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CRIMINAL ALIENS IN THE UNITED STATES

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PREPARED BY THE

PERMANENT SUBCOMMITTEE ON
INVESTIGATIONS

OF THE

COMMITTEE ON GOVERNMENTAL AFFAIRS
UNITED STATES SENATE



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(II)

CRIMINAL ALIENS IN THE UNITED STATES

APRIL 7 (legislative day, APRIL 5), 1995.—Ordered to be printed

Mr. ROTH, from the Committee on Governmental Affairs,
submitted the following

REPORT

PART I—INTRODUCTION

OVERVIEW AND SUMMARY OF THE INVESTIGATION

America's immigration system is in disarray and criminal aliens (non-U.S. citizens residing in the U.S. who commit serious crimes for which they may be deportable) constitute a particularly vexing part of the problem. Criminal aliens occupy the intersection of two areas of great concern to the American people: crime and the control of our borders.

Criminal aliens are a serious and growing threat to public safety that costs our criminal justice systems hundreds of millions of dollars annually. Although criminal aliens who commit serious crimes are subject to deportation under current law, the deportation system is in such disarray that no one, including the Commissioner of the Immigration and Naturalization Service, can even say with certainty how many criminal aliens are currently subject to the jurisdiction of our criminal justice system. We do know that the Federal Bureau of Prisons confines about 22,000 criminal aliens—25 percent of the total Federal prison population—and that both the number and percent have been growing steadily since 1980. The Justice Department estimates that there are about 53,000 criminal aliens in federal and state prisons. However, this figure does not include criminal aliens in local jails, on probation or on parole. The Subcommittee conservatively estimates that there are 450,000 criminal aliens in the United States who are currently incarcerated or under some form of criminal justice supervision.¹

Confinement of criminal aliens in state and federal prisons cost taxpayers approximately \$724,000,000 in 1990. This cost estimate

¹ See footnote 11.

is quite conservative because it does not include the substantial costs associated with law enforcement investigations, prosecutions, judicial proceedings, probation, parole and deportation proceedings.

The Immigration and Naturalization Service (INS), the agency responsible for detaining and deporting criminal aliens, is overwhelmed by the criminal alien problem. While INS has responsibility for deporting all criminal aliens, the agency is unable to even identify most of the criminal aliens eligible for deportation. Even when INS identifies criminal aliens in a timely fashion, current U.S. immigration laws—formulated in piecemeal style over the years by Congress—permit those who object to delay their deportations for years by taking advantage of an often-times irrational, lengthy and complex system of hearings and appeals.

To make matters even more difficult for immigration officials, some local communities have adopted official policies of non-cooperation with the INS. Public employees in these communities are prohibited from providing information to the INS or cooperating with INS in most circumstances. Even in communities without such non-cooperation policies, criminal aliens who come in contact with state and local law enforcement officials are often not identified as aliens because it is difficult for untrained personnel to accurately determine citizenship. Consulting INS is often fruitless since the INS file system, which is name based, cannot reliably be used to identify criminal aliens because of the widespread use of aliases by such aliens. Even when state or local law enforcement officials correctly identify a criminal alien and notify the INS, INS often refuses to take action because of insufficient agents to transport prisoners, or because of limited detention space.

Even when a criminal alien is properly identified and the deportation process has begun, the procedures that the INS is required to follow are lengthy and complex. Criminal aliens may remain in the U.S. for years while they appeal their cases. After their appeals have been exhausted, some criminal aliens delay deportation for additional years by filing dubious asylum claims. Many criminal aliens are released on bond while the deportation process is pending. Ironically, INS routinely provides work permits, legally allowing such criminal aliens to work while their appeals are pending.

Delays can earn criminal aliens more than work permits and wages—if they delay long enough they may even obtain U.S. citizenship. Time spent in the U.S., whether it is in a prison, a jail, on bond or under community supervision, may count toward the 7 year residency requirement established by one section of the immigration laws.

Despite previous efforts in Congress to require detention of criminal aliens while deportation hearings are pending, many who should be detained are released on bond. Over 20 percent of nondetained criminal aliens fail to appear for deportation proceedings. Through 1992, nearly 11,000 criminal aliens convicted of aggravated felonies (which are particularly serious crimes) failed to appear for deportation hearings. Undetained criminal aliens with deportation orders often abscond upon receiving a final notification from the INS that requires them to voluntarily report for removal. (This notice is humorously referred by some INS personnel as the

72 hours "run notice.") Too often, as one frustrated INS official told the Subcommittee staff, only the stupid and honest get deported.

One would think that processing incarcerated criminal aliens for deportation would be a simple matter, but problems also exist here. INS directs much of its resources into the Institution Hearing Program (IHP) which entails identifying, processing and expeditiously deporting criminal aliens located within prison populations. But, instead of removing (from the U.S.) the "worst of the worst" as the INS asserts, the program is actually a fast-track home for the "best of the worst" criminal aliens. Cases that may be difficult to complete before sentences expire are excluded from the program in favor of less complicated, uncontested cases.

Focusing on these so-called "quick departs" yields impressive statistics but does little to resolve the underlying problems. For example, according to a recent GAO study, immigration judges complete 79% of cases in the IHP before prisoners' sentences expire, but only 6% of all criminal aliens have their cases completed before their sentences expire.² Thus, the great majority of criminal aliens, upon completing their sentences, are released from custody without being deported.

Even when the system does finally work and a deportation order is issued, delays may occur if the criminal alien's native country fails to issue travel documents in a timely fashion. While most countries are cooperative, some countries, including Nigeria, Jamaica, and the Dominican Republic were cited repeatedly as being uncooperative and employing delaying tactics in issuing necessary travel documents.

Finally, even after the lengthy deportation process has been completed and the criminal alien has actually been returned to his own country at U.S. taxpayer expense, deported criminal aliens often return to the U.S. in a matter of days or even hours. Deportation is too often perceived by criminal aliens as an inconvenience, perhaps even a blessing, providing an opportunity for a brief visit with friends and family before returning to the U.S. Although the crime of re-entry following deportation is a felony punishable by up to 20 years in prison (increased from 15 years by the 1994 crime bill), such cases are a low priority with federal law enforcement officials who often fail to prosecute unless the criminal alien has engaged in multiple reentries and has multiple felony convictions.

It is apparent from the foregoing summary that substantial legislative and administrative reforms are urgently needed if the problems presented by criminal aliens in the United States are to be adequately addressed.

First, the law governing deportation of criminal aliens should be dramatically simplified. After all, criminal aliens have already been afforded all the substantial due process required under our system of criminal justice before being convicted beyond a reasonable doubt of a felony. There is little reason for the multiple levels of appeal and delay in the deportation process which current law permits. Congress should consider restricting defenses available to avoid deportation and allowing any appeals to be pursued only

²Report on Immigration Control: Immigration Policies Affect INS Detention Efforts, GAO/ GGD-92-85, June 1992, p. 39.

after deportation has taken place. Further simplification could be achieved if Congress were to eliminate the current distinctions among aggravated felonies, crimes of moral turpitude and drug offenses and simply make all felonies deportable offenses.

The Immigration and Naturalization Service must dramatically improve its recordkeeping procedures and adopt a finger-print based records systems. Fortunately, the INS Commissioner has announced plans to move toward adoption of such a system.³

Problems of undetained criminal aliens who fail to appear or who abscond after they are ordered deported would be lessened if the INS detained more criminal aliens. Congress should consider requiring the detention of all criminal aliens who are in the country illegally pending their deportation, and prohibit INS from releasing such criminal aliens on bond while providing them with work permits.

Current policies and practices have little deterrent effect on re-entry by deported aliens. Rather, they foster a kind of revolving-door that is, in the words of one Subcommittee member, "worthy of a feature on Saturday Night Live". The Department of Justice should establish policies that make clear that all deported criminal aliens who illegally reenter the U.S. will be prosecuted and punished to the full extent of the law. Having increased the maximum penalty for re-entry after deportation, Congress should consider doing the same for failure to depart after being deported.

Countries that impede the removal of criminal aliens by failing to issue travel documents need to understand that if they don't take back their criminal citizens, the U.S. will invoke procedures to restrict travel visas for other citizens of that country. Such procedures are available under current law, but have never been invoked by the Justice Department or State Department.

Finally, as previously pointed out, some local jurisdictions have passed laws or adopted official policies prohibiting cooperation of their employees with the Immigration and Naturalization Service. Officials of some of these same local governments have often complained most loudly about the federal government's failure to stem the tide of illegal immigration across our borders. Congress should adopt legislation to discourage such local policies of non-cooperation. Senator Roth offered an amendment to the Senate crime bill, which was adopted 93-6,⁴ that would cut crime bill funding to entities that adopt such official policies of non-cooperation.

CRIMINAL ALIENS IN AMERICA

The Immigration and Naturalization Service reported that a record 873,000 new immigrants became legal permanent residents of the U.S. in 1993. As usual, the number of persons seeking legal entry from foreign nations, approximately 3.2 million according to the INS, far exceeded the number of visas issued.

³In a press release dated June 2, 1994 the INS Commissioner stated, "We are taking advantage of new technology to be able to multiply the effectiveness of our people on the front lines who deliver benefits and enforce the immigration laws."

⁴Roth Amendment Number 1150, entitled, State and Local Cooperation with the United States Immigration and Naturalization Service, November 9, 1993, Congressional Record, S 15427-S 15429. Roll Call Vote Number 364. The Amendment was not included in the Conference Report and thus was not part of the final 1994 Crime Bill which was signed into law.

The total resident alien population is estimated to lie between 12 and 15 million persons.⁵ Aliens who are in the U.S. illegally, are known as “illegal aliens.” INS reported that 1.2 million aliens were apprehended entering the U.S. illegally in 1992,⁶ and INS estimates that in 1993 there were about 3.5 million illegal entries into America.⁷

This investigation concentrated on “criminal aliens” and how the U.S. Government responds to that problem. Criminal aliens are non-U.S. citizens residing in the U.S. who commit serious crimes for which they may be deportable. The person may or may not have entered the U.S. legally. While the term “criminal aliens” is not specifically defined statutorily, it applies mainly to aliens convicted of “aggravated felonies” or crimes involving moral turpitude. Aggravated felonies are defined in the Immigration Act of 1990, while definitions of moral turpitude depend on state law.

