

# REMOVING CRIMINAL ALIENS: THE PITFALLS AND PROMISES OF FEDERALISM

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## I. INTRODUCTION

For fifteen years, the United States has experienced high levels of immigration.<sup>1</sup> Although analysts debate the effects and merits of this development,<sup>2</sup> all acknowledge one

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1. From 1981 through 1995, over twelve million legal immigrants were admitted to the United States. See U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1997, at 10 (117th ed. 1997).

2. See generally NATIONAL RESEARCH COUNCIL, THE NEW AMERICANS: ECONOMIC, DEMOGRAPHIC AND FISCAL EFFECTS OF IMMIGRATION (1997). See also, e.g., PETER BRIMELOW, ALIEN NATION: COMMON SENSE ABOUT AMERICA'S IMMIGRATION DISASTER (1995) (severely criticizing recent immigration); PETER H. SCHUCK, CITIZENS, STRANGERS, AND IN-BETWEENS: ESSAYS ON IMMIGRATION AND CITIZENSHIP, ch. 14 (1998) (reviewing Brimelow and defending recent immigration); MICHAEL FIX & JEFFREY S. PASSEL, IMMIGRATION AND IMMIGRANTS: SETTING THE RECORD STRAIGHT (1994) (highlighting some economic benefits and costs of immigration).

undesirable consequence: an increasing number of aliens commit crimes in the United States but are not removed.<sup>3</sup> Decrying the costs of arresting, prosecuting, and incarcerating these criminal aliens, politicians in jurisdictions where immigrants cluster have implored the federal government for more than a decade to remove the illegal aliens as quickly as possible.<sup>4</sup>

This chorus of complaints began as early as July, 1985, when Senator Alfonse D'Amato of New York asked the Government Accounting Office (GAO) to investigate the performance of the Immigration and Naturalization Service (INS) in removing criminal aliens in the New York City area.<sup>5</sup> In the first of many such reports during the next decade, the GAO announced what would come to be a familiar litany of alarming findings. A significant share of arrested felons were aliens. The vast majority of them were quickly released by local law enforcement agencies without any INS screening. Most of the arrested aliens convicted of crimes for which they ought to have been removed were released pending completion of deportation proceedings and either absconded or were arrested only after they committed new crimes. Few who were released were actually removed. The INS often failed to prevent the re-entry of the small percentage of criminal aliens whom it did manage to remove, and its information systems for screening

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3. Although the absolute *number* of criminal aliens in the United States has increased, the findings of two recent studies improve our information about the nature of this population by comparing criminal aliens incarcerated in California prisons to native-born inmates over a ten-year period ending in 1996. The studies find that aliens are much more likely to be imprisoned for drug offenses, serve longer sentences, have a lower crime rate despite a lower education level, and are less likely to be incarcerated than demographically similar native-born Americans. The studies also find that this cohort of criminal aliens has a lower crime rate than the cohort that preceded it. See Kristin F. Butcher & Anne Morrison Piehl, *The Role of Deportation in the Incarceration of Immigrants*, unpublished manuscript, Boston College Dept. of Economics, Feb. 1999; Kristin F. Butcher & Anne Morrison Piehl, *Recent Immigrants: Unexpected Implications for Crime and Incarceration*, 51:4 INDUS. & LAB. REL. REV. 654-57 (July 1998). For a review of four recent books on criminal aliens in the United States from specific ethnic groups, see Wayne Fulton, *Four Books about Criminal Aliens*, THE SOCIAL CONTRACT, Winter 1997-98, at 149.

4. See, e.g., Daniel M. Weintraub, *County to Dun U.S. for Illegal-Alien Expenses*, L. A. TIMES, June 25, 1986, at B3; *Illegal Alien Felons: A Federal Responsibility: Hearing Before the Subcomm. on Federal Spending, Budget, and Accounting of the Senate Comm. on Governmental Affairs*, 100th Cong. 2 (1987) [hereinafter *Federal Responsibility*] (statement of Sen. Lawton Chiles).

5. See Judith Bender, *INS Computer System Failing to Keep Out Aliens*, NEWSDAY, Mar. 13, 1987, at 41.

aliens' entry into the country did not even list most of the previously removed criminal aliens. Senator D'Amato demanded an INS response detailing a plan to remedy the criminal-alien problem, and, in September 1986, the INS presented its Alien Criminal Apprehension Program, a coherent strategy for action.

