet Holl Lute to Michael Wishnie and Paromita Shah (Jan. 24, 2009)), http://www.nationalimmigrationproject.org/legalresources/Immigration%20Enforcement%20and%20Raids/Detention%20Standards%20Litigation/DHS%20denial%20-%207-09.pdf.). See also Jacqueline Stevens, *Broken ICE*, The Nation, Mar. 15, 2010, *available at* http://www.thenation.com/article/broken-ice.

98 Page 31 of the 3,627 document includes a table claiming that in 2012 97% of ICE detention facilities were "in compliance with the national detention standards by receiving an inspection rating of acceptable or greater on the last inspection." Department of Homeland Security, *U.S. Department of Homeland Security Annual Performance Report for Fiscal Years (FY) 2012 – 2014, 31* (2013), *available at* https://www.dhs.gov/sites/default/files/publications/MGMT/DHS-%20Annual%20Performance%20Report%20and%20Congressional-Budget-Justification-FY2014.pdf.

99 Department of Homeland Security Immigration and Customs Enforcement, *Performance-Based National Detention Standards 2011,* 308-424 (2011), *available at* http://www.ice.gov/detention-standards/2011/. The Performance Work Statement (PWS) in ICE detention facility contracts tracks the seven sections of the PBNDS.

For instance, the "Justice" section of the evaluation form for the Florence Pinal County Adult Detention IGSA states: "A Contract Discrepancy Report that cites violations of PBNDS and [Scope of Work] sections that treat detainees fairly and respect their legal rights, permits the Contract Office to withhold or deduct up to zero% [sic] of a monthly invoice until the Contract Officer determines there is full compliance with the standard section."[100] The performance measures ICE weights at zero for Justice include the protection of the rights in Detainee Handbook (which includes the rules for the Volunteer Work Program), adherence to grievance procedures, law libraries, legal materials, and the Legal Orientation Programs.[101] This means effectively a zero weighting for violations of most other sections of the PBNDS that might adversely affect ICE residents as well. If the written grievance procedures can be disregarded with zero or a negligible impact on a facility's performance review, OSHA compliance, medical treatments, and any abuse by guards of ICE residents will not reliably surface.

The effort to prevent ICE's image from being tarnished by reports of abuse is further reinforced by ICE contracts, which specify that grievances should be addressed "informally" and without written complaints.[102] The 2011 York County, Penn. IGSA adds that a "prohibited act

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Each of these are operationalized and assigned weights. The Florence Service Processing PWS released in 2009 for a contract active today assigns the following weights for "withholding criteria":
Safety = 20%
Security = 25%
Order = 10%
Care = 25%
Activities = 10%
Justice = 0%
Department of Homeland Security Immigrations and Customs Enforcement Office of Detention Management, *Solicitation HSCEDM-9-R-00001-000002, Performance Requirements Summary, Florence Service Processing Center*, Attachments 1 - 7, February 2, 2009.

100 *Ibid*.

101 *Ibid*.

102 York County IGSA, 2011, available at htttp://deportationresearchclinic.org/yorkcountypaprison-igsa-11-0007.pdf.

that cannot or should not be resolved informally" merits a "complete Incident report."[103] But the guards and not the ICE residents are deciding this. For ICE to be alerted of misconduct by guards, it would need to require formal reporting of all grievances.[104]

ICE's policy on guard misconduct appears to have emerged from the deaf, blind, and mute monkey. A standard that lacks not only regulatory force but allows if not instructs its contractors to avoid reporting resident grievances means the ICE detention program provides no due process protections for residents either by law or even market incentives, in apparent violation of their Fifth Amendment rights as individuals and as employees of the federal government or its contractors.

PART IV

The Government's Legal Defense: ICE and *Alvarado Guevara* (1990)

Since 2009, journalists and scholars have made inquiries of ICE as to the legal basis for the slaving wages paid those held under immigration and not criminal laws. Part IV reviews the main lines of legal analysis the government offers in defense of the program: Section A summarizes the official statements and their reliance on the single appellate court decision directly on point, *Alvarado v. Guevara v. I.N..S.*, 902 F. 2d 394 (5th Cir., 1990); section B considers as well the relevant administrative case law on which the government might draw, i.e., the line of decisions that would authorize agency autonomy to effect the conditions of immigration confinement, including slaving wages; and finally, section C introduces the three

103 *Ibid*.
104 Contracts drafted in the era of the INS reveal the opposite emphasis and require formal grievance procedures.

dominant approaches to statutory construction as they will be laid out for evaluating the government's position in Parts V (plain meaning), VI (legislative intent); and VII, legislative purpose.

A. ICE's Legal Defenses

"ICE officials say the program is perfectly legal. There is no specific statute, regulation, or executive order authorizing the program, ICE said in a statement,"[105] according to the *Houston Chronicle*, which also quotes the agency claiming that the "most important benefit from the program is 'reducing inactivity and disciplinary problems,'"[106] a phrase lifted from the Performance Based National Detention Standards (PBNDS), reviewed in Part III above.

In response to my own queries,[107] ICE provided this response:

> 8 U.S.C. 1555(d) provides that appropriations for ICE are available for 'payment of allowances (at such rate as may be specified from time to time in the appropriation Act involved) to aliens, while held in custody under the immigration laws for the work performed ...' The appropriations act for the Fiscal Year ending September 30, 1979 was the most recent appropriation act in which this fee was specified. Specifically, Pub., L. No. 95-431 provided for the 'payment of allowances (at a rate not in excess of $1 per day) to aliens, while held in custody under immigration laws for work performed...' 92 Stat. 1021, (1978). The INS practice of paying $1 per day was challenged in federal court and

105 Susan Carroll, *$1 a day for immigrants illegal on outside, just fine in jail*, HOUSTON CHRONICLE, March 26, 2009, *available at* www.chron.com/news/houston-texas/article1-a-day-for-immigrants-legal-on-outside-just-1661907.php/.

106 *Ibid*.

107 E-mail from Jacqueline Stevens to Immigration and Customs Enforcement Chief Public Engagement Liaison Andrew Lorenzen-Strait, June 21, 2010, on file with author.

> upheld. This practice of allowing volunteer work programs with payment allowances is found amongst all types of ICE facilities: Service Processing Centers (SPCs), Contract Detention Facilities (CDFs), and Intergovernmental Service Agreement (IGSAs) facilities.[108]

In response to a follow up query, ICE public liason officer Andrew Lorenzen-Strait confirmed that the court ruling referenced was *Alvarado Guevera v. INS* 902 F. 2d 395 (5th Cir. 1990).[109]

Alvarado Guevera v. INS is a rare instance of residents challenging their $1 per day wages as a violation of the Fair Labor Standards Act (FLSA) and the Fourteenth Amendment. The two-page Fifth Circuit Appellate Court decision affirming the legality of these payments consists almost exclusively of a verbatim quotation of the decision by the federal district court judge.[110] The plaintiffs were residents at the INS-run Port Isabel SPC,

> whom Defendants employed in grounds maintenance, cooking, laundry and other services at the rate of one dollar ($1.00) per day. Further alleging that this practice is a violation of the Fair Labor Standards Act (hereinafter "FLSA"), 29 U.S.C. Secs. 201-219, Plaintiffs seek relief in the form of unpaid minimum wages, statutory liquidated damages, attorneys' fees and costs, and injunctive relief pursuant to the FLSA.

The Fifth Circuit Court of Appeals, reprising the district court, held that the payment of $1 per

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108 E-mail from Immigration and Customs Enforcement Chief Public Engagement Liaison Andrew Lorenzen-Strait to Jacqueline Stevens, July 6, 2010, on file with author. "Service Processing Centers" are those owned by the federal government, a legacy of the Immigration and Naturalization *Service* and the more fluid understanding of these places as residential sites of transit to the interior of the United States as well as to the immigrant's home country.

109 E-mail from Immigration and Customs Enforcement Chief Public Engagement Liaison Andrew Lorenzen-Strait to author, July 6, 2010, on file with author.

110 "With the exception of additional footnotes provided by our court, we adopt the judgment and persuasive reasoning of the district court to the extent published below as Appendix A." *Alvarado Guevara v. I.N.S.*, 902 F.2d 394 (5th Cir. 1990).

day was pursuant to 8 U.S.C. 1555(d) and thus "set by congressional Act. Department of Justice Appropriation Act, 1978, Pub. L. No. 95-86, 91 Stat. 426 (1978)."[111] The decision also held that the "Plaintiffs are not covered by the FLSA."[112] The decision states that because the work challenged was undertaken by people whose employer fed and housed them, they were outside of the economic relations covered by the FLSA:

> [I]t would not be within the *legislative purpose* of the FLSA to protect those in Plaintiffs' situation. The congressional motive for enacting the FLSA, found in the declaration of policy at 29 U.S.C. sec 202(a), was to protect the 'standard of living' and 'general well-being' of the worker in American industry.[Citations omitted.] Because they are detainees removed from American industry, Plaintiffs are not within the group that Congress *sought to protect* in enacting the FLSA.[113]

The opinion supports for its inference of Congressional purpose for the FLSA several cases in which courts held the FLSA did not cover prison inmates ("Those courts have concluded that an extension of the FLSA to the prison inmate situation was not, therefore, legislatively contemplated. Id. Because of the similarity in circumstances between the prison inmates and Plaintiff detainees here, the reasons noted by those courts for not extending the FLSA are applicable in this case.")[114] The *Alvarado Guevara* ruling also rejects the plaintiffs' claim that 8

111 *Ibid*.
112 *Ibid*, see below for analysis.
113 *Ibid,* emphasis added.
114 *Ibid*. (*Alexander v. Sara, Inc.*, 559, F. Supp. 42 (M.D. La 1983), aff'd. 721 F.2d 149 (5th Cir. 1983); *Sims v. Parke Davis & Co.*, 334 F.Supp. 774 (E.D. Mich 1971), aff. 453 F. 2d 1259 (6th Cir. 1971), cert denied, 405 U.S. 978, 92 S. Ct. 1196, 31 L.Ed.2d 254 (1972; Worsley v. Lash, 421 F.Supp. 556 (N.D.Ind. 1976). See also *Lavigne v. Sara, Inc.*, 424 So. 2d 273 (La. App. 1st Cir. 1982). The Appellate Court adds the following additional citations: "*Wilks v. District of Columbia*, 721 F. Supp. 1383, 1384-85 (D.D.C 1989) ('court found that plaintiffs-foremen's supervision of inmates was not the supervision of employees" under the FLSA); *Emory v. United States*, 2 Cl. Ct.. 579, 580 (1983) (prisoner work while incarcerated is not government employment), aff'd, 727 F. 2d. 1119 (Fed. Cir. 1983)."

U.S.C. 1555(d) distinguishes based on alienage "without a compelling justification,"[115] and concludes, "The court will uphold the constitutionality of the statute as a valid exercise of the congressional power."[116]

The appellate court in a footnote makes a further point. Pointing out that the government is not authorized to employ aliens in the federal government, it infers that the "detainees are not government 'employees'...[T]he federal government usually authorizes the employment of aliens only under limited circumstances, none of which apply here."[117] There is no attempt to review the legislative histories and no effort to conduct an implied repeal analysis along the lines proposed in Part V.

In sum, the Fifth Circuit appellate court provides these defenses of INS residents' slaving wages:

1) A 1978 appropriations Act for fiscal year 1979 provides the agency indefinite authority to pay aliens held under immigration laws $1 per day.

2) The INS residents are "removed from American industry."

3) INS "detainees" are legally similar to "inmates" and "prisoners," and courts have found the FLSA precedents for inmates and prisoners applies to those held under immigration laws.

4) The government cannot legally employ detainee aliens, so INS residents are not covered by the FLSA.

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115 *Ibid.* ("*Mathews v. Diaz*, 426 U.S. 67, 96 S. Ct. 1883, 48 L. Ed. 2d 478 (1976) (noting that there are many federal statutes that distinguish between citizens and aliens). Because of this broad congressional power, immigration legislation is subject to a limited scope of judicial inquiry. *Fiallo v. Bell*, 430 U.S. 787, 97 S. Ct. 1473, 52, L. Ed. 2d 50 (1977); *Hampton v. Mow Sun Wong*, 426 U.S. 88, 96 S. Ct. 1895, 48 L. Ed. 2d., 496 (1976)."

116 *Ibid*.

117 *Ibid*.

Section B: Administrative Law Precedents Authorizing Agency Discretion

The *Alvarado Guevara* decision focused on the failure of the agency to abide by the FLSA. One line of defense the opinion did not explore but that the DHS implies in its 2009 response to inquiries by the Houston *Chronicle* reporter is its implied authority to disburse funds at the discretion of the Secretary of the Department of Homeland Security (DHS).[118] DHS on this basis would presumably claim the authority to employ ICE residents at $1 per day in furtherance of its obligation to house 34,000 immigrants each day.

Before turning to an analysis of the statute using alternative interpretive strategies, this section considers the most obvious precedents affirming agency discretion, as set forth in *Skidmore*, *Chevron*, *Christensen*, and *Mead*.[119] The problem ICE may encounter is that, as the Court pointed out in *TVA v. Hill*, an agency generally in implementing its programmatic authority via rules and other internal operations cannot violate federal laws: "Generally, the Congress in making appropriations leaves largely to administrative discretion the choice of ways and means to accomplish the objects of the appropriation, but, of course, administrative discretion may not transcend the statutes, nor be exercise in conflict with law, nor for the accomplishment of purposes unauthorized by the appropriation..." (19 Comp. Gen. 285, 292 (1938))[120] And, also from Sutherland, "When Congress wishes to confer discretion unrestrained by other law its

118 8 USC § 1103 (a)(c) "[T]he Secretary [of Homeland Security] shall establish such regulations; prescribe such forms of bond, reports, entries, and other papers; issue such instructions, and perform such other acts as he deems necessary for carrying out his authority under the provisions of this chapter."

119 William Fox, Understanding Administrative Law, pp. 78-79 ("[T]he issue of whether an agency is acting ultra vires assumes that there is a proper delegation in the statute and then analyzes specific action taken by the agency to see whether that aation is within the limits set by the enabling act."), citing *Udall v. Tallman*, 380 U.S. 1, 6 (1965) ("When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration."

120 Sutherland, *Statutes and Statutory Construction*, 7th edition, 3:42-43.

practice has been to include the words 'notwithstanding the provisions of any other law' or similar language." 14 Comp. Gen. 578 (1935) (3:44).

Moreover, as explored in more detail below, the courts give less latitude to an agency's internal guidelines, such as the PBNDS, than to regulations or rules that have been crafted through a formal review process: "--for agency interpretations not in regulations, standard of review varies according to "nature and degree possessed by the agency" (Sutherland 3:31); "duration and consistency of interpretation"; "soundness and thoroughness of reasoning underlying the position"; "evidence (or lack thereof) of congressional awareness of, and acquiesce in, the administration position" and whether the policy is "muddled" (Sutherland 3:33). Under all these criteria the ICE work program would seem to fall short.[121]

RECENT CASE LAW

1) *Skidmore et al. v. Swift* 323 U.S. 134 (1944) evaluates whether a decision by an administrator within the Wage and Labor Division of the Department of Labor's (DOL) is a "fair reading of the statute's definition of hourly work."[122] This decision authorizes discretion to implement a statute, and thus could be read as a defense of ICE's authority to administer the work program authorized by 8 USC 1555(d). But *Skidmore* does not authorize an agency to override the law. Moreover, the DOL's substantive understanding of compensation for those on-call tracks the work conditions of ICE residents and their protection under the FLSA, the character of the

121 And insofar as its "duration" is a function of agency dissembling and lack of transparency concerning a program that affects hundreds of thousands of people in ICE custody this history may not weigh on the balance favoring its continuity as presently implemented.

122 ("no principle of law found either in the statute or in Court decisions precludes waiting time from also being working time") at *Skidmore* at140.

maintenance duties in *Skidmore* resembling those of the cleaning shifts at issue for ICE residents:

> The Administrator thinks the problems presented by inactive duty require a flexible solution, rather than the all-in or all-out rules respectively urged by the parties in this case, and his Bulletin endeavors to suggest standards and examples to guide in particular situations....The facts of this case do not fall within any of the specific examples given, but the conclusion of the Administrator, as expressed in the brief curiae, is that the general tests which he has suggested point to the exclusion of sleeping and eating time of these employees from the workweek and the inclusion of all other on-call time: although the employees were required to remain on the premises during the entire time, the evidence shows that they were very rarely interrupted in their normal sleeping an eating time.[123]

The question being litigated was not whether the workers living on or near the factory should be paid for the time when they were fighting fires, but rather, for the time when they were "engaged in general fire-hall duties and maintenance of fire-fighting equipment of the Swift plant" (at 136). As a condition of their employment, the workers agreed to "stay in the fire hall on the Company premises" or quite close several nights a week (at 136). The Supreme Court overturned the appellate court's rejection of the DOL interpretation: "...we hold that no principle of law found either in the state or in Court decisions precludes waiting time from also being working time" (at 136). The agency decision was given deference after it was determined it violated no laws and because the agency reasons were it was consistent with the broad coverage the Court finds in the FLSA.

Also, in this case the agency determination was not self-serving, unlike ICE's self-assessment that the labor policies it designed for the episodically avowed reason of saving money comport with labor law.[124] In fact, none of the major precedents contemplate agency discretion when the beneficiary is at least putatively the agency itself. For those bureaucrats

123 *Ibid*, at 139.
124 See Part VI, esp. hearing testimony by INS Commissioner, 1982.

motivated by the increases in their own areas of authority,[125] the euphemistically termed "efficiencies" enable a detention operation on a scale that otherwise might not be possible.

2) *Chevron USA, Inc. v. the National Research Defense Council* 467 U.S. 837 (1984) evaluates whether a regulation issued by the Environmental Protection Agency (EPA) was consistent with the underlying Clean Air Act.[126] The Court held that "[I]f Congress has explicitly left a gap for the agency to fulfill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute" (at 843-44).

The implementation of 8 USC 1555 (d) is distinguishable in two importance respects that go to the heart of the *Chevron* rationale. First, rather than having "explicitly left a gap" for ICE to set the rate of compensation for a mandatory program, Congress passed a law *allowing* but not mandating the employment of aliens, and *expressly delegating to Congress*, not the agency, the authority to set their rate of compensation. ICE might reference for its authority the more general obligation Congress delegated to run the immigration detention facilities. But the scope of this delegated authority is of a different character than the specific requirements of the Clean Air Act provisions about "stationary source" air quality monitoring. The discretion the Court authorized in *Chevron* was to implement a specific requirement in a specific portion of a statute, not to invent on an ad hoc basis various otherwise illegal actions for ensuring clean air.

In 1986 Congress passed the Immigration Reform and Control Act (IRCA) (PL 99-603),

125 William Niskanen, Bureaucracies and Representative Government (1972).

126The EPA regulation promulgated to implement this "permit requirement allows a State to adopt a plantwide definition of the term 'stationary source'...The question presented by these cases is whether EPA's decision...is based on a reasonable construction of the term 'stationary source.'" *Chevron* at 839. At issue was 48 CFR §§ 51.18 (j)(l)(i) and (ii) (1983) under Clean Air Act Amendments of 1977 Pub. L. 95-95 (*Chevron* at note 839 and note 1).

rendering the employment of non-citizens unlawful unless done in compliance with certain measures put forward in 8 USC §1324a (7). The law applies the prohibitions to private firms as well as "any branch of the Federal Government." On its face, the eight hour day and other employment specifications in the PBNDS are "manifestly contrary to the statute" (*Chevron*, at 844, citations omitted). While not defeating all employment of those in ICE custody, the prohibitions would seem to make the requirements of 8 hour shifts and other requirements of a conventional labor force inconsistent with the plain meaning of IRCA.

Second, the *Chevron* opinion affirms deference to agency decisions on policies in service of a "regulatory scheme" that is "technical and complex" and in which the "agency considered the matter in a detailed and reasoned fashion" (at 865). ICE has eschewed a regulatory scheme for its detention facilities. Beyond cost-savings for the contractors, there is no evidence of any agency consideration of the program's implementation, much less that which is "detailed and reasoned."

There are two kinds of further differences between agency deference based on *Chevron* and ICE's assertions of its prerogative to incentivize work at $1 per day. First, the detention standards were implemented for the purpose of protecting then INS residents through imposing measures by which Congress might hold the agency accountable. And second, the PBNDS do not meet the criterion in *Mead* or even Scalia's dissent, that the rule be authoritative across the agency.

The 1980 House Conference Report states that the forthcoming requirement that the INS issue "national detention standards" was for the purpose of redressing the same problems that

persist today, now at a much larger scale. The Conference Report, responsive to investigative reporting by the *New York Times* on the miserable conditions of the detention facilities,[127] speaks for itself:

> At the present time, there are no comprehensive standards for detention facilities operated by the INS. Instead, policies and procedures for the five facilities (located at New York, N.Y.; Port Isabel, Tex.; El Paso, Tex.; El Centro, Calif.; and, as of March 4, 1908, Miami, Fla.) have evolved in a piecemeal and haphazard manner.
>
> Furthermore, conditions in the INS detention facility in Brooklyn (New York City Service Processing Center) have been criticized by several concerned individuals and organizations for some time. The committee recognizes that INS facilities are utilized primarily for short-term detention and that the vast majority of aliens are held for less than 48 hours. Nevertheless, the committee believes that short-term detainees (who are being held for deportation, and not for criminal violations) are entitled to a humane and sanitary environment, with adequate food, lodging, medical care, and recreational activities.
>
> In order to insure critically needed improvements in INS detention facilities, policies and programs, the committee amendment requires the Attorney General to develop comprehensive detention standards for the INS and to conduct an evaluation, based on such standards within 1 year form the date of enactment of this legislation.[128]

In 1980 the INS produced its first draft standards but it was not until 20 years later that the INS actually published the National Detention Standards. They "do not have the force of law"[129] and

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127 "The Special Investigator established at the initiative of the committee in the fiscal year 1980 authorization bill to respond to widespread allegations of fraud, corruption, and mismanagement with int he Immigration Service." House 1980 Appropriations Authorization no amount, April 14, 1980, Committee on Judiciary House Rept. 96-Pt. I, p. 13.

128 The last sentence contradicts the sense of the preceding paragraph and is responsible for many of the problems documented herein and elsewhere: "The committee expects that such standards will be developed in close consultation with the Bureau of Prisons and the American Correctional Association." House 1980 Appropriations Authorization no amount, April 14, 1980, Committee on Judiciary House Rept. 96-, pt. I, p. 3. The 1980 INS standards on the facilities' resident work program produced shortly after the Conference Report states:
1010 Written Policy and procedure provide that only carefully screened detainees are assigned food service work. Discussion: Food service personnel should be in good health and free from communicable disease and open, infected wounds. They should practice hygienic food handling techniques and be periodically checked for personal hygiene." p. 132
p. 166 1903 Detainees are paid for work performed
Discussion: A system of reward for services may take form of additional funds to purchase canteen items, or additional recreational items or programs. INS. "INS Standards for Detention prepared by Detention and Deportation Division, Central Office, DC August, 1, 1980,

129 Siskin, at p. 11.

they are also still not applied evenly across ICE contracts[130] nor implemented evenly across detention facilities.[131]

Further suggesting the Congress advising on the need for standards had in mind the protection of INS facility residents and not the rationalization of their exploitation by the private prison industry is an expression of concern about the practice of immigration detention more generally: "The committee has consistently maintained that the most reasonable and humane administrative solution to the undocumented alien problem is to prevent their entry, rather than attempt to locate and deport them once they have entered the United States."[132] Returning to the Court precedents, the context here is one in which the agency explicitly rejected a petition to implement a "regulatory scheme" and rejected its rule-making process[133] for detention policies, thus weakening any claim to judicial deference to the programs thereby defined. The work program's ad hoc character and internal inconsistencies as well as inconsistencies between the program in the PBNDS and as implemented all fall short of the conventional bench marks for judicial deference. In sum, the ICE decision to informally design a labor policy outside the statutory and regulatory process and without contemplating the inconsistencies between its program and relevant statutes that apply across federal agencies has little resemblance to the EPA's effort to implement an air quality policy designed with public review and without conflicts with other laws.