While there are no completely dependable figures for the number of criminal aliens in the United States, a combination of INS and GAO statistical data leads to a conservative estimate of 450,000 criminal aliens in the criminal justice system at any given time. The fact that many criminal aliens have entered the U.S. illegally helps explain why so many aliens are involved in crime their illegal situation conveys an “outlaw” status, often leading them into the shadowy realms of criminal lifestyles. The point was made succinctly in Congressional testimony by a former Commissioner of the INS, “Those entering the United States illegally have no legitimate sponsors and are prohibited from holding jobs. Thus, criminal conduct may be the only way to survive”.⁸

While estimates of the exact number of criminal aliens in America are quite large, the number of criminal aliens deported each year is much smaller. The INS reported deporting about 19,000 criminal aliens in FY '93—approximately four percent of the estimated total of criminal aliens in the U.S. At that rate, assuming no additional aliens commit crimes here, it would take more than 23 years to deport all the criminal aliens in the United States.

THE INVESTIGATION

The Subcommittee’s investigation began in June, 1993 and culminated with hearings before the Subcommittee in November, 1993. All aspects of the Government’s efforts related to criminal aliens were considered in the investigation, including: the identification of criminal aliens; notification of the INS that a confined person may be deportable; record keeping; detention of criminal aliens; case handling by prison officials; adjudication by the Executive Office of Immigration Review (EOIR), the adjudicative body that hears appeals from the INS regarding the administration and interpretation of immigration law; the appeals process; actual deportation; and fugitive apprehension.

⁵ INS Statistics Department figures provided January, 1994

⁶ INS Statistical Year book, 1992, page 143.

⁷ INS applies a rule of thumb to estimate illegal entries: for every apprehension they estimate that there are two aliens Statistics Office, January, 1994.

⁸ Testimony of Gene McNary before the Subcommittee on Information, Justice, Transportation and Agriculture of the Committee on Government Operations, U.S. House of Representatives, March 30, 1993, at page 126.

In conducting the investigation, Subcommittee staff observed border operations at Chula Vista, California, and interviewed officials in California representing local jails, the state prison system and local offices of INS and the Executive Office of Immigration Review. Staff also met with INS officials in Philadelphia, Pennsylvania, and with Delaware state prison officials in Wilmington, Delaware. In Washington, DC, staff extensively interviewed officials from the INS, the EOIR and the Federal Bureau of Prisons. Several Institutional Hearing Program (IHP; explained below) locations were visited including sites at California's Donovan State Prison, the Los Angeles County Jail, and the Federal facilities at Oakdale, Louisiana.

The Subcommittee conducted two days of hearings under the direction of Senator William V. Roth, Jr., then the Ranking Minority Member, with the concurrence of Senator Sam Nunn, then the Subcommittee Chairman. At the November 10, 1993 hearing, the Subcommittee heard testimony from the minority staff regarding the findings of the investigation, as well as testimony by three criminal aliens who were serving sentences for a variety of crimes they had committed while in the U.S. On November 16, 1993, Immigration and Naturalization Service Commissioner Doris Meissner, along with other INS officials, responded to questions from Subcommittee Members. Also testifying on November 16 were Chief Immigration Judge Jere Armstrong of the Executive Office of Immigration Review, and Immigration Judge Thomas Fong from Los Angeles, California.⁹

THE CHALLENGE OF CRIMINAL ALIENS IN AMERICA

While there is a continuing debate in our Nation concerning what to do about crime and criminals, a consensus seems to exist regarding criminal aliens. That is, there is just no place in America for non-U.S. citizens who commit criminal acts here. America has enough criminals without importing more. That consensus, however, has not solved the problem. In fact, simply put, a significant portion of America's law enforcement resources are currently directed toward the apprehension, adjudication and confinement of criminal aliens.

IMPACT ON LAW ENFORCEMENT

Criminal aliens are a growing threat to the public safety and a growing drain on scarce criminal justice resources. Our federal and state prisons alone currently house over 53,000 aliens. As recently as 1980, this number was well below 9,000. Aliens now account for over 25 percent of federal prison inmates and represent the fastest

⁹This investigation was conducted by the Minority Staff of the Permanent Subcommittee on Investigations at the direction of Ranking Minority Member, Senator William V. Roth, Jr., with the concurrence of the Subcommittee's Chairman, Senator Sam Nunn. It was authorized pursuant to Senate Resolution 62, adopted February 28, 1991, and Senate Resolution 71, adopted February 25, 1993, which empower the Subcommittee to investigate "the efficiency and economy of operations of all branches of the Government including the possible existence of fraud, misfeasance, malfeasance, collusion, mismanagement, incompetence, corruption, or unethical practices, waste, extravagance, conflicts of interest, and the improper expenditure of Government funds" and "all other aspects of crime and lawlessness within the United States which have an impact upon or affect the national health, welfare, and safety. * * *

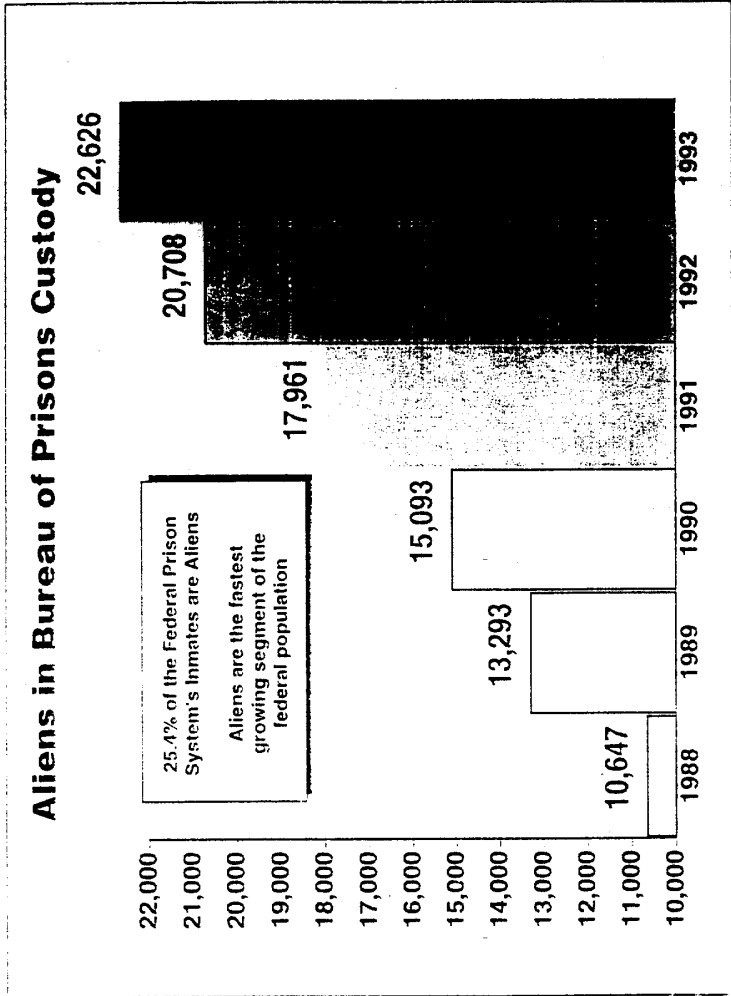
growing segment of federal prison population.¹⁰ A conservative estimate is that there are 450,000 aliens who have been convicted of a crime and who are in prison, in jail, on probation or on parole in the United States.¹¹ Criminal aliens not only occupy beds in our prisons and jails, they also occupy the time and resources of law enforcement and our courts. Although immigrants to the United States have been, and continue to be, predominantly hard working and law abiding, there appears to be a growing criminal class among immigrants, especially among those here illegally.

The increase in the number of aliens in the federal prisons is also noteworthy—the number more than doubled between 1988 and 1993. (See Table 1.) Currently, the Federal Bureau of Prisons (BOP) confines 89,078 prisoners and 22,626 are aliens, while in 1988 BOP confined 50,553 prisoners and 10,647 were aliens.¹²

¹⁰In 1980, there were just 9,071 “foreign-born” prisoners in state and federal prisons. By 1991 there were over 41,000 “foreign born” inmates in state prisons alone. “Historical Corrections Statistics in the United States, 1850–1984.” Westat, Inc., Rockville, Maryland, 1986. According to the INS, while not all “foreign born” inmates are aliens, a 1991 Bureau of Justice Statistics Report estimated that about 76% of the foreign born were aliens. “Survey of State Prison Inmates, 1991.” Report by the Bureau of Justice Statistics, Washington, D.C. 1993.

¹¹In testimony and discussion before the House Judiciary Committee in November of 1989, officials of the INS and GAO agreed to the estimate that 10% of persons in prisons are deportable aliens—at one point GAO officials acknowledged perhaps as many as 20% were deportable aliens. Applying the lower estimate of 10% to the current prison, jail, parole and probation populations results in a estimate of 450,000 criminal aliens.

¹²Figures provided by the Bureau of Prisons, Office of Research and Evaluation, PSI Hearings on Criminal Aliens in the U.S., Exhibit 38.



Aliens in BOP Custody

The five states most heavily burdened by alien prisoners, according to a 1992 survey by the National Institute of Corrections, are: California (10,575, 10.4 percent of prison population); New York (7,168, 12.4 percent of prison population); Florida (3,313, 7 percent of prison population); Illinois (2,912, 1 percent of prison population) and Texas (2,187, 4.3 percent of prison population).¹³

Approximately 47 percent of state and 36 percent of federal alien prisoners are from Mexico. States confine large numbers of aliens from the Caribbean (26 percent), and from Central and South America (14 percent). Crimes for which aliens are confined are primarily drug related (45 percent) or violent (34 percent). The federal prison system confines many people from Colombia (20 percent); Cuba (9 percent); and the Dominican Republic (6percent). The BOP confines an even higher percentage of aliens convicted of drug offenses, nearly 80 percent of the total number of confined aliens.¹⁴

Considerable taxpayer dollars are being spent policing, adjudicating, confining, and deporting criminal aliens. In 1990, state, local and federal governments directed over \$74 billion tax dollars for law enforcement activities. A full year of imprisonment (which of course is only a part of law enforcement costs), according to a recent Bureau of Justice Statistics report, costs approximately \$15,600, per prisoner.¹⁵ The number of state and federal aliens in prison in 1990/91 (estimated to be 46,000 using figures from the Bureau of Prisons and the Bureau of Justice Statistics), can be multiplied by the annual per capita cost (estimated at \$15,600) to produce a conservative cost estimate of approximately \$724 million for confinement alone of criminal aliens.¹⁶

These cost estimates are conservative because they do not account for the costs of criminal aliens in local jails and on probation and parole. How many aliens are in jails on probation or parole? In some locales, the number cycling through local jails is very high. In Los Angeles, about 22,000 deportable aliens pass through the county jail annually judging from the results of several studies.¹⁷

The exact number of criminal aliens on probation and parole is unknown but it can be estimated since parole populations tend to be very similar to prison populations. While not all criminal aliens on probation or parole have committed deportable offenses, most probably have. There are more persons on probation (2,670,234) than under any other form of correctional supervision. According to the Justice Department's Bureau of Justice Statistics, more than half of all persons on probation in 17 states across 32 counties com-

¹³ Unpublished report, National Institute of Corrections, 1992.

