

# ARTICLES

## INS DETENTION AND REMOVAL: A "WHITE PAPER"

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### PREFACE

*In 1996, the National Institute of Justice commissioned a "white paper" on INS detention in order to consider the limitations of the INS's current detention strategies and to explore possible improvements and alternatives. With the concurrence of the Georgetown Immigration Law Journal, I have decided to publish this paper in the form in which I submitted it to the NIJ rather than adopting the traditional scholarly format of a law journal article. This paper was submitted to NIJ in February 1997; it has not been updated.*

This discussion is based primarily upon (1) personal and telephone interviews that I conducted with numerous INS personnel in Washington, D.C. and at the regional and district levels; (2) visits to Service Processing Centers (SPCs) and other alien processing and detention sites in the Dallas, Houston, Los Angeles, New York City, Oakdale, and San Diego areas; and (3) a review of government documents and outside studies bearing on the INS's detention policies and performance. I performed almost all of the research for this paper between June and September 1996, and I revised it in the light of comments by senior INS officials on an earlier draft of this paper, dated September 5, 1996 and also in light of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), which became law on September 30, 1996, after that draft had been submitted.

The paper is addressed primarily to policy-level INS officials who are already intimately familiar with the existing detention and removal program and the obstacles encountered in its implementation. Because this is an audience of well-informed specialists who currently deal with these problems on a day-to-day basis, I shall try to avoid repeating what these officials

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already know. Instead, I mean to afford them the kind of detached, broad perspective on policy planning that extraordinarily busy officials with demanding programmatic responsibilities are seldom able to adopt.

I have organized the paper in two parts. Part I is introductory; it begins with a brief discussion of the POLICY CONTEXT in which this paper is being written, the frame within which possible reforms must be understood and evaluated. It then identifies the particular POLICY GOALS AND CONSTRAINTS that I believe should guide the analysis. Next, it makes explicit a number of ASSUMPTIONS on which the analysis will proceed. Finally, it notes certain LIMITATIONS on the scope of this paper, limitations imposed either because of severe time and cost restraints or because the INS is already conducting or sponsoring other studies directed at other discrete aspects of the detention problem.

Part II, the heart of the study, begins by discussing two “macro-strategic” issues that should frame INS’s review of its detention program: (1) whether the INS should be in the business of running detention facilities (other than very short-term ones) in the first place, and (2) among the various possible goals, which specific mix the INS hopes to advance with its detention beds.

The bulk of Part II identifies and analyzes seven broad reform strategies. Each strategy emphasizes a different aspect of, or point of leverage on, the system. All of them, however, are consistent with one another and all should be pursued as parts of a coordinated approach to the detention problem. Although these seven strategies inevitably compete with one another for limited INS detention resources, I believe that all are necessary components of any serious INS effort to improve its detention policies and performance. Moreover, because each strategy is intended to improve the efficiency with which those resources can be deployed, each should in effect increase the total resources available for detention.

In order to emphasize the principal orientation of each strategy, I have given each a label, but it should be obvious that these labels are simply convenient rubrics and that the seven strategies in fact overlap with one another to a considerable extent. These strategies are: (A) prevention; (B) diversion and “softer” detention; (C) more efficient review processes; (D) more efficient removal processes; (E) logistical support; (F) criminal prosecutions; and (G) detention management. For each strategy, I shall consider—and in some cases, strongly recommend—a number of specific legal, policy, and administrative changes that might contribute to effectuating it.

In a brief conclusion, I offer a general vision of what the features of an ideal detention system of the future might be, drawing on the earlier analysis.

## I. INTRODUCTION

**POLICY CONTEXT.** The INS’s responsibility to detain and remove aliens has probably never been greater. First, the removable alien population is steadily growing. The total illegal population in the United States was estimated at

approximately 5 million in 1996. This certainly approaches and may even exceed the levels that prevailed prior to the adoption of the legalization provisions of the Immigration Reform and Control Act of 1986 (IRCA). Moreover, these levels promise to increase in the future as the economic gap between the United States and immigrant source countries, especially Mexico, widens.

Second, and even more important, Congress in recent years has repeatedly and emphatically insisted that the expeditious deportation of removable aliens, especially those who have been convicted of crimes in the United States, must be one of the INS's highest priorities. The Anti-Terrorist and Effective Death Penalty Act of 1996 (AEDPA) and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) are only the most recent and dramatic expressions of this congressional intent. By using these new laws to again expand the category of aggravated felonies; mandate (with some exceptions authorized by Attorney General certifications) the detention of all aggravated felons and many other criminal aliens; eliminate access to section 212(c) relief for most such aliens; render all EWIs [entries without inspection] more readily removable; subject arriving aliens without either appropriate documentation or credible asylum claims to expedited removal at the border; authorize additional funds for the removal of inadmissible and deportable aliens; mandate the Attorney General to increase detention capacity and improve the systems for identifying and tracking criminal aliens; and many other enforcement-strengthening provisions, Congress has imposed its detention and removal priorities with unmistakable clarity. Not surprisingly, the current INS administration has adopted these priorities and is seeking energetically to implement them by allocating additional budget, staff, and legal authority.

Third, uncertainties about detention needs abound. An examination today of the Federal Detention Plan prepared four years ago suggests that future INS detention requirements are hard to predict. Although the Plan correctly anticipated the general direction of future change—i.e., that the need for detention capacity would continue to grow—it failed to predict some of the changes that would occur in the composition of the detainable population and in the legal requirements for detention imposed by Congress. The degree of uncertainty is illustrated by the fact that even today, nine months after AEDPA's enactment, the INS cannot accurately predict whether the new law's provisions will, on balance, increase or decrease the agency's overall need for detention beds.

Fourth, the INS's detention of any individual, even of a removable criminal alien, implicates fundamental constitutional rights and values. These rights include access to relatively swift remedies for unlawful detention through the writ of habeas corpus;<sup>1</sup> due process claims to at least

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1. The constitutionality of section 440 of AEDPA (now codified in section 242 of the INA), which eliminates judicial review of certain criminals' removal orders, is under challenge.

minimally decent conditions of custody and care; adequate hearing procedures before a detainee's protected interests may be adversely affected; and statutorily-prescribed time limits on detention. Because of the constitutionally protected character of these rights, the courts are intimately involved in defining and enforcing them, which in turn implies intermittently close judicial supervision of INS administration of its detention and removal program. In addition, legal scholars and the media are also intensely interested in detention, thus increasing the external scrutiny of the program.<sup>2</sup>

Finally, as a practical matter, detention capacity is the linchpin of the entire enforcement system. This is far truer today than it was in the past when non-detained aliens were less likely to abscond and when there were fewer criminal aliens to be detained. I discuss this development below.

**POLICY GOALS AND CONSTRAINTS.** The first and most fundamental goal of the INS's detention program, of course, is to comply with statutory detention requirements, which even after IIRIRA's amendments to the AEDPA provisions are categorical in some cases, neither providing for statutory exceptions nor permitting the agency to exercise its discretion and grant parole. Beyond this, however, the INS does possess some discretion to structure its detention program in order to accomplish two policy goals: (1) effecting the actual deportation of removable aliens by ensuring their presence at hearings and their compliance with final orders, and (2) deterring future illegal immigration to the United States. The INS may also wish to detain criminal aliens in order to punish and incapacitate them, but as the agency's authority has been traditionally understood,<sup>3</sup> it may not detain for these purposes, which are the concerns of the criminal justice system. The INS may only detain aliens in order to effectuate their removal.

The constraints on INS detention (in addition to any legal rules that may bind the agency) are many; I shall mention seven of them. It is these constraints, of course, that account for the difficulties in designing an optimal detention policy.

First, widely-shared humanitarian values cause the public properly to view detention as the remedy of last resort, even where the alien does not possess a strong legal claim to release. This is especially true of children and asylum-seekers, whose claims often evoke public sympathy and who are protected by the Refugee Convention and human rights treaties against unreasonable restrictions on free movement. But humanitarian values are also at work in the bonding system, which is premised on a presumption that release is the rule and detention the exception, a presumption that results in the release of

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2. See, e.g., Margaret H. Taylor, *Detained Aliens Challenging Conditions of Confinement and the Porous Border of the Plenary Power Doctrine*, 22 HASTINGS CONST. L. Q. 1087 (1995).

3. I say "as traditionally understood" simply to flag the possibility, discussed below, of a legal change that would clarify the circumstances and conditions under which the government would be authorized to continue—indefinitely, if necessary—to detain removable criminal aliens who have already served their criminal sentences.

most aliens who are initially in INS custody; indeed, until recently, it is likely that many criminal aliens (although not aggravated felons) were released for this reason.

A second constraint on detention policy is related to the first and concerns the conditions of confinement; because the INS may detain aliens only to the extent necessary to assure their presence for proceedings and not in order to punish them, their detention is regarded as civil and not criminal in nature. Just as the civil nature of removal proceedings deprives aliens of certain rights associated with the criminal process, the civil nature of removal-related detention cuts the other way and implies greater obligations on the INS with respect to the conditions of confinement. This question is now under litigation and internal INS review.

Tort liability of the INS is a third constraint. Under the Federal Tort Claims Act (and perhaps also under a so-called *Bivens* claim), the INS (and/or its officials) might be liable to a detainee and to third parties injured as a result of negligence in exercising the agency's custodial responsibilities.<sup>4</sup> The prospect of such liability would create even greater concerns about proposals for "soft detention" alternatives to traditional incarceration, alternatives that would involve less intensive supervision. I discuss such proposals in Part II(B).

Political acceptability is a fourth crucial constraint on detention policy. The public must have confidence that the INS is maintaining detained aliens in circumstances that are secure from a public safety perspective and that are neither too harsh nor too pleasant for the detainees. Immigrant advocates tend to press for higher levels of amenity and care and emphasize the deprivation of detainees' personal liberty, while many people in the communities in which detention facilities are located resent the standard of living that detainees enjoy at public expense.

A fifth constraint on detention also constitutes an essential justification for it: the INS can deploy few effective sanctions other than removal to induce them to comply with its proceedings and orders. This fact, which sharply distinguishes the INS's enforcement posture from those of the Bureau of Prisons and other penal authorities, is what makes detention the key to the INS's ability to effectively remove aliens from the United States. If a convicted criminal in governmental custody misbehaves, he is subject to a variety of additional sanctions, including loss of parole, extension of sentence, etc., which give him powerful incentives to comply. But for an alien, removal is the ultimate sanction that the INS can impose. Although the 1996 amendments do strengthen the criminal and civil penalties and bars to immigration benefits to which aliens may be subjected if they fail to appear

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4. For example, potential tort liability limits the INS's willingness to transport criminal aliens to consulates for travel document interviews. See Memorandum from OGC to Joan C. Higgins, dated May 11, 1994.

for hearing or removal as required by law, it remains the case that the typical absconding alien will be no worse off than if he had appeared and lost. This fact constrains detention policy because the alien has little or no additional incentive to comply with INS orders and indeed has strong incentives to abscond. Even if he is detained, he has little reason to cooperate with the INS in effecting his removal unless he wishes to return to his country, in which case he probably could have done so at any earlier point in the process.