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130 See Part III.

131 See *supra*, Part III.

132 Committee on Judiciary House Rept. 96-

133 Jane Holl Lute, Deputy Secretary, Letter to Paromita Shah and Michael Wishnie, Re: Petition for Rulemaking to Promulgate Regulations Governing Detention Standards for Immigration Detainees," July 24, 2009, available at http://nationalimmigrationproject.org website and on file with author ("The Department of Homeland Security (DHS) does not intend to initiate a rulemaking proceeding covering detention standards for immigration detainees at this time.")

Other Court Precedents

Christensen et a. v. Harris County, et al 529 U.S. 576 (2000) and *United States v. Mead Corp* 533 U.S. 218 (2001) address as well an agency's discretion to interpret a statute absent use of the regulatory review process. In *Christensen* the Court held that "Interpretations, such as those in opinion letters are 'entitled to respect'...but only to the extent that those interpretations have the 'power to persuade.'"[134] The Court held that where the FLSA and its regulations were silent, the agency had discretion but that it had to be used in a manner the Court found persuasive,[135] and rejected the agency's interpretation. "To defer to the agency's position would be to permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation" (at 588). *Christensen* suggests that the PBNDS would not be among those agency documents that would invite judicial deference.

In *Mead* the Court elaborated on the different standard of deference due "administrative practice in applying a statute," holding that an agency could have the "force of law" through adherence to certain rule-making procedures. Declining to apply *Chevron* deference, the Court held nonetheless that the agency had met the still intact *Skidmore* criteria of deference, holding that the rule classifying certain Mead products as "diaries" triggered review and on review was within the discretion authorized by Congress: "There is room at least to raise a *Skidmore* claim here, where the regulatory scheme is highly detailed, and Customs can bring the benefit of specialized experience to bear on the subtle questions in this case."[136] By rejecting the regulatory

134 *Christensen* at631, quoting *Skidmore* at 140.

135 ("Unless the FLSA *prohibits* respondents from adopting its policy, petitioners cannot show that Harris County has violated the FLSA.) *Christensen* at 588.

136 *Mead* 533 U.S. at 15 pdf.

rule-making procedures ICE would seem to invite review in the courts.

B. Statutory Construction and Agency Discretion: Textualist, Intentionalist, Purposivist, and Pragmatic[137]

Each of the assertions above is difficult to countenance based on the plain meaning of the relevant statutes in play or with respect to the facts of the program in place across ICE detention facilities today. The district court judge and the appellate court in *Alvarado Guevara v. INS* substitute their own guesswork about the legislative history and intent of Congress in 8 U.S.C. 1555(d) for an actual analysis; ignore the budgeting history of the program; fail to recognize the private industry as a major player in the American economy; and also fail to recognize the categorical differences of policies and jurisprudence for inmates enduring punishment in federal prisons and aliens in civil custody awaiting admission or return to the United States or their countries of origin. Moreover, the decision does not address the employment relations contemplated in the federal contracts with the private prison firms, per the Service Contract Act, Congress's effort to bring all federal contractors into compliance with the highest level of protections for those working for U.S. employers in the United States.

The government assertions appear to lack merit based on the plain meanings of the federal laws and regulations, but there are alternative theories of statutory interpretation that have been urged by some jurists and scholars, including two potentially more accommodating to the government's position. The approaches have been deployed for analyzing labor rights under

137 The discussion going forward is enormously indebted to the parsing of these fields in William Eskridge, Dynamic Statutory Interpretation, Cambridge, 1994 and Lawrence Solan, The Language of Statutes, Chicago, 2010.

conditions of pretrial and post-release custody in criminal contexts; indeed two cite to *Alvarado Guevara.*[138] Specifically, approaches that favor denying criminal inmates, and also some accused and post-conviction detainees employment protections of the FLSA are selectively relying on an actual or imagined legislative history and divining the statute's purpose.[139]

The one approach potentially favoring ICE and the private prison firms is that most vulnerable to appearing excuses for judge-made law. The correspondence between the interpretative strategy and outcome is not specific to the field of ICE detention or even prison law but apparently applies across cases: "[L]egal scholars and Justice Scalia himself agree that the textualist approach decreases the likelihood that justice will defer to the administrative agency, and the historicalist approach increases the likelihood that the justice will defer to the administrative agency,"[140] although here the historicalist approach as well has little to offer ICE and the private contractors. Moreover, even within the latter approaches approaches, a more complete understanding of the broader set of competing laws and jurisprudence appears to yield outcomes other than those advocated by the *Alvarado* Guevara opinion.

138 See Part VII.

139For instance, setting forth his own anti-textualist approach of judicial "pragmatism," Richard Posner, has used a pseudo-historical reasoning in a post-conviction FLSA case, an approach that would likely affirm *Alvarado Guevara* and thus support allowing these employer-employee relations to continue.

140 Ruth Ann Watry, Administrative Statutory Interpretation: The Aftermath of Chevron v. Natural Resources Defense Council, New York, 2002, p. 9, citations omitted.

PART V

PLAIN MEANING STATUTORY CONSTRUCTION

Adrian Vermeule's insights on inaccurate judicial interpretations of a statute's legislative histories and purpose, drawn from his analysis of the *Holy Trinity* facts and its subsequent case law, lead him to write:

> Distinctive features of the adjudicative process--the whole set of institutional and procedural rules that determine when and how litigants try and argue cases and when and how courts decide them--might interact with distinctive features of legislative history in a manner that causes courts systematically to err in their attempts to discern legislative intent from legislative history. Indeed, judicial error in the use of legislative history might occur sufficiently often, and with sufficiently serious consequences, that courts relying on statutory text and other standard sources of interpretation, would achieve *more* accurate approximations of legislative intent over the long run of future cases than courts that also admit legislative history as an interpretive source.[141]

The pseudo-legislative history of the work program on which the *Alvarado Guevara* opinion relied is a symptom of the problems Vermeule describes. As Parts VI and VII suggest, this history is not conducive to the current slaving wage employment contracts.

Drawing on the empirical information presented heretofore, Part V suggests how the program might be modified in light of the plain meaning approach to statutory construction and an implied repeal analysis of Immigration Expenses (8 USC § 1555(d)); the Fair Labor

141 Vermeule, *Holy Trinity*, p. 1838.

Standards Act (FLSA) (29 USC § 201 et seq.); Service Contract Compliance Act (41 U.S.C. 351, ***et seq*);**[142] the Occupational Health and Safety Act (OSHA) (5 USC § 1101-2013); Immigration Reform and Control Act (1986) 8 USC § 1324(a));[143] Federal Procurement (42 USC § 6962); and Convict Labor Contracts (18 USC § 436).[144]

Using the plain meaning and implied repeal approach means hewing closely to the authorizations, mandates, and prohibitions of the statutes based on their plain meanings, and implementing them all to the fullest extent logically and physically possible.[145] This produces an outcome quite different from the *Alvarado Guevara* opinion. That opinion disregards the plain meaning of the texts and invents a legislative history; moreover, 2014 is 24 years longer than the distance between that ruling and 1978. Also, there are differences between how the program was implemented in 1990 and how it is implemented today. Finally, only the first two of the seven laws listed above were part of the *Alvarado Guevara* lawsuit and thus the opinion ignored the remaining five and their role in construing the law that might guide the implementation of a work program in ICE detention facilities.

A. The Plain Meanings

According to the Yule Kim, the Congressional Research Service's author of a report on statutory interpretation, "The starting point in statutory construction is the language of the statute

142 As amended Public Law 92-473, as enacted October 9, 1972, and in bold face new or amended language provided by Public Law 94-489, as enacted October 13, 1976.
143 PL 99-603.
144 48 CFR 22 et seq.); 161 FR 31644, June 20, 1996; 28 CFR 94-1(b); Exec. Order 11755, Dec. 29, 1973) [39 FR 779, 3 CFR 1971-1975, p. 837).
145 See *infra* at note 193.

itself."[146] Second, in cases in which agency actions are disputed, "there is a 'strong presumption that Congress intends judicial review of administrative action.'"[147] Finally, Kim's report discusses "repeals by implication," and explains that when there are apparent tensions between statutes, e.g., among the allowances for work performed by those in custody under immigration law, the FLSA, and the Immigration Reform and Control Act's prohibition of employing unauthorized immigrants,

> courts will try to harmonize the two so that both can be given effect. A court 'must read [two allegedly conflicting] statutes to give effect to each if [it] can do so while preserving sense and purpose.' Only if provisions of two different federal statutes are 'irreconcilably conflict,' or 'if the later act covers the whole subject of the earlier one and is clearly intended as a substitute,' will courts apply the rule that the later of the two prevails.' '[R]epeals by implication are not favored,... and will not be found unless an intent to repeal is clear and manifest.' And in fact, the Court rarely finds repeal by implication.[148]

The statutes below are reviewed for analysis of how they might be best read in light of the Court's favoring reading the plain meaning of disputed statutes and disfavoring repealing statutes absent the express Congressional delegation to do so.

1. 8 U.S.C. § 1555 (d)

Immigration Service Expenses 8 USC § 1555 is the sole statutory authority that specifically speaks to compensation for the work of those in ICE custody. It states in its entirety:

> Immigration Service expenses Appropriations now or hereafter provided for the

146 Kim, Statutory Interpretation, p. 2.
147 *Ibid*., at p. 22.
148*Ibid*., pp. 26-27, citations omitted.

> Immigration and Naturalization Service shall be available for payment of (a) hire of privately owned horses for use on official business, under contract with officers or employees of the Service; (b) pay of interpreters and translators who are not citizens of the United States; (c) distribution of citizenship textbooks to aliens without cost to such aliens; (d) payment of allowances (at such rate as may be specified from time to time in the appropriation Act involved) to aliens, while held in custody under the immigration laws, for work performed; and (e) when so specified in the appropriation concerned, expenses of unforeseen emergencies of a confidential character, to be expended under the direction of the Attorney General, who shall make a certificate of the amount of any such expenditure as he may think it advisable not to specify, and every such certificate shall be deemed a sufficient voucher for the sum therein expressed to have been expended.[149]

Nothing in the statute exempts the work from the hourly wage protections of the FLSA, passed in 1938. As noted in *Alvarado Guevara,* the last appropriation Act authorizing the $1 per day allowance was for fiscal year 1979 and expired on October 30 of that year.[150]

In light of the canon instructing jurists to understand specific provisions in the context of the statute as a whole,[151] what does 8 USC § 1555 as a whole tell us about section (d)? One possible clue is the use of "pay" for "interpreters and translators" in section (b), in contrast with the "allowances" authorized for aliens in custody under immigration laws ("Words that are not terms of art and that are not statutorily defined are customarily given their ordinary meanings,

149 Act of Jul. 28, 1950, Pub. L. 81-626, 64 Stat. 380. Statute was previously codified to 5 U.S.C. § 341d, prior to the reclassification of Title 5. Act of Sep. 6, 1966, Pub. L. 89-554, 80 Stat. 378. Can now be found at 8 U.S.C. § 1555.

150 The history of this statute and its appropriations are discussed in Part VI at B.

151 Kim, Statutory Interpreation, at p. 2.

often derived from the dictionary.")[152] According to the American Heritage Dictionary (online), an "allowance" (n) is "1. The act of allowing. 2. An amount htat is allowed or granted: *consumed my weekly allowance of two eggs.* 3. Something, such as money, given at regular intervals or for a specific purpose: *a travel allowance that covers hotel bills*. 4. A small amount of money regularly given to a child, often as payment for household chores. 5. A price reduction, especially one granted in exchange for used merchandise: *The dealer gave us an allowance on our old car.*"

The definitions here bring home a fundamental problem with the statute: None of these definitions apply to what appears to be 8 USC 1555 § (d)'s scheme of an "allowance" for work performed by adults. In short, the statute's plain meaning is oxymoronic. An allowance can be provided in exchange for work performed *by a child*, but otherwise has very different meanings. Instead of an "allowance," the compensation under 8 1555 (d) is much closer to the meaning of "pay," (n.) defined by the American Heritage Dictionary as: "1. The act of paying or state of being paid. 2. Money given in return for work done; salary; wages. 3. a. Recompense or reward: Your thanks are pay enough; b. Retribution or punishment. 4. Paid employment: *the workers in our pay.* 5. A person considered with regard to his or her credit or reliability in discharging debts." (It is tempting to move straight to the legislative intent of "allowance," but this discussion is reserved for Part VI. The point here is that the plain meaning of the statute's words are not absurd or ripe for unanticipated applications but unclear, and also sui generis. Other sections of the federal code refer to an "allowance" as a capped *reimbursement*. I know of no other portion that provides payment as an "allowance" as indicated in 8 USC 1555 § (d). The

152 *Ibid.,* at p. 6.

idiomatic word for transaction described therein is "pay."[153] Also in keeping with this use is that the contracts themselves typically refer to "detainee wages" or "detainee pay," although the 2013 Denver RFP, issued after ICE was alerted to recent interest in this program, uses the word "stipend."

That the word in the statute is "allowance" may be helpful for accommodating IRCA. A non-pay (allowance) compensation suggests a policy short of a full employment policy that might be repealed by provisions of the IRCA, passed in 1986, while at the same time protecting workers in and out of detention centers from the depressed wages the FLSA was passed to remedy. For reasons discussed below, 8 USC's 1555 (d) functional meaning of pay or wages, along with Congress's wage policies in the FLSA and its failure to set separate rates for work performed by aliens in custody under immigration laws favors resolving ambiguities "in favor of persons for whose benefit the statute was enacted,"[154] in this case those in ICE custody as well as those in neighboring communities adversely impacted by losing employment to people employed at slaving wages.

The statute indicates Congress shall set the rate of compensation "from time to time," not annually. The phrase "from time to time" and "the appropriation Act involved" also appears in

153 Note that while different words appearing in the same statute call for attention, the Court has held, "'[N]egative implications raised by disparate provisions are strongest when the portions of a statute treated differently had already been joined together and were being considered simultaneously when the language raising the implication was inserted.'" Kim goes on to point out, "establishing that language does *not* mean one thing does not necessarily establish what the language *does* mean." Citing Lindh v. Murphy, 521 U.S. 320, 330 (1997), and Chapman v. United States, 500 U.S. 453, 459 (1991) "(fact that, with respect to some drugs, Congress distinguished between a 'mixture or substance' containing the drug and a 'pure' drug refutes the argument that Congress's failure to so distinguish with respect to LSD was inadvertent)." This is of note since this opinion appears to infer meaningful intentions from the text and not to impute meaning to the text based on hypothetical legislators's intentions. And see Field v. Mans, 516 U.S. 59, 67 (1995) ("without more, the ['negative pregnant'] inference might be a helpful one," but other interpretive guides prove more useful)." at 14.

154 *Ibid*., at p. 30, quoting "Smith v. Heckler, 820 F. 2d 1093, 1095 (9th Cir. 1987) (Social Security Act 'is remedial, to be construed liberally...so as not to withhold benefits in marginal cases.')"

Article I, section 9, clause 7: "No money shall be drawn from the Treasury but in Consequence of Appropriations made by Law, and a regular statement and Account of the Receipt and Expenditures of all Public Money shall be published from time to time." From "time to time" in this context is a phrase that requires Congress periodically to make transparent its expenditures. In the context of 8 USC 1555 (d) it associates the wages authorized with the "appropriations Act involved," indicating that Congress has retained the authority to set the rate of compensation and has not delegated this to the Executive branch.

Under some circumstances an authorizing statute mandates duties for an agency even absent appropriations: "If an authorization of appropriations expires, or if Congress fails to appropriate sufficient funds without explicitly denying their use for a particular purpose, these statutory obligations still exist even though the agency may lack sufficient funds to satisfy them."[155] However, 8 USC § 1555 (d) is neither an entitlement program nor an unfunded mandate but a discretionary program that has received a permanent authorization for expenditures from the DHS budget for operating expenses,[156] with the caveat that Congress and not the agency must set the rate of the daily allowance for work performed by those in custody under immigration laws.

It is possible that if Congress had persistently assigned a rate more recently than 1978 there might be an argument that rate might supersede the rate of compensation Congress set in the FLSA. That argument very well might fail, for statutory as well as Constitutional reasons,[157]

155 Jessica Tollestrup and Brian Yeh, Cong. Research Serv., R 42098, Authorization of Appropriation: Procedural and Legal Issues, at "Summary" (2011).

156 For 2014 the projection is that only 14.9% of the federal budget is available for non-defense discretionary spending. *Ibid*.

157 There are Fifth, Sixth, and Fourteenth amendment questions that could be raised if Congress set a wage below the minimum wage for those in custody under immigration laws. 2.94 "It is well settled that courts will attempt

especially a possibility that ICE residents could claim the program violates the Fifth Amendment. To the extent that those in ICE custody have a property interest in their labor and their earnings, the failure to heed the FLSA protections or other basic standards of employee rights suggests that ICE may be violating Fifth amendment takings clause as well ("nor shall private property be taken for public use without just compensation"),[158] and that even if the current payments were authorized by Congress or otherwise survived statutory challenges, the program also raises Fifth Amendment due process concerns, as well as as Sixth, Thirteenth, and Fourteenth amendment problems, discussed below. Regardless, absent Congress setting this rate, and absent any statutory authority for ICE to set the rate, the FLSA and other statutes that specify the terms of compensation for those employed by federal contractors would appear to be the ones most appropriate for discerning the statutory authority for federal pay or wages, even if called an "allowance." Any capped payments would need to be accommodated by reducing the number of hours worked, not providing an hourly rate of compensation at 1.7% of the minimum wage.

2. Fair Labor Standards Act (FLSA)[159]

The law that mandates these higher payments to those employed by private prison firms and the federal government while held under immigration laws are the wage determinations based on statements of purpose in the the actual text of the FLSA. The FLSA begins with a broad

to avoid a construction of a statute that would render the statute unconstitutional, '[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.' *Edward J. DeBartolo v. Florida Gulf Coast Building and Construction Trades Council*, U.S. 568, 575 (1988). *Immigration and Naturalization Service v. St. Cyr*, 533 U.S. 289, 300 (2001) 'where an alternative to a constitutionally problematic interpretation is 'fairly possible...we are obligated to construe the statute to avoid such problems.'" And see Kim, Statutory Intepretation, p. 21.

158 Thanks to Professor Christopher Serkin for pointing this out.

159For additional sections of the FLSA, please see Appendix I.

Congressional finding and declaration of policy that demands a capacious understanding of its coverage and deference to its specific language and exemptions. 29 USC 202 (a) states:

> (a) The Congress finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers
> (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States;
> (2) burdens commerce and the free flow of goods in commerce;
> (3) constitutes an unfair method of competition in commerce;
> (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and
> (5) interferes with the orderly and fair marketing of goods in commerce. That Congress further finds that the employment of persons in domestic service in households affects commerce.
> (b) It is declared to be the policy of this chapter, through the exercise by Congress of its power to regulate commerce among the several States and with foreign nations, to correct and as rapidly as practicable to eliminate the conditions above referred to in such industries without substantially curtailing employment or earning power.

The finding includes statements about about a) the well-being of workers; b) the deleterious effects that distortions of labor markets have on commerce; and c) recognition that labor practices for one firm may harm workers employed elsewhere or unemployed, and the explicit intent of the bill to thwart these dynamic exigencies. This is extremely important and is recognized in certain prison labor laws and decisions that enforce the minimum wage requirements not only for the benefit of the inmates, who generally do not receive the full amount.[160]

The "detainee workers" residing in ICE facilities, including U.S. citizens and legal residents, as well as those in the country in violation of the immigration laws, are not excluded

160 See Parts V and VII, *infra* .

from coverage under the FLSA by the plain meaning of the statute. Moreover, these slaving wage payments affect not only them but the broader labor markets of which their labor is a part. Congress stated its purpose in the law itself and thus unlike 8 USC 1555 (d) there is no need to guess this.[161] To the extent that Congress may have contemplated undermining the ability of service workers to achieve full employment because work they might perform is being done at $1 per day and hence firms have no need to employ them at the legally required minimum wage, the failure to specify this in the bill weakens any reading of 8 USC 1555 (d) that might advance this claim. Moreover, courts have used this portion of the FLSA to cover foreign workers on ships in international waters, if the ship is owned by a U.S. firm[162] It would seem no more prejudicial to the employment prospects of those in Louisiana and Texas for a ship owner to violate the FLSA by exploiting Malaysians at sea than for CCA to violate the FLSA by exploiting Malaysians in Oakdale and Houston to avoid paying full wages to U.S. Americans.[163]

Alvarado Guevara's claim that the FLSA does not cover INS detainees is based on imputations of "legislative purpose" and "motive" absent historical or textual evidence, not the plain meaning of the statute. The statute references concerns for the "general well-being of workers in industries engaged in commerce." The PBNDS and contracts describe ICE resident

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161 For this reason, courts weigh purposes stated in the statute's text more than those imputed to Congress on the basis of hearing records, reports and other related materials. See *infra*, Part VII.

162 ("I]f Defendant is able to employ foreign workers working off of the Coast of Louisiana under working conditions that Congress has deemed unacceptable for American workers, then there is nothing to stop them from 'outsourcing' all of the jobs on the vessels in the Gulf, which would have dire economic consequences for families throughout the Gulf Coast region.") *Kaluom v. Stolt* 474 F. Supp. 2d 866 at 881.) "'...That's their standards that they've set and they're happy. They're happy to have these jobs.' (Thomas Dep. at 104-05.)...The problem with Thomas's reasoning is that... [t]hey were working in the Gulf of Mexico on a vessel that, for purposes of this Motion, was an American vessel..." *Ibid.*

163 "[T]he 'purpose of the [Fair Labor Standards] Act was to eradicate from interstate commerce the evils attendant low wages and long hours of service.' *McComb v. Farmers Reservoir & Irrigation Co.*, 167 F. 2d 911, 913 (10th Cir. 1948), *aff'd* 337 U.S. 755, from *Kaluom v. Stolt* 474 F. Supp. 2d 866 at 888.

workers in an industry engaged in commerce. The FLSA also embodies the harms contemplated by Congress's finding and declaration, including that $1 per day wages "constitute an unfair method of competition in commerce," as the prison industry gains an unfair margin of profitability compared with those industries that might benefit from an immigration policy that favored legalization of immigrants and not their detention and deportation.[164] (Also, *Alvarado Guevara* asserts the FLSA declaration concerns the "worker in *American* industry" (emphasis added) gratuitously using a prejudicial adjective absent in the law itself (referencing simply "industries engaged in commerce").[165]

Among the dozens of exemptions, the FLSA includes no exemption for those held in custody under immigration laws. Segments of the labor force that had historically been excluded, e.g., "domestic service in households" are explicitly included (29 USC § 202(a)(5)) and those that are exempt are excluded very specifically and with caveats to ensure that employers do not enlarge their scope beyond the letter of the law. On its face this means no specific delegation from Congress of the authority to provide these payments at rates and conditions below those established by the FLSA for work performed by aliens held under immigration laws.

One possible response to this analysis would be to point out the reference to a "wage" in the FLSA and to an "allowance" in 8 USC 1555 (d). Other than including compensation of room

164 This distorts not only commerce, by drawing investment toward the unproductive sector of warehousing people and away from more productive sectors--pretty much any other sector--but it also makes available more funds for lobbying on on behalf of the prison industry and thus distorts the policy-making process.