Today, almost fifteen years later, the INS has made only a small dent in the criminal-alien problem. In 1986, the INS removed fewer than ten percent of the criminal aliens who had been arrested.<sup>6</sup> Although it has multiplied the number of deportations seven-fold since then, it still removes<sup>7</sup> fewer than twenty percent of the nearly 300,000 criminal aliens estimated to be *already* under law enforcement supervision.<sup>8</sup>

In the vast majority of cases, these aliens are removable as a matter of law.<sup>9</sup> Congress has repeatedly insisted—ever more emphatically—that criminal aliens be easily removed on the assumption that, because Congress has systematically deprived aliens of avenues of relief, removal can be swiftly effectuated. The latest and most drastic measure, the Illegal Immigration

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6. See *Federal Responsibility*, *supra* note 4, at 1.

7. Although the terms "removal" and "deportation" are not equivalent, they are used interchangeably in this Article to refer to the expulsion of aliens already in the country. Prior to April 1, 1997, the INS could remove aliens from the United States through either exclusion or deportation. Aliens who had not yet entered the country could be excluded; those who had entered had to be deported. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Division C (part of the Omnibus Consolidated Appropriations Act, 1997), 110 Stat. 3009-546, merged the procedures for deportation and exclusion into one "removal proceeding." IIRIRA § 304 (codified at 8 U.S.C. §§ 1229, 1229a, 1229b, 1229c). Because this study is concerned with the identification and removal of criminal aliens already in the United States, it focuses on issues relating to deportation, not exclusion. Thus, although the term "removal" now technically applies to what were previously considered exclusions as well as deportations, this Article uses the term to mean only those actions formerly known as deportations.

8. See *infra* Section II.C. Throughout this Article, the phrase "under law enforcement supervision" is used to refer to all those individuals in state or federal prisons, in local jails, on state or federal parole, or on probation.

9. An alien is removable (or deportable) by law if he has engaged in conduct that constitutes a ground for removal under the Immigration and Nationality Act (INA). Before IIRIRA, this included aliens convicted of one or more "crimes of moral turpitude" or of an "aggravated felony," and those convicted of certain drug and firearm offenses; those excludable at the time of entry or of adjustment of status; status violators; non-registrants; document violators; and security offenders. IIRIRA added other crimes to this list and expanded the category of aggravated felony. A removable alien, however, may have available to him certain defenses or waivers enabling him to defeat removal, although IIRIRA severely restricted these defenses and waivers, essentially eliminating them for convicted criminals.

Reform and Immigrant Responsibility Act of 1996 (IIRIRA),<sup>10</sup> expands the category of criminal aliens who are subject to expedited removal,<sup>11</sup> bars judicial review of most removal orders,<sup>12</sup> mandates detention pending removal,<sup>13</sup> and eliminates legal defenses for all criminal aliens except a few long-term permanent residents.<sup>14</sup> Coming on the heels of similar legislation passed with notable regularity in 1986, 1988, 1990, 1991, 1994, and earlier in 1996, IIRIRA was heralded as a "landmark" law, the toughest "in a generation."<sup>15</sup>

In truth, IIRIRA may be the harshest, most procrustean immigration control measure in this century—so much so that Congress should amend the new law in a number of important respects. One of us has discussed these objections elsewhere.<sup>16</sup> In this Article, however, we do not develop those objections but instead take the statute as given.

Despite the rigor of IIRIRA and its predecessors, they will not rid the country of criminal aliens. The recent history of the criminal-alien problem suggests that only an enormous increase in resources or a significant realignment of inter-governmental responsibilities will enable the federal government to deport most removable criminal aliens.<sup>17</sup> This

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10. IIRIRA, *supra* note 7. IIRIRA made many other changes, but here we discuss only those relating to removal of criminal aliens.

11. See IIRIRA § 321 (codified at 8 U.S.C. § 1101(a)(43)) (expanding definition of "aggravated felony," a term discussed in more detail *infra* beginning at text accompanying note 90).

12. See IIRIRA § 306 (codified at 8 U.S.C. § 1252).

13. See IIRIRA § 303(a).

14. See IIRIRA § 348 (codified at 8 U.S.C. § 1182(h)).

15. William Branigin, *Congress Finishes Major Legislation; Immigration: Focus is Borders, Not Benefits*, WASH. POST, Oct. 1, 1996, at A1.

16. The objections concern the statute's broad retroactivity provisions, its possibly unconstitutional restrictions on judicial review, its elimination of INS discretion in cases of extreme hardship, its indiscriminate expansion of the aggravated felony category, and other features. See SCHUCK, *supra* note 2, at 143-45. Many earlier immigration control measures were also exceedingly harsh—some examples are the Chinese exclusion laws, the "gentleman's agreement" with Japan, Operation Wetback, and the infamous Palmer raids of the 1920s—but those were discrete enforcement initiatives rather than structural legislative reform of the immigration enforcement system as a whole, as represented by IIRIRA and the Anti-terrorism and Effective Death Penalty Act of 1996 (AEDPA).