¹⁴ Figures are taken from the "Survey of Prison Inmates, 1991", Bureau of Justice Statistics, Washington, D.C., 1993. Also figures were provided by the BOP's Office of Research and Evaluation, PSI Hearings on Criminal Aliens in the U.S., Exhibit 38.

¹⁵ "Census of State and Federal Correctional Facilities, 1990" Bureau of Justice Statistics, Washington, DC 1992.

¹⁶ This cost estimate is likely to be low. First, the BJS used survey methods to estimate the number of state alien prisoners. Such prisoners would be expected to under report their alien status. That is because many aliens in prison may feel it would be risky to disclose their alien status to government officials. Similarly, the cost figures from 1990 are dated, and are presumed to be low. One non-federal source, "The Corrections Yearbook, 1993" estimates that in 1992 the average cost of confining one prisoner for one year exceeded \$18,250. The Corrections Yearbook, 1993" Camp and Camp, South Salem, New York, 1993.

¹⁷ Reports prepared by the Los Angeles Countywide Coordination Committee, November 1990, July 1992 and November 1992.

mitted felony crimes.¹⁸ At the time sentences were delivered, 27 percent of those convicted of a violent felony (murder, rape, robbery, and aggravated assault) received a straight probation sentence, or a jail-probation sentence. We would therefore expect significant numbers of deportable persons to be under the supervision of probation authorities.

Also excluded from the \$724 million estimate are the cost of INS resources used to investigate, detain and deport criminal aliens. Nor does this estimate include the heavy law enforcement costs of investigation and apprehension. Of course, criminal aliens also take up prison space which could be used for other prisoners. Some expensive additional prison construction could likely be avoided were it not for this displacement of bed space by criminal aliens. One former INS Commissioner has estimated the aggregate cost to U.S. taxpayers of criminal aliens to be in the billions.¹⁹

In 1992 the INS deported 18,375 criminal aliens. While this is a 30 percent increase from 1991 and more than double the number deported in 1990,²⁰ these figures mask the fact that criminal aliens stream back across the border in large numbers following deportation—especially along the southwest border. While reported arrests for re-entry are not very high,²¹ anecdotal evidence suggests that re-entry after deportation is widespread and that deportation is not a significant deterrent to re-entry. That may be in part because some U.S. Attorney's offices have policies that limit re-entry prosecutions to offenders who have multiple illegal reentries and multiple felony convictions. Other districts have informal caps on the number of re-entry cases they will prosecute.²² Even when re-entry cases are prosecuted, they are often plea bargained to a minimal sentence, even though the maximum potential sentence for re-entry after deportation is 15 years.

LAWS GOVERNING CRIMINAL ALIENS

For much of this country's history there has been no comprehensive body of immigration law and no laws at all addressing criminal aliens. The Federal government first assumed an active role in immigration policy with the enactment of the first general immigration statute in 1882. The 1882 statute addressed criminal aliens by barring the entry of so-called undesirables, including convicts, mental defectives and paupers. The Act did not, however, provide for the deportation of aliens who committed crimes after entering the U.S.

In 1917 and 1924, restrictive immigration legislation was enacted. The 1917 Act included the first criminal ground for deportation, providing for the deportation of aliens who committed "serious

¹⁸"Recidivism of Felons on Probation, 1986-89" by Langan, Patrick A., and Cunniff, Meck, BJS Special Report, February 1992.

¹⁹Testimony of former INS Commissioner Gene McNary before the Subcommittee on Information, Justice, Transportation and Agriculture of the Committee on Government Operations. U.S. House of Representatives, March 30, 1993 at page 126.

²⁰Briefing document for the Commissioner of the INS, 1993 prepared by the Detention and Deportation Division.

²¹In 1992 the INS reported that, for FY 1991, 461 aliens were arrested by the INS for illegal re-entry following their deportation, 1992 INS Report to Congress.

²²Data was provided to the Permanent Subcommittee on Investigations by the United States Department of Justice. Washington, D.C., October, 1993. PSI Hearings on Criminal Aliens in the United States, Exhibit 29. (Exhibit 29 is sealed and held in the files of the Subcommittee.)

crimes” within five years after entry. The Act also provided for deportation of aliens without limitation on length of time after entry, who after entry proved to be “criminals of the confirmed type.”²³

The Immigration and Nationality Act (INA) of 1952 was a major recodification and revision of the immigration laws. The INA carried forward many of the elements enacted in 1917 and 1924. It expanded federal authority for deporting certain criminal aliens and specified “crimes of moral turpitude”²⁴ as crimes that could subject an alien to deportation. Criminal alien policy continues to operate under the framework established in 1952 by the INA.

Under the INA, the INS may apprehend and deport criminal aliens who have been: (1) convicted of a crime involving moral turpitude committed within five years of entry and sentenced to confinement for a year or more, or (2) convicted of two or more crimes involving moral turpitude, not arising from a single action, at any time after entry regardless of whether confined.²⁵ Aliens convicted of drug and firearm offenses are also deportable. Once deported, aliens are considered to be excludable, which means they cannot reenter the country for 5 years after deportation without the permission of the Attorney General. Re-entry after deportation is a felony.

The next major piece of immigration legislation that included provisions addressing criminal aliens was the Immigration and Control Act of 1986 (IRCA).²⁶ IRCA required that the INS begin deportation proceedings against aliens with deportable offenses as expeditiously as possible after their convictions. IRCA authorized general increases in all enforcement activities and contained provisions to improve interior (areas removed from the borders) enforcement against criminal aliens. IRCA also authorized the Attorney General to reimburse states for costs incurred imprisoning illegal aliens convicted of felonies. These authorizations, however, have not been funded.

The Narcotics Traffickers Deportation Act (Subtitle M of the Anti-Drug Abuse Act of 1986) significantly broadened the range of narcotics violations subjecting a criminal alien to exclusion or deportation. Prior to the 1986 Act, only those aliens convicted of violating a law or regulation regarding an “addiction-sustaining opiate” could be deported. The 1986 law did away with the addiction-sustaining opiate language and replaced it with the current broader language—“controlled substance.” The Act also required that the INS respond promptly to referrals from federal, state and local law enforcement regarding alien arrests for violations of narcotics laws.

The Anti-Drug Abuse Act of 1988 made further changes to the INA with regard to criminal aliens.²⁷ The most significant of these changes was the creation of a new class of criminal alien—aliens convicted of an aggravated felony. Aliens who commit aggravated felonies are deportable, and are subject to different treatment under the law than other deportable criminal aliens. For example, aggravated felons are precluded from obtaining certain types of re-

²³ See Senate Report 64–352 (64th Congress, 1st Session, December 7, 1916).

²⁴ Crimes of moral turpitude include murder, manslaughter, rape and sodomy.

²⁵ INA Section 241(2), [8 U.S.C. 1251].

²⁶ Public Law 99–603, November 6, 1986.

²⁷ Public Law 101–649, 104 Stat. 4978.

lief that non-aggravated felons may seek. Aggravated felonies include drug trafficking, firearm offenses, money laundering, certain crimes of violence and murder.²⁸ For the purposes of the aggravated felony definition, drug trafficking has been broadly defined as “any trade or dealing, and any drug trafficking crime.”²⁹

The 1988 Act required, among other things, that an alien convicted of an aggravated felony: be taken into INS custody upon completion of his sentence; be ineligible for release under bond; and be ineligible for voluntary departure unless the alien is a permanent resident, is not a threat to the community, and is likely to appear for his hearing. The clear intention of this provision is to prevent the very worst of the criminal aliens from further endangering the public and from being able to flee before deportation. This provision, however, was weakened substantially by a later “technical amendment,” which allowed not only aggravated felons who are permanent resident aliens to be released, but also all aggravated felons who entered the country legally even though they may have quickly become illegal.³⁰

The 1988 Act also mandates a 24 hour alienage determination capability so that the INS could respond to law enforcement inquiries, and an INS computer system to maintain records of aliens convicted of aggravated felonies who have been deported. The Act further mandated that the INS institute special deportation proceedings within correctional institutions for aliens convicted of aggravated felonies to eliminate the need for detention and to ensure expeditious deportation.

The Immigration Act of 1990³¹ (IMMACT 90) contained several provisions dealing with criminal aliens. A provision to aid the INS in deporting criminal aliens, known as section 507, required that states provide the INS notice of convictions of aliens and provide any requested certified record of conviction, without fee, within 30 days of a request by INS.

While the U.S. has had a basic legal framework for addressing the problem of criminal aliens since 1917, subsequent immigration law changes as evidenced in the 1965 Act, and most recently IRCA and IMMACT 90, have dealt with the problem of criminal aliens mostly as an afterthought. In fact, no major immigration legislation has focused exclusively on the problem of criminal aliens. Rather, legislation governing treatment of criminal aliens has been enacted in a piecemeal fashion.

It is clear that our immigration laws governing treatment of criminal aliens need reevaluation—particularly those governing deportation and appeals. In several instances, the requirements of the law are not being met. In other instances current law is ill conceived.

²⁸ INA section 101(a)(43), [8 U.S.C. S. 1101 (a)(43)].

²⁹ Gordon and Mailman, “Immigration Law and Procedure”, Vol. 3 (1993), section 71.05[2][b], citing *Matter of De La Cruz*, 9 Immigration Report or B1-93 (I.D. 3155 BJA 1991).