165 "'Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of a contrary legislative intent.' *Andrus v. Glover Const. Co.,* 446 U.S. 608, 616-17 (citing Contiental Casualty Co. v. United Stats , 314 U.S. 527, 533 (1942)." from Kim, Statutory Interpretation at 16-17.

and board as possible forms of "wages"[166] the FLSA does not define the word. It is certainly the case that those in ICE custody have their room and board covered. But since their confinement is not a punishment, the government is not authorized to force those in detention to work as payment for this, per *Wong Wing*. Detention in service of the implementation of immigration law is a choice Congress has made to protect the integrity of its deportation laws, and thus a benefit to their constituents they represent. Some Congresses have made other choices, i.e., to reject proposals for mass detention of those in deportation proceedings.[167] Further, the plain meaning of 8 USC 1555 (d) is to authorize cash payments for work performed; it does not describe a *quid pro quo* exchange of work for lodging.

There is a legitimate question about how to read 8 USC 1555 (d) reference to an "allowance" in relation to the FLSA protection of "wages." The Amerian Heritage Diction defines "wage" as "1. A regular payment, usually on an hourly, daily, or weekly basis, made by an employer to an employee, especially for manual or unskilled work." The definition of a wage is consistent with the protocols for ICE facility residents signing up for work at specified times and shifts and receiving payments for each day's work. That this might be capped as an "allowance" to be used for commissary purchases of commercial products -- at retail prices with profits going to the company store, so to speak -- is also consistent with "wage" as used in the FLSA. Just because the government, or any other employer, caps hours worked, does not exempt the organization from the requirements of the FLSA. Other institutional employment settings may cap hours worked and still pay wages at minimum wages.[168] To the extent that a

166 FLSA, Definitions 29 USC 203 (4) (m).
167 House. Justice Department Appropriation Hearings, 1943, for fiscal year 1945.
168 One familiar one for this audience might be student research assistants. A university may prohibit students employed under the work-study programs from working more than 10 hours per week. The amount earned is

firm's hourly work requirements for this "allowance" put the rate of compensation below that of the federal minimum wage, the firm is violating the law.

One possible legitimate FLSA exemption for the ICE resident work program would be if it truly did comport with the definition of a "volunteer" in the regulation implementing the FLSA. The PBNDS describes its "Volunteer Work Program," and invokes as well prohibitions against the use of immigrants for forced labor, per *Wing,* but this does not qualify for the exemption as defined in the relevant regulation. To preclude employers from circumventing coverage with assertions about the supplemental character of income to their work force, a federal regulation defines"volunteer" as follows:

> Definition of Volunteer ″(a) An individual who performs hours of service for a public agency for civic, charitable, or humanitarian reasons, without promise, expectation or receipt of compensation for services rendered, is considered to be a volunteer during such hours.[169]

Were the FLSA to be interpreted in such a manner as to exempt those who were willing to work below minimum wage, along the lines of the program defined in the PBNDS, McDonald's could pay retired senior citizens to "volunteer" for eight hour shifts in exchange for a Big Mac or its cash equivalent.

Moreover, additional sections of the regulation specify that there can be no hint of coercion: "(b) Congress did not intend to discourage or impede volunteer activities undertaken for civic, charitable, or humanitarian purposes, but expressed its wish to prevent any

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capped to a significant extent, but at an amount at minimum wage or higher.

169 29 CFR § 553.101.

manipulation or abuse of minimum wage or overtime requirements through coercion or undue pressure upon individuals to 'volunteer' their services."[170] ICE might be hard-pressed to expect judges to believe ICE facility residents are cleaning toilets for the companies constraining their liberty in service of furthering the residents's "humanitarian purpose" of supporting the deportation industry. ICE most likely is using this language because of the Sixth Amendment issues raised in *Wong Wing*. Nonetheless a legal strategy to avoid this violation does not address the problems of violating the FLSA, or government obfuscation. In sum, the conditions under which people in ICE custody are being paid $1 per day for their work fail to meet any of the criteria for the definition of a "volunteer." Nor do they qualify for any other exemptions.

3. The Service Contract Act of 1965 (41 USC 351)

The Service Contract Act (SCA), referenced in all ICE facility contracts, states: "Required Contract Provisions, minimum wages: (b)(1) No contractor who enters into any contract with the Federal Government the principle purpose of which is to furnish services through the use of service employees and no subcontractor thereunder shall pay any of his employees engaged in performing work on such contracts less than the minimum wage specified under section 6(a)(1) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 201 et seq.)." The SCA is referenced in all the ICE facility contracts and the work listed in the ICE contracts[171] is covered by this Act---which includes no exemptions for those working while held in custody under immigration laws.

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170 *Ibid*.
171 See *infra*, *Part* III.

4. Occupation Safety and Health Act of 1970 (19 USC chapter 15, et seq)

The Occupation Safety and Health Act states that the "purpose and policy" is to assure so far as possible every working man and woman in the Nation safe and healthful working conditions."[172] The Act also includes among its purposes, "providing for appropriate reporting procedures with respect to occupational safety and health."[173] The Occupational Health and Safety Administration (OSHA) defines in its regulations an employer as "a person engaged in a business affecting commerce who has employees but does not include the United States or any state or political subdivision of a State."[174] An employee is an "employee of any employer..."[175] The OSH Act requires the OSH Administration to develop regulations to implement the Act, including its enforcement: "Any employees or representative of employees who believe that a violation of a safety or health standard exists that threatens physical harm, or that an imminent danger exists, may request an inspection by giving notice to the Secretary or his authorized representative of such violation or danger."[176]

The Port Isabel facility in 1990 was operated by the Immigration and Naturalization Service. Today it and all other ICE detention facilities are run by private firms whose supervisory and other contractual operational responsibilities include work performed by ICE residents. At present the facility is managed by Ahtna Technical Services. The PBNDS provides no possibilities for reporting OSHA violations and the Ahtna contract weights the "detainee

172 29 USC 651 (b).
173 29 USC 651 (b) (12).
174 29 CFR 1910.2(c).
175 29 CFR 1910.2(d).
176 29 USC 657 (f) (1).

rights" portion of compliance at 5%.[177] The standards of evaluation in the contract clearly contemplate facility residents performing work ("Detainees receive safety and appropriate equipment training prior to beginning to work department"),[178] but Ahtna has little or no incentive to follow its own internal grievance procedures much less OSHA requirements.

5. Immigrant Reform Control Act, Making Employment of Unauthorized Aliens Unlawful (8 USC 1324a)

This Act states: "(1) **In general** It is unlawful for a person or other entity -- (A) to hire, or to recruit for a few, for employment in the United States an alien knowing the alien is an unauthorized alien (as defined in (h)(3) of this section) with respect to such employment..."[179] On its face the law would seem to conflict with 8 USC 1555 (d) and if implemented to cover ICE facility residents, potentially rendering the program unlawful. However, the rest of the statute accommodates some work by ICE residents, provided that the employment is consistent with other laws and the Constitution. To provide work opportunities for limited hours at wages set by the FLSA would fit the "general" goal of the law and also provide a "defense" against prosecution for which the statute explicitly provides.

First, the only group of people who are clearly covered by the statute are those who have consented to final removal orders and are waiting for travel documents from their home countries

177 HSCEDM-08-d-00002-AHTNA TECHNICAL SERVICES, period of performance through 5/31/2013, p. 80.
178 *Ibid*., p. 90.
179 PL 99-603, as amended. (The Act has a lengthy history of amendments, see 8 USC 1324a, "Notes," at http://www.law.cornell.edu/uscode/text/8/1324a.)

and for ICE to make arrangements for their departure.[180] Second, ICE has custody of thousands of people who ultimately have their U.S. citizenship affirmed,[181] and tens of thousands of people whose legal residency is ultimately recognized in an immigration court or by a federal judge.[182] Prior to this occurring the employer would be in the same position of uncertainty about citizenship and legal residency as the government, and would not be hiring an ICE resident "knowing the alien is an unauthorized alien," indeed not even knowing if the alleged "alien" is even an alien, only that the resident stands accused of this by ICE.

Further, firms employing ICE residents under 8 USC 1555 (d) may find relief in the final lines of 8 USC 1324(a)(h)(3) : "As used in this section, the term "unauthorized alien" means, with respect to the employment of an alien at a particular time, that the alien is not at that time ... [(A) omitted] (B) authorized to be so employed by this chapter or by the Attorney General." This last authorization could be accomplished by prosecutorial discretion or, preferably, pursuant to the Attorney General initiating a rule-making process to provide such an exemption.

Alvarado Guevara takes a different position, claiming that the 1988 Treasury, Postal Service, and General Government Appropriations Act would prohibit the Immigration and Naturalization Service (INS) from employing INS facility residents (at note 2). However, section 603 (a) applies only to employees of the federal government and is prefaced by the caveat that the prohibition applies, "Unless otherwise specified..."[183] 8 USC 1555 (d) and also 8 USC 1324(a)(h)(3) authorizes these expenditures and is hence such a law specifying Congressional

180 ICE has released no snapshot data on the number of people in their custody who fit this description. No one who fits this description can be held for longer than six months, *Zadyvadas v. Davis* 533 U.S. 678 (2001).
181 Stevens, U.S. Government Deporting U.S. Citizens, *supra*.
182 EOIR, Statistical Yearbooks, at http://www.justice.gov/eoir/statspub/syb2000main.htm/.
183 PL 100-440, Sept. 22, 1988, 102 Stat. 1751.

authorization for this employment.

6. Convict Labor Contracts (18 USC § 436), Executive Order 11755 (Dec. 29, 1973), as modified by Executive Order 12608 (Setp. 9, 1987) and Executive Order 12943 (Dec. 13, 1994), 48 CFR 22.201.

The order imposes conditions on the use "convict labor" and does not reference those in custody under immigration laws. The order, collapsed into the 48 CFR 22.201, references "prison inmates," "persons on parole or probation," and other categories of those who are or were in criminal custody for purposes of punishment and, per the order and regulation, rehabilitation: "The development of the occupational and educational skills of prison inmates is essential to their rehabilitation and to their ability to make an effective return to free society..." Clearly there is no relation between this and the work program described in the PBNDS nor implemented in the ICE facilities. The only reason to mention it is that it is referenced in all ICE-owned facility contracts and a portion of 48 CFR 22.201 requires facilities to ensure that "(4) (iii) paid employment will not (A) Result in the displacement of employed workers; (B) Be applied in skills, crafts, or trades in which there is a surplus of available gainful labor in the locality; or (C) Impair existing contracts for services." This provision is not referenced in *Alvarado Guevara* but is relevant to understanding the legal texts that speak to the employment of ICE facility residents and that, in written mandates of laws and regulations, demand protections for workers in general and not just those employed by a specific firm, specifying a dynamic understanding of the relation between employment decisions within and among firms, employment sectors, and the labor pool and U.S. economy.

The plain meaning of all these laws and regulations can be accommodated by a policy that a) enforces the minimum wage for all work performed in ICE facilities, per the SCA and FLSA; b) caps the number of hours worked, per 8 USC § 1555 (d) and 42 CFR 22.201; c) removes OSHA compliance from the internal grievance review procedures of the PBNDS and places this in the purview of OSHA; and d) exempts contractors from prosecution under 8 USC 1324 (a) by prosecutorial discretion or rules elaborated by the Attorney General, as specified in 8 USC 1324 (h).

B. Jurisprudence of Prison Labor Cases Relying on the Plain Meaning of the FLSA

Alvarado Guevara largely ignores the plain text of the FLSA and other statutes, but other widely cited decisions on prison work have taken a different approach. Instead of dismissing prisoners from coverage because of their status as prisoners, some courts have distinguished between mandatory work performed as a condition of punishment or correction and that which is for purposes of income for commercial enterprises as well as the inmates. This section reviews decisions that look to the plain meaning of laws relevant to assessing prisoners' claims for compensation per the FLSA. For the most part they do not look to congressional intent, purposes, or the judges's notions of an "absurd" result.

The argument developed here is that *implied repeal* is the correct interpretive strategy for understanding the legal work conditions of inmates as well as ICE residents.[184] Like the tension between the statutory requirements of punishment and those for protecting workers' rights to a

184 Indeed, many of the cases that have been construed in case books as exemplifying the limits of reading laws at face value, so to speak, occur in the contexts of prison labor cases, exemplifying how this doctrine affects populations whose ideas of a statute's purpose or most pragmatic implementation will be unlikely to resonate with the intuitions of the population of judges using these criteria.

minimum wage, the tension is between general statutes and those specifically instructing law enforcement officials to implement corrections or other penal policies. The criterion for when a court might find an implied repeal[185] is that the requirement(s) of the statute in question are irreconcilable in the case at hand with those of another statute. In light of the ability to implement the statute, this appears not to be the case.[186]

As noted above, the explicitly avowed purpose of the FLSA is to protect the labor rights of workers across industries. Since its inception the FLSA has been repeatedly invoked to "require its application to many persons and working relationships which, prior to this Act, were not deemed to fall within an employer-employee category" (*Rutherford Food Corp. v. McComb*, 331 US 722, 729 (1961). Criteria to evaluate this are "whether the alleged employer (1) had the power to hire and fire the employees; (2) supervised and controlled the employee work schedule or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records" (*Louis Carter v. Dutchess Community College* 735 F2d 8, 20-21 (1984), quoting *Bonnette v. California Health and Welfare Agency*, 704 F.2d 1465). In a widely cited decision, the Second Circuit appellate court held the FLSA applied to prisoners: "Congress has set forth an extensive list of workers who are exempted expressly from FLSA coverage. The category of prisoners is not on that list. It would be an encroachment upon the legislative prerogative for a court to hold that a class of workers is excluded form the Act" (*Carter* at 13, denying motion to dismiss prisoner lawsuit seeking damages under the FLSA).

Similarly, on September 13, 1990, just a few months after its decision in *Alvarado*

185 Va and Schwartz urge its use for analysis of FLSA claims by undocumented workers, *supra*.
186 *See supra.*

Guevara the Fifth Circuit in *Watson v. Graves* hewed closely to the text of the FLSA. Overturning a district court opinion and ignoring entirely the interpretive strategy in *Alvarado Guevara,* the Fifth Circuit restated the analysis used in *Carter v. Dutchess County* ("We agree with the *Carter* court that status as an inmate does not foreclose inquiry into FLSA coverage. We also agree that in order to determine the true 'economic reality' of the inmates' employee status, we must apply the four factors of the economic reality test to the facts in the instant case in light of the policies behind the FLSA. We must also look to the substantive realities of the relationship, not to mere forms or labels ascribed to the laborer by those who would avoid coverage").[187]

In distinguishing the case at hand from those in which other courts had refused FLSA protections for prisoners, *Watson* pointed out that the Plaintiffs were offered the opportunity to work, and thus were not working as a condition of their punishment ("...by stark contrast, Watson and Thrash were not *required* to work as part of their respective sentences. Therefore, their labor did not 'belong' to the Livingston Parish Jail, and was not legitimately at the disposal of the Sheriff or Warden," at 1555). In other words, the fact that Watson and Thrash chose, or in the language of the ICE PBNDS "volunteered" to work is precisely what triggered their protections under the FLSA.

Those decisions following the plain meaning of the FLSA and denying coverage to prisoners nonetheless parse the law in a way that would still allow coverage for workers who are ICE facility residents. Stressing the primarily rehabilitative purpose of the programs, so stated in

187 *Watson v. Graves,* 909 F. 2d 1549, 1554 (5th Cir. 1990), writ denied. Interestingly, the decision makes no mention of its recent ruling in *Alvarado Guevara*, which entirely ignores the criteria from *Bonnette* used in *Carter.*

authorizing state and federal statutes for prison employment, and the statutes contemplating designs to prevent this from adversely impacting commerce and labor, there is an implied repeal approach available to the prison work cases that is not available for those in custody under immigration laws.

The court in *McMaster et al. v. State of Minnesota et al*. 819 F. Supp 1429 (1993) denied prisoners the right to sue under the FLSA (holding the work is "part of their sentences of incarceration") and cited with approval a prior decision in which the court "rejected an interpretation of the FLSA under which coverage would turn upon whether inmates performed services for the prison itself or produced goods for distribution beyond prison walls" (*McMaster* at 1438, citing *Vanskike v. Peters,* 974 F. 2d 806 (7th Cir. 1992).). In *McMaster* the court rejected the claim that prisoners producing goods for market through prison industries programs authorized by Minnesota are covered by the FLSA ("by statute, the prison industries are to operate 'for the *primary purpose of providing vocational training, meaningful employment and the teaching of proper work habits to the inmates*...and not as competitive business ventures." Minn. Stat. 2471.27, subd. 1 (1438), emphasis added). The court held that the work relation at issue was one of "involuntary servitude" and not employment (at 1437) and that "the Thirteenth Amendment's exclusion of prison labor from the prohibition on involuntary servitude is a strong indication that as a matter of economic reality, prisoners working for the prison itself are not employed by the prison within the meaning of the FLSA" (at 1437). This determination finds labor within the prison is exempt from FLSA coverage because such work is a condition of punishment and not because it is not considered work.

An analysis purporting to rely on the text of the FLSA has been read to imply ICE residents are ineligible for protections under the FLSA because their "standard of living" is accommodated by jailers.

In *Harker v. State Use Industries* (1990), the Fourth Circuit wrote:

> The FLSA does not cover these inmates because the statute itself states that Congress passed minimum wage standards in order to maintain a 'standard of living necessary for health, efficiency and general well-being of workers." 29 U.S.C. § 202(a). While incarcerated, *inmates have no such needs because the DOC provides them with the food, shelter, and clothing that employees would have to purchase in a true employment situation.* So long as the DOC provides for these needs, [the inmates] can have no credible claim that inmates need a minimum wage to ensure their wage to ensure their welfare and standard of living.[188]

For reasons that appear in *Wong Wing* and are discussed in more detail in Part VI, the reasoning above is not relevant to ICE residents, despite them being held at government expense. *Harker's* questionable inferences about room and board removing penal institutions from the obligation to pay minimum wage have been influential in court opinions denying coverage to those in prisons, but may have limited relevance to the ICE PBNDS work program.[189]

The Fourth Circuit arrives at this opinion in part by reading the FLSA in the context of laws for prison custody and work programs. Using an implied repeal analysis the court points

188 *Harker v. State Use Industries*, 990 F. 2d 131, 133 (4th Cir. 1990), italics in original, underlined emphasis added.

189 *Harker v. State Use Industries* is cited by 57 decisions and followed by *Danneskjold v. Hausrath*, 82 F. 3d 37 (2d Cir. 1996), cited in 68 decisions. (Source: Shepherdize, Lexis-Nexis, November 10, 2013. And see Part VI.)

out that 18 USC 1761 (B) specifically "exempts prison-made goods" and specifies that prisoners must have "received wages at a rate which is not less than that paid for work of a similar nature in the locality in which the work was performed, except that such wages may be subject to deductions, which shall not, in the aggregate, exceed 80 per centum of gross wages, and shall be limited as follows..." The court's references to the specific text referencing statutory charges of room and board for prisoners finds no corollary for those in ICE custody.

The *Harker* opinion also interprets the FLSA in the context of the "State Use Industries," an "organization within the DOC [Department of Correction] created by the Maryland legislative to meet the rehabilitative needs of inmates" (at 2). The court further states, "As part of the DOC, the SUI has a rehabilitative rather than pecuniary interest in Harker's labors" (at 6).

In the case of states or other government agencies requiring work as a condition of punishment, such measures would indeed present an "irreconcilable conflict" with the FLSA, and has allowed judges to infer Congress had by authorizing this, implied the repeal of other acts that would otherwise protect individuals from the exploitation of low or unremunerated work. This approach to the FLSA accommodates as well those decisions that disallow FLSA coverage for prisoners *when their condition of punishment is work, hard labor or otherwise.* It is physically possible to force someone to work and to ensure compensation at $7.25 per hour. But to do so would pose a "positive repugnancy" to the prospect of punishing the criminal whose compensation is so guaranteed.

ICE might claim that the Immigration Expenses law, passed in 1950 is more specific and passed after the FLSA (1938) ("It follows under the general principles of statutory

construction ... that the narrowly drawn, specific venue provision of the National Bank Act must prevail over the broader, more generally applicable venue provision of the Securities Exchange Act.")[190] Still, the analysis is that "even then only to the minimum extent necessary" (*Silver v. New York Stock Exchange* 373 U.S. 341, 357 (1963)).[191] The criterion of restraint for an implied repeal analysis would seem to disfavor courts finding the type of conflict between the FLSA and 8 USC 1555 (d) along the lines of the decisions in *McMaster* and *Harker.*

The Supreme Court is reluctant to implied repeal analyses ("We have repeatedly stated...that absent 'a clearly expressed Congressional intention,' *Morton v. Mancari*, 417 U.S. 535, 551 (1974), 'repeals by implication are not favored," *Universal Interpretive Shuttle v. Washington Metropolitan Area Transit Comm'n*, 393 U.S. 186, 193 (1968). An implied repeal will only be found where provisions in two statutes are 'in irreconciliable conflict,' or where the latter Act covers the whole subject of the earlier one and 'is clearly intended as a substitute.' *Posadas v. National City Bank*, 296 U.S. 497, 503 (1936), in *Branch v. Smith,* 538 U.S. 254, 273)." Insofar as it is feasible logically and physically to accommodate the plain meanings of all the statutory texts mobilized by slaving wages paid ICE resident workers, there would be no basis for only enforcing the ad hoc wage levels in the PBDNDS and ICE contracts and to disregard the plain meaning of the FLSA.

C. Jurisprudence of Implied Repeal FLSA Analysis for Undocumented Workers[192]

190 *Radzanower v. Touch Ross and Co.* 426 U.S. 148, 158 (1976).
191 *Silver*, citing Note 11.
192 This section is indebted to the analyses in Nhan Vu and Jeff Schwarz, Workplace Rights and Illegal Immigration: How Implied Repeal Analysis Cuts through the Haze of Hoffman Plastic, its Predecessors and its Progeny, 29 Berkeley J. Emp & Lab. L. 1 (2008).

When courts have been asked to disregard the FLSA because the plaintiffs were immigrants without legal work authorization courts generally have held that the FLSA covers "persons" regardless of alienage or work authorization.[193] Using an implied repeal analysis, and consistent with the approach to the PBNDS and private firm payments of $1 per day, the Department of Labor (DOL) has filed *amicus* briefs and opinion letters indicating the agency's longstanding view of their coverage by the FLSA. On September 24, 2012, the DOL filed an *amicus* brief affirming a position it had taken in similar cases: "*Hoffman* cannot be read ... to alter the FLSA's bedrock minimum wage and overtime requirements, nor did IRCA impliedly repeal the definitions of "employee" or "employ" under the FLSA."[194] A few months later, on February 14, 2013, the Eighth Circuit court in *Lucas v. Jerusalem Cafe*, *LLC*, 721 F. 3d 927 (2013) affirmed this analysis ("Having decided the FLSA protects unauthorized aliens and the workers have standing to sue the employers for violating the FLSA, we swiftly reject the employers' challenge to the district court's decision to suppress evidence related to the workers' immigration status" at 939).

As in similar cases, the court discusses *Madeira v. Affordable Hous Found*., Inc 469 F.3d 2019, 243).[195] *Madeira* is a textbook case of an implied repeal analysis, finding that although

193 For an important exception see *Hoffman Platic Compounds Inc. v. NLRB*, 535 U.S. 137 (2002). The Court uses an intent analysis, asserting, "There is no reason to think that Congress...intended to permit backpay where but for an employer's unfair labor practices, an alien-employee would have remained in the country illegally..." The case comes out of an National Labor Relations Board ruling and has been disavowed in subsequent FLSA cases. See Va and Schwartz, *Workplace Rights and Ilegal Immigration,* at note 187.

194 Lucas *Amicus* Brief, in support of plaintiffs-appellees, in *Elmer Lucas*, *et al. v. Jerusalem Cafe, LLC, et al.*, No. 12-2171, available at www.dol.gov/sol/media/briefs/lucas(A)-09-24-2012.htm, and on file with author.