17. In the remainder of this Article, all references to criminal aliens will refer to removable criminal aliens unless the context suggests otherwise. This distinction is extremely important because aliens are not removable by reason of a crime as a matter of law until they either have been convicted of the crime in a court, have entered a plea of guilty or *nolo contendere*, or have admitted sufficient facts to warrant a finding of guilt and the judge ordered some punishment, penalty, or restraint on liberty. See IIRIRA § 322(a)(1) (codified at 8 U.S.C. § 1101 (a)(48)(A) (Supp. II 1996)). At that point,

Article explains the basis for this baleful prediction.

Policy failure is remarkably common. Its causes are numerous. Any vague or contradictory policy may unravel during implementation, especially if it was based on a fragile political consensus or commands a low priority in Congress or the relevant department or agency.<sup>18</sup> Congress may hobble a policy by granting insufficient authority to the agency charged with implementing it<sup>19</sup> or by diffusing that authority across several agencies, leading to time-consuming turf disputes. Well-organized special interests may co-opt administrators and twist a policy to suit their own purposes. Judicial interference may hobble implementation.<sup>20</sup> And, when these problems arise, Congress may no longer be paying attention.

What is most striking about the INS's failure to establish an effective criminal-alien removal system, however, is that none of these familiar explanations—even in combination—can account for it. It is hard to think of any public policy that is less controversial than the removal of criminal aliens. Although consensus on overall immigration policy has often been elusive, no policymakers or significant interest groups have argued that aliens who commit serious crimes after IIRIRA's effective date should not be removed. Even immigration lawyers, who have fought to maintain due process for aliens in removal hearings, have focused their attention on the issues of the law's retroactive effect and its elimination of relief in hardship cases.

The criminal-alien problem also has been a perennially high policy priority for lawmakers. Congress began investigating the problem in 1985,<sup>21</sup> and politicians and reporters have

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they may be placed in removal proceedings. The Board of Immigration Appeals ("BIA") recently held that this provision is not affected by state expungement or other rehabilitative statutes. *See* *Matter of Roldan-Santoyo, Int.*, Dec. 3377 (BIA 1999). As detailed in this Article, Congress has steadily—most dramatically in IIRIRA—eased the INS's procedural and substantive burdens in obtaining and executing a final order of removal.

18. *See, e.g.*, BRUCE A. ACKERMAN & WILLIAM T. HASSLER, *CLEAN COAL, DIRTY AIR* (1981).

19. *See, e.g.*, BERYL A. RADIN, *IMPLEMENTATION, CHANGE, AND THE FEDERAL BUREAUCRACY* (1977).

20. *See, e.g.*, JERRY L. MASHAW & DAVID L. HARFST, *THE STRUGGLE FOR AUTO SAFETY* (1990).

21. *See, e.g.*, U.S. GEN. ACCOUNTING OFFICE, *CRIMINAL ALIENS: INS INVESTIGATIVE EFFORTS IN THE NEW YORK CITY AREA 1* (1986) [hereinafter *INVESTIGATIVE*].

emphasized it ever since.<sup>22</sup> It has been a focus of media attention since 1991, when California Governor Pete Wilson began to complain about the fiscal burdens of illegal immigration.<sup>23</sup> Indeed, Congress passed legislation on the topic in every Congress since 1986.<sup>24</sup>

The INS also enjoys immense administrative advantages that ought to make its task of removing criminal aliens relatively easy. First, the federal government possesses exclusive legal authority over immigration and has delegated all of that authority to one agency, the INS. Hence, the INS need not share legal authority with state governments or with any other federal agency, although this Article argues that it should do so in the future. Second, whatever conflicts inhere in other aspects of immigration law, criminal-alien policy is clear: Congress has repeatedly demanded that criminal aliens be removed immediately and ahead of other removable aliens. Third, compared to problems such as global warming and poverty, the causes and nature of the criminal-alien removal problem are straightforward and clearly understood by all of the relevant actors. Fourth, few criminal aliens have legal avenues of defense or even delay available to them anymore, as Congress has scaled back or eliminated nearly all of them. Fifth, because all criminal aliens are, at some point, in physical custody or otherwise under the supervision of law enforcement, it should be possible for the INS to find and control them without undue difficulty. Finally, at a time of fiscal stringency, Congress has rapidly expanded the agency's

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22. See, e.g., Peter Kerr, *Moves to Deport Aliens for Drugs are not Pressed*, N.Y. TIMES, July 30, 1986, at A1; George Ramos, *New Effort to Deport Alien Criminals in U.S. Jails Told*, L.A. TIMES, July 31, 1986, at B1.