³⁰ See INA Section 242(a)(2)(B) as amended by The Immigration Act of 1990, Section 504(a)(B), of the Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, Section 306(a)(4).

³¹ Public Law 101-649, 1990.

INS ALIEN CRIMINAL APPREHENSION PROGRAM

INS implemented its Alien Criminal Apprehension Program (ACAP) in 1986. The goals of the program are: to identify, locate and initiate removal proceedings against criminal aliens; to ensure expeditious removal of convicted alien criminals; and to create an effective deterrent against aliens seeking entry into the United States for the purpose of engaging in crime.³²

Although the INS claims to carry out its Alien Criminal Apprehension Program through practice and reactive measures, a large part of INS resources appear to be devoted to a reactive strategy. This reactive strategy aims to identify criminal aliens already involved in the criminal justice system for reasons other than immigration violations, and to institute deportation proceedings against those criminal aliens. Under this strategy, if everything works properly, the criminal alien is identified while incarcerated in a local, state or federal correctional facility. INS determines whether the criminal alien is potentially deportable and, if so, places what is known as a detainer on the alien (the detainer requests that the correctional system incarcerating the criminal alien notify INS before it releases the criminal alien so that INS can physically detain or conditionally release the criminal alien pending removal). INS then institutes a deportation proceeding against the criminal alien and finally, after the deportation hearing process has been completed, departs the criminal alien.

Within the Alien Criminal Apprehension Program, the INS has several "sub-programs." One such program is the so-called Five State Criminal Alien Model. This program focuses INS resources on states with the highest concentration of foreign-born inmates: California, New York, Texas, Florida and Illinois. The program seeks, through discussion and agreement among federal, state and local entities, to improve identification, processing and removal of criminal alien inmates.

Another program within the Alien Criminal Apprehension Program is the Institutional hearing Program (IHP). The IHP is a cooperative program between the Executive Office of Immigration Review the INS, seven federal prisons, 68 state prisons and Los Angeles County Correctional System. The IHP allows the INS and the Executive Office of Immigration Review to begin deportation proceedings for criminal aliens during their incarceration for their underlying criminal convictions. The IHP is designed to Immigration Reform and Control Act mandate that the INS begin deportation proceedings against aliens with deportable offenses as expeditiously as possible after their convictions, while also serving to reduce INS detention costs by deporting criminal aliens prior to their release from prison. As previously noted, however, the INS is required by current law to detain only a small percentage of criminal aliens after their release from federal, state or local incarceration. Although the 1988 Anti-Drug Abuse Act mandates that INS detain all aggravated felons after their release from prison pending their deportation, IMMACT 90 permits discretionary release on bond in

³²Testimony of Cynthia J. Wishinsky, Director, Criminal Alien Branch, before the Information, Justice, Transportation and Agriculture Subcommittee of the House Committee On Government Operations, August 31, 1993.

deportation cases for aggravated felons who entered the U.S. legally.³³

As part of the Alien Criminal Apprehension Program, the INS also uses several central facilities established to detain criminal aliens received into its custody. One such facility is the Federal Detention Center (FDC) in Oakdale, Louisiana. The INS moves some criminal aliens who have completed their sentences in state, local and federal facilities from locations throughout the country to Oakdale FDC for their immigration hearings. Also, INS's Service Processing Center in San Pedro, California is used as a centralized detention facility for West Coast Criminal aliens.

INS claims ACAP "is an extremely effective and efficient use of INS resources because these aliens have already been arrested and detained or incarcerated, thus minimizing the expense and effort which would otherwise be required for INS to locate and detain them."³⁴ However, based on the Subcommittee's investigation, the program appears to have little real impact in dealing with the large criminal alien population in most states.

FAILURE TO EFFECTIVELY COMBAT THE GROWING PROBLEM OF CRIMINAL ALIENS

The Subcommittee found serious and long-running problems with INS efforts to deal with criminal aliens. These problems exist at the initial identification stage, the final deportation stage, and most points in-between. In addition, the Subcommittee found that the INS cannot accurately measure the extent of the criminal alien problem nor its response to that problem because its record keeping system is so limited.

INS RECORD KEEPING SYSTEM

The INS record keeping system for criminal aliens is outdated and seriously flawed. The system's many failures allow criminal aliens to easily evade INS detection. These failures stem from the fact that the INS does not have a central record keeping system for specifically tracking criminal aliens. Moreover, the central record keeping system which INS does have is name-based and thus unable to readily identify those criminal aliens who employ multiple aliases.

INS assigns all immigrants, excluding tourists, an "A" number and creates a paper file for each individual which is known as an "A-file." Once an A-file is established, certain limited information from the file, including name and date of birth, is fed into the INS central index system. The central index system can be accessed by INS officials nationwide. To access the central index system, an INS official enters the name of someone whose record must be reviewed. If the system identifies more than one individual with that name, a date of birth can be entered to further narrow the search. Once a specific individual is identified through the central index system, the searcher can then access a limited amount of information, including the officer where the A-file is physically located. (An

³³ INA Section 242(a)(2)(A), 8 U.S.C. Section 1252(a)(2)(A), as amended by Section 504 of IMMACT 90.

³⁴ Id at pp. 4-5.

A-file is typically stored in the district office where it was opened.) The INS officer can then request the file.

A major weakness of the central index system is that it is name-based. Criminals, including criminal aliens, tend to use multiple names or aliases. One study, for example, found that the typical criminal alien used an average of seven aliases.³⁵ If a criminal alien who is already in the central index system and has an A file is arrested under an alias, a query of the INS central index system will provide no match. If some INS action is required, the agent handling the case may not learn of the already existing file on the individual, and consequently will open a new A-file for this "newly encountered" alien. It is thus not uncommon for a criminal alien to have multiple A-files in the INS record system, with each file showing only part of the alien's criminal and immigration history.

The case of Jose Carmen Encarnacion illustrates the system's flaws. In 1976, Encarnacion entered the U.S. illegally from his country of citizenship, the Dominican Republic. Encarnacion was apprehended and then deported back to the Dominican Republic in 1977. At some point before 1980, Encarnacion re-entered the U.S. and proceeded to commit a series of serious crimes in the New York area. He was eventually arrested, convicted and incarcerated by New York authorities for several years. After being released from prison, he was not deported, detained by INS or prosecuted for re-entry, even though he has re-entered after deportation in violation of the law. Subsequently, Encarnacion was arrested in New York and Louisiana, but fled both states. In 1988, Encarnacion was apprehended in Puerto Rico where he admitted to immigration officials that he had entered the U.S. illegally. Although Encarnacion was deported for the second time, INS officials were apparently not aware of his earlier deportation because he was using an alias. In any event, he was not prosecuted for re-entry after deportation. In fact, between 1977 and 1988, Encarnacion used a minimum of 10 different names and five different dates of birth. INS created an immigration file for Encarnacion in 1977 and a second separate file for him using a different name and date of birth in 1988.

Encarnacion returned to the U.S. after his second deportation in 1988 and proceeded to commit, and eventually be arrested for, a series of crimes. After 16 years of criminal activity in the United States, and 13 years after having been first deported, Encarnacion has now, for the first time, been prosecuted for re-entry after deportation. Although Encarnacion's fingerprints were taken many times, including several times by the INS, the INS did not, and does not, have the capability to search its files using fingerprints as identifiers. This prosecution occurred only because the INS discovered that Encarnacion had been deported several times after an agent's suspicion led to a manual search of fingerprint records to determine that Encarnacion had been previously deported under different names.

³⁵ Impact of Repeat Arrests of Deportable Criminal Aliens in Los Angeles County, Final Report, July 15, 1992, Ad Hoc Subcommittee on Criminal Aliens, at p. 15. PSI Hearings on Criminal Aliens in the United States, Exhibit 30.

INS's difficulties with identification and subsequent tracking of criminal aliens are well documented³⁶ and were discussed at length during the Subcommittee's hearings. INS Commissioner Meissner explained that the INS has initiated several major systems automation initiatives for positive identification and information sharing using biometric data such as fingerprints. INS Assistant Commissioner Kleinknecht added that seven western states banded together and developed a quick turnaround fingerprint-based identification system which INS offices in that region routinely access.³⁷ However, other states have no such capability and the INS is relying on the FBI to develop and make available its national "AFIS" system.³⁸ At the time of the Subcommittee's hearings, INS officials were unable to determine exactly when a fingerprint-based system would be available to the INS nationwide. Subsequently, on June 2, 1994, INS officials announced a new program to develop an automated fingerprint based identification system. Assuming adequate funding, this system is projected to be in place within three years. However, the system will include future records only and there are no plans to convert the estimated 43 million "A" files to a fingerprint based system.

INS IDENTIFICATION OF CRIMINAL ALIENS IN THE CRIMINAL JUSTICE SYSTEM

Currently, the INS falls far short of its stated objective to "systematically identify, locate and initiate removal proceedings against criminal aliens, whether or not incarcerated."³⁹ The Subcommittee's investigation found that the majority of criminal aliens identified by the INS are those who are incarcerated in state or federal prisons. However, since correctional officials are not trained to determine alien status, the INS usually relies on lists of foreign born inmates supplied by correctional officials to make an initial identification of potentially deportable criminal aliens. Under these circumstances, deportable criminal aliens can and do avoid detection and deportation by simply claiming to be U.S. born. One INS district director told staff that INS agents noticed that a particular state prison system had an unusually high number of inmates from the U.S. Virgin Islands and Puerto Rico. On closer inspection it was discovered that inmates from other Caribbean nations were routinely claiming to have been born in the U.S. Virgin Islands or Puerto Rico in an effort to avoid identification as criminal aliens.

Another more serious problem is that many state corrections systems and most county and local jails are not systematically monitored by the INS in an effort to identify criminal alien felons who are deportable. Moreover, no effort is made by INS to identify deportable alien felons who receive probation rather than sentences of incarceration. When one specific local court in California was carefully screened for aliens, about 36 percent of the total docket

³⁶ For example, see GAO investigation on Criminal Aliens, INS' Enforcement Activities (GAO/GGD-88-3), November, 1987.

³⁷ Unfortunately, alien identification is assigned a low priority in this system and response time is reported to be quite slow.