Lack of knowledge about the particular aliens whose detention the INS is considering is a sixth important constraint. This problem is far greater than in the case of most U.S. citizen criminals; for that reason, it casts serious doubt on any easy analogies to the conventional system of criminal justice, custody, and conditional release. In order for the agency to make sound decisions about whether to detain or release an alien—and if he is to be detained, under what conditions and for what period of time—it must know a great deal about his character, community ties, and personal situation. When an alien initially comes into INS custody, however, the agency probably knows little or nothing about him. Moreover, the agency cannot readily obtain reliable information about him unless he has previously been criminally convicted or was otherwise in the custody of some government agency. Here again, penal authorities are in a far better position to make the analogous detention decisions regarding U.S. citizens, about whom much better information is likely to be available from a variety of sources. As discussed in Part II, this ignorance about particular aliens makes it very difficult to implement “soft detention” alternatives effectively. The Appearance Assistance Program, developed by the Vera Institute and briefly described below, seeks to address this problem.

The final constraint that I shall mention is the most obvious: scarce resources. Under any imaginable circumstances, detaining aliens is bound to be very costly; consequently, the INS can detain only a small fraction of those whom it is entitled to detain. The INS now incurs an average cost of \$66 per person-day in its detention facilities; in juvenile shelters and some other facilities requiring more intensive staffing, the figure is higher. Detainees’ length of stay in INS custody varies considerably, depending on the length of their proceedings, the availability of travel documents, and other factors. Most OTM [other than Mexican] detainees remain in custody for at least several months. Some, like the Mariel Cubans who were not released or who were released but were then re-arrested, have been there for many years; others, like the mandatorily detained Vietnamese, could be “lifers.”

The INS’s detention program is often pressing up against capacity, at least so far as its own facilities are concerned. Constructing new capacity or contracting with state and local governments or private firms for additional detention space is expensive, the cost is increasing, and it takes time for the new capacity to come on line. Meanwhile, more aliens are constantly

entering the system, and under AEDPA a large fraction of them must be detained.

ASSUMPTIONS. Any analysis must proceed on the basis of certain assumptions about both facts and values. I wish to make mine explicit.

The first and most basic assumption, which I question briefly in the introduction to part II, is that the INS will continue to operate long-term detention facilities. Beyond this premise, my most important assumption is the proposition, already mentioned, that the integrity and effectiveness of the immigration enforcement system as a whole depends on the INS's ability to make a credible threat to aliens—both those now in the United States and those who might come in the future—that the agency can impose costs beyond the burden of removal itself on removable aliens who fail to appear for hearings or to comply with legally valid agency and court orders, including surrendering for removal if their efforts to remain are unsuccessful. The credibility of this INS threat in turn depends on the INS's ability to remove such aliens, which in turn depends on its ability not merely to threaten detention but actually to detain. Empirical studies confirm what all INS officials already know—that relatively few of the aliens who are not detained pending the completion of their removal proceedings and the execution of the final warrant will surrender for removal. Instead, they will abscond, elude subsequent apprehension, and thus remain in the country illegally and indefinitely, acquiring in the process additional equities supporting their claims to remain permanently,<sup>5</sup> notwithstanding recent amendments to the statute limiting the availability of such equities. To its credit, the INS is now developing what it hopes will be more effective approaches to this fundamental problem, including transitional period custody rules and tougher, more easily triggered surrender requirements, and elimination of redundant notice procedures.

Thus, little else that the INS does with respect to enforcement will matter unless aliens know that they will be detained for a significant period of time if and when they are apprehended. This means that the INS must enlarge its capacity to detain, which leads to the general strategies and specific policy options discussed in Part II.

A third, closely related assumption is that INS enforcement comprises a system of many intimately interconnected and interdependent elements and that the INS's detention capacity is at the center of this system, powerfully affecting each of the other elements. Indeed, it is not too much to say (and INS field personnel often do say) that the availability of detention (bed) space is what drives and shapes INS enforcement at every point—from migration flows and apprehension to BIA [Board of Immigration Appeals] and court review.

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5. For example, a March 1996 inspection report by the Office of Inspector General, DOJ, found that 94% of the detained removable aliens were removed, while only 11% of the non-detained were removed.

My fourth assumption is that the INS is an exceedingly diverse agency. Each district is distinctive in terms of the number of the aliens with which it deals, their nationality (and hence the costs and benefits the INS creates in removing them), the average length of stay, the detention capacity available to it, the logistical and other constraints it faces, its relationship with the immigration court, and many other factors that directly affect the nature and performance of its enforcement activities. This diversity strongly implies the need for administrative flexibility both for the INS as a whole and from district to district within the INS. As I suggest in Part II(G)(4), however, this flexibility might be more rationally assured through a detention system administered in a somewhat more centralized fashion than at present.

Fifth, I assume that many of the changes that the INS must make in order to use detention more effectively would require changes in the statute, not simply administrative changes—although the 1996 amendments to the statute do provide much of the needed regulatory authority. I further assume, however, that the necessary legislative changes may be politically more feasible now than they were in the past.

One reason why the necessary congressional support for reform may now be forthcoming is because of another set of assumptions—concerning the INS's overall performance. I assume that the INS has been making substantial progress in increasing its administrative and policy making effectiveness, that its increased resources, expanded legal authority, political support, and strong leadership place it in a good position to continue its improvement in the future, and that Congress recognizes this fact—although this recognition may not be apparent in an election year. I also assume, however, that public expectations, media interest, and congressional demands on the INS are growing faster than is its capacity to respond. This gap produces a consistently high level of criticism despite the agency's improved performance overall.<sup>6</sup>

The result—the final assumption that I mention—is that the INS's budgetary, manpower, and infrastructural resources, while much greater than they were even a few years ago,<sup>7</sup> have not kept pace with the even greater challenges posed by Congress's current immigration enforcement priorities. If the detention system is to be improved, it is imperative that the INS leadership make the case for more resources, which in turn requires the agency to show that it is already using its current resources effectively. Additional resources alone will not do the job, but it cannot be done without them. On the other hand, some of the policy options discussed below could

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6. See, e.g., *Union Alleges Border Patrol Faked Results in Crackdown*, N.Y. TIMES, July 14, 1996, at A21; Schmitt, *Immigration Aides Deceived V.I.P. Group, Inquiry Finds*, N.Y. TIMES, June 21, 1996, at A14.

7. By my calculations, spending by INS Detention and Deportation will have increased by approximately 250% in the five years between 1992 and 1997.



probably be implemented at a very modest cost, and some—especially those aimed at more efficient review and removal—would actually save resources.

LIMITATIONS ON SCOPE OF THIS ANALYSIS. It was understood that I would conduct this study in a very short period of time (much of which was spent visiting the field). Accordingly, I was urged to ignore certain important topics that are the subject of other studies that the INS is already conducting or sponsoring. These excluded topics include: the quality and legality of the conditions of confinement; the desirability of private management of detention facilities; the contract provisions necessary to regulate private contractors; the legal validity of various possible detention policies; the need for an automated data system for coordinating bed location and transportation decisions (the “optimization” study); staffing requirements; the parameters for an “assisted voluntary return” program; enhancement of the IHP [Institutional Hearing Program]; and Vera’s Appearance Assistance program. I was also urged not to spend my limited research time and space in the white paper reviewing the history of INS detention policy or in rearguing the merits of the policy judgments that Congress has so recently and emphatically made, for better or for worse, with respect to detention policy.

Having recognized this last limitation, I must nevertheless add my personal view that Congress has rendered the already difficult problem of designing a rational, just, and cost-effective detention policy even more difficult by enacting the exceedingly rigid detention requirements that the AEDPA imposed on the INS. These requirements were relaxed somewhat by the IIRIRA but they continue to be excessively restrictive and indiscriminate. They fail to distinguish adequately among different categories of aliens whose humanitarian claims to be considered for release from custody on an individualized basis may be especially strong and whose risk of flight is low.<sup>8</sup> Indeed, some of these restrictions are not only unwise; they may even be unconstitutional.<sup>9</sup> Short of changing the statute, this problem will not yield to any easy or cheap fixes. Indeed, absent such changes even costly fixes (should the necessary resources be made available) will be hard to implement because of the constraints discussed above.

The political feasibility of some of the policy options in Part II is uncertain. As just noted, public and congressional criticism of the INS will probably grow, not diminish, even if the agency improves its performance. While seeking to be realistic in identifying policy options for the INS, I have thought it better to assume that the necessary authority and resources to implement desirable options can be obtained if the INS does not already

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8. Aliens who have already demonstrated a credible fear of persecution and are being detained pending a full hearing on their asylum claim before an immigration judge are the most obvious such group.

9. The INS’s recent proposed regulations, 62 Fed. Reg. 444 (Jan. 3, 1997), are arguably even more restrictive with respect to release than the new law requires. See Margaret H. Taylor, “The 1996 Immigration Act: Detention and Related Issues,” 74 Interpreter Releases 209 (Feb. 3, 1997).

possess them. After all, few observers would have predicted ten years ago that Congress would bestow on the INS the annual budget of more than \$3 billion, 26,000 employees (including temporaries), and vastly enhanced enforcement authority that it wields today.

Finally, the time limitations of the project prevented me from focusing on many programmatic details that are clearly essential to the sound development and implementation of detention policy but that would have taken much longer to investigate.<sup>10</sup> Accordingly, my descriptions and diagnoses of the problems of the detention system are inevitably more superficial than the complexity of those problems truly deserves. I have proceeded nonetheless as if my diagnoses were essentially correct, focusing instead on prescription—on identifying general strategies and specific changes that might improve the system.<sup>11</sup>

I therefore hasten to emphasize what is inherent in the nature of a “white paper:” before the INS decides to adopt any of these ideas, it should conduct a far more detailed policy and implementation analysis, including a rough assessment of costs and benefits, to determine the idea’s feasibility and desirability. In this sense, what follows should be viewed as a series of policy options that must be fleshed out and analyzed for possible adoption rather than as firm policy recommendations or proposals.

## II. SEVEN STRATEGIES FOR REFORM

Before proceeding to a consideration of the seven basic strategies for reforming the INS’s detention program, two “macro-strategic” issues deserve mention. First, although this paper assumes that the INS will continue to operate medium- and long-term detention facilities, this should by no means be viewed as an obvious or foregone conclusion. Indeed, I believe that the Justice Department should carefully review this question afresh, and I understand that studies of possible privatization options are now under way. Strong arguments can be made that the INS is competent to apprehend, transport, and service aliens, and even to detain them administratively for brief periods, but that the Bureau of Prisons or some other governmental entity<sup>12</sup> should oversee their long-term detention.<sup>13</sup> BOP control is especially appropriate for the subset of detained aliens who are potentially dangerous,

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10. In addition, the INS failed to provide the statistical data on current detention patterns that I twice requested and that would probably have enriched the analysis.

11. In addition, Congress suddenly transformed the entire structure of immigration law with its enactment of IIRIRA, and the INS responded in January 1997 by proposing implementation regulations. These legal changes occurred after my fieldwork had been concluded and just as I was completing my draft report. They have occasioned enormous confusion among immigration lawyers, not to speak of academics who are not engaged in the daily representation of clients before the INS. Although I have attempted to take account of all relevant changes in the law, it is possible that I have inadvertently overlooked something.

12. I assume that a federal agency will retain responsibility for alien detention even if some or all of the management functions are contracted out to private firms.

13. The BOP and the INS, of course, jointly operate the detention facility at Oakdale, Louisiana.

and since the INS's relative ignorance about aliens' backgrounds makes it particularly difficult for the agency to predict dangerousness, this group cannot readily be limited.

The INS did not take on long-term, massive detention as a matter of considered federal policy; rather, it did so almost imperceptibly, reluctantly, and by default. Moreover, there is no reason to believe that the INS is particularly good at performing this function, at least compared to a professional public or private<sup>14</sup> corrections agency—even recognizing that immigration detention is aimed at removal, not punishment, incapacitation, or rehabilitation. While urging that this fundamental functional question be reviewed, however, this paper will proceed on the premise that the INS will continue to administer even long-term detention for the foreseeable future.