195 *Madeira* holds that the Immigration Reform and Control Act of 1986 does not preclude FLSA actions ("a number of district courts have concluded, even after *Hoffman Plastic*, that IRCA does not preclude such FLSA awards)."The ruling was affirming the legal claims advanced by the federal government itself "Although plain statutory text squarely resolves this issue, it is noteworthy that the Department of Labor's interpretation of the Act is consistent with this holding. The Secretary has supplied the Court with an August 26, 2010 letter from the Solicitor of Labor that reflects the Department's longstanding interpretation that immigration is not relevant

enforcing federal labor laws might appear to conflict with immigration policy, the Supreme Court has instructed the government to enforce both unless "compliance is physically impossible."[196] Likewise, in 2011 a nail salon in New York City lost a lawsuit brought under the FLSA by employees, some without employment authorization documents. The court rejected the employers' argument that the FLSA did not cover undocumented immigrants[197] ("an employee's immigration status, or national origin, is clearly *irrelevant* to a claim for back pay or wages under the FLSA" *Solis v. Cindy's Total Care* 10 Civ 7242 (PAE) (October 31, 2011), (emphasis in original); ("the courts as well as the Department of Labor have, with some consistency, viewed FLSA claims for such payment unaffected by immigration status") *Marquez et al v Erenler* 12 CIV 8580 (ALC) (MHD) (September 20, 2013). As in the prison cases, courts relying on the plain meaning of the FLSA have held that the purpose of the FLSA is to protect "persons" employed by the firm charged violations and those in the labor market, including those in prisons, and those who are in the country without legal authorization to work.

It is of course possible that if sued under the FLSA private contractors may assert immunity on the basis of the program's description in the PBND Standard 5.8 and in many, but not all, of the ICE contracts. However, neither the FLSA nor the SCA provides an exemption for unlawful contracts, including those issued by the government. It is true that *Parker v. Brown* (1943) provides immunity to firms taking actions in violation of an otherwise valid federal law if

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to liability for unearned wages earned under the FLSA." *Ibid*.

196 *Madeira v. Affordable Hous Found* 469 F.3d 219, 241 (2006), citing *Chellan v. John Pickl Co.*, 46 F. Supp. 2d. 1247, 1277-1279 (2006), *Zavela v. Wal-Mart Stores, Inc*. 393 F. Supp. 2d 295, 321-25 (2005); *Galaviz-Zamora v. Brady Farms, Inc*. 230 F.R.D. 499, 501-03 (W.D. Mich, 2005); *Flores v. Amigon*, 233 F. Supp. 2d 462, 463064 (E.D.N.Y 2002); *Singh v. Jutla*, 214 F. Supp. 2d at 1060-62; *Liu v. Donna Karan Int'l, Inc*, 207 F. Supp. 2d 191, 192 (S.D.N.Y. 2002); see also *Patel v. Quality Inn S*. 846 F.2d 700, 704-06 (11th Cir. 1988).

197 *Solis v. Cindy's Total Care, Inc.* Case No. 10-CIV-7242 (PAE).

those actions are taken because of state authorization.[198] But *Parker* (allowing state legislatures "authority to regulate the commerce with respect to matters of local concern") affirms coordination otherwise in violation of the Sherman Act because the actions were taken under the direction of the state legislature ("[Raisin producer coordination] derived its authority and its efficacy from the legislative command of the state [of California] and was not intended to operate of become effective without that command" at 350-51). The act of a state legislature implicates questions of federalism that do not arise in the context of these contracts, nor is a determination by a state legislature of equivalent governmental supremacy as decisions made by employees in the ICE Acquisitions office.

Likewise, potential assertions of immunity by the federal contractors also are called into question by *Cal. Liquor Dealers v. Midcal Aluminum,Inc.*, 445 U.S. 97 (1980) ("State's involvement...is insufficient to establish anti-trust immunity under *Parker v. Brown,"* from syllabus). In that case, the Court set forth a two-pronged test for the circumstances under which actions based on state authority would immunize private actors from prosecution: "First, the challenged restraint must be 'one clearly articulated and affirmatively expressed as state policy'; second, the policy must be 'actively supervised' by the State itself" (at 444, citations omitted). On this basis, the Court held that liquor retailers were not immune from anti-trust litigation under the Sherman Act. The Court found the state's legislation is "forthrightly stated" but that it "neither establishes nor reviews the reasonableness of the price schedules; nor does it regulate" (at 444).

198*Parker v. Brown*, 317 U.S. 341 (1943). Thanks to Rebecca Haw for pointing out the relevance of this and *Cal. Liquor Dealers v. Midcal Aluminum,Inc.*, 445 U.S. 97 (1980) to this analysis.

In implementing PBND Standard 5.8, neither criteria are met. Congress has provided no legislative scheme that specifically authorizes firms to pay below the minimum wage and the program vaguely and inconsistently outlined in the PBNDS is reviewed in an ad hoc fashion if at all, and lacks any regulations. Moreover, the PBNDS states that the payments are "at least $1 per day," suggesting that even the federal government does not believe the 1979 appropriations Act, limiting payments to "no more than $1 per day" controls the rate of wages paid today. Thus, even on its face, the contracts specifying the reimbursements from the government for the use of ICE resident labor at $1 per day does not prevent the firms from paying minimum wage; it simply informs them that if they do use this labor, the government will reimburse them for it at $1 per day.

PART SIX: LEGISLATIVE HISTORY

A. Legislative History of 8 USC 1555 (d), 1949 to present[199]

Part V reviewed the plain meaning of the laws bearing on the rate of compensation for those in custody under immigration laws. The analysis suggested that the explicit statutory language in the Fair Labor Standards Act (FLSA), the absence of any statutory language indicating that those in ICE custody should be paid less than minimum wage, the failure in the last 35 years of Congress to set compensation for work performed outside the FLSA, and the

199 This section draws extensively on analysis and case citations in the General Accounting Office, Office of General Counsel, Principles of Federal Appropriations Law, 3d ed. Vol. I (January 2004), GAO-04-261SP, 645.

absence of any rule-making context or process that might provide ICE discretion under the *Chevron* standard, suggested that ICE residents are indeed covered by the FLSA and the federal contracting laws implementing it in the context of ICE agreements with private prison firms. However, in some contexts, the Court has held that a law's meaning may not be discernible from simply its plain text and have adduced conditions under which a statute's legislative history might help judges construe "legislative intent" that might yield the law's true meaning. Those who might oppose paying minimum wage to residents of ICE facilities could point to the silence in 8 USC § 1555 (d) on its relation to the FLSA and claim this renders the bill's meaning is ambiguous, one of the triggers for resort to legislative history.[200] Part VI reviews the relevant legislative background for the program in place and analyzes it in light of the statutory construction relying on "legislative intent."

According to William Eskridge, "The most popular foundation for an archaelogical theory of statutory interpretation is probably intentionalism, which directs the interpreter to discover or replicate the legislator's original intent as the answer to an interpretive question."[201] This Part reviews the Congressional record on the bill authorizing compensation to those in custody under immigration laws to see if there is language that might help us better understand whether the Congress that first passed the bill would have considered the Immigration and Customs Enforcement (ICE) residential work program in its procedures as well as in detention facilities is consistent with their intentions for 8 USC § 1555 (d).[202]

200 E.g. Solon, Language of Statutes, pp. 109-110, and see Kim, Statutory Interpretation, *supra* at 40, note 228.

201 Eskridge, Statutory Interpretation, at 14.

202 *Alvarado Guevara* imputes legislative intent on the rate of compensation for residents in immigration detention facilities in passing the Fair Labor Standard Act, but without evidence. And the opinion says nothing silent on the intent of the Congress that passed the bill that became codified as 8 USC § 1555 (d), the focus of the discussion below. Concerns of method, scope, and space exclude from this review the legislative histories of the

As is well-known, the Supreme Court is self-avowedly conflicted about the role legislative history might play in statutory construction.[203] The challenge is heuristic as well as institutional. What counts as "legislative intent"? The empirical contexts amplify the confusion. Explaining why the concept is "slippery," Daniel Farber writes, "legislators depend on institutional actors (sponsors, committees, floor leaders, and staffers), who are charged with drafting statutes and moving them to enactment, to explain the meaning and import of the statutes under consideration, and their goals may be vague and in conflict."[204] Amidst a general skepticism wit which the Court holds rulings based on legislative intent or legislative history,[205] a few standards for weighting different pieces of the record have been established. Section II below reviews the legislative history of 8 USC 1555 (d); section III considers its significance for the legality of current payments to those held in custody under immigration laws.

The findings below reveal: first, a legal and empirical context for detention that has nothing in common with those of today, essentially rendering moot any resort to this history for clues on the law's application today; and second, a contradictory and ambiguous record of which most members were ignorant, along the lines of what Justice Antonin Scalia describes in his

additional laws discussed above. As discussed in Part V, the most important one, Fair Labor Standards Act (29 USC § 201 et seq) includes a statement of purpose and this urges an expansive reading that would supersede floor statements and so forth by members of Congress. Because of the time frame in which these laws were passed, and the low numbers of those in custody under immigration laws, reference to their rate of compensation seems unlikely. (I am referring to the Service Contract Compliance Act (41 USC § 351 *et* seq) (1972); Occupational Health and Safety Act (1970) (5 USC § 1101-2013), Immigration Reform and Control Act (1986) (8 USC § 1324(a); and the Federal Procurement Act (1974) (42 USC § 6962); and Convict Labor Contract Act (1940) (18 USC § 436).

203"Members of this Court have expressed differing views regarding the role that legislative history should play in statutory interpretation. Compare County of Washington v. Gunther, 452 U. S. 161, 182 (1981) (Rehnquist, J., dissenting) ('[I]t [is] well settled that the legislative history of a statute is a useful guide to the intent of Congress'), with Wisconsin Public Intervenor v. Mortier, 501 U. S. 597, 617 (1991) (Scalia, J., concurring in judgment) (legislative history is "unreliable . . . as a genuine indicator of congressional intent"). *Shannon v. United States*, 512, 583 US 573 (1994).

204 Farber, Statutory Interpretation, at 280.

205 Solon, Language of Statute, pp. 84-87.

critique of this approach ("...with respect to 99.99 percent of the issues of construction reaching the courts, there *is* no legislative intent so that any clues provided by the legislative history are bound to be false)."[206]

The highlights of the record below are 1) immigration detention authority in 1949 was on legally shaky grounds; there are no reliable numbers but those in custody for more than a few days in deportation proceedings appear to be low;[207] 2) the member of Congress responsible for ushering through expansive immigration detention authority acknowledges that the Supreme Court had required them to be housed entirely at government expense, and that it would be unconstitutional to force them to work to defray the costs of their confinement; 3) at the time the program passed no one from the administration nor Congress indicated a purpose was to defray custody expenses (as opposed to the policy indicated in the PBNDS, 5.8); 4) an Acting INS Commissioner surmised in 1982 testimony that defraying costs was a purpose of the program; 5) the last time the program had compensation set by Congress discussed was in 1978 and its most recent discussion by a member of government in a Congressional hearing or report is 1983.[208]

1. Origins of work allowances for "aliens in custody under immigration laws": 1949-1950

H.R. 4645, introduced in the House on May 11, 1949, contains the first legislative reference to "payment of allowances (at such rate as may be specified from time to time in the

206Antonin Scalia, A Matter of Interpretation: Federal Courts and the Law,

207 House Judiciary Subcommittee No. 1, Deportation and Detention of Aliens, Hearings before the 81st Congress, 1st session, Serial no. 8, May 20 and 25, 1949.

208 Professor Craig Haney's 2005 testimony and report on detention provides Congress mentions the program in passing, see *supra* at note 67.

appropriation act involved) to aliens, while held in custody under the immigration laws, for work performed."[209] Acting Assistant to the Attorney General Peter Campbell Brown states the general purpose is to "preclude the raising of points of order against the DOJ appropriation bills on the ground that certain expenditures provided therein have not previously been authorized by law."[210] Brown singles out the section on the work allowances as "included at the urgent request of the Commissioner of Immigration and Naturalization to meet a practical problem encountered in the work of that service."[211] There is no clarification here or in any other document as to the nature of this problem. Before turning to the specific history of 8 USC 1555 (d), the broader context of detention legislation considered in that session bears review. The history suggests that whatever Congress in 1950 may have intended for the wages paid to aliens held under immigration laws, it has little bearing on the program in place today. The worker/employer relation in today's ICE facilities is much closer to the factors contemplated in the FLSA than it is to the economics and management of the multi-faceted alien internment, prisoner of war, and immigrant detention laws and policies in the 1940s.

The Immigration and Naturalization Services (INS) letter on wages quoted above appears in the same Congressional session as the agency's request for modifications to the 1917 Immigration and Naturalization Act (INA) to provide specific statutory authorization to hold immigrants in custody for six months or longer.[212] At a hearing, Immigration and Naturalization

209H.R. 4645, 81st Cong. (1949).

210 Senate Committee on the Judiciary, Administrative Expenses for the Department of Justice, Rept. No. 1258, 81st Congress, 2d session, letter of April 19, 1949, February 7, 1950; House Committee on the Judiciary, Administrative Expenses for the Department of Justice,Rept. No. 2309, 2d Session, letter of April 19, 1949, June 22, 1950.

211 *Ibid*.

212 The 1917 Act, after a long list of those deportable, indicates that they, "...shall, upon the warrant of the Secretary of Labor, be taken into custody and deported." Chapter 29., 64th Congress., 2d session, Sec. 19 (d), p. 889. In

Commissioner Watson Miller defends the need for the new law: "The existing law does not grant the Attorney General any specific period within which he may hold deportable aliens in custody or under control while he negotiates for their return abroad...Some courts have ordered the release of aliens by means of the writ of habeas corpus in less than 6 months."[213]

The "Red Scare" was the impetus for the 1949 hearings to explore providing detention authority for those ordered deported ("Are we going to let [Communists ordered deported] run loose and do as they want, to lecture all over the country and fill everyone full of their ideas; and simply remain helpless?")[214] Amid concerns about civil rights violations Commissioner Miller was supporting, the 81st Congress rejected H.R. 10, as it had done to similar bills for several consecutive sessions before that.[215] According to Daniel Wilsher, the period from 1948-1952 "saw 2,000 lawfully resident foreigners held, mostly at Ellis Island, pending expulsion on the basis of secret evidence,"[216] about 500 per year, and not the 400,000 in custody each year today. The detention authority requested in H.R. 10 is enacted in the 1952 Immigration and Naturalization Act.[217] The INA in 1952 authorized but did not mandate detention and in 1954 the INS "announced it was abandoning the policy of detention."[218]

1949 there was no regular system of detaining those who were ordered deported. To do so, courts had held, would require adherence to the rules of the Administrative Procedures Act (APA). Absent this, judges were regularly granting habeas orders requiring the release from I and A custody of those in deportation proceedings after a range of a few days to a few months. *Ibid*., p. 8.

213 *Ibid*., p. 8.

214 Frank Fellows, R-ME, *Ibid*., p. 2.

215 House. Committee on the Judiciary. Facilitating the Deportation of Aliens from the United States, Providing for the Supervision and Detention Pending Eventual Deportation of Aliens whose Deportation Cannot be Readily Effectuate because of Reasons beyond the Control of the United States. (H.R. 10), 81st Congress, 1st Session, Rept. 1192, August 4, 1949.

216 Wilsher, Immigration Detention, p. 59, citing David Cole, Enemy Aliens: Double Standards and Constitutional Freedoms in the War on Terrorism, New York, 2003, Ch. 10.

217 PL 81-414, 66 Stat. 208 (sec. 252) (1952).

218 *NY Times* Nov. 13, 1954, quoted in Daniel Wilshire, Immigration Detention: Law, History, Politics (2012), p. 353.

At the 1950 hearings on the language codified as 8 USC § 1555 House Judiciary Committee Chair Joseph Wilson (D-TX) stated that the purpose of the bill was to "enact into substantive law authorization for the expenditure of certain items which frequently recur in the appropriation Act dealing with certain administrative expenses incurred by the DOJ."[219] Witness George Miller, DOJ Assistant Chief of the Accounts Branch, states there is nothing "with one exception [the detainee payments] that has not appeared in the Appropriations Act, so I think there is nothing controversial in it."[220]

The problem at the program's legal inception in the 1940s resonates in the program's implementation today. The Justice Department takes a practice it began without authorization or appropriations[221] and then claims its de facto implementation should assure Congress of its legality, despite numerous Court opinions in that time frame ruling unconstitutional other Justice Department detention and deportation actions, and Congressional legislation and hearing statements relevant to this program, especially the INS detention authority, and the unconstitutionality of forced labor for those in custody under immigration laws. Moreover, when House members in 1950 express concerns about the program's scope and Constitutionality, the bureaucrat obfuscates, and the members of the Judiciary Committee fail to clarify. (The record thus instantiates Antonin Scalia's concern about relying on legislative history for statutory interpretation.)

Commissioner Miller initially states that the INS already was paying aliens for work in

219 House Rept. 2309.

220 House Subcommittee No. 2. To Authorize Certain Administrative Expenses for the Department of Justice, unpublished hearing, May 26, 1950, HRG-1950-HJH-0061, p. 6.

221 For a thorough discussion of the program's origins, see House. Committee on Appropriations. Subcommittee on State, Justice, and Commerce Departments. Department of Justice Appropriation Bill for 1945. (H.R. 4204). Hearings. 78th Congress, 1st Session, Dec. 1, 2, 3, 7, 8, 9, 1944.

the detention camps. The agency, he explains "find[s] that their problem of maintaining these aliens in detention is greatly minimized if they can put an alien to some useful work and *pay him a modest return for the work he does.*"[222] Miller adds, "in order that this will not get out of hand, it can be taken care of by the Appropriations Committee, which will specify the rate from time to time."[223] Miller's testimony indicates that from its inception the DOJ understood that the program was to be funded at a rate set by Congress: "...whether it is 25 cents or $1.50 a day would be determined by the rate to be fixed of this provision in the Appropriation Act."[224]

According to Miller, the INS was then paying aliens in the "center or camp" for "policing the place," as well as maintenance and "attending some garden farm or plot."[225] Miller, asked whether those held were being punished, replies, "No, sir; in connection with the immigration laws, probably for deportation while the case is pending or under hearing."[226] Miller explains that the DOJ had been modeling the work details and compensation "along the lines of the prisoner of war provision under the Geneva Convention, whereby prisoners of war who come to prison camps may be used for useful purposes and *paid some small amount*. It is patterned after that."[227] The program grew out of the internment of "enemy aliens" and, on behalf of the Army, Prisoners of War.[228]

The Geneva Convention Relative to the Treatment of Prisoners of War states: "Prisoners

222 House Subcommittee No. 2, Certain Administrative Expenses, p. 21, emphasis added.
223 *Ibid*. "This" is not elsewhere further clarified.
224*Ibid*.
225 "Miller: Any kind of work around the detention center or camp, such as policing the place, cooking, or possibly, attending some small garden farm or plot." *Ibid*, at 30.
226 *Ibid* at 31.
227 *Ibid,* emphasis added.
228 Subcommittee on State, Judiciary, and Commerce, Appropriations Hearings, p. 274. The Geneva Convention in 1944 did not yet apply to enemy aliens, but the U.S. government in 1941 informed the Japanese that in exchange for the same protections the U.S. expected Japan to extend to U.S. POWs, the U.S. would apply the Geneva Convention to civilian Japanese Americans held as enemy aliens.

of war shall be paid a fair working rate of pay by the detaining authorities directly. The rate shall be fixed by the said authorities, but shall at no time be less than one-fourth of one Swiss franc for a full working day."[229] In other words, the genesis of today's ICE resident work program is an international treaty for the treatment of foreign nationals in the custody of an enemy power. This treaty mandates not only a "fair working rate of pay," but many other conditions specific to the treatment of POWs as labor that are absent from the U.S. protocols for the treatment of people who are trying to become legal residents or U.S. citizens, or who already have obtained that status and are trying to prove it in an immigration court.[230]

In the 1950 hearing to authorize funding that since 1942 had gone through the Appropriations Subcommittee, Rep. Sam Hobbs (D-AL), a former federal judge,[231] paraphrases a Supreme Court decision holding that "we had no authority to detain them, even in a case of deportation, at hard labor."[232] The precedent Hobbs had in mind also held Congress could not

229 Part III (Articles 49-68), Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135. *bid*, art. 62. In 1950, one Swiss franc = 23 U.S. cents, which even for that time frame would not have been considered a "fair working rate of pay." During World War Two the United States paid prisoners of war 80 cents per day. There are several important differences between the background economics of POWs and residents of U.S. ICE detention facilities. Foremost is that the families of POWs were receiving remuneration from their respective governments. While the fact that the detaining power was paying for basic food and housing was taken into account, POWs received small allowances and officers more generous ones. *Ibid*, and see commentary - Art. 62, Part III: Captivity, Section I: Financial resources of prisoners of war. And see Lawrence Officer, *Exchange Rates between the United States Dollar and Forty-one Currencies,* MeasuringWorth (2013), http://www.measuringworth.com/exchange/global/. An additional difference is that of labor markets during these two time frames. The POW labor was being used to supplement in agricultural and other work labor that was at war. Thus unemployment or other effects on the local labor market did not pose the same problems that the substitution of slaving wage labor for minimum wages has on the U.S. labor market today.

230 Among the provisions in the relevant Geneva Convention protocols is one requiring that "the national legislation concerning the protection of labour, and more particularly, the regulations for the safety of workers, are duly applied." In short, the illegal compensation to U.S. residents with varying legal statuses, and even actual U.S. citizens, originated under a regime for maintaining custody of people with whom we were at war, *and*, the U.S. agreed to treatment then superior to the U.S. treatment of non-combatantsin civil detention.

231 Biographical Directory of the U.S. Congress, *Hobbs, Samuel Francis, (1887 - 1953)*, bioguide.congress.gov/scripts/biodisplay.p1?index-H00063/ (last accessed Nov. 18, 2013).

232 House Subcommittee No. 2, Certain Administrative Expenses, at 31, referencing *Wong Wing v. U.S.* 163 U.S. 228 (1896), a decision that struck down portions of an 1892 statute ordering that "Chinese persons found to be

"confiscat[e] their property...without a judicial trial," invoking for this analysis the Fifth, Sixth, Thirteenth, and Fourteenth Amendments.[233] Within weeks, Rep. Hobbs, then chairing the committee considering increasing the government's immigration detention authority, said, "The no-hard-labor restriction will bring us into collision with some critics because they will say that the Attorney General would be authorised under the bill to make parlor boarders of these people. That is true, but we feel that the free air of America should be protected against the consumption in freedom by these people even though they do cost us money."[234] Hobbs, the DOJ, and the INS were cognizant of the series of court decisions challenging the DOJ's custody authority over citizens and aliens ordered deported, as well as their authority to compel work.

In light of such concerns at the time, and Miller's response that the labor presently performed was "voluntary,"[235] Chauncey Reed (R-IL) asked, "How do they do it now, without this law?"

Miller then contradicts his opening description of the program and replies: "*They do not pay them*." Reed replies, "They do not pay them anything, and they do work. It must be voluntary."[236]

Reed and his colleagues did not have the opportunity to compare this last assertion with Miller's opening description ("they...pay him a modest return for the work he does")[237] and to

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not lawfully entitled to be or remain in the United States ... imprisoned at hard labor for a period not exceeding one year, and thereafter removed from the U.S." Act of May 5, 1982, Pub. L. 52-60, 27 Stat. 25, quoted in *Wong Wing*, at 233.

233 House Subcommittee No. 2, Certain Administrative Exepnses, at 37-38.

234 House Judiciary Subcommittee No. 1, Deportation and Detention of Aliens, p. 14.

235Hearing rept., p. 31.

236*Ibid*, emphasis added. Of course the fact that people who are under lock and key and beyond the Red Cross monitoring of prisoner of war camps might very well labor without compensation because they are forced to do so is at least as plausible--and occurs today.