³⁸ Automated Fingerprint Identification System

³⁹ Wishinsky testimony, August 31, 1993, at p. 4.

involved criminal aliens and more than half of all cases were probation violators.⁴⁰

While INS officials understand that the current identification strategy focused entirely on prisons misses many criminal aliens, they defend the policy on grounds of lack of resources. As INS Assistant Commissioner Jack Shaw testified before the Subcommittee:

In New York City alone there are 14 courts. So while I would agree in concept that we have to see how we can bring our resources to bear more effectively, the fact is if we move away from the penitentiary system where the “worst of the worst” are incarcerated and try to move at this point into probationers and parolees or into putting investigators into monitoring court dockets, it is beyond our capability or capacity.⁴¹

There are 7,665 correctional facilities and offices in the United States and only about 1,100 INS investigators. Moreover, investigators do not work exclusively or even primarily on criminal alien matters. However, the wisdom of using highly trained investigators to do relatively routine monitoring of prisons is questionable. Commissioner Meissner acknowledged that using investigators in this capacity was inefficient and explained that the Office of Personnel Management and the Department of Justice had approved a para-professional position for “Investigative Agent” at the GS 5–9 level.

INS has only one program in the nation—at the Los Angeles County jail—designed to identify criminal aliens at the county jail level. A review of the INS Institutional Hearing Program at this facility revealed marked deficiencies; namely that deportable criminal aliens are being missed (i.e., not being identified as such) as too few cases are being presented to immigration judges.

The Los Angeles County jail system is one of the largest in the world, holding approximately 20,000 inmates at any given time. According to the Los Angeles County Sheriff’s Office, the average inmate’s stay is 30 days, with over 260,000 prisoners passing through the system each year.⁴² Thus, inmate population turnover is very high. A 1990 study estimated that 11 percent of the inmates in the Los Angeles County jail system are deportable criminal aliens.⁴³ Based on these numbers, it can be estimated that more than 20,000 criminal aliens pass through the Los Angeles County Jail each year. However, in FY 1993, only 642 criminal aliens cases were reviewed by immigration judges in the IHP at this facility.

The Institutional Hearing Program at the Los Angeles County Jail is a cooperative effort of the INS, the Executive Office of Immigration Review, and the Los Angeles County Sheriff’s office. The

⁴⁰ This project involved a joint effort of the Orange County California Superior Court and INS. Statement of David O. Carter before the Committee on the Judiciary, Subcommittee on Immigration, Refugees, and International Law, U.S. House of Representatives, November 1, 1989 at page 12.

⁴¹ Testimony of Assistant Commissioner Jack Shaw, PSI Hearings on Criminal Aliens in the United States, November 16, 1993, pp. 39–40.

⁴² Staff interview with Alan Chancellor, Area Commander, Custody Division, Los Angeles County Sheriff, September 1, 1993.

⁴³ Criminal Aliens in the Los Angeles County Jail Population, Final Report 1990, Ad Hoc Subcommittee on Criminal Aliens. PSI Hearing on Criminal Aliens in the United States, Exhibit 25.

Sheriff's office provides the INS with a list of new foreign-born inmates each day. The INS reviews that list and interviews inmates periodically. Most of these interviews, however, are conducted just prior to when the prisoners are due to be released from custody, leaving the INS little time to act. INS officials assert that detainees are placed only on the worst cases, as time permits.

Although the EOIR assigns an immigration judge to the Los Angeles County Jail one day each week, that judge often has few cases presented to him under the IHP. A review of EOIR records shows that as few as six criminal alien cases were presented to EOIR judges on a given day even though an immigration judge can adjudicate up to 30 cases in a half-day session. Los Angeles Immigration Judge Thomas Fong explained in his testimony that the cases presented to him are mainly cases that can be completed before prisoners are released. There are simply not that many criminal aliens who are likely to serve the 60–90 days required to complete a review.

It is clear that deportable criminal aliens are being missed by this program. In a 1992 report to the Congress, INS asserted that, "Cases filed for inclusion in the IHP must meet certain EOIR criteria for acceptance" and that cases are selected so as to "conserve limited EOIR judicial resources and ensure sufficient time for the case to be heard in a deportation hearing prior to release of the alien."⁴⁴ However, EOIR contends that it is the responsibility of the INS to issue charging documents to initiate deportation proceedings.⁴⁵ Clearly, the Justice Department needs to reconcile the conflicting views of INS and EOIR.

TARGETING OF QUICK DEPORTS

INS targets those criminal aliens in prison who are likely to be easily deported—so-called "quick departs." These "quick departs" are predominately Mexican or Central American nationals, who are in the U.S. illegally and have usually been convicted of drug offenses. This policy, while substantially inflating INS deportation statistics, serves as an ineffective revolving deportation door for many criminal aliens. Although a 1992 report to Congress reported that INS agents encountered and arrested only 461 criminal aliens who had re-entered the U.S. in fiscal year 1991 after deportation, the Subcommittee believes that the number of such re-entries is many times higher because of the problems with the system outlined below.

Since deported criminal aliens are unlikely to be sanctioned if they reenter the U.S. after deportation, "quick departs" too often become "quick returns." This problem is compounded by the fact that many U.S. Attorneys are reluctant to prosecute criminal aliens for re-entry after deportation. Moreover, as previously mentioned, criminal aliens often confuse the INS with their use of multiple aliases. Further, it is unlikely that criminal aliens who re-enter the United States will be identified even if they use their real names

⁴⁴ Immigration Act of 1990 Report on Criminal Aliens. Report to Congress by the INS, April 1992, at page 7.

⁴⁵ In response to written questions from the Subcommittee, Judge Jere Armstrong Stated, "At the trial level, INS charging documents initiate deportation, exclusions and rescission hearings." PSI Hearings on Criminal Aliens in the U.S., Exhibit 42.

because frustrated INS officials run no checks on most aliens apprehended at the Mexican border. The upshot is that deportation is too often at worst an inconvenience for criminal aliens, and at best a free trip home for a short visit before they return to the U.S.

The Institution Hearing Program (IHP) as it is currently conducted, targets these individuals as quick deports.

The EOIR has eligibility criteria to determine which criminal aliens will have their removal cases heard in the IHP. These criteria serve to weed out contested or complicated removal cases. With the IHP focused on quick deports, a single immigration judge can easily adjudicate large numbers of cases in a short period of time.

The IHP hearings observed by Subcommittee staff typically involved less than five minutes each. The immigration judge has the criminal alien identify himself, informs the criminal alien of the charges against him or his rights, gives the criminal alien the opportunity to make objections and then, when no objections or motions are made, orders the criminal alien deported. A significant percentage of criminal alien deportations are of criminal aliens who do not contest their deportation and in many cases even wish to be deported.

Once the INS receives travel authorization from the country to which the criminal alien is being deported, the alien is transported to that country at INS expense. Mexican nationals ordered deported through the IHP at California's Donovan State Prison, conveniently located a few miles from a Mexican border checkpoint, are loaded in buses, driven to the checkpoint and handed over to Mexican authorities or simply released into Mexico.

Given the inadequacies of the INS record system, even if a deportee is arrested by the Border Patrol for border jumping, or attempting to cross the border illegally, it is very unlikely that the Border Patrol would be able to identify the alien as a recent deportee. Moreover, since many federal prosecutors, particularly along the Southwest border, limit the number and types of individuals they will consider for prosecution for the crime of re-entry after deportation, there is little deterrence to re-entry even if a deported alien is unlucky enough to be arrested and properly identified. Furthermore, even when such prosecutions are undertaken, they are typically plea bargained down substantially from the 15-year maximum sentence which Congress has provided for re-entry after deportation.

The case of Manuel Castillo-Catalan is an example of how "quick deports" are often also "quick returns." Catalan is a Mexican national who was first deported in 1984 after serving seven years for second degree murder. Catalan did not contest his deportation. After being ordered deported, Catalan was driven by bus to a Mexican border town. Catalan returned to the U.S. one week later, was arrested a short time after returning, and was deported a second time in 1984. Catalan was again driven to the same Mexican border town from which he had returned to the U.S.

In 1989, Catalan was arrested on a narcotics charge. After spending several years in a California prison, he was deported for a third time on June 26, 1992. Catalan had not contested his deportation and was again driven to the Mexican border. On June 27,

1992, Catalan returned to the U.S. In December 1992, Catalan was arrested and for the first time was charged with the crime of re-entry after deportation, and is now serving a sentence of 57 months.

Another example of the “quick deport, quick return” problem is Richard Simons, a criminal alien who testified before the Subcommittee.⁴⁶ Simons is a 26 years old Canadian citizen who has been deported 3 times. He never contested any of his deportations. Simon first entered the U.S. illegally in 1986. After apprehension and conviction for felony crimes of theft and stolen property, he was deported in 1988. He re-entered the U.S. two months later and was soon arrested in Pennsylvania for forgery. The state sentenced him to 11–23 months for forgery, and the Federal government sentenced him to 6 months for criminal re-entry; the re-entry sentence ran concurrently with the longer state sentence. Simons was deported a second time in 1990. Again he re-entered the U.S. about 2 months later. A few months after that, he was arrested for theft, battery and possession of illegal substances. This time he received a 27 month sentence for illegal re-entry. In 1993, he was processed expeditiously through the Oakdale, Louisiana facility at the conclusion of his sentence and was removed from the U.S. a third time early in 1994.

After his first two deportations, Richard Simons testified that he and his friends travelled with impunity across the border into the U.S. many times. Following both deportations he returned to the U.S. intending to remain here indefinitely, and each time he committed numerous felony crimes. He testified that he does not intend to return again because he expects that if he is convicted of criminal re-entry another time, the sentence will be very long.

By targeting “quick deport” criminal aliens such as Catalan or Simons, INS is able to report deporting significant numbers of criminal aliens. These same criminal aliens—typically Mexican and Central Americans with no lawful U.S. immigration status and long criminal histories—are also the criminal aliens most likely to repeatedly return after deportation. These aliens are part of a revolving door that shows little prospect of actually reducing the number of criminal aliens in the United States. In short, “quick departs” are a sham.

Moreover, there appears to be little reason for the current practice of devoting limited judicial and prosecutorial resources to uncontested deportations. These cases can, and in some jurisdictions are, processed rather conveniently without the alien even being present. In these jurisdictions, aliens simply stipulate in writing that they wish to be deported. This stipulation, the administrative equivalent of a guilty plea, is accepted, and the alien is deported.