A second “macro-strategic” issue is in a sense the most important one: what does the INS hope to accomplish with its detention beds—or more precisely (since a mix of goals is probably desirable), with each new bed. The 1996 amendments to the statute do establish some mandates and priorities for removal and detention. Even after it complies with these new statutory mandates and priorities, however, the INS must still make strategic choices about the use of bed space. It must move from its three general goals—to comply with statutory detention requirements, to assure that removable aliens appear at their hearings and surrender for removal; and to deter future illegal migration to the United States—to more specific policy aims. In doing so, it must choose among a number of objectives which compete with one another for detention resources. Does it want to use its beds to deter document fraud or illegal border crossers or smuggling? To prosecute those who commit first-time immigration crimes? To prosecute recidivist immigration criminals?<sup>15</sup> To remove those who have already been convicted of non-immigration crimes? To emphasize certain ports of entry or cities or certain geographic regions or certain industries? This list of possible policy targets, of course, could easily be extended. There is no fixed answer to the question; the INS is likely to choose some mix of goals which will—and should—change over time depending on congressional preferences, aliens' behavior, new information, and so forth.

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14. From my admittedly superficial observation, the privately-operated SPC in Houston appears to be at least as well-managed, and at a lower cost to the INS, than the comparable INS- or INS/BOP-operated facilities that I visited. Obviously, a detailed, probing comparative analysis of the privately- and publicly-managed alternatives would be necessary before an informed decision could be made about the merits of privatization of some or all of the detention management functions. For present purposes, it suffices to say that privatized management of detention facilities should be treated as a viable policy option requiring further study.

15. The distinction between new and recidivist criminals, of course, ignores the fact that aliens who appear to be first-time offenders may well have been convicted of other crimes in their home countries (or even in the United States) of which the INS simply has no record. Although this is also a problem with respect to U.S. citizens (because of glitches in record-keeping and transmission), it is much greater with aliens.

This paper makes no effort to resolve this question, which is highly political in the best sense.<sup>16</sup> Instead, the rest of Part II is concerned with how the INS can best organize itself and deploy its limited detention resources in order to achieve whichever mix of policy goals the INS decides to pursue. The “macro-strategic” point, however, remains: each new bed (and indeed the existing ones as well) could be put to a number of different and sometimes competing uses. The INS can either choose what the mix of goals will be and consciously design its enforcement programs to advance these goals, or it can simply let nature take its course and see its programs driven by external factors and events over which it exercises little control or policy direction. This paper is intended to help the agency do the former.

### A. *Prevention*

The essential idea of a prevention strategy is quite simple and compelling. To the extent that aliens who are likely to be illegal at entry or to lose their legal status after entry can be deterred from attempting to come to the United States, or detected and prevented from entering the United States once they arrive, the necessity for detention—indeed, for any further enforcement activity—will be minimized. Obviously, the INS has long instituted preventive measures at the border, in the interior, and to a limited extent abroad, while State Department officials are charged with the primary pre-screening responsibility in our consulates overseas. These traditional and ongoing efforts, however, have been manifestly ineffective, as evidenced by the 5 million illegal aliens living in the United States, composed of illegal entrants and a roughly equal number of non-immigrant overstays. The following changes might ameliorate this most fundamental problem directly. In addition, of course, most of the policy options discussed under strategies other than “prevention” would, by increasing detention capacity and effectiveness, deter potential EWIs and overstays, thus contributing indirectly to a prevention strategy.

#### 1. *Overseas inspection.*

The INS has posted some inspectors at the Shannon airport, yet other airports are even more important transit points for aliens who are potential detainees. It seems likely that there would be a high payoff to the INS if it located additional inspectors at those airports, especially if the agency could contract out for such inspectors at the lower wage rates that prevail in some

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16. I will say, however, that my own view is that the removal of new and recidivist criminals should be the dominant goal for the allocation of detention beds, although of course not the only goal. I say this both because Congress has clearly adopted such a priority and because of empirical evidence that incarceration of criminals prevents a minimum of twelve crimes a year that they would otherwise commit on average, were they released. Although INS detention is not supposed to be for the purpose of incapacitating criminals, the agency inevitably serves this socially beneficial purpose when it detains a criminal for the purpose of effecting his removal.

of those cities (such as Rome). This will not be easy to accomplish, as the host countries are naturally reluctant to permit U.S. law enforcement on their territories.

Alternatively or in addition, carrier inspections could be improved. There is some evidence, for example, that the NYC Carrier Training Program has contributed to the dramatic decline in political asylum claims asserted at JFK airport recently. Unfortunately, the efficacy of carrier training is limited by the fact that carriers have relatively weak incentives to pre-screen carefully for the INS, as they no longer incur liability for the costs of aliens' detention should that become necessary. Carrier fines for boarding improperly-documented passengers are a useful deterrent but they need to be augmented.

If the INS is to place greater reliance on carriers' pre-screening, their incentives might be strengthened by making the carriers liable for some fraction of detention costs, which should be reduced somewhat in any event because of the expedited removals that are mandated by the new law. Alternatively, the carriers might be required to pay the cost of stationing INS inspectors at the airports; in this event, they might not be expected to conduct additional pre-screening or be subject to any civil liability.

## 2. *New criminal grounds for inadmissibility.*

At present, the statute does not expressly render inadmissible several categories of criminal aliens who by reason of their crimes are removable, including aggravated felons and other firearms offenders. This omission was presumably an oversight and the law could readily be amended (or interpreted, even in its present form) to make them removable at the border, perhaps summarily so (absent a credible asylum claim). More generally, the grounds for inadmissibility should be reviewed to ensure that they include, at the very least, all crimes that may render an alien removable.

## 3. *Surrender of passport at border.*

In order to deter overstays and facilitate subsequent enforcement and removal activity, the INS might require any alien seeking admission to prove his nationality by surrendering his passport. The INS could then give him a stamped copy, retain the original, incorporate it into the alien's A-file, and return it only upon presentation of a non-refundable one-way ticket confirming departure from the United States. The current effectiveness of INS record-keeping and efficiency, however, may not be equal to the logistical demands of physical passport retention and return.

## 4. *Public information in source countries.*

Although the INS's border enforcement policies have become far more effective in recent years, the "word on the street" in Mexico and other Latin American source countries, particularly in the villages, probably lags well

behind the new reality. INS-produced public service campaigns in such countries to inform potential migrants not just about the potential dangers to their safety (e.g., an INS film now warns about aliens being killed on the busy highways near the border) but more importantly about the greater probabilities of detention, criminal prosecution for multiple entries, workplace enforcement, etc. that now face them in the United States under the beefed-up enforcement regime. A regular campaign "blitz" could be very cost-effective in convincing many aliens that illegal migration is likely to be far less successful than one may think.

### 5. *Third country agreements.*

The United States, like some European countries, has contracted with other neighboring "safe" countries, notably Mexico, to ensure that aliens who first pass through such countries to reach the United States under certain conditions cannot apply for asylum in the United States. For a variety of reasons, the United States has not taken as full advantage of these arrangements as it might. If the United States proceeds down this road, however, it must be certain that both it and the "safe" countries do not violate human rights principles in the course of processing asylum-seekers, which will not be easy to accomplish.

### B. *Diversion and "Softer" Detention*

Conventional ("hard") detention is essential for many criminal aliens. Nevertheless, it is very costly to the INS and highly restrictive of the liberty interests of detained aliens. The INS's extensive detention responsibilities have gradually been thrust upon it and have now reached a point at which detention drives much of the rest of its enforcement programs, consumes much of its budget, and produces much of the agency's adverse publicity. Any alternative that could reduce the INS's costs, restrict the alien's freedom as little as is needed to assure his compliance and removal, and still effectively deter other aliens from violating the immigration laws would constitute a major policy triumph. On the other hand, undue optimism about alternatives can lead to misguided reforms.

First, facile analogies to the criminal justice system, which has long employed pre-trial and post-conviction programs to divert criminal suspects and convicted offenders from incarceration, may misconceive the rather different character of immigration enforcement. In Part I, I noted several of those differences: the lack of reliable information about aliens on which release decisions could be based; the shorter turnaround time for the vast majority of detained aliens; the different constitutional standards applicable to removable aliens compared to each other and to U.S. citizens; and most important, the stronger incentives for aliens to abscond, given the lack of sanctions (other than criminal prosecution) beyond removal itself.

Second, the INS has little or no operating experience with non-traditional “soft” detention alternatives, while its experience with the traditional ones—bonding, release with conditions, and release on recognizance—is so discouraging that it must give any prudent reformer considerable pause.

Finally, even the criminal justice system’s diversion programs, on which alien releases would presumably be modeled, are subject to serious criticisms.<sup>17</sup> Nevertheless, while skepticism about the effectiveness of detention alternatives is surely warranted, the disadvantages of the current system are so great that the INS has an obligation to search for and experiment with any plausible alternatives. It has begun to do so in its contract with the Vera Institute to develop a demonstration Appearance Assistance Program to test the feasibility of loosely supervised release of certain aliens coupled with counseling to encourage them to appear for their hearings. This project, which has been somewhat confounded by the mandatory detention provisions of the AEDPA and IIRIRA, will of course provide much information and operating experience relevant to detention alternatives. In what follows, I shall focus on other approaches.

### 1. *Electronic monitoring.*

This alternative is the subject of a very recent report to the INS by the Vera Institute. As the report recognizes, a threshold legal question exists as to whether the INS’s use of electronic monitoring would satisfy the “custody” requirement for the groups of aliens who are mandatorily detainable under AEDPA and other laws. As to its practical efficacy, Vera’s analysis suggests that an experiment would be necessary before firm predictions could be made. Although most of the field personnel whom I interviewed were attracted by electronic monitoring of detained aliens in principle, they were highly doubtful that it could work for the INS in practice. In addition to the special problems with releasing aliens, noted immediately above, INS officials fear that the aliens could easily defeat the system (e.g., break the bracelet); they have little confidence that the logistical support and manpower necessary to implement the electronic monitoring scheme, and especially to apprehend an absconding alien, would in fact be available. To work, electronic monitoring might have to be used in conjunction with a low-security facility in which perimeter alarms could serve as a back-up control if the alien attempts to abscond. I discuss this below.

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17. *E.g.*, Andrea Gerlin, *Criminal Defendants Released Without Bail Spark A Heated Debate*, WALL ST. J., July 9, 1996, at A1 (those released often absconding and commit new crimes).

## 2. *Privatizing the monitoring of released aliens.*

Such concerns about adequate INS staffing to support a diversion program make privatizing certain surveillance and pursuit elements of the program an option worth considering.<sup>18</sup>

Two models seem promising. First, the INS might contract with private for-profit firms to conduct surveillance of released aliens and to apprehend those who abscond. This approach might be likened to a system of private bounty-hunters or parole officers who act on the basis of reward incentives to do what the government would otherwise seek to do itself. The agency, for example, might pay plainclothes private investigators on an incentive commission basis to present “bag and baggage” cases for immediate removal. The contract would be performance-oriented in that the amount of the private firm’s fee would depend on its success in keeping the alien under surveillance and in retrieving those that abscond. The contract would also have to protect, perhaps through a bond and other sanctions, against improper conduct by the private monitoring firm.<sup>19</sup>

Second, the INS might contract with non-profit community groups to perform the same functions. The hope would be that such groups, as ongoing organizations with a concern for their reputations and their continuing relationships with the government, would have a strong incentive (quite apart from the prospect of earning monitoring fees) to ensure compliance by the aliens for whom they have assumed responsibility, aliens with whom they may have some ethnic or other tie that would reduce the aliens’ likelihood of absconding. As with the private bounty hunter model, the compensation of the community group would be determined by its performance. The effectiveness of this approach, of course, depends on the optimistic assumption that community groups would not either be duped by the alien or actually connive with the alien to assist him in absconding and avoiding detection (as occurred in some refugee sanctuary cases during the 1980s). The crucial question is whether this assumption is—or can (through a carefully drafted contract provision) be made to be—a realistic one.