237 *Ibid*., p. 21.

recognize that Miller was coming to the Appropriations Committee to make this *de jure* and receive funding.[238] The substantive portion of the DOJ defense of the program ends with Miller leaving the impression that people were then working without compensation. At that point Rep. Earl Michener (R-MI) remarks on his own kitchen duties in the army, to which Reed replies, "Of course you were paid a salary, though, as a soldier," as would be the case for a foreign soldier in a US POW camp. The two then joke about how they were individually responsible for winning the Spanish-American and World War One, respectively. DOJ witness Miller takes advantage of the tangent and moves the hearing along to the next section of the Act[239] and an initial appropriation of $1 per day for those held under immigration laws makes its way into law.[240]

2. 1950-1978

Pursuant to 31 USC 1104 (b) ("Budget and Appropriations Authority of the President"), for 28 consecutive years thereafter the program discussed above was re-funded with exactly the same language through appropriations bills under the section titled "Immigration and Naturalization Service Salaries and Expenses" as "payment of allowances (at a rate not to exceed $1 per day) to aliens while held under immigration laws for work performed."[241] This was still within the time frame when INS had a policy against detaining those in deportation proceedings.

3. 1979-1980

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238 Note as well ehre further evidence that the word "allowance" in the Act is indeed a synonym for "modest return for the work he does" and that no one asserts this should be less than the minimum wage.

239 Act of Jul. 24, 1949, Pub. L. 81-179, 63 Stat. 447.

240 PL 81-626, approved July 28, 1950, codified as 64 Stat. 380 in 1966 (PL 89-554, p. 656).

241 For the last consecutive year, see Act of Oct. 10, 1978, Pub. L. 95-431, 92 Stat. 1021.

In 1979, for reasons that do not appear in the legislative record, the INS budget request proposed deleting from the appropriations Act reference to the program altogether.[242] The DOJ appropriations Act for Fiscal Year 1980 (PL 96- 68, September 24, 1979) reflects the INS proposed change and is the first one since 1950 failing to specify a rate of pay for work performed by aliens held under immigration laws. The INS writes that it "proposes deletion of language which is proposed for inclusion in the Department of Justice Authorization Act,"[243] implying the rate of payments is redundant. 31 USC 1104 (b) requires budgeting in the language of statutes passed in 1950 or later, and states the repetition from past appropriations "may be waived or changed by joint action of the Committees on Appropriations of both Houses of Congress."[244] To be clear, the amount does not appear in the statute or in the Department of Justice Authorization Act for fy1979. Congress affirms the deletion of this item from the appropriation Act, but without benefit of an accurate description. Thus in 1979 for the first time, the resulting bill "Making Appropriations for the Departments of State, Justice, and Commerce, the Judiciary" (PL 96-132, 10 (a) Nov. 30, 1979) fails to indicate the per diem allowance for work performed for aliens held under immigration laws.

4. 1980-1981

242 The Immigration and Naturalization Service Salaries and Expenses statement includes a "Justification of Proposed Language Changes." The statement proposes deleting from the appropriations Act of 1979: "advance of cash to aliens for meals and lodging while en route; payment of allowances (at a rate not in excess of $1 per day) to aliens, while held in custody under the immigration laws, for work performed, payment of expenses and allowances incurred in tracking lost persons as required by exigencies[.]"

243 House. Departments of State, Justice, and Commerce, the Judiciary, and Related Agencies Appropriations for 1980, Pt. 5: Department of Justice, pub. March 14, 1979, HRG-1979-HAP-0090, pp. 504-505.

244The 1979 Congressional hearings reveal members concerned both about INS civil rights violations and corruption described by a *New York Times* investigative article, and there is no reference to this work program. *Ibid*. For a primer on the laws and rules of Congressional appropriations, see Jessica Tollestrup and Brian Yeh, Cong. Research Serv., R 42098, Authorization of Appropriation: Procedural and Legal Issues (2011).

The 1979 House and Senate rubber stamp the INS change and omitting the rate without discussion in committee modify the appropriations Act accordingly. But in 1980 the matter arises in the House hearings as well as the DOJ appropriations conference report for the fiscal year 1981 budget.[245]

At a hearing, Rep. Jack Hightower (D-TX), the Chair of the House Appropriations Committee quotes from the the DOJ budget proposal, referencing "Payment of allowances (at a rate not in excess of $4 per day)..."--the first time the DOJ had proposed an increase--and asks, "Why are you proposing this language in the appropriations bill?"[246]

The most sensible answer would have been to reference the phrase in 8 USC 1555 (d) delegating to Congress the responsibility of setting the rate of compensation in the "appropriations act involved." Instead, Acting Commissioner of the INS David Crosland replies: "The idea is to be paying people to do work such as maintenance--maintenance of their own detention facilities--that we would otherwise have to pay somebody else to do; so it would reduce the amount we have to pay out, and I guess it is similar to what prisoners are paid in detention facilities in this country."[247] Crosland's rationale contradicts the 1950 description of the program--no party at any point references defraying expenses, and also ignores the legislative history explicitly rejecting connotations of prison labor.

Regardless, the rate of payments had been deleted from the fiscal year 1980 appropriation and Crosland's answer was not responsive to Hightower's question about legislative process for its funding. Hightower presses Crosland: "Why was it deleted from the 1980 appropriation?"

245House Appropriations Hearing, February 26-26, March 4-5, 1980, HRG-1980-HAP-0035, p. 618; House Conf. Rept. for 7548, House No. 96-1472, Nov. 20, 1980, p. 7.
246House Appropriations Hearing, February 26-26, March 4-5, 1980, HRG-1980-HAP-0035, p. 618.
247*Ibid.*

Crosland says he does not know.[248]

> A supplemental written response published in the hearing report states:
>
> The language was deleted from the fiscal year 1980 appropriation language and included in the fiscal year 1980 authorization bill to avoid duplication. However, 8 USC 1555 requires the rate for payment of allowances be specified from time to time in the Appropriation Act. An increase of $1 to $4 per day is proposed for the payment of allowances to aliens held in custody for work such as serving meals and cleaning. *Since an increase in work allowance is proposed, it was deemed appropriate to include this change in both the appropriation and the authorization bills*.[249]

This statement is inaccurate. On a reading most generous to the INS, it appears as though the agency is implying that the amounts did not need to appear in an appropriation Act unless the INS was seeking to change the rate. However, not only would such a position be at odds with how the INS and Congress had been running the program for 29 years, per 31 USC 1104 (b) and 8 USC 1555 (d), it also repeats the mischaracterization of the DOJ's authorizing legislation, which continued to omit reference to a rate of compensation. An appropriations Act with this information thus would not be duplicative of the 1980 authorization bill.

In the event, the 1980 House Appropriations Committee does not pass the proposed increase, nor does it reference the program in its report on the bill.[250] The Senate Appropriations Committee in 1980 approves the increase of the per diem compensation to $4 per day for fiscal year 1981. The Appropriations Conference Report handles the discrepancy through Amendment

248 *Ibid*.
249 *Ibid*, INS written response, emphasis added.
250H.R. REP. NO. 96-1091 (1980).

13: "Deletes language proposed by the Senate which would have increased from $1 per day, to $4 per day the amount paid to aliens, while held in custody under immigration laws, for work performed."[251] The final appropriations law omits any reference to the rate of compensation.[252]

5. 1981-1983

As was the case for the fiscal year 1981 budget submitted under President Carter, the INS budget for fiscal year 1982 submitted by President Ronald Reagan again proposes an increase to "$4 per day for work performed by aliens in custody under immigration laws."[253] Yet the program receives no mention in any of the committee reports at any funding level in either the authorization or appropriation acts passed that year.[254]

For fiscal year 1983, the same INS budget request as previous years elicited this statement in the House Committee on Appropriation Report: "The Committee has not approved the requested language which would have increased the amount paid to aliens for work performed while in INS detention facilities to $4 per day. This request also was denied in fiscal year 1982 and fiscal year 1981."[255]

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251 H.R. Rep. No. 96-1472, at 7 (1980).

252 According to Congressional appropriations rules any discrepancy in funding provisions between the House and Senate defaults to the lower amount. The 1980 appropriations for the DOJ (and thus the INS) was complicated by the fact that President Carter vetoed the Act associated with the hearings because of a section on busing to end desegregation. Vernon Guidry Jr., *Carter Promises Veto of Anti-busing Proposal: Refusal of New Appropriations Bill Also Expected if Amendment is Included*, Prescott Courier, Dec. 5, 1980, at 2. Congress had anticipated this and had already passed a backup appropriations bill without this section.

253 Office of Management and Budget, US Budget, Fiscal Year 1982, submitted April 9, 1981, p. 633.

254 Department of Justice Appropriation Authorization Act, Fiscal Year 1982, H.R. 3201, 97th Cong. (1982); S. Rep. No. 97-94 (1982); Department of Justice Appropriation Authorization Act, Fiscal Year, 1982, H.R. 3462, 97th Cong. (1981) OR H.R. Rep. No. 97-95 (1981)

255 H.R. Rep. No. 97-121, at 39 (1982).There is no reference to the language of 8 USC § 1555 (d) in any appropriations bills thereafter. This is in contrast for funds for the use of prisoners for work performed in the building and renovating of prisons and appropriations for the Federal Prisons Industries. The following are all appropriations acts for the DOJ (and INS) absent appropriations for compensation below minimum wage: Act of Dec. 21, 1982, Pub. L. 97-377, 96 Stat. 1830; Act of Nov. 28, 1983, Pub. L. 98-166, 97 Stat. 1071; Act of Aug.

Largely motivated by the influx of Cubans and Haitians, the 1982 hearings focused on whether to radically increase the number and length of immigration detentions, including contracting with the Bureau of Prisons and acquiring more facilities for this purpose.[256] There was no discussion of the immigration service's resident work program. Even if the committees had considered the program, it would be still in the context of a detention system much closer to the one in 1950 than the one today. In 1981 the five Service Processing Centers had a capacity for 1,839 people,[257] and it was for "short-term detention....the kind of thing that INS is very well equipped to handle," according to then Assistant Attorney Rudolph Giuiliani, who was proposing new construction for long-term captivity of immigrant asylum seekers that would be run by the Bureau of Prisons.[258]

Rep. Robert Kastenmeier (D-WI) asks whether Congress had been misled by prior DOJ statements indicating the expansion of detention would be "used primarily for short-term detainees." Norman Carlson, Director of the Federal Bureau of Prisons replies, "I cannot foresee how long they would be incarcerated because we haven't had that experience...[I]t is essentially a new approach..."[259] Of note is that Congress was told that the maintenance work for the detention facilities was done by the federal prisoners and not immigrants in custody under civil laws. Referencing 1,330 Cubans, Carlson says, "Virtually all of the prisoners now at the Atlanta

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30, 1984, Pub. L. 98-411, 98 Stat. 1545; Act of Dec. 13, 1985, Pub. L. 99-180, 99 Stat. 1137; Act of Oct. 18, 1986, Pub. L. 99-500, 100 Stat. 1783; Act of Dec. 22, 1987, PL 100-202, 101 Stat. 1329; Act of Oct. 1, 1988, Pub. L. 100-459, 102 Stat. 2186. For more on the contrast between the legal framework of payments through ICE and that of the payments to federal prisoners see Parts V and VII.

256 Committee on the Judiciary. House. Detention of Aliens in Bureau of Prison Facilities: Hearing before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice, 97th Cong. 2d Sess. (1982), at 22.

257 Assistant Attorney General Rudolph Giuliani , *Ibid*.,

258 *Ibid* at 21.

259 *Ibid.,* at 22.

Penitentiary, Mr. Chairman, are Cuban detainees. There is something in the neighborhood of 150 to 200 American prisoners who do the maintenance work in the institution..They are there essentially to maintain the institution."[260]

In the same time frame as Congress is shifting to a new program for detention, and for the first time making it illegal for private and federal employers to hire immigrants who lack a particular legal status,[261] the INS ceases to reference the program authorized by 8 USC 1555 (d) in its budget proposals and it disappears entirely from the appropriations acts. 1982 is the last year that any agency of the executive branch requested an increase in the rate of its per diem allowance for the U.S. citizens and aliens held under immigration laws. According to statements before the 1982 committee, there were 2,000 immigrants in the federal prisons under ICE custody.[262] In July, 1984, 1,744 people were in INS custody.[263]

B. Legislative History and Intent Analysis

1. Jurisprudence

Of course all programs grow and change over time, and agencies must have some discretion for delegating rules for activities not anticipated by Congress. The question this section takes up is whether the legislative history of 8 USC § 1555 and the FLSA, when interpreted by canons used for assessing legislative intent, authorize ICE's $1 per day payments. Are the two program purposes as stated in the PBNDS at 5.8 -- enhancing essential operations

260 *Ibid*. at 29. There is no clarification of how work is performed and compensated at other INS facilities.
261 NOTE
262 *Ibid*., at 8, 32.
263 Arthur Helton, *The Legality of Detaining Refugees in the U.S.* New York University Review of Law and Social Change, 14 (1986), 363, citing "Statistics Supplied by the INS, copies of which are on file at the offices of NYU Review of Law and Social Change," see notes 57and 90.

through "detainee productivity," i.e. work for $1 per day, and improving morale-- policies contemplated by the legislative body that passed 8 USC § 1555 (d)? What about the de facto practices described in Parts I and II, from forced maintenance and service work to subsidizing the private prison industry?

On behalf of the argument that ICE residents are not covered by the FLSA is the fact that 8 USC 1555 (d) passed after the FLSA, and that by using a language of "allowances" and not "wages," the legislators may have intended a different compensation scheme from that for wage workers. On this analysis, it is less important to make the statutes work together than to conceive how the legislators at the time understood the bill.

The Supreme Court has provided two limiting criteria for disregarding a statute's plain meaning in favor of an intent imputed to the legislature: "For even those who would support the power of a court to disregard the plain application of a statute when changed circumstances cause its effects to exceed the original legislative purpose would concede, I must believe, that such power should be exercised only when (1) it is clear that the alleged changed circumstances were unknown to, and unenvisioned by, the enacting legislature, and (2) it is clear that they cause the challenged application of the statute to exceed its original purpose."[264] Do the failures of the Congresses of 1938 or 1950 to have contemplated both the enormous expansion and privatization of civil immigration detention, and the failure of Congresses after 1979 to single out for adjustment the rate of payments those in custody under immigration law bring ICE and private employers of ICE under the protections of the FLSA? Or, could one look to these legislative histories and discern Congress intended to accommodate something like the Krome

264*K Mart Corp. v. Cartier, Inc.,* 486 US 281, 325.

Food Service staffing and wages, but did not exempt this work from either the FLSA or 8 USC 1555 (d) simply because Congress could not have anticipated this development?

B. Applied to 8 USC 1555 (d)

In using this approach, the Court considers the timing and character of legislative statements, favoring pre-enactment statements, especially in conference reports,[265] while "next in sequence are the reports of the legislative committees that considered the bill..."[266] The only discussion of 8 USC 1555 (d) in a hearing report is the memorandum from the DOJ with the initial request of Congress, but it provides no program details or rationale.[267] The program is discussed in more detail during hearings. Hearing statements typically are not granted much weight,[268] with the exception of "testimony by the government agency that recommended the bill," which is "entitled to special weight" (*Shapiro v. United States*, 335 U.S. 1, 12 n. 13, *SEC v. Collier*, 76 F.2d at 941.[269]

In this context, the silences and statements by the DOJ witness (Miller) and Hobbs in the 1949-1950 time frame may be relevant. First, there was no information on the scope or condition of the program as implemented. Second, the legal context mentioned by the DOJ for setting the wages was the Geneva Convention, not domestic labor law. Third, Rep. Hobbs acknowledges that not requiring detainees to work may be the price of doing business if the

265"The most authoritative single source of legislative history is the conference report....The reason the conference report occupies the highest run on the ladder is that it must be voted on and adopted by both houses of Congress and thus is the only legislative history document that can be said to reflect the will of both houses." GAO, Principles, at 2-98-99.
266 *Ibid*., at 2-99.
267 See *supra*.
268 GAO, Principles, at 2-102.
269 *Ibid*.

United States wants to deport people without trials.

To the extent that the DOJ is concerned about international law, this might appear to undercut any invocations of the FLSA on behalf of ICE residents. Along these lines, although Rep. Hobbs is opposing forced labor, he says nothing about the possibility of immigrants working for wages below the minimum wage. It would seem that lack of information, and conflicting information, available to Congress about the program's purpose and practice from its inception are a good illustration of the perils of construing a bill's meaning from legislative intent. Another way to think about Miller's reference to the Geneva Convention is that it would provide ICE residents far more protections than they have at present. Consider the 1944 exchange about the program for the "enemy aliens" whose conditions of custody are referenced by the DOJ in the 1950 hearing:

> Mr. Kerr. What do these enemy aliens do? Do you let them sit around all day long?
>
> Mr. Harrison. No. As you know, our treatment of enemy aliens is covered by the terms of the Geneva Convention. That Convention provides that wherever possible they be given work to do, that is, certain kinds of work....
>
> Mr. Kerr. What do they do?
>
> Mr. Harrison. All kinds of things around the camp and outside of the camp. They raise their own vegetables; they have very large vegetable gardens. They have a carpenter shop in which they are working, and they helped in the construction of the camp, and they perform any employment in the camp that is susceptible of their services.
>
> Mr Stefan. They are paid 80 cents per day?

> Mr. Harrison. Yes, it is about 80 cents a day, in accordance with the terms of the Geneva Convention; that is what the Army paid them before the Army turned them over to us. They do everything that has to be done in a regular little community, and that is what this is, just a community town such as we have in Crystal City, Tex. They are permitted to do any work *except that which has to do with maintenance and management of the camp*; everything else that can be done, all kinds of services, such as the preparation of their own food; their own cooking.[270]

The idea was neither to punish them, nor incentivize their departure, nor to attempt to deport them en masse, but to establish what seems similar to a displaced persons camp, to support them in a circumstance where the "internees" were not allowed to live "at home" in the United States, but were not actively encourage them to "go home," all parties understanding that for most they had no other. Those so held were not under heavy surveillance and were encouraged to be as self-sufficient as possible, not because of any ideology about managing this population but because the country was at war and food scarce. The off site meal preparation now in favor would not have been possible in 1942. This also may be why gardening is not considered part of the management of the camp. There was a degree of self-management of those so held, they even served as guards!, even in circumstances of stigma and hardship. The context out of which the payments originated are far more humane than the warehousing and direct control by guards of those now in ICE detention facilities, and the government might find it difficult to locate a defense of the current work conditions.

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270 Subcommittee Hearing Report(1944), p. 274. The full names of those above are John Kerr (NC) and Karl Stefan (NE), and INS Commissioner Ear Harrison Emphasis added.

them to return to their homes. Commissioner Harrison also notes that those held were regularly working outside the camp on farms, railroads, and "watching for fires," for which the enemy aliens were paid the "prevailing wage."[271]

If the courts use the standard of legislative history, it is reasonable to infer that Commissioner Harrison's 1944 and Commissioner Miller's 1950 testimony on behalf of payments to those in internment or detention camps implies a legislative intent to follow international law's standards of worker care and compensation. Thus, in addition to higher wages, ICE would need to provide much higher levels of civil and worker rights protections than those of the PBNDS.

The statements and exchanges above may be of interest to legal historians. For purposes of discerning the meaning of the current law, however, we need to be cautious about weighting any of this too heavily. "[T]o be considered legislative history, material should be generally available to legislators and relied on by them in passing the bill,"[272] neither of which occurred when the bill was first passed. The DOJ never provided a written explanation of the program's purpose for the Congressional Record, nor did this appear in the hearing reports, and few members of Congress were familiar with the program.

Standard conventions of statutory construction discount both post-enactment statements as well as proposals that do not become law.[273] This would suggest assigning little weight to the

271 *Ibid*., According to the Commissioner, "the money was held for them and would be released when they returned home." The report provides a detailed table on the prevailing wages in different regions (at p. 275).

272 2A Sutherland, and 48:04, from GAO, *Principles*, at 2-103-4.

273 "Courts have not found expressions of intent concerning previously enacted legislation that are made in committee reports or floor statements during the consideration of subsequent legislation to be relevant either, E.g., O'Gilvie v. United States 519 U.S. 79, 90 (1996) ("the view of a later Congress cannot control the

1982 statement of INS Acting Commissioner Crosner (on the program's purpose of saving money),[274] nor to the failure of Congress to increase compensation from 1950 to 1978.[275] In fact, this inertial and seems to violate the letter of the Act itself. Moreover, between 1942 and 1950 these payments increase 20%, from 80 cents to one dollar per day, further suggesting that in the time frame at hand Congress was not feeling especially stingy in its payments to detained immigrants. The General Accountability Office (GAO) report on statutory construction states, "GAO naturally follows the principle that post-enactment statements do not constitute legislative history. E.g., 72 Comp. Gen. 317 (1993); 54 Comp Gen. 819, 822 (1975)."[276] (The GAO report conclusions here and elsewhere are important because matters of appropriations and statutory construction are squarely in the purview of this agency.)

C. Discussion of a Theory of Legislative Intent for Interpreting the FLSA and 8 USC § 1555 (d)

The texts and legislative histories of the FLSA and 8 USC § 1555 (d) are very different. The FLSA includes in the statute itself a broad statement of purpose that on its face is consistent with coverage for ICE residents employed by private prison firms. 8 USC § 1555 (d) contains no language about compensation relative to the FLSA, but it does contemplate wages changing, presumably increasing, though this is not specified. One possibility would be to say that

interpretation of an earlier enacted statute"); *Huffman v. Office of Personnel Management*, 263 F.3d 1341, 1354 (Fed. Cir. 2001) (post-enactment statements made in the legislative history of the 1994 amendments have no bearing in determining the legislative intent of the drafters of the 1978 and 1989 legislation)." *Ibid*. Solid Waste Agency v. US Army Corp 531 U.S. 159 (2001) refusing to allow evidence of failed legislative proposals to inform interpretation of plain text of statute.. and the connection beween the subsequent history and the original congressional intent is 'considerably attenuated'.") *Ibid*.

274 See Kim, *supra*,

275 *Ibid*,, at p. 42, note 240..

276 *Ibid*.

changing circumstances simply allow an agency to interpret a statute as it sees fit, not because of any specific precedents on agency discretion per se but because of broader underlying principles of what Eskridge calls dynamic statutory construction: "a statutory interpreter is a relational agent,[277]... and a relational interpreter should have freedom to adapt the statute's directive to changed circumstance."[278] Using this approach, ICE may claim it should be able to adapt the statute's directive to assign compensation to ICE residents as it sees fit and in keeping with the allocation for fiscal year 1979, while the ICE residents in any FLSA litigation will say that the law has to be read to accommodate their need for higher levels of payments, at the very least to keep pace with inflation.

Under the framework and rationale offered here, ICE residents do not need to resort to a dynamic reading of the FLSA but can simply point to its opening statement purpose; however, for those who might find this unpersuasive, a theory of dynamic statutory construction also might require minimum wage obligations on private prisons employing ICE residents, for reasons bearing on the purpose of the legislation, discussed in Part VII.

The hazards of this approach are manifest in the context of prison labor cases. And even here, as discussed in Part IV, courts have pointed out "Congress's concern with unfair competition in the FLSA will not be subverted by declining to apply its minimum wage standard to convict labor in prison-structured programs."[279] As held in one recent decision, the government's prerogative to require pre-trial custody does not authorize exemptions from the FLSA laws ("[I]t is clearly established that a state may not 'rehabilitate' pretrial detainees"

277 A "relational agent" is a concept Eskridge draws from contract law, someone who effects a contract goals over time, in the context of unanticipated exigencies. Dynamic Statutory Construction, at 125.

278 *Ibid*., at 127

279 *Hale v. Arizona,* 993 F.2d 1387, 1397 (9th Cir. 1993).