Both Judge Armstrong and Judge Fong testified that the “quick departs” heard in IHPs could be handled by written stipulation, freeing judges to hear more complex cases. Texas, for example, used written stipulation because all parties in the District including the Court and the Bar accept the practice.⁴⁷

⁴⁶ PSI Hearings on Criminal Aliens in the United States, November 10, 1993.

⁴⁷ Testimony of Judge Jere Armstrong, PSI Hearing on Criminal Aliens in the United States, November 16, 1993 at pp. 58–59.

INABILITY OF INS TO PROCESS CRIMINAL ALIENS FOR DEPORTATION
PRIOR TO THEIR RELEASE

INS does not complete the deportation process for a large number of criminal aliens before completion of their underlying sentences which means that the INS has to either detain or release them. The detention option is problematical because it takes up limited INS bed space and because it costs money. Release, on the other hand, is even more of a problem since large numbers of non-detained criminal aliens never show up for their deportation hearings. INS needs to acquire additional detention space or better utilize existing space.

The Immigration and Nationality Act calls for the expeditious removal of criminal aliens. The Act further requires the INS to initiate and complete, to the extent possible, deportation proceedings against aggravated felons before the aliens are released from incarceration for the underlying felony.⁴⁸ According to the INS, the IHP was established to help comply with this legislative mandate.⁴⁹ Many criminal aliens, including those aggravated felons channelled into the IHP, are not fully processed before the release date for their underlying crime.

INS inability to efficiently process criminal aliens is illustrated by problems at the Oakdale, Louisiana federal criminal alien detention and processing facilities. The Oakdale, Louisiana facilities include two federal prisons, a federal prison camp and EOIR and INS offices. One prison (the correctional institution) contains aliens nearing completion of their federal sentences. The other, the detention center jointly operated by the INS and the BOP, confines aliens who have served state prison sentences, but have not yet completed their removal proceedings. The EOIR hears cases from both prisons.

The process begins in Federal prisons across the nation when staff identify deportable criminal aliens and INS issues a detainer. Transfers to Oakdale usually occur at the end of the criminal aliens' sentences—typically no later than 6 months before sentence expiration.⁵⁰ The INS staff at Oakdale complete most of the paper work required to deport a criminal alien, and immigration judges hear cases in immigration courts located within the complex. It takes approximately one month to complete paperwork and hear an uncontested case. More complicated cases can take considerably longer. Backlogs have occurred at Oakdale because aliens are often received with less than a month to serve.⁵¹ This has slowed the movement of aliens out of the correctional institution considerably,

⁴⁸ See Section 242A (8 U.S.C. 1252).

⁴⁹ Immigration Act of 1990, INS Report on Criminal Aliens (April 1992).

⁵⁰ Until January, 1994, prisoners were required to have at least 6 months remaining on their sentences when transferred to Oakdale or to other IHPs. This informal practice was designed to insure that prisoners had sufficient time remaining on their sentences to complete proceedings before their sentences expired. To increase the flow of cases into IHPs, the Justice Department recently rescinded the 6 month ceiling. Criminal aliens can now be sent to an IHP a month or two before sentence expiration. The workload in IHPs across the country should be increased because of this modification.

⁵¹ A court may reduce a criminal alien's sentence unexpectedly. Prison officials may have intended to transfer the prisoner to Oakdale with sufficient time remaining to complete a case before sentence expiration, however such a reduction makes that impossible.

and the INS has had to absorb the expense of detention past sentence expiration.

Ideally, the detention center should receive aliens from state facilities with most of their paperwork completed. In fact, however, aliens arrive at the detention center from states with little case work completed. Although the detention center was not intended to house federal prisoners, it has had to absorb "spill-over" of those alien prisoners who could not be processed at the correctional institution prior to sentence expiration.

The delays stem in large part from INS failure to collect information about the identity of criminal aliens in prisons in a timely fashion because it does not have the manpower required to complete paperwork prior to transferring a prisoner to Oakdale. This point is underscored by the following example. The INS recently gained access to the Federal Bureau of Prison's prisoner data base system, Sentry, which contains data on prisoners' citizenship. Using this system, the INS was immediately able to identify 6,000 additional federal prisoners it was not previously aware of who are eligible for new INS detainees.

Moreover, early identification of alien prison inmates by the INS does not guarantee that the flow of prisoners to the federal complex will take place in a timely fashion or that the INS paperwork will be completed before they arrive. This is not always the responsibility of INS, since some states, upon learning that the INS wants to take custody of a prisoner when the prisoner's sentence expires, may advance the prisoner's release data and turn him over to the INS sooner than expected.

Although normal prison processing routines could be used to identify criminal aliens, state prison officials view alienage determination as a Federal responsibility and often they assign a low priority to the task. As a result many criminal aliens in prison will not be identified unless the INS develops a cooperative relationship with prison officials. In Delaware, for example, contact between corrections officials and the INS is minimal. Upon intake, the prison staff ask prisoners where they were born, and the response is typically accepted—whatever it might be. In contrast, in the federal system, the U.S. Probation Officer prepares a pre-sentence investigation on most federal prisoners. Officers are required to document place of birth and, if there is any doubt about a prisoner's citizenship, probation officers are obliged to contact the arresting agency, the INS, or even INTERPOL to determine alienage.

Exactly what percentage of criminal alien cases are completed prior to release is a matter of some debate. Judge Jere Armstrong testified that in FY 93, EOIR completed 79 percent of criminal alien cases prior to release.⁵² The statistic is impressive, but as was noted earlier, EOIR targets the simpler cases. GAO's review of this program concluded that only 6 percent of all criminal aliens had hearings before they were released.⁵³ Notwithstanding this debate, the fact that serious logjams in processing criminal aliens cases persist cannot be ignored. The Subcommittee found there are

⁵² PSI Hearings on Criminal Aliens in the United States, November 16, 1993, p. 57.

⁵³ GAO document GAO/GGD-92-85, 1992.

large numbers of criminal aliens detained after their sentences expire who create significant problems for the INS.

LACK OF INS DETENTION SPACE

Although detaining a criminal alien pending removal proceedings guarantees that the alien will actually appear at those proceedings, this option is often not available due to the INS' chronic lack of detention space. The INS has only approximately 3,500 detention beds for criminal aliens in the entire country and some INS districts are particularly short of detention space. For example, the Pennsylvania district, which also includes Delaware and West Virginia, has only 15 detention beds. The lack of adequate detention space puts extreme pressure on the INS to release, rather than detain, criminal aliens. The INS can, and does, pay county jails to hold its detainees. An additional option is for an INS District to transfer a criminal alien to a federal facility such as the Oakdale detention center. However, INS districts are sometimes reluctant to utilize the transfer option since the transferring district will also transfer its "credit" for a completed deportation to the receiving district.⁵⁴

In the majority of cases, the need to detain criminal aliens after they have served their underlying sentences indicates the INS' inability to completely process criminal aliens for removal prior to their release date. This inability has serious ramifications: detention is costly and takes up prison and jail space; and it puts pressure on the INS to release criminal aliens, which greatly increases their chances of evading removal.

According to the GAO 1992 investigation of detention capability, INS' planned expansion of detention space, from 6,259 to 8,600 beds by 1996, would not significantly alleviate the shortage. GAO concluded that release determinations are made by the INS in large part, according to the number of beds available in a particular region.⁵⁵

RELEASE OF CRIMINAL ALIENS

Many criminal aliens who are released pending their deportation never appear for their deportation proceedings. In fact, over 20 percent of non-detained criminal aliens do not appear for their deportation proceedings. As of 1992, the INS reported to Congress that some 10,875 aliens convicted of aggravated felonies had failed to report for deportation proceedings. It appears that the INS makes limited efforts to locate and arrest those criminal aliens who fail to appear. Although some aliens are ordered deported in absentia,⁵⁶ deportation cannot be effectuated until the alien is apprehended.

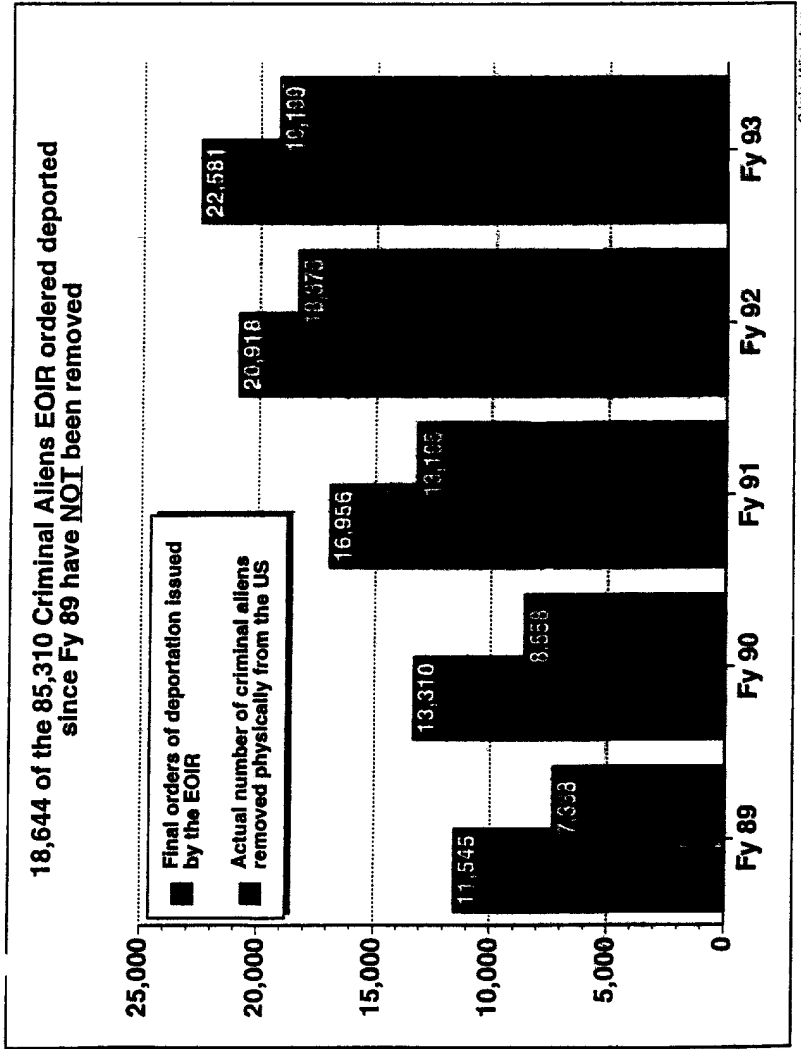
Some criminal aliens abscond after being issued a final order of deportation. Under the INS practice, undetained criminal aliens

⁵⁴The INS Commissioner testified that she was unaware of this practice and indicated that she will certainly see that it is halted. See Testimony before the PSI on November 16, 1993 at p. 46.