At least until the effectiveness of these models is demonstrated or refuted, the INS should continue with its usual monitoring and apprehension activities. So long as the INS compensates the private firm or community group purely on a performance basis, the agency will probably either obtain the same or better outcomes at a lower cost, or at least be no worse off than it is now. This “no lose” feature of the private monitoring approach is a very attractive feature. Moreover, the INS’s experience with the models would

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18. Indeed, the INS should consider privatizing the search for absconders more generally—not just as an adjunct to the detention program.

19. Although Congress has authorized many new INS positions for bag and baggage operations, this is no reason not to augment those resources with contractual arrangements, at least on an experimental basis.



enable it to compare the costs and benefits of private versus public monitoring, and to compare the efficacy of the two different private models.

### 3. *Bonding reform.*

Although I have not conducted a systematic analysis of the current bonding system, my strong impression is that it operates ineffectively, inefficiently, and unfairly—a truly dismal combination of features.

First, it fails to achieve its only legitimate purpose—assuring the alien's appearance at his hearings and his presence for removal, if ordered. As noted earlier, the vast majority of aliens who are released—either on bond or otherwise—do not appear for their hearings or removal. By mandating detention in many cases rather than allowing the INS to rely on bonding to assure the alien's presence and removal, Congress has clearly indicated its lack of confidence in the current system.

Second, a distorting dynamic operates in which the DDs [district directors] set bond levels that, at least in many districts, are almost routinely reduced by the IJs [immigration judges].<sup>20</sup> This dynamic, in which each official's bonding decisions are based in part on anticipating the decision of the other, reduces the likelihood that bond levels will ultimately be set at optimal levels. It also entails an often needless, time-consuming, and costly (to the alien as well) appeals process. This problem may diminish under the new law, which reduces the availability of parole for certain categories of removable aliens and limits the availability of bond redeterminations for other categories for whom parole is at least theoretically possible,<sup>21</sup> but it will continue to some extent.

Third, the conclusion that bond levels have often been set too low, sometimes almost ludicrously so, seems inescapable. Unsystematic analyses conducted in a number of districts demonstrate the obvious—that bond breaches decline substantially as the bond amount increases. The current bonding system was established long before the problems of illegal migration and criminal aliens became urgent ones and at a time when INS detention was not a viable option. Indeed, the statutory minimum bond level had been \$500 for decades until the new section 236(a)(2)(A) raised the minimum to \$1,500. Until now many aliens simply viewed the bond premium (typically only 10% of the bond amount) as a routine cost of doing business, a small price for illegal entry. In part, this pattern of low bonds reflected the fact that bonds seemed to be set at a level designed to assure public safety and aliens' appearance at hearings, whereas bonds set at a level necessary to assure their surrender for actual removal might require a higher bond level. It is essential,

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20. See Janet Gilboy, *Setting Bail in Deportation Cases: The Role of Immigration Judges*, 24 U. SAN DIEGO L. REV. 347 (1987).

21. See Taylor, *supra* note 9, at 214-15.

however, that the bond never be set at a level higher than necessary to assure that compliance.

Finally, the bondsmen apparently have little incentive to enforce their bond conditions against the aliens, and the INS apparently has little incentive to do so against the bondsmen. The bondsmen may not enforce their bonds because the collateral is sufficient to cover their risks, or because the INS fails to enforce the bond obligations,<sup>22</sup> or both. I was informed that the INS seldom seeks to recover forfeited bonds from the bondsmen, perhaps because of administrative obstacles, the cost of bond enforcement litigation, the political influence of bonding companies, the fact that most of the proceeds go to the general fisc rather than to the INS, and other reasons.

I hesitate to recommend policy changes without a more systematic study of the bonding system—and launching such a study is my first and most important recommendation in this area. In addition, the agency is developing transition period custody rules (TPCRs) that will presumably address these problems. Nevertheless, two reforms seem amply justified even without further analysis.

First, the Deputy Attorney General with managerial responsibility for both the INS and EOIR [Executive Office for Immigration Review] should adopt guidelines and policies designed to better coordinate bonding decisions and to impose departmental priorities and policies on EOIR as well as the INS.<sup>23</sup> Compared to the IJs, the DD almost certainly faces an array of incentives, responsibilities, and constraints—detaining aliens who are unlikely to appear for hearings and removal, releasing aliens who are likely to appear, maximizing the effective use of limited detention resources—that are more balanced, more comprehensive, and more reflective of the full benefits and costs (social, fiscal, political, and otherwise) of detention and bonding decisions. A DD's information base for making such decisions is better than that of an IJ, who considers isolated cases and receives little feedback about the accuracy and effects of her bonding (or other) decisions. If the DD's conflicting, balanced incentives are nevertheless deemed insufficient to protect aliens' legitimate liberty interests, the Deputy Attorney General should establish a review process that will supply the necessary counterweights. But Congress in the new law has clearly signaled its view that the current system fails to strike the proper balance and that the social costs of releasing aliens who will abscond are higher than the current system has registered.

Second, if surety bonds are to continue to be used to assure aliens' appearance, the system needs to be reformed so that the bonds are actually enforced, which means that the current enforcement incentives of the bondsmen and the INS must be rationalized and strengthened. In addition,

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22. The June 1995 settlement agreement in *Amwest Surety Ins. Co. v. Reno*, C.D. Cal., Civ. No. 93 3256 JSL(SHx) would seem to make INS enforcement of its bonds even more difficult in the future.

23. The importance of policy leadership and coordination at the Deputy Attorney General level is a recurrent theme of this paper. See section II(C) *infra*.

alternatives to the current system of surety bonds should be considered. A variety of incremental changes (e.g., altering the bond conditions), creating performance-based incentives for qualifying bondsmen and more radical ones (e.g., some privatization of alien monitoring, discussed above) should be considered. In addition to the option of privatizing some alien monitoring, the INS might consider contracting out some of its bond enforcement litigation to private firms which would have a profit incentive to more aggressively collect on the bonds from the bondsmen. As noted earlier, such privatization must be accompanied by adequate safeguards against improper conduct by the contractors.

#### 4. *Lower security detention.*

Currently, the detention decision is essentially a binary (yes or no) decision: either the alien is released under conditions that do not assure his appearance at hearings (much less his actual removal), or he is detained. If he is detained, he will be detained at the identical level of security—regardless of either his risk of violence or his risk of flight<sup>24</sup>—which will be a high level of security (albeit one that the Bureau of Prisons calls “medium”).<sup>25</sup> This “one size fits all” system is unfair, unnecessarily costly, and difficult to manage. It is unfair and costly because it requires levels of confinement for all detainees that are more restrictive than some of them need, given the risks of violence and flight that they present, and it is difficult to manage because it mixes together inmates of very different kinds.<sup>26</sup>

I do not mean to underestimate the difficulties of improving this system without better information about the risks of violence and flight posed by individual aliens detained in INS custody. Nevertheless, the INS should actively seek to diversify its detention options even as it attempts to upgrade its information systems. In principle, the low security (or BOP “camp”) model is a very attractive way to detain low-risk aliens. Examples in the federal system are the federal prison camp at Oakdale, the Allenwood facility in Pennsylvania, and the Fort Dix Federal Prison Center. At the Oakdale camp, which I visited, U.S. citizens are serving their federal time, usually for

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24. The only variation on this theme consists of a limited number of isolation cells in each INS detention facility reserved for detainees who prove to be especially dangerous or recalcitrant, or who request isolation out of fear of being the target of violence by other inmates.

25. The BOP classifies its facilities as minimum (called “camps,” discussed below), low, medium, high (i.e., federal penitentiaries), and maximum. The variable features that define these levels are (1) security of the perimeter (e.g., number and hardening of fences, alarm system, roving patrol vehicles, towers); (2) security of housing (e.g., more or less open dormitories vs. single- or double-bunk cells); (3) building structure (materials and security devices); and (4) inmate/staff ratio (i.e., 3.5:1 in the INS facility at Oakdale, 2:1 at federal penitentiaries, and 1:1 at maximum security facilities). The officer-in-charge at the San Pedro SPC [Service Processing Center] on Terminal Island reports that the ratio of inmates to guards on a given shift is 125:1. I am not certain that the ratio is defined identically by Oakdale and San Pedro—both “medium” level facilities, but in any event the disparity appears to be enormous.

26. Again, the San Pedro and Varick Street SPCs may present the extreme cases. There, men and women, hardened criminals and minor offenders, “lifers” and short-termers, are held in the same facility and under much the same conditions of confinement.

non-violent drug and white collar crimes and with two years or less to serve. The detainees are relatively unrestricted. Because there is no fence and the inmates can wander about the premises, they could easily escape or obtain illegal drugs if they tried, although in two years only two inmates have walked away (one was in his 70's and dying), and only one has tested positive. The staff/inmate ratio is 1:130, and detainees live in open dormitories. They receive furloughs every 90 days if they are well-behaved. Little programming other than basic education and recreation is provided. The officer-in-charge reports no disciplinary problems. The cost per inmate is under \$30 per day, roughly half the cost of the facilities used to detain aliens.

Again, however, it must be emphasized that these "campers" are U.S. citizens about whom much more information about the risks they pose is known, individuals who face very different—and much stronger—incentives to comply with the rules than do long-term detained aliens and even short-term aliens who are likely to be removed anyway and who have few ties to the United States. Still, some subset of aliens, especially those who are non-violent and who have ties to the United States, could probably be detained at security levels that are lower—hence cheaper and less confining—than those now imposed by the INS. It should be possible to experiment with using facilities in which the INS relaxes one or more of the principal security variables—perimeter control, housing control, building structure, and especially inmate/staff ratio (since it is the most cost-sensitive variable).

Another possibility is to house some detainees—principally short-termers—in tents or other forms of temporary shelter in those districts where weather patterns pose no threat to the detainees' health or safety and in situations where minimal security precautions would suffice. Although some public criticism of such "tent cities" can be anticipated, the U.S. government has housed its own soldiers and many refugees in tents for limited periods of time, and the INS has done so with asylum seekers in Texas and on Guantanamo Naval Base.<sup>27</sup> Abandoned military bases might provide suitable venues for such tent cities.

### 5. *Group-differentiated detention.*

There are at least four groups that need detention facilities that differ from those in which the rest of the population can be maintained. The groups are long-term detainees, unaccompanied minors, females, and families. For each of these groups, the facilities should be further differentiated to separate the violent criminals and the non-violent, and in the case of minors, small children and near-adults.

LONG-TERM DETAINEES consist of aliens—mainly Mariel Cubans and those whose travel documents cannot be obtained—who are unlikely to be re-

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27. The sheriff of Maricopa County, Arizona reportedly has been housing many criminals in tents previously used in Operation Desert Storm.

moved in the foreseeable future. Some of them may be “lifers” while others may be in custody for many years. This population is apt to be more frustrated and demoralized and to conclude that they have little or nothing to lose by resisting authority, becoming violent, and attempting to escape. At present, they are mixed in with the other detainees, which is a recipe for disaster. Because they will be detained for so long a time, they also need to be kept busy and to receive more programming than short-termers.