23. See *infra* Section IV.C.1.

24. Including IIRIRA, ten laws since 1986 have included significant measures affecting criminal aliens. See Criminal Aliens Identification (CAI), Pub. L. No. 105-141, 111 Stat. 2647 (1997); AEDPA, Pub. L. No. 104-132, 110 Stat. 1214 (1996); Immigration and Nationality Technical Corrections Act of 1994 (INCTA), Pub. L. No. 103-416, 108 Stat. 4305 (1994); Violent Crime Control and Law Enforcement Act of 1994 (VCCLEA), Pub. L. No. 103-322, 108 Stat. 1796 (1994); Miscellaneous and Technical Immigration and Naturalization Amendments Act (MTINA), Pub. L. No. 102-232, 105 Stat. 1733 (1991); Immigration Act of 1990 (IMMACT90), Pub. L. No. 101-649, 104 Stat. 4978 (1990); Anti-Drug Abuse Act of 1988 (ADA of 1988), Pub. L. No. 100-690, 102 Stat. 4181 (1988); Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, 100 Stat. 3359 (1986); and Anti-Drug Abuse Act of 1986 (ADA of 1986), Pub. L. No. 99-570, 100 Stat. 3207 (1986). This does not include appropriations legislation targeting criminal-alien removal or amnesty legislation adopted in 1997 and 1998 making aggravated felons ineligible for this relief.

resources, staffing, and authority; indeed, the INS budget has increased more than five-fold since 1985 and has more than doubled since 1994. As a result, the INS is now the largest law enforcement agency in the country.

Despite these remarkable policy implementation advantages, the INS removed relatively few criminal aliens until recently. From a population conservatively estimated at 300,000 removable criminal aliens under law enforcement supervision (and many more at large),<sup>25</sup> the INS has managed to remove only a small fraction, fewer than twenty percent.<sup>26</sup> The best estimates suggest that the number of removable criminal aliens under law enforcement supervision has increased nearly ten-fold since 1980.<sup>27</sup> This number of criminal aliens imposes heavy costs on the public and on law enforcement, especially in those states such as California and Florida with large immigrant populations. What possibly could have gone wrong?

Searching for an explanation for this surprising policy failure, this Article first describes the contours of the criminal-alien problem (Part II), although data deficiencies of the criminal-alien removal system make this difficult. It next explores the legal and institutional framework of the removal system (Part III) and concludes that, although the provisions of the Immigration and Nationality Act (INA) applicable to criminal aliens arm the INS with ample legal authority to perform the task, it must rely as a practical matter on other public agencies that do not always share its congressionally mandated priorities. Local law enforcement agencies apprehend and identify criminal aliens; state and local correction officials detain them; and immigration judges in the Justice Department's Executive Office of Immigration Review (EOIR) preside over their removal proceedings. This web of federal, state, and local institutions is complex, fragmented, and subject to the sort of coordination problems that

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25. See Telephone Interview with Russell A. Bergeron, Director of Public Affairs, INS (Feb. 11, 1999) [hereinafter Feb. 11, 1999, Bergeron Interview]. Our own estimates are detailed at Section II.A., *infra*.

26. In fiscal year 1997 (FY 97), the INS removed 114,386, 51,272 of whom were convicted of crimes in the United States. In FY 98, the INS removed 171,154 foreigners, which constituted a fifty percent increase over the previous year; deportees convicted of crimes increased less than ten percent, to 56,011. See MIGRATION NEWS, Feb. 1999, Vol. 6, No. 2 <<http://migration.ucdavis.edu>> [hereinafter Migration News].

27. See Feb. 11, 1999, Bergeron Interview, *supra* note 25. See also Section II.A., *infra*.

predictably confound implementation.<sup>28</sup>

The Article next reviews the political and policy responses to the criminal-alien problem (Part IV). One might ask: if the INS's difficulties were so substantial, why did Congress fail to allocate new resources or craft a legislative solution? The answer is that Congress did act; it conducted numerous hearings and steadily and severely limited the rights and defenses of criminal aliens, while also rapidly increasing the INS's budget. The result is that the INS has become one of the fastest growing federal agencies. Today, even relatively minor offenses can trigger the rapid removal of a long-term lawful permanent resident (LPR).

These efforts, however, did not solve the agency's problems. Although the INS developed a promising criminal-alien strategy as early as 1986, both Congress and the agency tried to devise cheap solutions to the criminal-alien problem by focusing on procedural reforms designed to reduce aliens' defenses to removal and to accelerate the hearing process. These reforms marginally improved the removal system, but did not increase removals substantially. Although both Congress and the INS knew that this course was too timid to be effective, they persisted in it until state governments, unwilling to pay the price for this federal policy failure any longer, devised strategies intended to raise the political costs to federal officials of further temporizing. The INS responded by proposing a comprehensive removal strategy that Congress fully funded—and then some. Yet the INS still removes only a small proportion of the criminal aliens under law enforcement supervision.