⁵⁵GAO document GAO/GGD-92-85, 1992. Despite these problems, the Justice Department's recently released "Immigration Initiative" fails to discuss the detention space issue.

⁵⁶As many as 20-30 percent of cases in some parts of the country are tried "in absentia" according to Judge Armstrong. PSI Hearings on Criminal Aliens in the United States, November 16, 1993, p. 54.

who have been ordered deported are notified that they have 72 hours to report for deportation. This notice is often referred to by INS officials as the "run notice" since, as one would expect, criminal aliens who have received written notices to report for deportation often fail to appear for their actual deportation. In New York, for example, in fiscal year 1993, out of 1695 such notices to surrender sent to criminal and non-criminal aliens, 1486, or 87.7 percent failed to surrender. Also, in New York, there were \$2.4 million in bonds breached in fiscal year 1993. Table 2 shows the number of criminal aliens physically removed has been less than the number ordered deported for each year since 1989. Although the number of deportations has risen steadily, the number of actual physical removals has increased less precipitously, yielding a total of 18,641 criminal aliens who have been ordered deported but were not physically removed.



INS officials testified that the reason for the 72-hour “run notice” is humanitarian; it allows undetained criminal aliens to complete any final necessary arrangements prior to their deportation. The notice is a creature of regulation within the INS and can be changed.⁵⁷ Judge Fong testified that the notice practice needs to be reexamined. He testified that he frequently received “motions to reopen” cases from aliens who had previously received the 72 hour notice. Such motions indicated that the alien had not been physically removed, even though the alien’s removal had been ordered.⁵⁸

The INS needs to improve the use of detention bed space they already have for criminal aliens, and the way they project future bed space needs. For example:

At a Hearing before the House Committee on Government Operations in mid-1993, Justice Department Inspector General Hankinson gave several illustrations of how INS’ detention planning is ill conceived and wasteful. In 1991, for example, the INS paid \$28 million for non-INS detection facilities even though considerable bed space was available at facilities the INS operates.⁵⁹

Transfers of criminal aliens across districts are not routine because of difficulties INS has arranging and paying for prisoner transportation. There is also the related matter of transferring deportation “credit,” which was noted above.

A 1992 GAO investigation of detention space revealed that serious problems exist in the way the INS projects bed space needs. Inaccurate projections will actually yield serious bed space shortages in 1996 according to the GAO.⁶⁰

While the INS may need extra resources for detention space, it has to improve the way it manages existing resources if requests for additional resources are to be considered credible. Adding detention space and better use of existing space would ameliorate many problems associated with early release of criminal aliens including: there would be fewer “failures to appear” and fewer would abscond after receiving deportation orders; the 72-hour “run notice” would be unnecessary; and it would be unnecessary to expend resources locating fugitives or contracting for bed-space.⁶¹

CURRENT PROCEDURES ALLOW DELAY AND ABUSES OF DEPORTATION PROCESS BY CRIMINAL ALIENS

Criminal aliens who wish to contest their deportations have a host of avenues by which to do so. As Figure 3 shows, the deportation process for criminal aliens is byzantine to say the least.

⁵⁷ Ibid, p. 30.

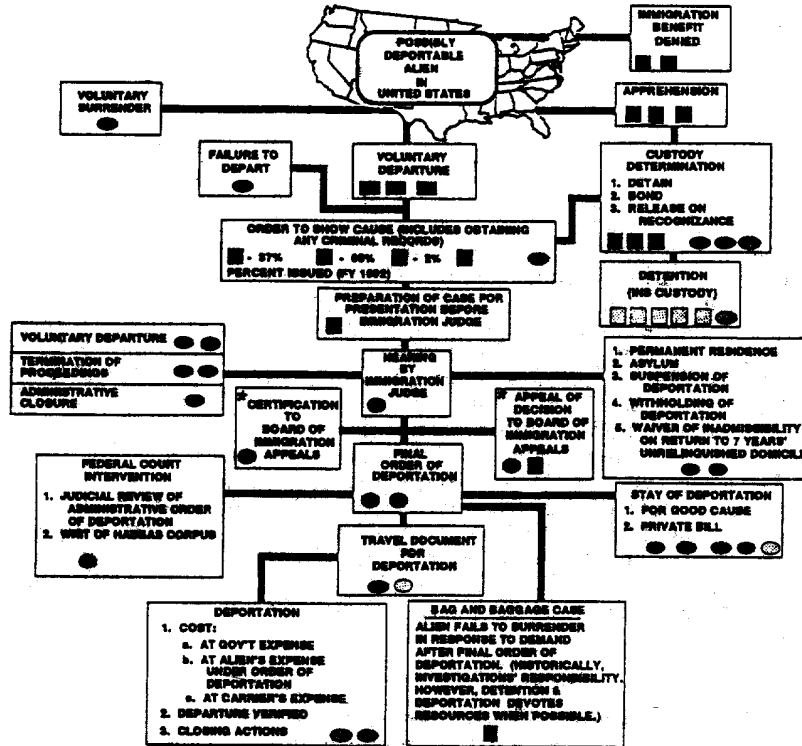
⁵⁸ Ibid, p. 61.

⁵⁹ Testimony before the Subcommittee on Information, Justice, Transportation and Agriculture of the Committee on Government Operations, U.S. House of Representatives, March 30, 1993, p. 49-50.

⁶⁰ GAO report on Detention Planning in the INS: GAO/GGD-92-83 Immigration Control.

⁶¹ The 1994 crime bill authorized additional resources for the INS to address the criminal alien problem, including \$160 million (for 1995-98) for two criminal alien detention and processing centers. The crime bill also authorized \$675 million to improve border controls by increasing Border patrol personnel by at least 1,000 positions each year from 1995-98. The crime bill also authorized \$18.4 million (for 1996-2000) for the operation of a criminal alien tracking center; \$338 million (for 1995-98) for expedited deportation of aliens who have been denied asylum; and \$1.8 billion (1995-2000) for the Attorney General to contract with states or localities for the incarceration of criminal aliens.

PARTIES AND STEPS INVOLVED IN DEPORTATION PROCEDURES 6/12/83



DAILY TAKEN ACTION

WITHIN IMMIGRATION & NATURALIZATION SERVICE (INS)

- BORDER PATROL
- INVESTIGATIONS
- EXAMINATIONS
- DETENTION & DEPORTATION
- ASYLUM
- TRIAL ATTORNEY

OUTSIDE INS

- IMMIGRATION JUDGE
- BOARD OF IMMIGRATION APPEALS
- PUBLIC HEALTH SERVICE
- ALIEN
- COURT
- CONGRESS
- DEPARTMENT OF JUSTICE
- FOREIGN CONSULAR OFFICER
- DEPARTMENT OF STATE
- CARRIER PROVIDING TRANSPORTATION

DETENTION FACILITIES

- INS SERVICE PROCESSING CENTER
- PRIVATE ENTITY UNDER CONTRACT TO INS
- BUREAU OF PRISONS
- STATE
- LOCAL AUTHORITY

* BOARD OF IMMIGRATION APPEALS MAKES SAME TYPES OF DECISIONS AS IMMIGRATION JUDGES

DEPORTATION PROCEDURES ARE COMPLEX ACTIONS SHOWN BY, THEREFORE, HAPPEN IN VARIOUS WAYS.

Some criminal aliens attempt to prevent their deportation by filing an asylum claim at some point before, during or after their deportation hearing. In 1992, out of 8,273 IHP cases alone, 219 criminal aliens filed asylum claims. The filing of an asylum claim starts a separate process that can easily take years to resolve.

One of the most common forms of relief from deportation sought by criminal aliens are so-called section 212(c) applications.⁶² Under section 212(c), criminal aliens lawfully admitted for permanent residence who have been in the U.S. for seven years, and who have not served a sentence of five years or more for a felony, can be granted relief from deportation. Time spent incarcerated is often included as part of the seven year U.S. residence requirement under this section. In 1992, out of 8,273 IHP cases alone, 1,015 criminal aliens made section 212(c) claims. Judge Armstrong acknowledged that 212(c) petitions could be simplified and the process expedited, and Judge Fong testified that having time spent incarcerated count toward the residency requirement should be "reexamined."⁶³ Both Judge Fong and Judge Armstrong testified at the Hearing that 212(c) is one area where immigration law, in their opinion, can and should be simplified.⁶⁴

Criminal aliens also seek to avoid deportation under section 243(h)(1), which provides that a criminal alien cannot be deported if the alien's life or freedom would be threatened in the country where the alien is to be deported on account of race, religion, nationality, membership in a particular social group, or political opinion. Those aliens determined to constitute a "danger to the community of the United States," are not eligible for relief under this provision.

STATE AND LOCAL NON-COOPERATION WITH THE INS

Essential to any effective governmental response to the criminal alien problem is cooperation among law enforcement authorities at all levels—local, state and federal. However, over the last decade, some local jurisdictions have enacted laws, often referred to as refuge, sanctuary or non-cooperation laws, that prohibit or limit local government employees' cooperation with the INS. For example, in 1986, the Oakland California City Council unanimously adopted a resolution declaring Oakland to be a "City of Refuge," which would serve as a safe haven for refugees from El Salvador, Guatemala, Haiti and South Africa. The resolution instructed all Oakland city employees to "refrain from assisting or cooperating" with the INS relative to alleged violations of the civil provisions of the immigration laws. The resolution further urged that the California State Legislature make California a "State of Refuge."⁶⁵

In 1989, the San Francisco California Board of Supervisors approved an ordinance making San Francisco "a City and County of Refuge." Broader than the Oakland resolution, the San Francisco ordinance was not limited to any particular foreign nations. Rather, it generally prohibited the use of "City funds or resources to assist in the enforcement of federal immigration law * * * unless

⁶² INA Section 212(c); [8 U.S.C. 1182(c)].

⁶³ PSI Hearings on Criminal Aliens in the United States, November 16, 1993, p. 53 and 56.