UNACCOMPANIED MINORS constitute a small<sup>28</sup> but growing share of the detained population. INS officials believe—apparently no study of this important issue has been conducted—that although the vast majority of them do not have criminal backgrounds and pose no significant threat of violence or flight, some (especially members of Chinese gangs) do. The juvenile holding centers in which they may be held for up to six hours, and the juvenile detention facilities in which they may be held for up to 72 hours, are not really equipped to meet their special emotional and activity needs, while the juvenile shelters to which they can then be sent are filled to capacity and often inadequate. More shelters are needed. Moreover, once juveniles are in custody, they are subjected to the same process as adult detainees; they do not automatically receive priority hearings. The INS is already spending up to \$9 million per year on this group; this cost might be reduced, and the children interests better served, if they were more quickly processed and placed in appropriate settings. But as the significant runaway problem experienced by these shelters indicates, adequate security must be assured through better staffing and surveillance. All of these reforms, of course, will be costly but they can hardly be avoided. Indeed, they may be even more costly if the courts impose them on the INS.

FEMALES also constitute a growing share of the detained population, and there are persistent criticisms of the conditions under which they are detained. If they are accompanied by their husbands and neither has committed a crime, they should either be released or detained together in a special family unit, presumably at a low level of security. If they are single, they should be detained at a security level commensurate with their risk of violence or flight; criminals and non-criminal females should not be mixed, as they are in some SPCs. If special facilities for women are lacking in the district, this should be reflected in a higher priority for early EOIR hearings.<sup>29</sup>

FAMILIES with children are now either detained in special family units, if available, or released on bond or recognizance. Assuming that the bona fides of the family unit can be reliably established, it is hard to see why they should not be released—unless one of the family members has committed a crime, in which case that member alone should be detained. Again, priority processing should be the rule.

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28. According to the INS, the juvenile population in custody in four shelter systems was 91 as of January 30, 1996. Paper used at Full Round Meeting of IGC in Berlin.

29. See section II (C)(6) *infra*.

### C. *More Efficient Review Processes*

The creation in 1983 of the EOIR and its separation from the INS has been a mixed blessing. On the positive side, it has established a domain of independence within which the adjudicators—the IJs and the BIA—are insulated from supervision and undue control by INS officials. Within this domain, the adjudicators can apply the rule of law to individuals without fear of political interference.

Like all good things, however, this independence has entailed some disadvantages. Perhaps the most important of these disadvantages of independence has been the EOIR's propensity to conduct its adjudicative functions with inadequate responsibility for the growing costs and constraints of the detention system that the INS, prodded by Congress, must administer. My strong impression is that the intersection of EOIR's vaunted independence and INS's highly constrained detention system has produced seriously (sometimes tragically) perverse consequences for detained aliens as well as for the INS and EOIR systems.

This is the bad news. The good news is that there are numerous fixes that could ameliorate the situation by avoiding, accelerating, or streamlining the review processes without necessarily eliminating the important value of independent adjudication. Some of these changes would necessitate new legislation but many would not. Implementing even these, however, will probably require the Deputy Attorney General to exercise firm policy direction of the EOIR, while being careful not to impair its legitimate authority to adjudicate individual cases without undue interference. In short, if the goal of minimizing unnecessary detention is to be a policy priority, the Deputy Attorney General will have to impose it forcefully and she will have to implement it by assigning an INS-EOIR coordinator to work virtually full-time on this problem. Nothing less is likely to solve it, given the different perspectives and incentives of the two organizations.

#### 1. *Removal pending appeal of removal orders.*

Until the 1996 amendments, an alien's claim to admission lapsed if he left the country. Merely by filing an appeal with the BIA or (upon BIA affirmance of the exclusion or deportation order) with the federal appellate court, an alien routinely obtained a stay of deportation pending review, either by grant or by right, allowing him to remain in the country for the months or years required to complete those proceedings. As is well known, aliens often used this additional time in an effort to acquire equities that enabled them to convert their excludable or deportable status into a claim of a vested right to remain. During this period, the INS had either to detain him, often at significant public cost, or to release him, usually facilitating his disappearance.

In an earlier era when international travel and communication was slow and costly, a default rule permitting the alien to remain in the United States

pending appeal of his removal order may have been both just and efficient. Today, however, the relevant factors have changed in ways that argue for the opposite default rule—one in which an alien with a final adjudicated order must pursue his appeal, if any, from outside the United States unless he can demonstrate some compelling equities for remaining here pending appeal. There is no question that some aliens, including many LPRs, would be able to make such a showing, but the vast majority of final removal orders do not involve LPRs and would be affirmed on appeal.

The 1996 amendments dramatically reverse the default rule. New section 242(b)(3)(B) provides that the filing of a petition for review shall not automatically stay a removal order, although a court may issue such a stay. The new rule recognizes no exceptions, even for long-term LPRs. Although this change alone could significantly reduce the amount of detention time required pending removal, it may be too sweeping. The INS will have to consider carefully how to exercise its discretion in passing on applications for stays pending administrative, BIA, and judicial review.

## 2. *Video-conferencing.*

Another default rule that results in much unnecessary detention time, as well as creating other costly logistical obstacles, is the requirement for hearings in person. Other things being equal, of course, hearings in person are certainly desirable. All other things, however, are emphatically not equal where a requirement for in-person hearings means additional detention. The logistical impediments to bringing aliens, their lawyers, the government's lawyers, and the IJs together in one location at one time entail frequent delays, continuances, changes of venue, and the necessity for complex transportation arrangements, which in turn require that detained aliens be detained even longer while these matters are worked out.

Video-conferencing, which has already been used quite successfully by EOIR in many cases, can significantly reduce these delay-related detentions. New section 240(b)(2)(A)(iii) authorizes the INS to conduct removal proceedings through video-conferencing, and the INS should employ it much more frequently. The technology is constantly improving, approaching the point at which the advantages of in-person hearings over video-conferencing will become negligible. Again, the suggestion is not for a categorical requirement of video-conferencing. Instead, it favors a default rule favoring video-conferencing whenever holding an in-person hearing would likely entail additional detention time, unless the alien made a showing that compelling circumstances nevertheless justify an in-person hearing.

## 3. *Legal representation of aliens.*

Out of a laudable concern for aliens' legal rights and for the integrity of the removal proceedings, immigration judges feel obliged to delay the proceed-

ings, often repeatedly and over long periods of time, until the aliens can obtain counsel. If the aliens are detained, these delays can greatly extend their detention time. If the INS or EOIR could provide aliens with legal representation at the earliest possible date, detention time would be minimized and the quality of adjudication would be improved. Nevertheless, several factors—the cost of furnishing such services (which the government is not obliged to bear), and the dearth of qualified counsel in the remote areas in which proceedings are sometimes held—constrain the government's ability and willingness to do so, and many aliens cannot afford to procure paid representation on their own.

Although there is no simple solution to these problems, a promising possibility is to create a system of *pro bono* representation of aliens beginning when an OSC [Order to Show Cause] is issued and continuing as long as the availability of *pro bono* resources permits. Recently, EOIR and the District Counsel in Los Angeles began an experiment along these lines. With the help of a local Hispanic lawyer and public interest law groups, they developed a list of local *pro bono* attorneys, which the IJ announces at the master calendar when the alien is supposed to plead to the OSC. The attorney mostly assists the alien by reviewing the charges with him, identifying possible factual and legal defenses and avenues of relief, explaining the effects of the new restrictions on bonding out and on relief. One limitation of this program is that it provides representation only at the master calendar stage, whereas representation is needed—especially in complicated cases—from beginning to end. In addition, *pro bono* attorneys are reluctant to represent criminal aliens or hopeless cases.

A better approach would be to augment the work of *pro bono* attorneys with law students working as part of a law school clinic on immigration or administrative law. In some respects, the immigration court is an ideal venue for developing legal advocacy skills. The court is a quasi-judicial forum, the rules of evidence are flexible enough to accommodate the inexperienced advocate, and law students would often bring both zeal and imagination to the task. And the alternative, of course, may be no representation at all. Such a system need not cost the government anything; indeed, it should economize not only on detention resources but also on the time of IJs, government lawyers, and court personnel. The EOIR or INS might facilitate its creation by adapting their rules to encourage such representation, by increasing video-conferencing where the travel distances are a problem, and, if necessary, by granting small subventions to qualified clinics.

#### 4. *Co-location of IJs and detained aliens.*

A cardinal principle of a rational detention policy should be to bring the immigration court to where detained aliens are concentrated—or if possible, to actually locate the court there. The practical, logistical difficulties of moving aliens to an immigration court that is geographically distant—or



even on the other side of a large city—are formidable, involving complex coordination of schedules, transportation arrangements, security requirements, staffing needs, and often impositions on a public that resents having to mingle with manacled criminals in government buildings.<sup>30</sup> A major effect of these difficulties is to increase the amount of unnecessary time that aliens must spend in detention before being either removed or released.

Much has already been done to implement this co-location principle through the creation of the IHPs in federal and state prisons, the placement of IJs in some SPCs, and some use of video-conferencing (a kind of technological co-location). Nevertheless, there are still many large concentrations of removable aliens in locations in which there are no IJs either resident or visiting. One example is in the Dallas district, where there is no SPC at all and aliens must be transported long distances to their hearings. Another is Camp Barrett, to which numerous aliens apprehended in the busiest Border Patrol sectors must be sent after initial processing. They must be detained until enough of them are gathered to justify busing them to Camp Barrett, where they are detained under contract with San Diego County at a cost to the INS of \$65 per day, only to be bused back (when IJ schedules permit) to San Diego for “QD” (quick deportation) hearings at which virtually all of them concede removability. This is costly, wasteful, and results in much unnecessary detention time for aliens almost all of whom want to be quickly removed. There seem to be similar situations in virtually all districts.

Certain obstacles to greater co-location are mundane but manageable. The creation of the necessary courtroom space, for example, takes time—although the use of temporary trailers to house the IJs might speed the process. Video-conferencing requires the purchase of equipment and training. Other obstacles, however, seem more narrowly bureaucratic, fueled by conflicts between INS and EOIR over turf and the professional self-image of some IJs, who take their status as independent judges very seriously and do not wish to co-locate with the INS, much less have their schedules driven by INS priorities and detention budgets. Whatever the merits of these disputes, their inescapable consequence is to exacerbate the logistical problems in getting detained aliens to and through their removal hearings and thus to increase the amount of unwarranted detention. I have already suggested that this problem can best (and perhaps only) be resolved if the Deputy Attorney General adopts a more active policy direction and coordination role, rather than relying entirely on the INS and EOIR to engage in their protracted negotiations of local *modus vivendi*.

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30. These difficulties are discussed at greater length below under the rubric of the “better logistical support” strategy.

### 5. *Night courts.*

Many removable aliens are apprehended in the late afternoon or evening. Many of these would both qualify for and prefer a QE (quick exclusion) or QD but because they cannot be brought before an IJ for a hearing that evening or the next day, they must be detained over night and often transported elsewhere for further detention until a hearing can be scheduled. In the San Diego district, for example, apprehended aliens detained over night must be flown (at considerable cost) to Las Vegas where they are further detained until their hearing date, when they must be flown back. Short of co-location, this unnecessary detention and cost could be minimized by holding some hearings in the evening. Some IJs have indicated that they would prefer a night shift, and such a system would also use IJs and EOIR facilities more efficiently at any given level of IJ staffing. The "port courts," which have been used successfully in a few venues, are the obvious analogy.