The Article concludes with a diagnosis and a recommendation for a partial remedy for the INS's ineffectiveness in removing criminal aliens. The removal system is plagued by a chronic and fundamental misalignment of governmental incentives. The INS cannot remove criminal aliens without the cooperation of federal, state, and local government agencies, yet those agencies do not share its priorities. Although these agencies support the federal policy of criminal-alien removal, their own organizational incentives

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28. See, e.g., JEFFREY L. PRESSMAN & AARON WILDAVSKY, IMPLEMENTATION 102-10 (1973) (ascribing delay in the Economic Development Administration's Oakland project to similar coordination problems).

cause them to emphasize other goals, which delay or defeat implementation of INS strategies. Although authority to enforce the immigration laws lies almost exclusively with the federal government, states and localities bear most of the costs of policy failure. This mismatch between legal authority and fiscal burden leaves states and localities vulnerable to federal neglect. Federalism, then, appears to be the source of the implementation problem.

This Article proposes a bold solution that seeks to build upon the crucial role of the states in sparking recent progress in criminal-alien removals<sup>29</sup>—the devolution of some immigration enforcement authority. States with large populations of immigrants are highly sensitive to the costs that criminal aliens impose, probably even more sensitive than Congress. In addition, state and local governments are almost always the first to apprehend criminal aliens and thus are in the best position to initiate the removal process. Under the current system, however, they lack the information, incentive, and legal authority to exploit this advantage. Rather than forcing states to seek relief in Washington from burdens relating to criminal aliens, federal policymakers should encourage states to contribute to local solutions. Here, as elsewhere, Congress can use federalism as a resource for, rather than an obstacle to, effective policy implementation.<sup>30</sup>

## II. THE SCOPE OF THE PROBLEM

### A. *The Growing Population of Criminal Aliens*

Any attempt to determine the size of the criminal-alien population must confront the lack of reliable information about the removal system. Aware of these pitfalls, the INS has not even attempted a comprehensive estimate.<sup>31</sup> Nevertheless, the population has certainly exploded since 1980, multiplying perhaps ten-fold.<sup>32</sup>

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29. For another analysis advocating a greater role for states in immigration policy, see Peter J. Spiro, *The States and Immigration in an Era of Demi-Sovereignities*, 35 VA. J. INT'L L. 121 (1994).

30. See generally Symposium, *Constructing a New Federalism: Jurisdictional Competence and Competition*, 14 YALE L. & POL'Y REV. 2 (1996).

31. See Telephone Interview with John Morton, Special Assistant to the INS General Counsel (Mar. 4, 1997) [hereinafter Morton Interview].

32. For an explanation of these estimates, see Table I and Table II later in this section.

For purposes of this analysis, the Article defines “criminal aliens” as those aliens who have been convicted of a crime in the United States<sup>33</sup> and who are removable under current law.<sup>34</sup> The target group, therefore, includes both illegal aliens who are convicted of any crime committed in the United States and legal aliens (including lawful non-resident aliens and lawful permanent residents (LPRs)) whose criminal convictions make them removable. Although this population is the precise target of the criminal-alien removal system, it is exceedingly difficult to count. Without precise data, officials and policy analysts make estimates based on any of three different measures:

- (1) All foreign-born persons, including citizens, convicted of crimes;
- (2) All non-citizens convicted of crimes, whether removable or not;
- (3) All non-citizens convicted of crimes who are removable under current law.

It is highly noteworthy—because it reflects the nature and causes of the underlying criminal-alien removal problem—that neither the federal government nor the states has developed reliable figures for any of these categories. The easiest number to count, and the only figure routinely gathered by state and local governments, is the number of prison and jail inmates who are foreign-born.<sup>35</sup> Congress has required states to report

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The INS also estimates that 93 percent of the aliens it detains have criminal records, compared to only 40 percent in the late 1980s. See Migration News, *supra* note 26, at No. 3, Mar. 1999 <[http://migration.ucdavis.edu/archive/mar\\_1999-01.html](http://migration.ucdavis.edu/archive/mar_1999-01.html)>.

33. Although any policy designed to limit the number of criminal aliens in the United States should also seek to prevent the entry of those who have committed crimes in other countries, this Article is not concerned with that problem. Furthermore, although the public is rightfully concerned about all aliens who commit crimes, and not simply those who are convicted, it is the principal task of the INS, and therefore the focus of this Article, to remove those who have been convicted, rather than to seek out, apprehend, and convict all aliens who commit crimes.