⁶⁴ Ibid, p. 57.

⁶⁵ Oakland City Council Resolution No. 63950, July 8, 1986.

such assistance is required by federal or state statute, regulation or court decision." The ordinance was inapplicable to persons charged with or convicted of felonies.⁶⁶

While Los Angeles, California does not have a refuge ordinance, the Los Angeles Police Department (LAPD) does have a policy of not permitting LAPD officers to inform the INS when they come in contact with illegal aliens except in limited circumstances. The LAPD Manual states: "Undocumented alien status in itself is not a matter for police action."⁶⁷ Further, according to the LAPD Manual, "Officers shall not initiate police action where the objective is to discover the alien status of a person" and LAPD officers are prohibited from arresting or booking anyone for the crime of illegal entry into the United States (8 USC section 1325).⁶⁸

Currently, LAPD policy is to notify the INS only when, "an undocumented alien is booked for multiple misdemeanor offenses, a high grade misdemeanor or a felony offense, or has been previously arrested for a similar offense."⁶⁹ The LAPD policy is, therefore, to avoid contacting the INS if a suspected alien is involved in any other offense. The LAPD is currently being sued by several organizations that claim it has violated previous court rulings and its own policy by cooperating too closely with the INS. According to the Los Angeles City Attorney's office, the goal of the organizations bringing this lawsuit is to make Los Angeles a sanctuary city.

In California, local jurisdictions that adopted such non-cooperation laws or policies were supported by a 1984 opinion by then-California Attorney General John Van De Kamp that stated:

There is no general affirmative legal duty in the sense of a legally enforceable obligation incumbent on peace officers and judges in California to report to INS knowledge that they might have persons who entered the United States by violating United States Code Section 1325.

* * * 70

More recently, however, the specific question of whether local jurisdictions could adopt sanctuary or non-cooperation laws was addressed by the California Attorney General. On November 2, 1992, California Attorney General Daniel E. Lungren concluded that the supremacy clause of the United States Constitution prohibited local jurisdictions from adopting such laws.⁷¹ Moreover, on October 4, 1993, California enacted a statute prohibiting local jurisdictions from preventing law enforcement officers from identifying and reporting to the INS any person suspected of violating the civil provisions of the federal immigration laws. However, this statute only applies in cases of a person arrested and booked for alleged com-

⁶⁶San Francisco Administrative Code Chapter 12H, sections 12H.1, 12H.2 and 12H.2-1 (as amended August 4, 1993).

⁶⁷Manual of the Los Angeles Police Department, Volume 1, Section 390 (1992).

⁶⁸Ibid, Volume 4, Section 264.50.

⁶⁹*Gates v. Superior Court of Los Angeles County, et al.*, 193 Cal. App. 3d 205, 211; 238 Cal. Rptr. 592, 595 (Ct. App. CA, 2d App. Dist., Div. 3, June 30, 1987).

⁷⁰Opinion of John Van De Kamp, Attorney General, State of California, No. 93-902, July 24, 1984, Volume 67, p. 340.

⁷¹Opinion of Daniel E. Lungren, Attorney General, State of California, No. 92-607, November 2, 1992, p. 1.

mission of a felony.⁷² Thus, the statute apparently would permit local jurisdictions to continue non-cooperation with the INS with regard to all other illegal aliens (such as those charged with or convicted of misdemeanors or those without criminal records, so-called “administrative violators”) where sanctioning or non-cooperation laws continue to exist.

Non-cooperation provisions are not limited to California. A Chicago Executive Order dated April 25, 1989, prohibits city officials from investigating or assisting “in the investigation of the citizenship or residency status of any person unless such inquiry or investigation is required by statute, ordinance, federal regulation or court decision.”⁷³ This order appears to effectively prohibit local law enforcement authorities from voluntarily cooperating with the INS in a broad range of activities.

A New York City Executive Order adopted on August 7, 1989 prohibits city officials from transmitting information regarding any alien to federal authorities unless required by law to do so or unless the alien is suspected of engaging in criminal activity. However, the order also specifically instructs law enforcement agencies to continue to cooperate with federal authorities, stating that: “Enforcement agencies, including the Police Department and the Department of Corrections, shall continue to cooperate with federal authorities in investigating and apprehending aliens suspected of criminal activity.”⁷⁴ According to the INS, however, this order still inhibits cooperation from New York City officials regarding administrative violators.

While enforcement of immigration laws is generally a federal responsibility and enforcement of most criminal laws is a state and local responsibility, clearly the two are not mutually exclusive domains. In the current debate regarding U.S. immigration laws, many states and local jurisdictions have been highly critical of what they see as the federal government’s inability to effectively police our nation’s borders, resulting in a massive influx of criminal aliens. Yet, by adopting non-cooperation laws, local jurisdictions are making effective governmental response to the problem of criminal aliens substantially more difficult.⁷⁵

NON-COOPERATION BY FOREIGN GOVERNMENTS

After a criminal alien has been ordered deported one of the final steps in the process before deportation can be effected is to secure documentation from the country receiving the deportee. Such documentation is typically secured by INS Detention and Deportation Officers through a given country’s U.S. embassy or consulate.

⁷² California Government Code Chapter 818, Section 53069.75.

⁷³ Executive Order 89-6, Mayor Richard M. Daley, City of Chicago, April 25, 1989, section 3, p. 3.

⁷⁴ “City Policy Concerning Aliens,” Executive Order No. 124, Mayor Edward I. Koch, City of New York, August 7, 1989, section 2.

⁷⁵ In November 1993, the U.S. Senate voted 93 to 6 to adopt Senator Roth’s amendment to the Violent Crime Control and Law Enforcement Act of 1993. The amendment called for the Attorney General, together with the Commissioner of the INS, to report to the Congress and the President within 6 months regarding the level of state and local cooperation. Under the amendment, any jurisdiction the Attorney General determined was not cooperating with the INS would not be entitled to share in funds appropriated under the crime bill. This amendment was not included in the Conference Report on the Crime Bill and thus did not become law.

INS personnel from several district offices have told Subcommittee staff that some countries are less than cooperative with regard to securing documentation. The country most often cited as a problem in this regard is Nigeria and Jamaica appears to be the second biggest problem country. INS personnel on numerous occasions in widely dispersed geographic areas informed Subcommittee staff that Nigerian and Jamaican consular officers were uncooperative in supplying the necessary travel documentation to allow deportations to take place.

At the Oakdale Federal Detention Center in October 1993 there were 33 Nigerians and 99 Jamaicans out of a total population of 811. The Oakdale Federal Correctional Institute had 101 Nigerians and 61 Jamaicans out of the INS population of approximately 614. These numbers do not include Nigerians and Jamaicans incarcerated in county jails in the area near Oakdale. Yet, from all of those facilities, the INS deported only 54 Jamaicans and 56 Nigerians between January–October, 1993.

Under the Immigration and Nationality Act, the Attorney General has the authority to notify the Secretary of State of any country which, “upon request denies or unduly delays acceptance of the return of any alien who is a national, citizen, subject, or resident thereof * * *.”⁷⁶ Upon such notification, the Secretary of State in turn is to instruct consular officers in the offending country to discontinue the issuance of immigrant visas to nationals, citizens, subjects or residents of the offending country. Apparently, neither the Attorney General nor the Secretary of State has ever invoked these procedures except with respect to certain Communist countries during the cold war period.

At the Subcommittee’s hearings, Senator Cohen asked INS Commissioner Meissner why the Attorney General had not requested that the State Department withhold immigrant visas from residents of those countries that failed to provide documents needed to deport criminal aliens. Commissioner Meissner testified that, indeed, such a request had not been made and that to make such a request was an “extreme measure.”

RECOMMENDATIONS

1. Congress should radically simplify the deportation process. Consideration should be given to eliminating distinctions among aggravated and non-aggravated felons, at least for non-resident aliens. INS employees often have difficulty in making these distinctions.

2. Existing immigration law establishes a crime severity threshold that must be exceeded for a person to be deportable—whether the alien is in the U.S. legally or not. The threshold should be reduced so that an alien can be deported following conviction for any felony. Criminal aliens who are in the U.S. illegally should have no relief from deportation available to them if they are convicted of 3 crimes (other than traffic violations).

⁷⁶INA Section 243(g); [8 U.S.C. 1253(g)].

3. Limited detention space is a fundamental problem confronting the INS and therefore it needs to increase capacity to keep pace with the increasing numbers of criminal aliens.⁷⁷

4. Congress should consider eliminating or restricting Section 212(c) and other avenues of relief from deportation for criminal aliens.

5. Consideration should be given to establishing the principle that deportation appeals of criminal aliens will be pursued after deportation has taken place, at least for those aliens who are not permanent residents.

6. Congress should consider requiring that all aggravated felons be detained pending deportation. Such a step may be necessary because of the high rate of no-shows for those criminal aliens released on bond.

7. Congress should require sanctions against local governments that adopt official policies of non-cooperation with INS.

8. The Attorney General should notify the Secretary of State of those countries that deny or delay the acceptance of the return of a criminal alien and consideration should be given to limiting issuance of U.S. visas in such countries.

9. INS should develop and institute a fingerprint based identification system, and a nationwide recordkeeping system for criminal aliens. In light of new initiatives in this area recently announced by the Attorney General, the INS should inform Congress of specific plans (including milestones and completion dates) for the immediate development and speedy deployment of a fingerprint based identification system.⁷⁸

10. INS should end the policy of issuing work authorization permits to criminal aliens contesting their deportation.

11. INS should end the 72-hour notice policy for deporting criminal aliens.



⁷⁷ As noted, the 1994 crime bill authorized \$160 million for two INS criminal alien detention and processing centers.

⁷⁸ On June 2, 1994, Attorney General Reno announced two new systems, ENFORCE and AFIS, to be used by the INS in its border control efforts. ENFORCE is the Enforcement Tracking System, which will automate the processing of illegal aliens and will create a case tracking system to link all INS enforcement and deportation functions. The initial phase of ENFORCE will operate for six months as a pilot program in San Diego.

AFIS, the Automated Fingerprinting Identification System, is a fingerprint-based identification system which is designed to enable border patrol agents to identify an alien from a fingerprint in 3-5 minutes and access that person's criminal records, photographs and other important information that may be on file. The AFIS system is in the late stages of development. (Source: Department of Justice press release, June 2, 1994.)