### 6. *Better EOIR scheduling.*

A number of discrete changes should be considered:

First, if minimizing unnecessary detention is truly a central policy goal, then each DD should regularly supply the EOIR with early hearing priority lists compiled with a view to minimizing such detention, and the EOIR should be bound by these priorities in its scheduling activity, absent other overriding factors. As noted elsewhere in this paper, the leading priorities should include unaccompanied minors, family groups, and aggravated felons whose swift removal is not likely to be impeded by travel document or other problems.

Second, for the vast majority of removable aliens who genuinely prefer QD to a continuance-cum-continued detention, IJs should be instructed either to immediately convert a calendar call to an on-the-record hearing (if the alien has, or genuinely waives, counsel) or to set the case over only until the next day, even if doing so means that a different IJ will conduct that hearing. The statutory requirement that fourteen days elapse between issuance of the OTSC and hearing should also be reviewed to see whether a more refined rule might protect the right to counsel without producing unnecessary and unwanted detention.

Third, EOIR should reexamine other procedural rules that impede aliens who prefer immediate removal from knowingly waiving their rights to additional time, thereby keeping them in detention and preventing them from obtaining the QDs that they want. To the same end, the INS should seek to reopen all consent decrees that have outlived their usefulness and that have the perverse consequences of increasing the amount of unnecessary alien detention. An example may be the *Orantes-Hernandez* decree, now more than eight years old, which requires the INS to detain a certain class of aliens in the area where they were apprehended and to allow many days to elapse

before holding removal hearings, days during which they may be detained for no good reason.

Fourth, the EOIR and INS should be directed to agree on performance standards for IJs designed to assure their efficient case scheduling and processing and their responsiveness to departmental priorities. These standards, however, must not seek to regulate adjudication outcomes as to which IJ independence must be preserved. The EOIR, like the INS, should be required to publish regular periodic reports with statistical indices bearing on its compliance with these performance standards, including those relating to the efficiency of adjudications.

#### 7. *Better EOIR staffing.*

IJ time is at a high premium. Fortunately, the vast majority of removal hearings are routine and virtually *pro forma*; even in more complicated cases, some time-consuming aspects of the hearing (e.g., the recitation of rights and remedies) are routine. EOIR should seek to use IJ adjuncts—an EOIR equivalent of special masters or magistrates in federal courts—to assist, and substitute for, IJs in performing these routine tasks wherever possible.

#### 8. *Faster EOIR transmission of final orders.*

Apparently, much time can elapse between the time EOIR issues final orders and the time INS acts to remove the aliens. To the extent that this delay is the result not of INS personnel shortages but of EOIR's slowness in transmitting the information to the INS, the EOIR should be able to provide that information immediately to the INS in computerized form so that the INS can act on it without delay.

#### 9. *Administrative deportation.*

In 1994, Congress authorized DDs to dispense with EOIR proceedings and instead to conduct administrative deportation hearings in the case of non-LPR aggravated felons who are not eligible for relief. According to interviews in several of the largest district offices, this option has been a dead letter even though the INS completed full implementation of the necessary procedures in September 1995. In the New York district, not a single administrative deportation has been undertaken. In San Diego there has been only one so far. At least one IHP<sup>31</sup> has been using it extensively and without apparent problems.

The main obstacle to the use of this authority appears to have been the unwillingness of INS counsel to proceed with proof less than a certified copy of the aggravated felony conviction, a copy that often takes a long time to

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31. See section II (D)(1) *infra*.

obtain from the state or federal court of conviction. There was considerable dispute between the INS counsel and some federal prosecutors (e.g., the U.S. Attorney in San Diego) concerning the adequacy of documentation. In the 1996 amendments, Congress resolved this dispute in new section 240(c)(3)(B) and (C) by authorizing proof of criminal convictions through the use of less formal, traditional documentation.

With this impasse resolved, there is now more reason to employ a sanction that, according to some officials, could be used to remove hundreds of criminal aliens whose eventual removal by an IJ is a foregone conclusion and who are consuming precious detention resources in the meanwhile. Indeed, Congress has now (in new section 238(b)) extended the availability of the administrative deportation sanction beyond its old target population.

#### D. *More Efficient Removal Processes*

Much unnecessary detention occurs because the INS is unable expeditiously to effect the alien's removal after a final order of removal has been entered and all appeals have been exhausted. One important aspect of the problem—the lack of logistical support—is so pervasive that it is considered below as a separate strategy. Here, I discuss several other problem areas.

##### 1. *Improve and extend the IHP.*

The IHP is an obviously desirable strategy for minimizing unnecessary detention and accelerating removals; it should be extended wherever possible. I have identified several problems with the program's operation that, if remedied, could greatly improve its effectiveness. (I also recognize that the INS is enhancing the IHP in a number of respects, so it may be that these problems are already being addressed.)

First, approximately one-third of the aliens in BOP custody (and a presumably larger proportion of those in state and local custody) are serving short sentences (under 12 months), which has limited the usefulness of the IHP as to them. However, if the removal proceedings could be commenced at an earlier stage in their process—at the point of conviction rather than commitment to prison—months might be added to the time available to the INS for completing the hearing and removal process before having to take these criminals into INS custody. As I understand it, section 507 of the Immigration Act of 1990 required the states, as a condition of certain federal grants, to notify the INS within 30 days of a conviction and gives the states 30 more days to then comply with an INS request for a certified record of conviction. Apparently, the states have not been notifying the INS or sending the records. The federal courts (under 28 U.S.C. § 1930) are not required to cooperate with the INS in this respect; the INS must initiate the process and copy the records itself. This seems to be an impasse that should be relatively easy to remedy, especially since notification and transmission of records are

tasks that will have to be done at some point anyway; the only question is when it will occur. It should also be possible for the courts to transmit in computerized form (rather than in certified hard copy) the information that the INS needs to commence the IHP proceedings—even if it will need hard copy later.

Second, as noted in section II (C)(9) above, some IHPs use administrative deportation extensively—Huntsville, Texas has been using it with great success and no problems for 30% of its cases (almost all that are statutorily eligible for it, about thirty per month), avoiding an estimated ten to fifteen days of detention time per case—while other IHPs apparently do not. This should be made an agency-wide priority.

### 2. *Station agents at local jails.*

Many criminal removable aliens are temporarily incarcerated in local jails when they come to the INS's attention. By stationing INS agents at those jails, the INS could quickly identify such aliens as potentially removable as soon as they were brought in by the local police or county sheriff, process and schedule them for QDs or removal hearings, and perhaps even initiate the application for travel documents (see immediately below). Rapid turnaround of this kind could save significant detention resources.

Obviously, the INS lacks the staff to station agents at all of the thousands of local jails in the United States but it might pursue this selectively, targeting those jails that are likely to receive the most removable aliens. For example, this approach—a kind of quasi-IHP in short-term facilities—was tried in the Los Angeles County Jail (apparently with success) and has been particularly effective in the Dallas district, which lacks its own SPC. It would also be useful in areas with SPCs by telescoping the removal process. An additional source of funding for cooperative arrangements with local jails may be found in section 328 of IIRIRA, which authorizes the use of State Criminal Alien Assistance Program appropriations for defraying local jails' incarceration costs.

### 3. *Facilitate travel documents.*

Unless the INS can obtain the travel documents required by the country to which the alien is to be returned, the alien—unless he is releasable—must remain in detention, perhaps indefinitely. A number of countries are particularly recalcitrant in issuing these travel documents; Vietnam, Cuba, and Jamaica are among the worst offenders. This constitutes a serious impediment to removal; the aliens in question, disproportionately criminals, are potential “lifera” in INS detention and create vexing disciplinary and morale problems in the facilities. At bottom, the problem is a political-diplomatic one that can only be resolved by the State Department in negotiations with the offending countries. In these negotiations, the State Department has some

formidable legal and political weapons. Thus the State Department is mandated by section 243(g) of the immigration statute to deny visa applications from countries that the Attorney General finds fail to repatriate their citizens promptly. Some countries such as Mexico already waive travel document requirements; the State Department could also press others to do so by threatening various kinds of reprisals and lodging complaints with international tribunals. Obviously, this is a delicate matter for negotiation between the Justice and State departments, but the legal authority is clear. The Department's incentives to "get tough" with offenders might be stronger if it were required to pay for the costs of continuing detention after the point at which the INS has completed the application for travel documents and the additional delay is entirely due to the source country's recalcitrance.

In addition, there are several ways in which the INS could improve the situation:

(a) The INS should facilitate the consular interviews that some source countries require by paying to have consuls brought to detention facilities where a number of their citizens are awaiting removal, and by seeking the appointment of "honorary consuls" who can do the local interviewing.

(b) The INS should attempt to initiate the travel document process sooner. In IHPs, it should train the IHP staff, who are not now responsible for doing so, about how to procure them.

(c) A more radical, but possibly effective tactic would be for the INS, having done what it reasonably can to obtain documentation from the source country, to put the alien on a plane back to his own country after informing the country's immigration agency (and the local press) that it was doing so. Alternatively, it might escort him back and leave him at the source country's border. A less radical approach would be to for the United States to assure the source country that if it accepts its national and it turns out that he has a right to return to the United States, the United States will quickly take him back.

(d) When placing aliens in detention, the INS should seek to predict which aliens are likely to be medium- and long-term detainees and, insofar as possible, should concentrate them in one or a few facilities where, among other things, the process of procuring travel documents can be more readily centralized and accelerated.

#### 4. *Serving criminal sentences abroad.*

Much INS detention (as well as federal or state imprisonment) could be avoided if aliens convicted of serious crimes in the United States for which removal is authorized were to serve all or part of their criminal sentences—at the United States' expense—in the countries to which they are to be returned rather than in the United States. Arguably, all parties would be better off. The United States would economize on scarce detention resources by purchasing imprisonment abroad at a lower cost and avoiding the need for INS detention. The source country would garner compensation for its custodial services.

The criminal alien's interests, while of lesser moment, might also be served by the arrangement: he would be spared an additional period of INS detention pending removal.<sup>32</sup>

In sections 330 and 331 of IIRIRA, Congress pressed the President to negotiate and renegotiate treaties providing for such home country incarceration. The INS could facilitate this process by beginning to establish the necessary contacts and consultations with the criminal justice systems of those countries for implementing such arrangements.

### E. *Logistical Support*

A rational, efficient detention system requires substantial logistical support and infrastructure. Unfortunately, although this support has improved it is still inadequate in some fundamental respects, resulting in much detention that is unnecessary and more costly than it should be:

#### 1. *Bed capacity.*

The number of beds available for INS detention has increased significantly in recent years. The problem, however, is not simply that the number of beds remains inadequate; it is also that they are not always located where the detainable aliens are. In some cities, there is no excess capacity. There, the INS has had to improvise—overcrowding its own facilities, contracting with local jails, and releasing aliens who are not mandatory detainees but whom the agency believes should be detained anyway to avoid public danger or prevent flight. (I shall call these aliens “potential detainees.”) In other locations, as one official put it, “there are empty beds but they are in the wrong places.”