34. After all, the INS cannot be held accountable for failing to remove aliens who are not deportable. As is discussed later in this Article, legislative changes over the period 1986 to 1996 have continued to expand the legal basis for deporting criminal aliens. By definition, these legal changes increased the population of deportable criminal aliens. This fact does not, however, affect this Article’s estimates of the growth in the criminal-alien population.

35. The number of foreign-born offenders on parole and probation is more difficult to ascertain because these data, though generally gathered, are not systematically reported. The analysis in this Article, described in more detail below, extrapolates from the percentage of foreign-born inmates to arrive at the number of foreign-born offenders on probation and parole.

these numbers to the INS only since 1990,<sup>36</sup> and many began to do so only in 1992. Even this measure, the best available for estimating the size of the removable criminal-alien population, may be unreliable because local criminal-justice officials do not verify inmates' often bogus claims that they were born in the United States.<sup>37</sup> Instead, the states simply report the number of inmates who say they are foreign-born.<sup>38</sup>

The next step—determining how many of the foreign-born are, in fact, removable—is left to INS investigators to determine on a case-by-case basis. Because the INS does not actually determine whether most foreign-born offenders are removable, analysts have developed rough rules of thumb to determine the percentage of foreign-born inmates who are removable. The INS estimates that seventy-nine percent of foreign-born state prison inmates are removable, while seventy-five percent of foreign-born federal inmates are.<sup>39</sup> Two studies indicate that about sixty percent of foreign-born inmates in the Los Angeles County jail system are removable.<sup>40</sup>

No fully integrated models exist that can estimate the total number of removable criminal aliens under law enforcement supervision, let alone the number currently at large. Instead, this Article contains necessarily imprecise extrapolations and educated guesses:

*Federal Prisons:* The federal prison system contains by far the highest proportion of foreign-born inmates of any component of the criminal-justice system.<sup>41</sup> In 1980, fewer

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36. See IMMACT90 § 507 (current version at 42 U.S.C. § 3753(a)(11) (1994)).

37. See, e.g., *Criminal Aliens in the United States: Hearings Before the Permanent Subcommittee on Investigations of the Senate Committee on Governmental Affairs*, 103rd Cong. 18 (1993) [hereinafter *Criminal Aliens in the United States*] (discussing preponderance of inmates in one sample who claimed to have been born in Puerto Rico or U.S. Virgin Islands).

38. Even these numbers may not be reported accurately. A recent report by the Urban Institute found that some states even included inmates born in the United States among their count of foreign-born inmates. See REBECCA L. CLARK ET AL., *FISCAL IMPACTS OF UNDOCUMENTED ALIENS: SELECTED ESTIMATES FOR SEVEN STATES* 57 (1995).

39. See THE INTERSTATE CRIMINAL ALIEN WORKING GROUP, *REPORT ON ADDRESSING THE CRIMINAL ALIEN PROBLEM* 10 (1996) [hereinafter *ADDRESSING THE CRIMINAL ALIEN PROBLEM*].

40. See *Criminal Aliens: Hearing on H. Con. Res. 47 Before the Subcomm. on International Law, Immigration, and Refugees of the House Comm. on the Judiciary*, 103rd Cong. 171 (1994) [hereinafter *1994 Hearings on Criminal Aliens*] (statement of Rep. Anthony C. Beilenson).

41. Experts attribute this to the increase in drug arrests, especially those targeting interdiction. Although seventy-five percent of the non-U.S.-citizen federal prison population is incarcerated for drug charges, only fifty-six percent of the U.S.-citizen

than 1,000 non-US citizen inmates were in Bureau of Prison (BOP) facilities, about 3.6 percent of the total BOP population at that time.<sup>42</sup> By 1988, the number had risen to 10,647 (21%);<sup>43</sup> in May of 1995, the number was 25,444 (25.4%);<sup>44</sup> and, by 1996, it had risen to 27,601 (26.2%).<sup>45</sup> By September, 1998, the number of sentenced, foreign-born inmates was 28,050<sup>46</sup> (29%).<sup>47</sup>

*State Prisons:* In 1980, approximately 8,000 foreign-born inmates were in state prisons, 2.6 percent of the total state prison population.<sup>48</sup> By January of 1995, that number had grown to 69,926 (7.6%)<sup>49</sup> and in May of 1996, the number was 77,257 (7.6%).<sup>50</sup> By July of 1998, the number of foreign-born inmates was 85,593<sup>51</sup> (7.6%).<sup>52</sup> Alien inmates are concentrated in a handful of states; just seven (California, New York, Texas, Florida, Arizona, New Jersey, and Illinois)

federal prisoners are. *See id.* at 165 (statement of Kathleen M. Hawk, Director of the Bureau of Prisons (BOP)).