(denying state prison officials motion to dismiss FLSA claims by Finbar McGarry).[280]

It is unfortunate from the perspective of the rule of law that the misrepresented erasure of the rate of the per diem allowance from the budget came in the same time frame that Congress was attempting to monitor DOJ expenditures more closely. Not only was the INS violating at the very least the spirit if not the letter of 31 USC 1104 (b) (requiring persistent wording in budget proposals), INS and Congress also failed to heed Congress's efforts to regain control of the DOJ expenditures in particular. In this time frame Congress mandated all DOJ expenditures for all agencies and activities occur only after authorized for appropriations *for that fiscal year.* According to Public Law 94-503 (sec. 204):

> No sums shall be deemed to be authorized to be appropriated for any fiscal year beginning on or after October 1, 1978, for the Department of Justice (including any bureau, agency, or other similar subdivision thereof) except as specifically authorized by Act of Congress *with respect to such fiscal year.* Neither the creation of a subdivision in the Department of Justice, *nor the authorization of an activity of the Department, any subdivision, or officer thereof, shall be deemed itself to be an authorization of appropriation for the Department of Justice, such subdivision, or activity with respect to any fiscal year beginning on or after October 1, 1978*. (Public Law 94-503, Oct. 15, 1976, 90 Stat. 2427.")[281]

The report by the Committee on the Judiciary to accompany the 21st Century Department of Justice Appropriation Authorizations Act[282] makes it clear that the appropriations committees had

280 See *McGarry v. Pallito et al.,* at 513.

281 From H.R. REP. NO 97-548, at 2 (1982). See 28 USC § 501, revisions, as well as Act of Oct. 15, 1976, Pub. L. 94-503, 90 Stat. 2427. Emphasis added.

282 S. REP. NO. 107-96 (2001).

not been functioning properly. The plain meaning of this law is that general program authorization of 8 USC § 1555 (d) still would require a specific appropriation for the activity or program, and not just the rate of compensation. This law was in effect in 1990 but *Alvarado Guevara* overlooks this.

In sum, the de facto INS work program on which the 1950 legislation was based began under the auspices of the Geneva Convention; it prohibited enemy aliens from work that would support camp maintenance and management; and it compensated them at 80% of the average daily per capita price of detention, which at the time was one dollar per day. The program in 1950 was explained in terms that were ambiguous, contradictory, and, arguably, deceptive. Shortly after the INS removed the program from the budget (the same time frame when private prisons organized to take over INS facilities),[283] detentions began to increase sharply and no further Congressional discussion of the program.

PART SEVEN: ANALYSIS OF WORK PROGRAM "PURPOSE"

"Purpose" in Statutory Construction

When a statute's plain meaning or legislative history would produce an outcome judges deem absurd there is a third approach to statutory interpretation on which they rely: the statute's purpose, or "purposivism." According to William Eskridge, "The Supreme Court often interprets statutes in ways that reflect statutory purpose or current values instead of original legislative

283 See CCA- Our History, at http://cca.com/our-history/ ("Back in 1983, three enterprising leaders came together under the banner of a game changer that would transform the way government and private business work together.")

intent, and agencies (like EEOC) are even more likely to do so."[284] In 1943 the Court held, "however well these rules [of statutory construction] may serve at times to decipher legislative intent, they long have been subordinated to the doctrine that courts will construe the details of an act in conformity with its dominating general purpose, will read text in the light of context and will interpret the text so far as the meaning of the words fairly permits so as to carry out in particular cases the generally expressed legislative policy."[285]

The imputation of purpose to a statute currently is the least favored of the three main approaches to statutory construction discussed so far. It often appears as though the criteria for assessing a law's purpose are invoked based on judges' intuitions on which they draw ad hoc support from a range of selectively cited sources. Were the result they favored in the statute's plain meaning or legislative record, then they would have no need to turn to such a "purpose" not available in the legislative texts themselves. Empirical research indicates that when judges invoke a statute's purpose the outcome is more likely to move in line with judges' political predispositions than decisions based on a statute's plain meaning.[286]

Lawrence Solon points out that the line of decisions associated with this canon is typically traced back to *United States v. Kirby*, an 1868 case cited in *Church of the Holy Trinity*.[287] Kirby was convicted of violating a federal law prohibiting deliberate interference with the passage of the mail "or any driver or carrier...carrying the same."[288] By arresting the mail carrier for murder, Kirby had interfered with the delivery of the mail, and was convicted. The

284 Eskrdige, Dyanamic Statutory Interpretation, p. 20.
285 *SEC v. Joiner*, 320 U.S. 344, 350-351, quoted in Kim, Statutory Interpretation at 3.
286 Sunstein and Miles, see *supra* at note 32.
287 Solon, Language of Statutes, p. 61.
288 *Ibid.,* quoting from *Kirby* 74 U.S. at 482.

Court overturned it on the grounds that it "made no sense to think that Congress would have wanted it otherwise."[289] This and other decisions availed by the canon of a statute's "purpose" at first seem necessary to avoid Richard Posner's widely cited hypothetical of a prosecutor's evidentiary custody of child pornography requiring his arrest,[290] although, as mentioned above, Court seemingly could resolve this and other similar cases by an implied repeal analysis of the child pornography statutes in conjunction with the statutory obligations of prosecutors and the rules of evidence, which require them to maintain evidence of a crime.

In light of the suspicion with scholars and leading jurists, especially Antonin Scalia, have directed toward purposivism, the heavy reliance on this approach when deciding prison labor cases is noteworthy. As indicated above, the FLSA includes a broad statement of purpose whose plain text accommodates minimum wage protections for prisoners; nor does its remaining text nor legislative history exempt prisoners from its protections. Part VII, Section A reviews these cases to highlight how judges have relied on purposivism to exempt prisoners from FLSA protections in most cases. Section B uses the broader economic and policy context on which the jurists rely to offer a different reading of these laws for prisoners and pre- and post-conviction inmates in civil detention pursuant to criminal laws. Section Three extends this analysis to criticizing the understanding of the purpose of the FLSA in the *Alvarado Guevara* decision.

In reaching their assessments of the purpose of the FLSA, the opinions in these cases tend to emphasize the 1) incommensurability of punishment with wage protections; 2) the insulation of service labor in prisons from the national labor market; 3) the absence of a profit motive in

289 *Ibid* at 62.
290 *Ibid*.

their employment by state agencies (or agencies under state control); 4) the fact that prisoners' basic needs of room and board are provided; and 5) the fact that in most cases the work is mandatory and a condition of their punishment.

As an alternative, this Paper suggests, first, that the FLSA does not base its enforcement priorities on the primary goal or purpose of an organization's employment objectives, including those mandated by legislative bodies or administrative agencies, nor in practice is it enforced on this basis; second, that service labor in general and labor in prisons are indeed part of the national economy; third, that private prisons have a profit motive putting them on separate footing than the state actors who are the defendants in most of these decisions; and fourth, that attends to differences between the significance of the provision of room and board for those who have been convicted in criminal courts under the Sixth Amendment and those who have not, for those in pre-trial detention and facing criminal charges, and even more so for those in custody under immigration laws. The arguments about the rights of those those in civil detention are especially strong for those in custody under immigration laws. While distinct from the policies directed toward those in confinement under criminal laws *de jure*, the ad hoc admixture of jurisprudence occasioned by the *Alvarado Guevara* decision requires further consideration of the prison labor rights cases.

A. Purposivist Standard Denies FLSA Protections for Prisoners and Pre- and Post- Conviction Inmates[291]

291 For an excellent overview and summary of the relevant literature see Ryan Marion, *Prisoners for Sale: Making the Thirteenth Amendment Case Against State Private Prison Contracts*, 18 William and Mary Bill of Rights Journal 213 (2009).

To exempt those in pre- or post-conviction confinement from protections under the FLSA, courts have leaned heavily on the rationales used in case of criminal confinement,[292] and disturbingly, the *Alvarado Guevara* precedent itself ("Thus, numerous courts have addressed the issue of whether an 'employee' under the FLSA. However, no court of appeals has addressed the specific issue with which are presented: whether a pretrial detainee is an 'employee' under the FLSA. Nevertheless, we find these cases helpful because pretrial detainees are similar to convicted prisoners in that they are incarcerated and are under the supervision and control of a government entity. *Alvarado Guevara v. I.N.S.,* 902 F. 2d 394 (5th Cir. 1990).")[293]

In a 2009 Wisconsin case, the Seventh Circuit dismissed a FLSA lawsuit brought against the state by persons civilly committed following sentences for violent sex offenses.[294] *Tran* holds that Wisconsin law treats sexual offenders committed to post conviction treatment facilities as "patients" and points to a 1981 amendment to the law on patient wages removing minimum wage requirements that had been in a 1975 statute (at 577) and stating instead that "Patients may voluntarily engage in therapeutic labor which is of financial benefit to the facility if such labor is *compensated in accordance with a plan approved by the department*" (at 578, quoting WIS. STAT. § 51.61(b)(2007-9), emphasis added by *Tran* opinion). In an earlier, similar case, the Second Circuit reaches the same result, but by classifying what Massachusetts calls "sexually dangerous persons" (SDPs) as "prisoners" and then applying the FLSA analysis in this context:

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292 See *Sanders v. Hayden,* 544 F. 3d 812, 814 (2008) ("If the words 'confined as a sexually violent person' are substituted for 'imprisoned' in the first sentence and 'secure treatment facility' for 'prison' in the second sentence, the quoted passage applies equally to the present case, as held in *Hendrickson v. Nelson*., No. 05-C1305 (E.D. Wis. Aug. 10, 2006).")

293 *Villarreal v. Woodman*, 113 F. 3d 202, 206 (1997). *Villareal* makes a number of findings inconsistent with subsequent rulings on this question, discussed below. This section therefore relies on more recent Seventh Circuit decisions for its analysis.

294 *Tran v. Speech*, 324 Wis. 2d 567 (2009). And see *Hale* at 9.

"There is nothing arbitrary, unreasonable, or inimical to the FLSA in this classification of SDPs as prisoners."[295] The analysis in this and the other cases ignores large portions of the FLSA and its purpose statement. These decisions seem to be making inferences about a population stigmatized by current or past incarceration, eliding the relevance of the Fifth, Sixth, or Thirteenth Amendment to produce an inchoate jurisprudence on their labor rights that is inimical to the FLSA.

These cases as well as other prison cases dismiss the "employer-employee" relationship as defined in the FLSA ("The statute itself provides little assistance...When it comes to such appeals to 'plain' or 'clear' language, perhaps our best guide consists of our common linguistic intuitions, and those intuitions are at least strained by the classification of prisoners as 'employees' of the DOC or of the State.")[296] Likewise, these decisions also reject the employee-employer relation definition's elaboration in the otherwise widely cited *Bonnette.*[297]

The rationale expressing the intuition that prisoners as well as pre- and post-release civil detainees lack protection under the FLSA, authored by Richard Posner and repeated in later decisions authored by himself and his colleagues, states:

> People are not imprisoned for the purpose of enabling them to earn a living. The prison pays for their keep. If it puts them to work, it is to offset the cost of keeping them, or to keep them out of mischief or to ease their transition to the world outside, or to equip them with skills and habits that will make them less likely to return to crime outside. None of these goals is compatible with federal regulation of their wages and hours. The reason

295 *Miller v. Dukakis*, 961 F.2d 7, 9 (1992).
296 *Vaniske v. Peters*, 974 F.2d 806, 807.
297 *Bonnette v. California Health and Welfare Agency*, 704 F.2d 1465), cited in over 500 cases, with just four categorized as "criticism" in Lexis database.

> the FLSA contains no express exception for prisoners is probably that the idea was *too outlandish* to occur to anyone when the legislation was under consideration by Congress. [*Bennett v. Frank*], 395 F. 3d [409,][409,] 410 (7th Cir.) 2005] *Sanders*, 544 F. 3d at 814 (emphasis added).[298]

The decision relies on the purpose of the scope of the statute -- incarceration as punishment -- and infers that the FLSA's failure to advance this goal as evidence of its inapplicability.

Pointing out that the primary purpose for state entities is reform and not profit, the decisions emphasize the fact that the prisons in certain cases are state-owned or run ("There is no indication that the DOC has a pecuniary, in contrast to a rehabilitative or penological interest in inmate labor," *Vaniske* at 809, citation omitted). The widely cited *Gambetta v. Prison Rehabilitative Industries (PRIDE),* 112 F.3d 1119 (1997) develops a lengthy analysis of the fact that PRIDE is a non-profit entity and that the DOC is still the final arbiter of worker placement, suggesting that because "PRIDE is operating, in a sense, as an arm of the Department of Corrections" the court will rely on the "cases from our sister circuits involving the applicability of the FLSA to prison industries which generate income for the prison" (at 1125). These cases use *Harker* and *Danneskjold*, discussed below, to assert broad prerogatives over prisoner life, including work assignments construed as a condition of their punishment or correction.

Vaniske acknowledges that prison labor includes service work and that minimum wages for prisoners could be necessary for avoiding a detrimental impact on service worker employment. Nonetheless, the 7th Circuit "does not believe that Congress intended the FLSA to

298 *Tran v. Speech*, 324 Wis. 2d 567, 574 (2009). Note that the emphasis on "too outlandish" was added by Judge Anderson, repeating the phrase first used by Judge Posner and repeated by Posner himself in *Sanders*.

dictate such a result, even given its goal of preventing unfair competition" (at 811). The opinion reasons that insofar as the Ashurst-Sumners Act specifically addresses the problem of private sector competition over goods, the silence on competition in the service sector "belies the notion that any and all uses of prison labor by the government unduly obstruct fair competition ... A governmental advantage from the use of prisoner labor is not the same as a similar low-wage advantage on the part of a private entity: while the latter amounts to an unfair windfall, the former may be seen as simply paying the costs of public goods--including the costs of incarceration..." (at 811-12). Based on inferences about Congress's silence on competition in the service sector as well as the governmental character of the work performed, the opinion affirms that the purpose of the FLSA is not to address this portion of the economy.

Further evidence that minimum wages for those in prison or civil detention does not advance the purpose of the FLSA is that to be effected would require reimbursement for board and lodging,[299] as required under 29 USC 203 (m) *Villareal* and other decisions also cite to *Danneskjold v. Hausrath*, 82 F. 3d 37 (1996) ("prisoners' living standards are determined by what the prison provides").[300] Insofar as their living standards are defined and attended to by the state, the FLSA purpose of protecting living standards is considered moot and the statute deemed irrelevant to civil or criminal detainees.

In language borrowed elsewhere, *Danneskjold* also addresses the significance of prison work programs where the participation is voluntary and not compelled for all inmates, a distinction that might suggest work is to serve the interests of the penal institution and not

299 *Vaniske*, note 6, citing 29 U.S.C. § 203(m), allowing employers to deduct" reasonable costs ... to the employer of furnishing such employee with board, lodging, or other facilities, if such board, lodging, or other facilities are customarily furnished by such employer to his employee."

300 *Villarreal* at 206-207, quoting *Danneskjold* at 43.

serving the objectives of punishment or reform:

> Voluntary work serves all of the penal functions of forced labor...and therefore, should not have a different legal status under the FLSA... The prisoner is still a prisoner; the labor does not undermine FLSA wage structures; the opportunity is open only to prisoners; and the prison could order the labor if it chose. Indeed, to hold otherwise would lead to a perverse incentive on the part of prison officials to order the performance of labor instead of giving some choice to inmates.[301]

The court in *Danneskjold* reasons that since a prison's total control over inmates renders prisoner choices so circumscribed as to be pro forma and effectively nonexistent, and thus consistent with the punitive and controlling objectives of incarceration, the work program's furtherance of the prison's economic efficiency and undermining of labor markets in the service industry as well as non-penal service sector viability are merely incidental to the institution's overarching statutory objectives.

B. Purposivism Standard Denies FLSA Protections for Prisoners and Pre- and Post-Conviction Inmates: An Assessment

The analyses above are riddled with logical and empirical problems symptomatic of the more general difficulties scholars have noted in the use of the purposivist canon of statutory construction, an approach commentators find founded in doctrine from *Holy Trinity* (1892) ("If a literal construction of the words of a statute be absurd, the act must be so construed to avoid the

301 *Danneskjold v. Hausrath*, 82 F. 3d 37, 43 (2d Cir. 1996).

absurdity. The court must restrain the words.")[302] Adrian Vermeule's careful and widely cited analysis of decades of misreadings of the statutory history and jurisprudence for *Holy Trinity* bears note here. The problems he locates in the judicial and scholarly interpretative efforts for *Holy Trinity* apply as well to the prison cases in general and the analyses of *Alvarado Guevara* in particular. Part VI of this Paper, reviewing the legislative history of 8 USC § 1555 (d), substantially weakens claims on behalf of the dollar per day work program, but nonetheless is is a review appropriate for scholars with research skills and a time line not available to most judges or law clerks ("Unlike an ideal interpreter, courts do operate under significant constraints of time, information, and expertise... [C]ourts might mishandle legislative history with sufficient frequency and gravity that courts relying principally on statituroy text) as well as canons of construction, judicial precedent, and other standard sources of interpretation) might achieve *more* accurate approximations of the legislature's intent over the whole run of future cases than would courts that admit legislative history as an interpretive source.")[303]

Purposivism is a separate canon of construction from that of "legislative history," but the two are hard to separate because under the U.S. Constitution, judge-made law is an oxymoron. Absent a preferred outcome based on a statute's plain meaning, judges nonetheless may not simply invent or disregard laws that fail to comport with the purpose the judge prefers. Judges therefore use the language of legislative intent or purpose Vermeuele finds suspect, as in *Alvarado Guevara*. ("[I]t would not be within the legislative purpose of the FLSA... The congressional motive for enacting the FLSA..." *Alvarado* at 396). Vermeule's conclusion that "a

302 *Rector, etc. of Holy Trinity Church v. United States*, 143 U.S. 457, (1892).
303 Adrian Vermeule, Legislative Hisotry and the Limits of Judicial Competence: The Untold Story of Holy Trinity Church, Stanford Law Review, 50 (1998), 1863-4.

rule [of statutory construction] that excludes legislative history displays the best mix of theoretical coherence and practical stability"[304] also suits the theoretical framework of democratic governance suggested in Part II. Not only does judicial reliance on pseudo-histories undermine the goal of historical accuracy, it also undermines the ability of average citizens to meaningfully pursue legal remedies. Especially in the area of immigration and deportation law, which already uses the plenary power doctrine to constrain Constitutional challenges, legislative intent serves as a pretext for projections by jurists onto earlier periods, further constraining protections of the rule of law for those who are in most need of its transparent and fair, i.e., unbiased, administration. Insofar as we know that the purposive approach to statutory analysis produces results especially likely to advance judicial biases, there is special reason to be cautious about its application in those substantive areas of law that affect those already stigmatized and with the fewest political and economic resources, i.e., prisoners and those in custody under immigration law, as well as workers in the service sector. Failure to do so allows individuals such as Posner to rely on these stereotypes and dismiss as "outlandish" claims that he acknowledges are allowed by the statutes at hand.

Section B, here. reconsiders the justifications used to exempt inmates from FLSA coverage. These analyses also apply to those in custody under immigration law, who have claims to FLSA coverage additional to those who are working while held in custody as a punishment, as well as those in pre- and post-conviction facilities. This Section reconsiders Posner's assertions about the main purpose of prison, suggesting it is a parry that would eviscerate FLSA protection for any industry and most government programs, none of which are established with the

304 Vermeule, Legislative History, 1896.

"primary objective" of providing a minimum wage for their workers. It also analyzes implicit and explicit empirical economic and political assumptions informing these decisions, pointing out that the prisons are indeed part of the national economy, as is the labor performed therein, by guards as well as inmates; that defraying expenses is not a legitimate purpose of FLSA exemptions; and points to decisions that obligate states to pay FLSA wages to those awaiting trials.

1. Purpose of Prison Not to Provide Living Wages to Workers

This section performs a close reading of Posner's defense of not allowing FLSA relief to prisoners. In his analysis in *Bennett,* cited later by himself and others, Posner writes: "People are not imprisoned for the purpose of enabling them to earn a living."[305] This is true. But line cooks are not recruited, guards are not hired, and, for that matter, judges are not appointed, for the purpose enabling any of them to earn a living. The purpose of each employment decision is to advance a larger economic or political objectives. Indeed, Congress intervened by establishing wage protections precisely because the well-being of these employees was not the main purpose of the firms employing.

If the argument about an organization's purpose fails to vanquish its employees from the FLSA's umbrella, it would seem that Posner's next sentence might further that goal: "The prison pays for their keep." This is a line of analysis taken in other decisions as well.[306] The inference uses as its main framework a bi-directional micro-economic relation between the prisoner and

305 *Sanders*, 544 F. 3d at 814.
306 *Harker* at 133, *McMaster* at 980;

the prison. Insofar as the prison is providing benefits of room and board, any prison labor that goes toward their remuneration can be exacted, and could at best be compensated after subtracting the costs for this from any wages that could be earned under minimum wage conditions.

This economic analysis does not comport with the purpose of prison, which is not to facilitate an exchange relation between prisoners and prison management or owners, but to punish and rehabilitate people. It is entirely sensible, therefore, to use delegation of authority through, say regulations of the federal Bureau of Prisons, to mandate work *as a condition of punishment or rehabilitation*, along the lines contemplated by the Thirteenth Amendment's exemption for this. Such authority would of course need to be understood in the context of complementary laws and regulations, including Amhurst Summers.

Posner's next sentence muddles this objective: "If [the prison] puts [prisoners] to work, it is to [a] offset the cost of keeping them, or [b] to keep them out of mischief or [c] to ease their transition to the world outside, or [d] to equip them with skills and habits that will make them less likely to return to crime outside." Insofar as the purpose of prison is punishment or rehabilitation, the instrument to this could be b, c, and d (inserted by author). Whereas Posner reasons that a legitimate *purpose* of prison work is offsetting costs, the analysis here suggests that offsetting costs is a permissible consequence pursuant to a bona fide purpose of punishment.

Much of prison work today and historically has indeed been organized in a punitive fashion, consistent with the organization of prison life more generally, giving rise to the confusion or collapse between the economic and punitive character of prison work in judicial

opinions. The failure of this can be seen more clearly if we think about other total institutions that are designed for a public purpose but that do not require labor from the individuals who actually accumulate immediate as well enduring benefits and pleasures from their duties. High schools in the United States, for instance, require students to keep their desks or lockers clean, but not to clean the toilets; to throw away their own garbage, but not to put trash into a compactor; to carry food trays to their tables in cafeterias, but not to take turns peeling potatoes, even though such tasks could be accommodated during recess or after school. Imagine a high school principal requiring these activities at $1 per day. Would Posner respond that the purpose of high school is not to earn a living and that the duties imposed were legitimately offsetting the costs of school?

De facto, prison work is often, though not always, punitive; sometimes rehabilitative; and certainly offsets costs. Under the implied repeal approach urged here, prison labor may be used in certain contexts without FLSA protections and may entail savings or offsetting costs, but only *as a consequence but not as a permissible objective*. On this analysis, the crucial distinction is between that work which is punitive or rehabilitative, and that which is neither. If either of these objectives are met and Congress has no other goal, then prison labor compensated not at all or at wages below the minimum wage would be legal. On this analysis as well the fact that such labor would undercut the price of service labor in the larger labor market does not need to be addressed by circular claims that inmate labor in a prison is outside the economy ("Prisoners are essentially taken out of the national economy upon incarceration" *Vaniske* at 81). This claim is of course false. Inmates who are cleaning showers, serving food, and cleaning clothes in a

laundry are all doing work that has an occupation code for federal contracts and they are depriving those in nearby communities these service employment possibilities. Nonetheless, the FLSA may be superseded without an exemption for prisoners as long as the purpose of the labor is genuinely punitive or rehabilitative and not simply to save the prison money ("Because prisoners...worked for programs structured by the prison pursuant to the state's requirement that prisoners work at hard labor, the economic reality is that their labor belonged to the institution We hold, therefore, that they were not 'employees' of the prison entitled to be paid minimum wage under the FLSA," *Hale v. Arizona*, 993 F.2d 1387 (9th Cir.) (en banc) cert. denied, quoted in *McMaster v. State of Minnesota*, 30 F. 3d 976).[307]

This does not provide a green light to FLSA exemptions for criminal inmates. The problem in any particular case is that while incarceration is clearly a condition of punishment, state legislatures and Congress do not always specify work, in the form of hard labor or any other labor, as a condition of punishment. Furthermore, in practice prison work is largely organized to offset costs, and not as punishment nor rehabilitation. Ashurst-Sumners (1935) (18 USC § 1761-1762) contemplates this if the end are "commodities...for use by the Federal Government, or by District of Columbia, or by any State or Political subdivision of a State or not-for-profit organizations."[308] For instance, as a thought experiment, imagine if the CCA executives for either penal or civil detention facilities could snap their fingers and have all the work performed by magic hands at current inmate or resident wages. Would they still implement the work programs now in place? Those facilities genuinely committed to a policy of reform, including

307 The claim in Vaniske and elsewhere
308 18 USC § 1761 (b).

punitive as well as rehabilitative measures, would not take the swap. But presumably most facilities would be either indifferent or favor cheap magic hands -- simply because these would lower the friction attendant the control of a work force paid close to nothing.