This point, while obvious, is an important one for policy. It is tempting to focus on new beds, as they would enable the INS to detain more potential detainees. But while the agency continues to seek new beds, it should also recognize the possibility that it might even be better off with fewer beds if they were located near removable alien concentrations, than with more beds located in inconvenient areas. The emphasis, therefore, should be on bed location and hence on the flexible deployability of detention resources. The “optimization” system that the agency is developing should help achieve this. In addition, the INS should focus on the many suggestions in this paper for utilizing existing, well-located beds more efficiently, and also on the particular suggestions for developing lower security detention alternatives—

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32. The conditions of his imprisonment, of course, might be harsher than they would have been in the United States. In order to minimize the risk that the source countries would, through bribery or otherwise, fail to incarcerate the criminals, the U.S. consulates could make random checks on whether these criminals in fact served the time there for which the United States was paying. Negotiating the right to make such random checks in other countries would be difficult.

especially those such as trailers or tents whose location need not be permanently fixed—in areas of removable alien concentrations.

### 2. *Transportation equipment.*

Aliens cannot be moved in and out of detention, and their removals cannot be effectuated, without a fleet of buses and planes adequate to the INS's logistical needs. The existing fleet of buses and vans is ancient and in constant need of repair, which is expensive and reduces its usefulness to the detention and removal programs. Many of these vehicles, which are often used to transport hardened criminals long distances, lack adequate security for the INS escorts, especially in light of policy guidelines restricting the use of manacles. INS use of the Marshal's Service fleet of aircraft has been helpful, but the availability of the planes is often a problem. Only a significantly increased investment by the INS in new equipment is likely to improve this situation. Quite apart from its contribution to the agency's effectiveness in detaining and removing aliens, such investment might well produce budgetary savings due to lower maintenance costs.

### 3. *Bag-and-baggage operations.*

Obviously, more effective B&B (bag-and-baggage) operations are desirable. A less obvious fact is that they constitute an alternative to detention. If more B&B officers are available to take custody of, and actually remove, removable aliens who have been released, the pressures on INS detention capacity will be reduced. Commendably, the INS is already moving in this direction. As suggested above, some privatization of monitoring and B&B operations, if accompanied by safeguards against abuse, might increase their effectiveness by strengthening their incentives to effect actual removals.

## F. *Criminal Prosecution*

The criminal prosecution of certain categories of removable aliens—particularly drug smugglers and recidivists—for their immigration crimes has long been an INS enforcement goal. Unfortunately, this strategy has remained on the shelf due to the reluctance of many federal prosecutors to devote their limited resources to immigration offenses. Congressional pressure, expanded legal authority, additional resources, and a growing sense that immigration crimes can pose significant threats to public health and safety have led some prosecutors to dust off the criminal provisions of the immigration statute and bring cases against offenders. Where this strategy has been employed, it appears to have been quite effective. It should be deployed more widely.

The San Diego sector of the Border Patrol has been particularly zealous in criminal prosecutions of recidivist illegal entrants. There, the prosecution unit of the Border Patrol, consisting of five permanent agents and ten



detainees, works closely with the local U.S. Attorney to prosecute previously-removed offenders and their co-conspirators under 8 U.S.C. §§ 1324, 1326, and 1327. After the prosecution unit works up the cases, the U.S. Attorney usually offers the defendant a “two-year package” under which the alien will plead guilty and serve two years in federal prison, stipulate to removal before an IJ while still in BOP or Marshal’s Service custody (often without going to an SPC), and thus submit to removal immediately upon completion of his sentence. (If the defendant rejects this offer, the U.S. Attorney will seek the maximum criminal penalty of seven years or more). Because of the stipulated removal, the process obviates the need for a full removal hearing (an advantage over the IHP), thereby minimizing INS detention.

The U.S. Attorney in San Diego considers these to be very attractive cases for prosecution; the cases are easy to win,<sup>33</sup> serious crimes are punished and (hopefully) deterred, and the defendants serves significant federal time. Under this program, the U.S. Attorney has prosecuted a large number of cases—approximately 700 under section 1326 and 50 under section 1324, just in the last year. Similar programs have recently been instituted, albeit on a smaller scale, in five other Border Patrol sectors and in the Eastern District of New York.

One limitation on criminal prosecutions for alien smuggling (as distinguished from illegal entry after prior removal) is that although Congress increased the maximum penalty in 1994, the U.S. Sentencing Guidelines have not been amended and still specify a sentence of only zero to six months. This sentence is too short to encourage the kind of plea bargain, including a stipulated removal, described above. Moreover, alien smuggling is still not an aggravated felony under current law if the alien has been an LPR for more than five years or if the smuggling is not “for gain”—restrictions that Congress may have overlooked and want to amend. Both of these problems should be relatively easy to remedy.

However, the main factor limiting the number of criminal prosecutions, both for illegal re-entry and for smuggling, is not the number of offenders who are arrested but the number of BOP detention beds available for defendants and for material witnesses (who average two per case and typically must be detained for a period of four to twelve months).<sup>34</sup> The Border Patrol prosecution is now processing an average of two criminal cases per day; it claims that if adequate BOP detention space were available, it could easily process twenty-one cases per day (one case for each of seven stations on each of three daily shifts).

Here, then, is one more context in which the INS, by investing in more detention capacity now, might well diminish the need for detention in the

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33. Smuggling cases are harder to win due to issues such as the Border Patrol’s probable cause to stop the vehicle and the smuggler’s profit motive. Even so, the prosecution’s success rate is very high.

34. Once the defendant is arraigned (usually within twenty-four hours after arrest), his detention becomes the administrative and budgetary responsibility of the BOP, not the INS.

future as a result of both the general deterrence exerted by criminal prosecutions and the reduced detention made possible by stipulated removals.

### G. *Detention Management*

Whatever specific detention policies the INS adopts must be managed in a way that support their effective implementation. Four aspects of detention management need particular attention: incentive systems; information systems; the rationalization of INS functions; and policy direction.

#### 1. *Incentives.*

In a number of areas of INS detention, there appears to be a mismatch between particular units' programmatic responsibilities and their bureaucratic incentives. Some examples will suffice to illustrate what I suspect is a more general problem.

(a) So long as units are rewarded for actual "removals," the facilities like Oakdale that house large concentrations of removable aliens and transport them to the border will receive more credit than they deserve relative to those units. These units usually are in urban districts with inadequate detention capacity, that process and detain those aliens, often for long periods of time, but do not actually move them across the border. Although headquarters staff may properly exhort the field offices to be team players and focus on the program as a whole rather than on their own small piece of it, the agency should design its data, reporting, and reward systems in ways that minimize parochial credit-grabbing and blame-avoidance by field officers.

(b) The proceeds of the INS's bond enforcement actions go not to the INS but to the general treasury.

(c) In San Diego (and perhaps other districts), the district office controls both the detention beds and the port of entry. It therefore receives credit for removals. Because the Border Patrol statistics reflect only the apprehensions between the ports of entry rather than those at them, it receives no credit for any removals. The DD (or so the Border Patrol claims) is primarily concerned to obtain detention space for the ports of entry, for whose removals he gains bureaucratic credit. Thus the Border Patrol must compete for detention space with the DD and with the BOP/Marshal's Service, which are also seeking beds in the area.

It is virtually impossible to design a perfect remedy for skewed incentives in a complex bureaucratic system lacking the focus of a profit criterion; any new incentive system, in curing one distortion, may simply create another. This is even true of privatization. Nevertheless, certain distortions are more problematic than others. The competition among the Border Patrol, DD, and BOP for credit for removals and for beds seems particularly wasteful. Two approaches discussed below—centralized responsibility for the policies of all SPCs, and an automated information system for coordinating the reservation

of detention beds throughout a locality and region—should improve matters. The contracting out of some enforcement functions to private firms, discussed earlier, may also help to align incentives and policy goals better—if the contract is well drafted and the contractor is properly supervised by the agency.

A quite different incentives issue—less a problem than an opportunity—is the possibility of taxing illegal aliens for some of the costs that they impose on the enforcement and detention systems. This notion is not far-fetched. First, some districts already charge aliens who are being voluntarily returned to the border a kind of user fee for the bus ride. The Dallas District takes \$25 from each alien who has it to spare (none is left penniless) and gives him a receipt; the proceeds of these charges are sufficient to pay for half of the bus charters that the district uses. Second, although many aliens have little money on them when they are apprehended by the INS, many others—particularly smugglers, drug traffickers, and other serious criminals—have hundreds or thousands of dollars in their possession. Just as many states have begun to charge criminal convicts for some of the costs of their incarceration, the INS might consider doing the same with respect to removable aliens who are apprehended with the fruits of their illegal work in their possession and can afford to pay the charge.

## 2. *Information systems.*

Sound detention decision making depends on supplying good and timely information to both the policy and field staff. The effectiveness of virtually every policy option discussed in this paper ultimately depends on such information flow. My strong impression is that such information is now lacking, although progress is definitely being made.

(a) Once an alien is apprehended, it is hard for INS staff to track where the alien is in the process and what his detention-relevant characteristics are. The A-files are not computerized and must be obtained from the Files Control Office (FCO), which cannot move the files to the field fast enough to keep up with the alien's physical and processing locations. The agency, of course, has long been keenly aware of this problem and is working hard to remedy it. In the meanwhile, however, the problem might be addressed by using optical scanners to transform the physical files to computer-readable form, which could then be transmitted instantaneously around the country.

(b) In principle, the development and deployment of the IDENT system should help enormously by enabling enforcement officials to learn about an alien's prior entries and criminal record in the United States. Unfortunately, a low-level glitch has developed that is impairing its usefulness. Although IDENT's interface with state criminal justice information systems like California's AFIS is crucial, several months now elapse between the time when the INS receives data from AFIS, inputs that data, and then sends the data to Washington for inputting into IDENT. During this time lag, a

removed alien may conceivably re-enter several times and commit several crimes. My impression is that this lag time is growing, not diminishing but also that this problem can readily be solved by increasing the inputting staff, by having the field input the data directly into IDENT without having to send it to Washington, or perhaps in other ways.

(c) The information systems, of course, contain little if any data about the alien's criminal activity in the country of origin; yet this information would be very valuable to the INS in making its detention and criminal charging decisions. It would be worth investigating whether a modest investment in improving, say, Mexico's criminal justice information system would have any significant payoff for the INS's enforcement program.

(d) If diversion or "soft" detention alternatives are to be useful, the INS must have better systems for classifying aliens with respect to their risk of violence and flight, which in turn means that the agency needs to obtain the underlying factual data enabling it to evaluate those risks. Thus there are two separate needs—for the factual data and for a classification system.

IDENT should certainly help, but more could be done to augment INS's data base. One particularly egregious missed opportunity is the INS's failure to require the Asylum Office to obtain information on affirmative asylum applicants who are initially released but whose applications may later be denied, information that may then become essential to taking them into custody and removing them. At present, there is no booking process, fingerprinting, photo, or other system that would facilitate subsequent removal. Another possibility is to instruct the inspectors to process aliens who are denied entry at the ports of entry and who withdraw their applications. I am told that for the inspectors to process these aliens—that is, to gather information about them for entry into IDENT—would require only five minutes of inspector time per alien, a minimal cost. (I am not certain whether this estimate includes inputting the data in computer-usable form.) There surely are other opportunities to exploit low-cost sources of data for IDENT, including information (discussed immediately above) about criminal involvement in the alien's home country.