42. *See id.* at 166.

43. *See Criminal Aliens in the United States, supra* note 37, at 13.

44. *See* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1996, at 531 (1997) [hereinafter SOURCEBOOK 1996]. The total population of federal inmates in 1995 was 100,250. *See* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PRISON AND JAIL INMATES, BULLETIN, 1995, at 1 (August 1996).

45. *See* ADDRESSING THE CRIMINAL ALIEN PROBLEM, *supra* note 39, at 11. The total population of federal inmates at the end of 1996 was 105,544. *See* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PRISONERS IN 1996, BULLETIN 1 (1997).

46. *See* Statement of Amy Dale, Administrator, Detention Services, BOP, submitted to the Subcommittee on Immigration and Claims, House Judiciary Committee (Sept. 17, 1998) [hereinafter Dale Statement] at 1.

47. The total BOP population in federal prisons at the end of 1997 was 112,973. *See Nation's Prison Population Increased By More Than 5 Percent During 1997* [hereinafter *Nation's Prison Population*] <<http://www.ojp.usdoj.gov/bjs/pub/press/p97.pr>> (visited Feb. 10, 1999).

48. There were 9,071 foreign-born prisoners in state and federal prisons in 1980. *See Criminal Aliens in the United States, supra* note 37, at 13 (staff statement of the permanent Subcommittee on Investigations). Subtracting the 1,000 foreign-born prisoners in federal prison in 1980 yields a foreign-born state prison population of approximately 8,000. The total state prison population in 1980 was 259,363. *See* U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 1995, at 194 (114th ed. 1994).

49. *See Removal of Criminal and Illegal Aliens: Hearings Before the Subcomm. on Immigration and Claims of the House Comm. on the Judiciary*, 104th Cong. 8 (1995) [hereinafter *Hearings on Removal*] (statement of T. Alexander Aleinikoff, General Counsel, INS). The total state prison population in 1994 was 936,896. *See* U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1997, at 220 (117th ed. 1997).

50. *See* ADDRESSING THE CRIMINAL ALIEN PROBLEM, *supra* note 39, at 10. The total state prison population at year-end 1996 was 1,076,625. *See* Christopher J. Mumola & Allen J. Beck, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, BULLETIN: PRISONERS IN 1996 (1997) <<http://www.ojp.usdoj.gov/bjs>>.

51. *See* Dale Statement, *supra* note 46.

52. The total population of state prisons at the end of 1997 was 1,131,581. *See Nation's Prison Population, supra* note 47.

hold more than eighty percent of them.<sup>53</sup> Foreign-born inmates account for twenty-one percent of California's prison population, thirteen percent of New York's, nine percent of Florida's and eight percent of Texas's.<sup>54</sup>

*Local Jails* : Data on foreign-born inmates in local jails is not systematically collected. Two studies of the Los Angeles County jails, conducted in 1990 and 1992, found that nineteen percent of the inmates were foreign-born and eleven percent were deportable.<sup>55</sup> Because criminal aliens are concentrated in certain localities, these figures cannot be extrapolated to jails across the country. Our best guess, admittedly a rough one, is that foreign-born inmates constitute roughly the same proportion of local inmates as they do of state inmates. This would mean that 7.6 percent of the 1996 local jail population of 518,492 was foreign-born.<sup>56</sup> If so, there were approximately 39,400 foreign-born inmates in local jails at any given time in 1996. For mid-year 1997, the numbers changed slightly: the local jail population grew to 581,733,<sup>57</sup> with an estimated 44,088 (7.6 %) foreign-born.

*Probation and Parole*: No hard data is available on the numbers of foreign-born offenders on probation and parole. If, as one would expect, the proportion is similar to that in the inmate population, there were at least 247,912 foreign-born probationers and 52,060 foreign-born offenders on federal or state parole as of December, 1997.<sup>58</sup>

All told, then, the number of criminal aliens in custody or

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53. See ADDRESSING THE CRIMINAL ALIEN PROBLEM, *supra* note 39, at 10.

54. See Deborah Sontag, *Porous Deportation System Gives Criminal Little to Fear*, N.Y. TIMES, Sept. 13, 1994, at A1. State-reported figures such as these, however, may not be entirely reliable. A 1992 study by the National Institute of Corrections, for example, found that alien inmates made up only 10.4 percent of California's total inmate population, and only 4.3 percent of Texas's. See *Criminal Aliens in the United States*, *supra* note 37, at 13 (staff statement of the permanent Subcomm. on Investigations). In another study, conducted by the Urban Institute, nearly twenty percent of those reported by Texas as foreign-born inmates were actually born in the United States. See CLARK, *supra* note 38, at 57. A recent study finds that twenty-seven percent of those admitted to California prisons in 1996 were foreign-born. See Butcher & Piehl, *supra* note 3. On the other hand, many aliens falsely claim to be United States citizens or nationals. See *supra* note 37 and accompanying text.