Of course the very nature of prison, i.e., locking people up and leaving them with nothing to do would suggest their use as labor is a practical solution to an obvious problem. But for its impact on labor markets, this approach is exactly the problem anticipated as a problem in the FLSA as well as in Ashurst-Sumners (1935) (18 USC § 1761-1762), prohibiting the transport of "goods, wares, or merchandise, produced, or mined, wholly or in part by convicts or prisoners..." excepting those items listed above "manufactured, produced, or mined by convicts or prisoners who (c) (2) have, in connection with such work received wages at a rate which is not less than that paid for work of a similar nature in the locality in which the work was performed, except that such wages may be subject to deductions which shall not, in the aggregate, exceed 80 per centum of gross wages, and shall be limited" by deductions for taxes, room and board charges, legally obligated family support, victim compensation.

As a reminder, for purposes of considering those in custody under immigration laws, this statute is only relevant under the statutory canon of purposiveness. It highlights Congress's efforts purposed to limit the impact of cheaply produced goods on the labor market. Crucially, the limit to deductions from wages indicates an interest in ensuring that prisoners retain a much higher level of wages than contemplated by the authors *Danneskjold* and its progeny, much less the Thirteenth Amendment. *McMaster*, for instance, states, "We conclude that Congress'[s] purpose in enacting the Ashurst-Sumners Act was to protect private business, not to protect the

inmate worker" (Note 29). Such an inference ignores plain text setting a ceiling for the amount that a prison may deduct for room and board and other expenses from minimum wages. If the sole purpose were the protection of labor markets then Congress would have been silent on the BOP's authority to confiscate these wages; it would not have required the BOP ensure prisoners keep 20% of their gross wages.[309] In short, Congress has already passed exactly the sort of legislation protecting prisoner's compensation for goods that the decisions above seemingly ignores and deems "outlandish" when applied to service work.

Judges infer that the silence on service work in 18 USC § 1761-1762 means that service work within the prison walls fails to attract the same protection. This appeal from the conservative intuitions of the jurists is not required by, or consistent with, the underlying nature of the labor in question. The policy needs served by passing labor laws for goods, including those imported from foreign countries, are different from those for service work in prisons or civil detention facilities. The prison labor devoted to goods establishes conditions of infinite exploitation and market deformities that are impossible for the government to regulate, thus necessitating the enforcement provisions of 18 USC § 1762 (a) ("All packages containing any goods, wares, or merchandise manufactured, produced, or mined wholly or in part by convicts or prisoners...when shipped or transported in interstate or foreign commerce shall be plainly and clearly marked..."). Congress's focus on prisoner produced commodities highlights the fact that the potential for the exploitation of prison labor in goods is infinite but that of service work constrained by the finite quality of maintenance needs within the institution.[310] For this reason,

309 For instance, gross wages for an 8 hour day at $7.25 would be $58, of which the 20% set aside for the prisoner would be no less than $11.60 and possibly higher, regardless of the costs of incarceration.

310 As Karl Marx, points out, the production of commodities relies on the accumulation of labor concentrated in the means of production. The capacity to absorb labor to produce further means of production, e.g., assembly-line

the potential impact of prison labor accumulated in goods on the labor market is exponentially higher and less transparent than that of service labor. It is thus perfectly consistent to read Ashurst-Sumners as addressing the problem of tracking the source of goods in the national economy while allowing the FLSA to target the exploitation of prisoner service work, which is transparent to any on-site investigator.

Moreover, as noted in Parts III and IV, in passing the Service Contract Act, Congress's sole purpose was to ensure that in making available government work to private contractors and removing jobs from the federal government, that service workers would nonetheless have the protections of Collective Bargaining Agreements or a pay rate structure substantially above the minimum wage. The SCA includes no exemption for work performed by residents in federal detention facilities.

Before turning to the legally and practically unique context of labor performed by residents of ICE facilities, two further characteristics of service labor undertaken by those in custody under penal laws bear note: first, differences between private-prisons and state-run prisons; and second, differences between pre- and post-conviction service labor. Insofar as the prison industry is part of the national economy and service workers employed therein are as well, it would seem that the same the FLSA could be construed to serve the same purpose for service work in the prison walls that Ashurst-Sumners serves for labor embodied in goods. For reasons noted above, i.e., the lack of an exemption for prison labor, a separate law is not necessary to effect this objective. And yet, in a brief opinion echoing his prior "outlandish" characterization

machinery, that may itself by used to produce goods or more machines is infinite. But the capacity to absorb service labor for the maintenance of a prison facility are limited.

of FLSA claims in state-run corrective facilities, Judge Posner writes, "We cannot see what difference it makes if a prison is private. Ideally, neither the rights nor the liabilities of a state agency should be affected by its decision to contract out a portion of the service that state law obligates it to provide. Otherwise the 'make or buy' decision (the decision whether to furnish a service directly or obtain it in the market) would be distorted by considerations irrelevant to the only that that should matter: the relative efficiency of internal versus contractual provision of services in particular circumstances" (*Bennett* at 410). Of all jurists, one would expect Posner especially to be cognizant of an alternative economic analysis, one recognizing that those industries in which labor costs are exempt from federal wage protections will have a market advantage over all others, and, especially in this era of *Citizens United*, use their enhanced market position to lobby for policy that would drive business in their direction. Whether through entreaties at the level of the executive or legislative levels, such firms' low labor costs give them an unfair advantage over those firms and sectors that judges have not exempted from the FLSA. Insofar as the decision is premised on an hypothetical ideal of Judge Posner's imagination, its refutation by the realities of prison contracts in the national economy urges reconsideration.

Posner dismisses differences between private and publicly run prisons, but other decisions are less cavalier. The bulk of *Gambetta* hangs on precisely this question ("This appeal presents an important question of economic and penological concern of first impression in this circuit, wherein prisoners ... seek the benefits of federal minimum wage laws when they engage in correctional work programs operated by a non-profit corporation established by the State....Because we conclude as a matter of law, however, that the employer in this matter is a

state instrumentality, we need pursue only a more limited inquiry," *Gambetta* at 1120). The bulk of the opinion is devoted to explaining that although prison labor is organized by a non-profit entity, the Florida Department of Corrections controls the work programs, including prescribing the "education, work, and work-training for each inmate entering the correctional system .... Having concluded as a matter of law that PRIDE is an instrumentality of the State of Florida, we now ascertain the impact of that status upon the applicability of the FLSA" (*Gambetta* at 1122, 1123). The opinion concludes, "We are persuaded by the reasoning of our sister circuits, and we join them in the conclusion that inmates that work for state prison industries are not covered by the FLSA" (at 1124). Regardless of the endorsement of these other decisions, the effort to affirm that the DOC and not a non-profit, much less a private firm, was organizing the prisoner work suggests that the private-public sector distinction is more important than Posner's decision credits. Insofar as prison or detention facility work programs are designed and implemented by private firms largely for reasons of efficiency, and not under DOC control, this would appear to further credit application of the FLSA in those contexts.

Also relevant to the organization of ICE resident labor is the analysis of labor in contexts that are non-punitive and therefore civil but still part of the criminal justice system, as opposed to the immigration detention system, which is entirely civil. The decisions in the pre- and post-conviction settings have facts, laws, and outcomes that are sufficiently different as to foreclose any clear inferences about their significance within even these contexts. Unlike the prison labor cases, where different courts in different time frames have come up with similar frameworks, along the lines reviewed above, and with significant outliers *(Dutchess County* and *Watson*), the

pre- and post-conviction cases are less uniform. *Villareal* asserts "pretrial detainees who perform services at the direction of correction officials and for the benefit of the correctional facility are not covered under the FLSA" (at 202); as noted above, the sole precedent on which the decision relies for linking the conditions of pre-trial detainees to prisoners is *Alvarado Guevara* (at 206). The defense is that the "correctional facilities provide pretrial detainees with their everyday needs..." (at 206). The problem with this reasoning is apparent in the oxymoron of applying norms of "'correction'al facilities" to those who are "pre-trial detainees" afforded a presumption of innocence.

This is precisely the point made in *McGarry v Pallito* (2012), a case in which a Vermont pre-trial detainee claimed the guards compelling him to work in the jail laundry was in violation of the Thirteenth Amendment. The district court dismissed the complaint. The *pro se* plaintiff Finbar McGarry appealed and the Second Circuit upheld his appeal and remanded:

> [I]t is clearly established that a state may not 'rehabilitate' pretrial detainees. The Supreme Court has unambiguously and repeatedly held that a state's authority over pretrial detainees is limited by the Constitution in ways that the treatment of convicted persons is not. In *McGinnis v. Royster*, 410 U.S. 263, 273 (1973) the Supreme Court concluded that 'it would hardly be appropriate for the State to undertake in the pretrial detention period programs to rehabilitate a man still clothed with a presumption of innocence." *See also Bell,* 441 U.S. at 536 (noting that a state may 'detain [a person] to ensure his presence at trial and may subject him to the restrictions and conditions of the detention facility so long as those conditions and restrictions do not amount to

> punishment, *or otherwise violate the Constitution*." (emphasis added)); *Houchins v. KQED, Inc.* 438 U.S. 1, 37-38 (1978 (Stevens, *J.* dissenting) (noting that certain penological objectives, such as punishment, deterrence, and rehabilitation are inapplicable to pretrial detainees); *cf. Salerno*, 481 U.S. at 747 (distingushing between 'impermissible punishment' and 'permissible regulation' of pretrial detainees).[311]

This is not a case brought under the FLSA, and the work is programmatically and not just de facto mandatory, thus distinguishing it from other civil detention cases, including of those in ICE custody. However, the decision's distinction between work that an institution with civil detainees may compel "personally related housekeeping chores" and that which it may not ("compelled work in a laundry for up to 14 hours a day") has implications for the FLSA cases as well. As long as courts recognize a line between conditions of government custody that have Constitutional protections and those that do not, the former seemingly would entail Fifth Amendment and Fourteenth rights to due process availing detainees of FLSA protections, absent legislation indicating otherwise.

In *Tran*, the court observed that the Wisconsin legislature changed a policy for those who volunteered to work in mental health facilities. Until 1980 the law allowed patients to "voluntarily engage in therapeutic labor...of financial benefit to the facility" if they were paid the federally-mandated minimum wages.[312] But a 1981 amendment changed this, stipulating that the

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311 The decision goes on to quote additional precedents: "*See United States v. El-Hage*, 213 F.3d 74, 81 (2d Cir. 2000) ("Where the regulation at issue imposes pretrial, rather than post-conviction, restricitons on liberty, the legitimate penological interests served must go beyond the traditional objectives of rehabilitation or punishment.' (internal quotation marks omitted))... [Note 7] Normally where it is alleged that a prison restriction infringes upon a specific constitutional guarantee,' this Court will evaluate the restriction 'in light of institutional security..'" *United States v. Cohen*, 796 F.2d 20, 22 (2d Cir. 1986)," at 513.

312 *Tran* at 577, quoting WIS. STAT. § 51.61(1)(b).

labor is to be "compensated in accordance with a plan approved by the department..."[313] The Plaintiffs argue that the Warden may not set a rate of compensation inconsistent with those allowable under the FLSA. The Wisconsin Court of Appeals uses an approach to the prison labor cases that is generally disfavored in other contexts. Instead of inferring that state actors cannot implement policies inconsistent with federal laws that cut across agencies, as would be recommended by an implied repeal approach following the plain text of the FLSA and WIS. STAT. § 51.61(1)(b), and likely applied by Wisconsin courts for any employment authority provided Wisconsin state agencies, the court affects perplexity over this approach: "Tran and Frankhauser nonetheless claim that WIS. STAT. § 51.61(1)(b) supports their position. We cannot fathom why" (at 578). Regardless, the language here authorizes a state agency to set the rate, and does not reserve to the legislature this prerogative, as is the case in 8 USC §1555(d).

C. Purposive Standard Implications for FLSA Analysis for those in ICE Custody

Sections A and B laid out some of the problems confronting a purposive approach conflating the corrective (punitive and rehabilitative) with an economic (cost-saving) analysis of FLSA claims by those in government custody as pre-trial detainees, convicted inmates, and post-conviction sexual offenders. These difficulties of laws and facts are not only relevant, but pose seemingly insuperable difficulties for efforts to avert an FLSA analysis of claims by those in custody under immigration laws using a purposive approach to statutory construction. First, the policy mandate of immigration detention, if not deportation, is affirmatively humanitarian. Second, the purpose of the ICE resident work programs is demonstrably and exclusively for the

313 *Ibid*., at 578, quoting WIS. STAT. § 51.61(1)(b) (1981-82) and § 51.61(1)(b) (2007-08).

economic benefit of the private prison industry. Third, the pre- and post-conviction settings, while not triggering conditions of correction, nonetheless occur in the context of Sixth Amendment protections, unlike those in ICE custody, thus seemingly affording the latter special due process protections under *Wing*. Finally, Ashurst-Sumners, not relevant under a plain meaning analysis, may be invoked in the context of a purposive analysis to indicate Congress's explicit interest in applying the FLSA in order to protect labor markets from the effects of work contracted under conditions of coercion, including that of employees facing wages determined by a single employer.

The easy and seemingly intuitive treatment at law of those in civil detention under immigration policies through analyses lifted from those incarcerated for purposes of punishment is worrisome. Analysts decry mass immigration detention as a simple outgrowth of neoliberalism, but such a critique imputes too much genteel sophistication to an operation that in its cunning, greed, depravity as well as anti-libertarian substance favors references that are more Dickensian than simply Foucauldian. GEO's and CCA's business model is incentivizing Congress to pass minimum daily bed mandates for a population that lacks any Sixth Amendment rights, thus triggering ICE's largely frictionless arrest of otherwise free people, most of whom are productive members of the work force These individuals are taken from their jobs harvesting the country's food, cleaning its homes and buildings, as well as working in highly skilled professions, and turns them into lodgers whose coerced residence and labor results in reliable and obscene profits for the prison industry while hurting every other sector.

Such a system is not required by the civil policing of immigration control[314] and is a

314 Alternatives to detention range from monetary bonds taken on a monthly basis from an employee's wages, as

major obstacle to those advocating lower-priced alternatives to detention. The experience of current practices prejudices our impressions, the current degrading terms of detention contaminating those affected with the taint of undeserving beggars at the castle gates instead of the potentially desirable residents contemplated by the earliest Congressional reports on "immigration stations," what we now call "immigration detention facilities."[315]

1. Humanitarian Objectives of Immigration

As discussed above, the Court has noted the right to be free of punitive measures directed to those in pre-trial detention. Insofar as immigration agencies have from the founding of the first immigration stations affirmatively stated a humanitarian vision for such environments, it would appear that measures appropriate to distinguish the custody of those in immigration custody from those incarcerated as a condition of punishment would be favored, including but not limited to protecting those held from slaving wages of $1 per day detention.

Part Four took note of ICE's contemporary statements favoring distinguishing conditions of immigration custody from those of prisons. Under a purposive standard of analysis the longer history of the agency's custody intentions also is relevant. A 1915 Department of Labor report for Congress reiterates a statement "made in the first annual report" of the recently established DOL, in whose purview lay the first immigration facilities:

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done in World War One, to ankle bracelets, the latter of which have produced high rates of appearances in immigration courts.

315"During World War One, the Immigration Commissioner Robert Wachtorn undertook to make these centers resemble residential areas. Schools were built, recreation fields corrected, and even paintings received from "Mrs. Harry Payne Whitney, of Whitney museum fame" and hung in the immigrant halls. Henry Guzda, *Ellis Island, A Welcome Place?*, Monthly Labor Review, 33 (July 1986), *available at* http://www.bls.gov/opub/mlr/1986/07/art4full.pdf/.

> For a satisfactory administration of the immigration laws, the character and condition of immigrant stations at ports of entry are of prime importance. So far, therefore, the Department of Labor is permitted by law and equipped for the purpose, it aims to make these stations as much like temporary homes as possible. While regulation and exclusion and therefore detention, are necessary in respect of immigration laws, it should be understood by all who participate in administering these laws that they are not intended to be penalizing. It is with no unfriendliness to aliens that immigrants are detained and some of them excluded, but solely for the protection of our own people and our institutions. Indifference, then, to the physical or mental comfort of these wards of ours from other lands should not be tolerated. Accordingly, every reasonable effort is made by the department, within the limits of the appropriations, to minimize all the necessary hardships of detention and to abolish all that are not necessary.[316]

Note that the purpose of these detention facilities from their origin is is to "make these stations as much like temporary homes as possible" and that the laws are "not intended to be penalizing," much less punitive. This is not a description of the purpose of the institutionalization of federal convicts in 1915. Similar sentiments appear throughout the legislative history accompanying the establishment of immigration courts as well.[317] but no similar sentiments are expressed for

316 Report of Secretary of Labor, 1915, pp. 69-70. It is true that that these stations were for only arriving immigrants and not those ordered deported. But that is only because the latter were not confined at all. Thus the earlier measures, as well as current laws, favor the liberty of those who have already entered legally, heightened protections that would seem to favor more protections for those who have been U.S. residents than those who are just arrived.

317The Congressional objective of immigration courts and detention is to ensure low-level agents do not mistakenly deny entry, residence, or mistreat in custody those whose presence is either mandated by international law or would improve our communities and economy. Under current laws, detention facilities must advance this objective. ICE housing conditions that resemble prisons do not conform with this goal any more than would shackling and otherwise humiliating those in line for screening by Border Patrol at air and land ports of entry.

those housed in prisons and jails, at least in the United States.

In contrast with this official purpose, consider the reality of the administration of the immigration work program through protocols and forms that are literally identical with those of the prisons. For instance, the forms and logs sheets CCA distributes to those in ICE custody are the same as those CCA uses in its prisons, e.g., the "Prison Information Request" sheet CCA distributes to those in its ICE facilities seeking a job assignment.[318] Among the dozens of ICE work forms, logs, and work descriptions reviewed for this Paper, none are specific to those held under immigration laws but are simply duplicates of those used in prisons.

2. Economic Purpose of Immigration Detention

Moreover, the purposes of the program ICE advances -- efficiencies of operations and alleviating the "negative impact of confinement"[319]--may be advanced through wages paid at the minimum wage rates Congress set. But the analyses above suggest that they may not be pursued by allowances arbitrarily set by either the agency or the private prisons of $1 to $3 per day. Part IV noted the problems with this based on the plain meanings of the FLSA and 8 U.S.C. § 1555(d). Bearing in mind the broader purpose of immigration detention and the jurisprudence on the prerogatives to strip those in state custody of their labor rights, these practices would seem to be especially disfavored. *Gambetta* and *Vaniske* noted the absence of an profit motive in the low

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3182011FOIA13921, 32 (Sep. 11, 2011), *available at* http://www.governmentillegals.org/2011FOIA13921SlaveLabor.pdf and on file with author. The form was sent responsive to my request for the forms ICE and its contractors distribute. Form 8-5A states at the top "Corrections Corporation of America Documentation of Inmate/Resident Work Place Safety Orientation" (*Id.*, at 7). The log sheets and codes CCA uses for its grievances, including for facility work, are also the same as the ones they use in the prisons.

319 PBNDS 5.8.

wages paid inmates ("There is no indication that the DOC has a pecuniary, in contrast to a rehabilitative or penological interest in inmate labor," *Vaniske* at 809, citation omitted). But the immigrant detention industry is on very different footing.

Prison companies brag in their annual reports about their high profits as well as resources devoted to maintain steady contracts for fixed bed space. CCA's 2012 Annual Report filed with the Securities and Exchange Commission states, "We have staff throughout the organization actively engaged in marketing this available capacity to existing and prospective customers. Historically, we have been successful in substantially filling our inventory of available beds and the beds that we have constructed. Filling these available beds would provide substantial growth in revenues."[320] The main target,[321] has been Congress's mandate "That funding made available under this heading shall maintain a level of not less than 34,000 detention beds through September 20, 2013 for ICE"[322] ("In the last two years, major private prison companies Corrections Corporation of America (CCA) and the GEO Group have spent at least $4,350,00 on lobbying the federal government, primarily to win immigration-related contracts.")[323] Mission accomplished. Insofar as even the most draconian deportation policies could be implemented in a variety of ways, specifying the funding of mandatory space serves only one purpose--increasing profits for the prison companies.

Further distinguishing the profit incentives for cheap labor in the immigration detention

320 CCA, 2012 Annual Report on Form 10-K, p. 53.

321 *Ibid* (noting CCA's in-house lobbyists Bart Velhulst, Jeremy Wiley, and Kelli Cheever targetting "'provisions related to ICE detention).

322 Public Law No: 113-76.

323 Piper Madison, "Meet the Private Prison Industry's Lobbyists Who Could Shape Immigration Reform," February 6, 2013, http://grassrootsleader.org/blog/2013/02/meet-private-prison-industry-s-lobbyists-who-could-shape-immigratin-reform/.

system from that of prisons is that the 34,000 daily mandatory minimum bed space occupation required of ICE has no corollary in the prison system. The prison firms' immigration detention sector, relying on the cost-efficiencies of immigrant labor, demonstrably furthers a business purpose for CCA and GEO and suggests the very profit motive that *Vaniske* scoffs at in the context of corrective incarceration and that *Gambetta* contemplates as a factor that would trigger FLSA coverage for Florida prisoners.

The Supreme Court has ruled that the government does not have an obligation to provide the utmost possible protection of all rights all the time but can employ a cost-benefit calculation, ensuring the accurate pricing of these tradeoffs is vital ("At some point the benefit of an additional safeguard to the individual affected by the administrative action and to society in terms of increased assurance that the action is just, may be outweighed by the cost.")[324] But this is hardly a rationale to exploit labor simply because such a possibility is expedient. If the government cannot afford to enforce the bare minimum requirements of the Constitution by providing assigned attorneys to those in detention under immigration laws, then it is obligated at the very least to ensure that labor markets are correctly functioning so as to provide the government the correct economic context in which to make its assessments, including that contemplated by convict labor regulations under the Federal Acquitions Regulations (48 C.F.R. § 52.222-3.).

3. Forced Work Impermissible under *Wing*

The *Wong Wing* court distinguished between the unconstitutional act before it--which

324*Mathews v. Eldridge*, 424 US 319, 348 (1976).

made illegal presence in the country summarily punishable by a sentence to being 'imprisoned at hard labor' for not more than a year and provided that the alien would be '**thereafter** removed from the United States)-- and detention pending deportation."[325] In other words, the plenary authority to regulation immigration is confined to requiring detention but does not authorize Congressional actions in violation of other due process rights. Even Congress may not impose work requirements on those in immigration custody that do not comport with the Thirteenth Amendment.