As to classification, there is a pressing need for a national system that can support various INS detention decisions—decisions about whether to detain, the level of bond (if relevant), the appropriate facility for detention, the appropriate housing and work unit for placement within a facility, the likely duration of stay, etc. Currently, the INS has only the CAPES classification system. Another system must be developed because CAPES was devised for the Western Region, considers only the alien's gender and risk of violence, and seems inappropriate for more widespread use by the agency. It appears that new system development, however, is only in the earliest stages. The variables that the INS now emphasizes—country of origin, criminal vs. administrative; aggravated felonies vs. other crimes; male vs. female; adult vs. minor; and LPR vs. illegal—are crude. A rational detention-oriented

information system would also attempt to classify them (if known) according to family characteristics; history of prior entries and removals; history of absconding; criminal recidivism; gang membership; removability; legal representation, etc. Some of these classification-relevant variables can perhaps be used as reasonably reliable proxies for other important variables about which the INS cannot obtain direct information. The alien's country of origin and legal representation, for example, often are good indicators of the difficulty that the INS will have in obtaining a final order and procuring travel documents. Gang membership is probably a strong clue both as to the risk of violence and as to the appropriate detention units in which aliens should be kept.

(e) Another way in which better information systems could support sound detention decision making is to provide the raw data for policy analysis. It appears that there is much policy-relevant data that the INS either has not gathered or has not used to design its policies. For example, it does not know the average lengths-of-stay in INS detention of aliens classified in different ways, much less disaggregating those averages into more refined categories. Here, averages may be a misleading basis for policy because they are disproportionately affected by the "lifers" who cannot be returned or by the LPRs who more aggressively contest their removals. The DACS system has limited utility; it was designed with case-tracking in mind and is not suitable for supporting other management and policy functions.

(f) Some potentially useful sources of data are literally right under the INS's nose; these data only need to be gathered and analyzed in order to inform decision makers. For example, the inspectors at the ports of entry do not know whether or not the admission decisions they make are "correct" because the INS has not conducted retrospective studies comparing inspectors' decisions with those that are appealed to their superiors or to the courts. As noted earlier, the agency has not systematically studied the relationship between particular bond levels and absconding rates. It has not studied the cost-effectiveness of its "internal repatriation" program that flies aliens back into the interior, far from the border.

(g) In some cases, the valuable information already exists in one or more places within the INS; it simply has to be brought together and integrated in order to support better decision making. For example, the San Diego sector of the Border Patrol has developed a system that centralizes and computerizes through the ATMS network information about the location of detainable aliens in the sector's custody, and about the location and availability of detention officers and buses. This "hub" system uses that information to even out workloads and to prioritize the allocation of these scarce resources. It should be extended, however, so that it interfaces with the SPCs in the region, creating a coordinated, automated "reservation" system for detention beds applicable to all INS-run facilities.

### 3. *Functional rationalization.*

I have already discussed the importance of considering whether the INS should be responsible for the medium- and short-term detention functions at all, and if it is to continue to bear that responsibility, whether and to what extent those functions should be contracted out to private vendors.

Another functional-structural issue is the importance of administrative discretion in detention decision making. In AEDPA, Congress withdrew from the INS much of the discretion that it has customarily exercised concerning whom to detain, for how long, and under what circumstances. Although some of this discretion was restored in IIRIRA, conditioned on appropriate certifications by the Attorney General. It may not suffice to enable the agency to maximize the fairness and cost-effectiveness of its detention program. The INS should try to make the case to Congress that the new categorical detention requirements create serious administrative difficulties, waste scarce detention resources, and will entail much individual hardship to the families of U.S. citizens and LPRs. But it must also satisfy Congress that this discretion, if restored, will not be abused.

### 4. *Policy direction.*

Detention officials in the field often lament the failure of the agency's leadership to provide clear policy guidance, uniform standards, and adequate training. This failure, which undermines accountability and may contribute to the many successful lawsuits filed against the INS, seems to take several forms.

First, each SPC operates according to its own rules and standards instead of being "on the same book." Many basic policy questions are left to the uncertain judgment of the local facility administrators. The current SPC operating manual dates back to 1983 and is viewed as not being very useful in helping detention officials deal with problems arising from important changes since then—the most important being the fact that detainees are now more likely to be hardened criminals picked up from jail or prison with few prospects for early release than a field or factory worker who is prepared to go back home.<sup>35</sup> SPC officials receive detention priorities from Washington but say that even these change frequently. (Some of these complaints, of course, may simply reflect the normal and often healthy tensions between headquarters and the field in any complex organization.)

To the extent that the differential operating modes of various SPCs are a genuine problem, the INS should consider how it can best achieve the optimal level of uniformity. One possibility is to adopt a more centralized, albeit flexible management system for the SPCs, rather than leaving them

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35. I am informed that a new SPC manual is being prepared and will be completed within the next year or so.

under the control of the local DDs, who may be unduly influenced by local political and other factors in their detention decisions. Another is to contract out many of the SPCs' functions under a more or less uniform contract centrally drafted and negotiated.

In suggesting the possibility of a more centralized detention management system, I certainly do not mean to minimize the political resistance that such a proposal would generate. Some district directors would surely raise objections to the loss of local control and flexibility that a more centralized system would entail; on the other hand, other district directors who are chronically short of detention space might support such a change because it might increase the detention capacity available to them and perhaps reduce the drain of existing resources through unnecessary transportation costs, high charges for obtaining short-term space, etc. Nor am I insensitive to the tradeoffs that centralization would inevitably involve. Any centralized system is likely to sacrifice responsiveness to local variations in the interest of national uniformity.

With respect to detention, however, there is a strong argument that greater uniformity would be highly desirable given the restrictions on liberty, the risks arising from extended confinement, and the dangers of unequal treatment in custody that detention necessarily entail. As in any administrative arrangement, there exists a range of possible compromises between the extremes of local autonomy and centralized control. Moreover, not all functions involved in a detention management system need to be organized at the same level; some could be performed in Washington, some at the regional level, and some in the district or even the SPC level. I do not know precisely where the INS should strike the overall balance or which functions should be located where. These are questions that can only be answered by a major management study. What does seem clear, however, is that the current system is more fragmented than it needs to be and that more control from the regions and the center could improve the system.

Second, many detention officers appear to perceive their training as inadequate to their responsibilities, half-hearted, unprofessional, and highly variable. The Immigration Officers Basic Training course, for example, is more geared to district office operations, which tend to involve shorter-term detainees, than to SPC operations, which involve more criminals and long-termers. Detention enforcement officers' training focuses on weapons, detention forms, bus driving, and conditions of custody, while providing almost no background in detention and removal law. When the law changes, as it now frequently does, little training concerning the new law is given. Establishing joint INS-BOP training programs might improve the quality and relevance of INS staff training.

Special training for offices-in-charge in the SPCs is also needed; much of the BOP training for its wardens would presumably be useful to INS detention managers. Although training is widely viewed in the field as being

a low priority with INS, it is striking that inadequate training is a focus of many successful lawsuits against the INS. Field officials also need more guidance as to the meaning of the laws that they must administer, particularly in view of the rapid changes occurring in the legal environment.

### CONCLUSION

In the real world of immigration politics and policy, the detention system is bound to be compromised in a number of respects. In Part I, I described what I take to be the most important goals of the detention system and the principal constraints that necessitate these compromises. Even recognizing these realities, however, it is worth concluding this white paper by briefly sketching the major principles that an ideal detention system would exemplify, a vision of an ideal future toward which the INS might wish to strive. The strategies and policy options discussed in Part II of the paper are designed to move the agency in this direction. The two critical principles are equality of treatment and cost-effectiveness.

**EQUALITY OF TREATMENT.** The total population of detainable aliens is very diverse in many ways: country of origin; risk of flight; legal status; strength of claims and equities; age; gender; etc. Despite these differences, the detention system should be organized so that every alien who comes within the jurisdiction of the INS stands roughly the same chance of being detained, and if detained being placed in roughly similar conditions of confinement, as every other alien who is similarly circumstanced. The INS, as a federal agency with a nationwide mission and obligations defined by a more or less uniform system of federal law, cannot countenance significant local variations in the treatment of individuals of whom it takes custody. This principle of equality of treatment requires considerable standardization of procedures, criteria, and standards of confinement, which in turn implies that officials in the field must be circumscribed in the discretion that they enjoy. Greater centralization of the system may be necessary to achieve this, even if it means some reduction in the freedom of action that district directors and SPCs can exercise.

A variety of fairly standard administrative techniques are available to attain greater equality of treatment without unduly sacrificing the values of flexibility and responsiveness to individual and local needs. These techniques include issuance of clearer rules coupled with well-defined procedures and criteria for granting exceptions; greater consultation between field officials and headquarters in the development of rules; more comprehensive, up-to-date information systems; improved training; improved systems for auditing and inspecting field operations; rotation of personnel between headquarters and the field; more rational incentives to harmonize the imperatives of field operations with national goals and standards; and effective leadership at all levels.



In an ideal detention system, both the policies and the operations of INS and the EOIR would be far more closely coordinated so that aliens throughout the system receive similar administrative and adjudicatory procedures and outcomes. This coordination would occur at all levels: the Deputy Attorney General; the INS Commissioner; the Director of EOIR; district directors, SPC officials, and immigration judges.

**COST-EFFECTIVENESS.** Ideally, each additional detention bed would be used in a way that maximizes the achievement of the INS's detention goals. This requires a well-developed, well-understood set of priorities which is responsive to changes in conditions and congressional mandates. In order to minimize waste of scarce detention resources, the incentives that drive detention managers would not be unduly dominated by immediate and local pressures but would be designed to encourage a longer-term, system-wide view. Congress would return to the INS some degree of discretion over whom and under what conditions to detain aliens, subject to INS compliance with congressional priorities.

The INS would create incentives—through publicity, screening, arrangements with source countries, and sanctions—to discourage undocumented aliens or documented aliens who are likely to violate visa restrictions from reaching the United States in the first place unless they are asylum-seekers with credible claims. The agency would install information systems that provide inspectors, enforcement officials, and detention managers with timely information identifying the alien as fully as possible, helping the manager to gauge the risk of flight that he poses, indicates any special needs of the alien (e.g., juveniles), his immigration history, legal status, and stage of processing, and the locations of available detention resources. Bonding requirements would reflect this information and would create appropriate incentives for the alien to appear for his hearings or removal.

The detention of aliens would take place in the least restrictive conditions necessary to assure his timely appearance for hearings and removal. Since the least restrictive condition will differ from alien to alien, the "one size fits all" approach would be jettisoned in favor of a broader menu of detention possibilities. In particular, those aliens who have special needs such as juveniles, women, and families would be maintained in sites and under conditions that met those needs as fully as possible. The conditions of detention for all aliens would be designed to deter illegal migration, maintain public security and safety, and minimize the cost to the public while at the same time providing aliens in custody with conditions meeting their minimum safety, health, educational, and recreational needs. To the extent that private operation of enforcement and detention functions could be shown to be achieve these goals in full compliance with the law but at a lower cost to taxpayers, those functions would be privatized under carefully drawn and scrupulously enforced contracts assuring that public responsibilities are met.

The processes of administrative and judicial review would be streamlined with a view to minimizing the unnecessary use of detention resources, consistent with the observance of all legal requirements to assure due process. To these ends, these administrative and adjudicative resources would be carefully coordinated among the INS, the EOIR, state and federal prisons, local jails, and foreign consuls. Performance standards would be used to monitor INS and EOIR activities and to encourage a high level of coordination and responsiveness to departmental priorities.

Similarly, the processes for removal of aliens would also be streamlined and coordinated, and the State Department would use its good offices to secure the cooperation of source country governments in the prompt issuance of travel documents, the incarceration of criminals who would otherwise have to be held in U.S. prisons, and in other ways. Necessary logistical support for the surveillance, detention, transportation, and removal of aliens would be provided, and fiscal and bureaucratic incentives would be arranged in order that this support be sustained and increased. A high priority would be assigned to the allocation of detention resources for the support of strategically deployed, high impact criminal prosecutions of illegal aliens and smugglers.