The reasoning in *Wing* has been affirmed by the Supreme Court in recent years and in thousands of cases across the country.[326] Thus the precedents in *Alvarado Guevara,* referring exclusively to prisoners who are removed by the Thirteenth Amendment from coverage under the FLSA and other laws,[327] have no bearing on residents of immigration centers. Recent contracts further exemplify the legal distinction between prisoners and ICE residents and the practices ICE recognizes should follow. The IGSA with the City of Adelanto, California states:

> A. Purpose: The purpose of this Intergovernmental Service Agreement (IGSA) is to establish an Agreement between ICE and the Service Provider for the detention and care of persons detained under the authority of the Immigration and Nationality Act, as amended. All persons in ICE custody are "Administrative Detainees." This term recognizes that ICE detainees are not charged with criminal violations and are only held to assure their presence through out the administrative hearing process and to assure their presence for removal from the United States pursuant to a lawful final order by the

325 *Zadvydas v. INS* 185 F.3d 279, 289 (1999), emphasis added by court.
326 Lexis-Nexis.
327 See Part IV.

> Immigration Court, the Board of Immigration Appeals or other Federal judicial body.
>
> B. ICE is reforming the immigration detention system to move away from the penal model of detention. A key goal of reform is to create a civil detention that is not penal in nature and serves the needs of ICE to provide safe and secure conditions that accommodate the needs of a diverse population...[328]

This development is consistent with the historical purpose of immigration proceedings and the distinction from any punitive rationales has been affirmed by the courts as well. Although Congress has ordered mandatory detention for those convicted of serious crimes, even their detention pending proceedings and possible deportation has been deemed a "penalty" and not a "punishment":

> [A] detention that occurs pending deportation following a convicted alien's completion of his term of imprisonment should not be viewed as a detention resulting solely from his conviction. Nor should it be viewed as part and parcel of the punishment for his criminal offense. Rather, it is part of a penalty that has been termed civil rather than punitive.[329]

There is little possibility that depriving people of the right to earn wages at those available to people outside detention facilities, including those who lack legal status,[330] is a penalty, one that *Restrepo* would seem to disallow.

Even *Hale*-s rationale of extending the coercive potential available prison wardens to a

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328 Release ICE2013FOIA07484, 7, on file with author. The contract goes on to list numerous provisions for the ICE residents that would not be contemplated for inmates, e.g. "They must provide housing environments with abundant natural light, outdoor recreation, contact visitation, noise control, freedom of movement, programming opportunities consistent with detainee demographics, and modern and fully functional medical facilities," *Ibid.*.

329 *United States v. Restrepo,* 999 F.2d 640, 646 (1993), citing *Abel v. United States*, 362 U.S. 217, 237; *United States v. Koziel*, 954 F.2d 831, 835.

330 See *Solis v. Cindy's Total Care, Inc.* Case No. 10-CIV-7242 (PAE) (2012).

total control of the prison environment is consistent with the decision in *McGarry.* Whereas *Hale* uses the prerogative of total control of the prison to rationalize exclusion from the FLSA, *McGarry* takes this same norm of prison work to exempt from such a punitive work environment those awaiting determination of whether they deserve to be punished. Those decisions that have granted the prerogative to pay slaving wages to those awaiting trial or post-conviction are still distinguishable from the contexts of immigrants in civil detention. Per *Wing,* the Sixth Amendment prerogative to a full range of due process rights, especially the right to a trial by a jury, means a higher level of confidence that those in custody merit this treatment than those in immigration custody. While the law at had had in *Wing* was forced hard labor, the language of the *Wing* decision allowing detention but striking down other penalties is on point for considering the relation between 8 USC 1555 (d) and the FLSA ("But when Congress sees fit to promote such a policy by subjecting the persons of such aliens to infamous punishment at hard labor, or by confiscating their property, we think such legislation, to be valid, must provide for a judicial trial to establish the guilt of the accused" (*Wing* at 237). Leaving aside the *de facto* forced work that occurs in ICE facilities the only reading of 8 USC 1555 (d) which would not seem to violate *Wing* would mandate wages to ICE residents consistent with the provisions of the FLSA ("Another rule of statutory construction...where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress," (*DeBartolo Corp. v. Florida Gulf Coast Building and Construction Trades Council and NLRB*, 485 U.S. 568, 575). Insofar as the Congressional record is barren of any intent whatsoever vis-a-vis slaving

wages in a privatized universe of mass detention, there is no reason to infer an intent of $1 per day wages. *(Alvarado Guavara* does not reference *Wing*, thus further weakening its standing as a precedent in this area.)

4. No Evidence that Congress Intended to Adversely Impact Service Labor Market

Posner's analysis of the Ashurst-Sumners Act fails to exempt from the FLSA ICE residents for the same reason that it fails to exempt those in private prisons and jails: the Act's 80% cap on gross wages that prisons may deduct indicates Congress wanted to protect inmates. Posner states such such a priority is "outlandish" and therefore dismisses it as a possible reading of the FLSA. However, Congress has a major piece of legislation protecting prisoner wages at no less than $11.60 per day suggesting that Posner may not be quite so clairvoyant at reading the intentions of Congress as he imagines. For the same reason, there is no reason to accept similar imputations to Congress in *Alvarado Guevara.*

5. Corrosive to Democracy and the Rule of Law

Finally, the subsidy to the prison industry artificially enhances its profitability, to the detriment of other industries that abide by the FLSA and thus cannot hire labor for $1 per day, thus distorting markets in exactly the fashion Congress sought to protect against by this legislation. Such distortions are reinforced when these super profits[331] drive a nativist immigration policy that has an overall adverse impact on markets in labor and goods.[332] True,

331 I definite "illegal super profits" as those revenues generated in violation of labor and other laws to which other firms or industries comply. CCA and GEO both recently reorganized as Real Estate Investment Trusts, a change made possible by the low ratio of labor and other expenses to those for real estate and buildings.

332 Editorial Board, *In Praise of Huddled Masses*, Wall Street Journal (July 3, 1984). proposal to amend U.S. Constitution as follows: "There shall be open borders." ("More people, the worry runs, will lead to overcrowding; will use up all our 'resources,' and will cause unemployment. Trembling no-growthers cry that

other industries may pay subminimum wages and benefit from unauthorized immigration from Mexico. Agrobusiness accumulates its own illegal super profits and uses these to lobby as well. But even the most exploitative employer pays its apple pickers more than $1 per day. In sum, the data show GEO, CCA, ATSI, and other firms negotiating with ICE to hire workers at $1 per day for the purpose of avoiding paying American workers the minimum wages set by Congress. Further, the off-the-books payments made from imprest funds seem to violate various laws violate the foundation of American democracy ("No Money shall be drawn from the Treasury, but in consequence of Appropriations made by Law; and a regular Statement and Account of these Receipts and Expenditures of All public Money shall be published from time to time," Article I, section 9.) These violations and the use of the super profits earned thereof advantage the prison industry over those abiding by the FLSA.

Conclusion

The requirement of unpaid work to support an institution of incarceration is pursuant to longstanding rehabilitative policies for criminals. Work within the grounds of a correction house was designed to save inmates' souls and not to save money.[333] The current policy as applied to those in ICE custody lacks any basis in common law, the Constitution, or the current U.S. code.

we'll never 'feed,' 'house' or 'clothe' all the immigrants--though the immigrants want to feed, house and clothe themselves. In fact, people are the great resource, and so long as keep our economy free, more people means more growth, the more the merrier.'") The sentiment is endorsed by economists across the political spectrum. Jacqueline Stevens, States Without Nations: Citizenship for Mortals, 27-72 (2009).

333 Marion, Prisoners for Sale, see supra at ("Considered a major reform in punishment at the time, the Walnut Street Prison required its inmates to work 'in order to attack idleness, though to be a major cause of crime.'" citing Stephen Garvey, *Freeing Prisoners' Labor*, 50 Stan. L. Rev., 339, 348 (1998), quoting as well William Quigley, *Prison Work, Wages, and Catholic Social Thought: Justice Demands Decent Work for Decent Wages, Even for Prisoners*, 44 Santa Clara L. Rev. 1159, 1161-62 (2004). ("The focus was primarily on the moral rehabilitation of the prisoner and only secondarily on the idea of having prison work defray some of the costs of incarceration.")

None of these, including the conditions at the inception of 1555 (d), are consistent with indigent ICE residents working at exploitative wages to subsidize the prison industry.

Table One

El Centro[1] Actual Disbursements (November 2009 to October 2010)[2]

ADP (June, 2010)[3]	ADE (2010)	Actual 12 month Pay-Work Program Disgursements, Per Firm Records (Nov. 2009-October-2010)[4]	Payments at California Minimum Wage ($8/hour)	Payments per 6 hours Service Contract Act at lowest level[5] and 2 hours minimum wage (est)	Amount of Profits for Ahtna Technical Services Incorporated from Nov. 2009 to October 2010 from paying slaving wages (est.)	Average Daily Employment (63426 days paid/Total Person Days, 2010)
457	173	$63,426 at $1 per day	at 8 hrs $3,678,708	$5,581,488	@ min wage 8 hrs/day $3,615,282	30%
			at 6 hrs $3,044,448		@ min wage 6 hrs/day $2,981,022	
					@ FLSA + SCA rates $5,518,062	

1 El Centro, California, Asset Protection and Security SVC LP
2 Source: Data from FOIA Case no. 2011 Case no. 113921, on file with author.
3 Source: FOIA 14-06388 FY2007-FY2012 Average Daily Population by Requested Facilities, ADE = Average Daily Employment 63426/365
4 Source: ICE FOIA Case no. 2011 Case no. 113921, at p. 8
5 Source: El Centro Contract, HSCEDM-R-00008 (Attachment 3), occupation Dishwasher at $8.76/hour and min. $3.24 benefits = $12/hour. 72 + 16 = 88, note this is for 2010, wages determinations change annually and vary by region.

TABLE 2[1]

Data on Private Prison Firm Use of Detainee Wages, Examples from ICE Contracts

Data on profits below reflect only official ICE and firm budgeting;
labor costs saved by paying from general funds, coercion, inducements of food, entertainment and other accommodations not included,
and amounts budgeted may not be spent[2]; except for El Centro, all expenditures are estimates from contracts

Facility	Firm	Year	Detainee Wages Per Contract, all at $1/day	Annual Profits Based on Minimum Wage ($58/day)	ADP #	ADE (%)	Sources [Note: Solicitations include recent data and terms obligate contractors, per revisions]
Denver CDF	GEO	2011	76650	$4,369,050	417	44	Denver, CO, Solicitation (2011 to 2017)
Florence SPC	Asset Protection and Security SVC, LP	2009	54531	$3,108,267	383	39	Florence, SPC Solicitation
Houston CDF	CCA	2007	95265	$5,525,370	864	30	Solicitation 2003-09
Krome	AKAL Security	2012	30000 to 40950	$1,710,000 to $2,334150	568	16-21	Solicitation for 2013-2024
Port Isabel	Ahtna Technical Services	2013	120000	$6,840,000.00	1115	29	Solicitation (2014), awarded as non-competitive renewal
Southwest TX	GEO	2004-10 2008-10	Detainee Work amts redacted	Coded as "Guard Services" (S206)	1695 (2012)		Contracts (2004-10) and (2008-10)
El Centro, CA		2010		$3,615,282.00	457	30	Actual Disbursements (November 2009-October 2010)
Total Wtd Avg per day for 6 facilities					3804	30.4	Note: Denver, Florence, Houston, Krome, Port Isabel and El Centro for one year = ~1114 ADE [Total ADP x .30] and this is ~10% of ADP in private prisons (2012)

1 ADP = Average Daily Population, from OIA 14-06388 FY2007-FY2012; ADE = Average Daily Employment (ADP/Annual Wages at $1/day)

2 A study prepared for Congress by Professor Craig Haney in 2005 found 19 of 21 ICE detention facilities responding to survey questions indicated "detainees were allowed to work." But only 12 provided pay. See Haney, *Conditions of Confinement for Detained Asylum-seekers Subject to Expedited Removal*, *in* Study on Asylum Seekers in Expedited Removal, as authorized by Section 605 of the International Religious Freedom Act of 1998, 178 (2005). Submitted February 2005, Appendix C, Committee on the Judiciary, House, Interior Immigration Enforcement Resources, Hearing before the Subcommittee on Immigration, Border Security, and Claims, 109th Congress, First Session, March 10, 2005, Serial No. 109-5. 47. For further specific examples by facility of non-monetary compensation for detainee labor, please see One Dollar Per Day, Part III.

Table 3

ESTIMATED PRIVATE PRISON CORPORATION PROFITS FROM SLAVING WAGES (2012)

FIRM	ADP	Total person days	.25 ADE* at min. wage	0.30 ADE at 2 hrs min. wage and 6 at SCA ($104.5/day)	Private prison population = 21230/34260 62% total detained population = 296,360 total
GEO	6418	2342570	$33,967,265 $585,642 $33,381,623	$73,439,570 $702,771 $72,736,799	
CCA	5877	2145105	$31,104,223 $536,276 $30,567,947	$67,249,042 $643,532 $66,605,510	
AKAL	1134	413910	$6,001,695 $103,475 $5,898,220	$12,976,079 $124,173 $12,851,906	
Ahtna	1130	412450	$5,980,525 $103113 $5,877,412	$12,930,307 $123,735 $12,806,572	
CEC	1115	406975	$5,901,138 $101.744 $5,799,394	$12,758,666 $122,093 $11,537,733	
Others	5556	2027940	$29,405,130 $506,985 $28,898,145	$63,575,919 $608,382 $62,967,537	
TOTAL	21230	7748950	**$112,359,775** **$1,937,238** **$112,051,940**	**$242,929,583** **$2,324,686** **$240,604,897**	

Amounts under federal labor laws, (Minimum Wages: $7.25/hr x 8 hours = $58/day, and Service Contract Act, prevailing wages by work performed, see http://www.wdol.gov/sca.aspx)

Est. Amount Firms Paid at $1 Per Day

Est. Firm Profits from Dollar/Day Pay

NO FILL

* **ADP = Average Daily Population, Per ICE FOIA 14-06388 FY2007-FY2012 Average Daily Population by Requested Facilities**

****ADE = Average Daily Employment of ICE Residents** (est. based on Table 2)

Note: These estimates are based on information sourced in Table 2; see especially *One Dollar Per Day, Part III*. ICE is not releasing responsive data, in violation of the Freedom of Information Act and author has filed a complaint in the Northern District of Illinois. For a copy of the lawsuit, filed May 6, 2014, please see http://stateswithoutnations.blogspot.com/2014/05/dhs-and-private-prisons-refuse-to.html/.

Attachment 2
Performance Work Statement for Food Service
Work Load data for Food Service

Workload Data for Food Service

Table 1 --- ICE/ERO Food Service Meal Served Workload

		Last Quarter April--2012 30 Days	May---2012 31 Days	June--2012 30 Days	Average Meals Per Day 91 Days	CY 2010 365 Days	CY 2011 365 Days
KRO-Miami	Total Meals	56,108	61,808	59,449	1,949	1,953	2,156
	Detainess plus Auth users	53,563	57,967	57,944	1,862	1,870	2077
	Satelitte/J-Pat Meals	2,545	3,841	1,505	87	82	82

Performance Work Statement for Food Service
ICE/ERO Food Service Operation Parameters

Food Service Operational Parameters

Table 2: --- ICE/ERO Food Service Oerational Parameters (Authorized Staffing Levels)

	Hours		Staffing			Population Served		
Shift	Hours	Feeding Begins	Food Service Admin/SUP GS-1667-11	Cook Supervisor WS-9	Cook WG-8	Average Number Detainees Workers Per Shift	Number Detainees Served Per Seating	Number Sittings Per Meal
First Shift	430A 1200P	Breakfast 0600 AM	1	1	6	**10	****65	****9
Second Shift	1100A 700P	Lunch 1100AM		1	5	**10		
Add Shift Rations	0900A 1730P	Dinner 1630PM				**10		
Add Supervisor Shift	0830A 1630P							

Workload---April Thru June 2012--- 91 Days — **Forecast**

Location	Number of Current FTE's Food Service Supv., Cook Supv, Cooks	Average # of Meals prepared Per day per FTE	Average Number Detainees Workers Per Day	Forecasted # of meals/day over the next 12 months
KRO-Miami	***14	171	**30	2400/DAY

* At KRO-Miami, Detainees work an average of 2.5 to 4 hours per shift.
***At KRO-Miami, FTE's there is currently one vacancy FTE Contract Cook
** An Average of 10 Detainee Workers for Breakfast, Lunch and Dinner per shift.
**** Average based on population count.

APPENDIX 2

EXCERPT FROM SOLICITATION FOR PROVIDING UNARMED GUARD SERVICES AT EL CENTRO SERVICE PROCESSING CENTER, 115 N. IMPERIAL AVENUE, EL CENTRO, CALIFORNIA 92243-1739,

PERIOD OF PERFORMANCE 4/2/2001 THROUGH 6/30/2009

[excerpted from section starting at p. 428 of pdf, undated, but appears to be 2008][1]

If paint details are performed, who provides respirators?

A. The government provides respirators."

37. Is there a Legal Orientation Program?

A. No.

45. A full time Nakamoto compliance officer is present. Would the Government provide a copy of recent monthly reports.[2]

A. No.

100. Subsection 6 -- Detainee work details. Can ICE provide a range or estimate of how many hours or days of detainee work details there are? Can these work details generally be monitored by positions listed in Attachment 1 or are extra people needed for this task? What tasks do detainees regularly perform?

A. Please refer to Section B CLIN. The RFP will be revised to reflect an estimated quantity of 39,712 detainees work days per year. Offerors should propose $1.00 per

1 Department of Homeland Security Immigration and Customs Enforcement Office of Detention and Management, *El Centro SPC, Solicitation Number ACL-0-R-0004*, 407-462, *available at* http://www.ice.gov/doclib/foia/contracts/acl2c0003asofp00027akalsecurity.pdf./. The RFP questions are not dated but appear to be from 2008. The section from which this is excerpted elsewhere projects performance from 2009 through 2014, at 434. The Question and Answer section from which this is excerpted is from pp. 428 - 462.

2 "Nakamoto is rich in compliance monitoring and technical assistance experience; in fact, Nakamoto's Federal Detention Division facilitates the ONLY on-site monitoring contract for the 300-plus Immigration and Customs Enforcement detention facilities." *Federal Detention Division,* The Nakamoto Group, Inc., http://www.nakamotogroup.com/Expertise.aspx (last accessed 9/21/02013).

detainee work day for 39712.[3]

Fourth set of questions (undated, 2009 or later):

1. ...please clarify if all the food service positions have been included in this breakdown..."

A: It is the responsibility of the contractor to submit post position descriptions for each position. Staff structure is currently as follows: Project Manager - 1; Asst Project Manager - 1; Cook II - 3; Cook I -4; Food Service Worker - 4. The RFP will be amended to include the statement that no detainee shall be used in preparation of food.

In a separate response the government states, "The food service employees and Recreation Specialists are new positions."[4] Another exchange on the topic states, "11. Please confirm there is no CBA for Food Service employees? **A: There is not currently a CBA for Food Service Employees**."[5]

86. Page 22, L-1(d) Has there been any history of 'lack of volunteer' detainee labor to support laundry or food service?

A. Yes, lack of volunteer detainee labor frequently occurs.[6]

Also among the documents is a form to indicate residents's completion of work training.[7]

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3 The contracts typically state an amount available for one dollar per day employment, and that these may be increased with the agreement of ICE. Until ICE releases the reports for reimbursements it has received from the private prison firms the actual amounts spent on this program across facilities cannot be ascertained. For instance, the payments under this program in El Centro during part of this time frame were over $62,000/year, approximately twice that indicated in the response above.

4 See 2011FOIA13921, 10 (Sep. 11, 2011), *available at* http://www.governmentillegals.org/2011FOIA13921SlaveLabor.pdf/.

5 *Ibid*.

6 Absent sufficient numbers of resident employees, guards simply force residents to work these shifts for no pay at all. See Part III.

7 2011FOIA13921. (El Centro's "Detainee Worker Roster" form states: "THE DETAINEES LISTED BELOW PERFORMED WORK FOR THE U.S. GOVERNMENT ON: August 31, 2011." 11 such forms at El Centro, one for each "barrack of workers," e.g., "Alpha North Barrack Workers. The form states, "The Worker Roster must be turned into the Detainee Funds Manager daily." The form has at the top left hand corner the logo for ATSI and has the form number QAM20111022.)

Appendix 2

Varick SPC, 2010[8]

A handout titled "Detainee Voluntary Work Program" states:

> The Varick Federal Detention Facility may utilize volunteer workers in the following areas:
>
> 1) Recreation -- custodial duties;
>
> 2. Processing - custodial duties;
>
> 3. Housing units - custodial duties in common areas;
>
> 4. Main hallway and traverse areas (visiting/court holding area) - custodial duties;
>
> 5. Library - detainee librarian Or any other areas as deemed appropriate by the Facility Director."[9]

The Varick Detainee Handbook states:

> Any detainee wanting to work in processing, recreation (including barbers), SMU [Segregated Management Unit], and all work detail positions must put in a written request to the Detainee Services Manager for review and approval. Wages are $1.00 per day. Ordinarily, you will not be permitted to work in excess of 8 hours daily, five days per week, or 40 hours weekly unless a request is made and approved by the Assistant Facility Director."[10]

The Handbook notes as well, "Detainees who participate in the volunteer work program are required to work according to an assigned schedule. Unassigned absences from work or unsatisfactory work performance will result in removal from the voluntary work program."

The "Varick's Daily Detainee Payroll" resembles many of the other documents for this program does not include the word "Volunteer" or its cognates, and states, "Detainee is paid $1 per each day of work and cannot work more than five days per week."[11]

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8 *Ibid*.

9 ATSI, Detainee Voluntary Work Program, Rev. 6, 11-Jan-2010, from Release from ICE to Jacqueline Stevens in the case of 2011FOIA13921, 10 (Sep. 11, 2011), *available at* http://www.governmentillegals.org/2011FOIA13921SlaveLabor.pdf.

10 *Ibid*.

11 *Ibid*.

(c) Florence CCA[12]

The "Detainee Voluntary Work Program Agreement" form issued as "Proprietary Information" by the Corrections Corporation of America, effective 04/25/2010, states nearly verbatim the terms of employment as the ATSI Varick material, but with a few additions, including that the detainees are "required... to participate in all work related training," and that "Detainees must adhere to all safety regulations and to all medical and grooming standards associate with the work assignment. Compensation will be at $1.00 per day."

CCA also provided a document titled Corrections Corporation of America Documentation of Inmate/Resident Work Place Safety Orientation." It has a blank for the Assigned Work Place and states in bold, "Completion of this form is required in each area/department that inmate/resident is assigned to work."[13] The "Orientation Acknowledgment" (updated 6/24/09) is issued to "insure that all inmates [sic] at Florence Correctional Center receive verbal orientation."[14] The "Inmate Handbook" ((3-22-2011) distributed to ICE residents states:

> Regularly scheduled work performed by inmates/detainees at FCC is voluntary. Housekeeping of your living area, however, is mandatory. Further, if a staff member requests you perform a task, it is expected that you comply with that request. Refusal may result in disciplinary action. Inmates/detainees who wish to work must complete a request for services form to the Case Manager [sic]. You must have medical clearance from Health Services prior to being assigned to food service or a barber job. Job assignments include laundry worker, pod porter, hall porter, etc. You will be required to attend a training session and sign a job description prior to beginning your duties. If your job requires the use of any chemicals you will be properly trained in its [sic] use. The use of any flammable, toxic, and caustic materials will be under

12 *Ibid*.
13 *Ibid.*, at 7.
14 *Ibid.*, at 24.

direct supervision."[15]

CCA Florence also distributes to those waiting for their immigration hearings a "Prisoner Information Request" form for inquiries about the Work Program.[16] and is in English and Spanish.[17]

To download entire contracts, please go to http://deportationresearchclinic.org

15 *Ibid. at* 26.
16 SEC 112-P 600903-2646, *Ibid*., at 30.
17 Release from ICE to Jacqueline Stevens in the case of 2011FOIA13921, 30 (Sep. 11, 2011), *available at* http://www.governmentillegals.org/2011FOIA13921SlaveLabor.pdf