55. See 1994 Hearings on Criminal Aliens, *supra* note 40, at 171 (statement of Rep. Anthony C. Beilenson).

56. See BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PRISON AND JAIL INMATES AT MIDYEAR, 1996, at 2 (1997).

57. JAILS STATISTICS, BUREAU OF JUSTICE STATISTICS (visited on Feb. 10, 1999) <<http://www.ojp.usdoj.gov/bjs/jails.htm>> [hereinafter JAILS STATISTICS].

58. There were 3,262 million probationers and 685,000 parolees at the end of 1997. See PROBATION AND PAROLE STATISTICS, BUREAU OF JUSTICE STATISTICS (visited on Feb. 10, 1999) <<http://www.ojp.usdoj.gov/bjs/pandp.htm>>.

otherwise under law enforcement supervision is approximately 300,000, a nearly ten-fold increase since 1980. The following Tables summarize the location and status of criminal aliens in 1980 and 1997 (as noted above).

Table I:

*Removable Criminal Aliens in 1997*

75% of 28,050 foreign-born federal prisoners:	21,036
79% of 85,593 foreign-born state prisoners:	67,618
79% of 52,060 foreign-born parolees:	41,127
60% of 44,088 foreign-born local prisoners:	26,453
60% of 246,912 foreign-born probationers:	148,147
TOTAL:	304,381

Table 2:

*Removable Criminal Aliens in 1980<sup>59</sup>*

75% of 1,000 foreign-born federal prisoners:	750
79% of 8,000 foreign-born state prisoners:	6,320
79% of 5,511 <sup>60</sup> foreign-born parolees:	4,354
60% of 4,557 <sup>61</sup> foreign-born local prisoners:	2,734
60% of 27,952 <sup>62</sup> foreign-born probationers:	16,771
TOTAL:	30,929

Others have estimated the total number of removable criminal aliens under law enforcement supervision at 450,000 or higher.<sup>63</sup> Although the calculations in this Article are more conservative, the actual number of removable criminal aliens

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59. Although the removable proportion of the foreign-born correctional population was probably lower in 1980 than in 1997 due to the legislative changes of the 1980s and 1990s, this Article uses the same proportions for the sake of comparison.

60. The total population on parole in 1980 was 220,438. See SOURCEBOOK 1996, *supra* note 44, at 502. Because 2.5 percent of the state prison population was foreign-born, this Article assumes the same percentage for parole, probation, and local jail populations.

61. The total population in local jails in 1980 was 182,288. See *id.*

62. The total population on probation in 1980 was 1,118,097. See *id.*

63. See *Criminal Aliens in the United States*, *supra* note 37, at 12.

present in the country is considerably higher than 300,000 because most criminal aliens move out of criminal-justice supervision before the INS screens them.

Most criminal aliens are not present in the country legally, although the percentage who fall within a particular immigration status varies from state to state. Though no one knows with certainty how many removable criminal aliens are LPRs, non-immigrant aliens, and illegal aliens, rough data from the State Criminal Alien Assistance Program (SCAAP) indicate that LPRs make up considerably less than a third of the population of removable criminal aliens in state prisons.<sup>64</sup> Officials estimate that over seventy-five percent of removable criminal aliens in border states such as California and Texas are not in the country legally,<sup>65</sup> whereas a majority in other major receiving states such as New York may be LPRs.<sup>66</sup>

#### B. *The Costs of Failure: High and Rising*

As the number of criminal aliens increases, so do the costs of apprehending, identifying, prosecuting, and incarcerating them. No precise cost estimates are available, although upper and lower limits can be established. The Bureau of Justice Statistics (BJS) reported that a total of \$97.5 billion was spent nationwide in 1993 on federal, state, and local law enforcement.<sup>67</sup> Because these costs increased by just over three percent a year since 1993,<sup>68</sup> the United States can anticipate

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64. The State Criminal Alien Assistance Program (SCAAP) allows states to seek reimbursement from the federal government for the costs of incarcerating removable criminal aliens. States submit lists of their foreign-born prisoners to the Bureau of Justice Assistance (BJA), and the INS attempts to match those names to INS databases of known aliens. For FY 98, participating states submitted a foreign-born population of roughly 106,000 names, about 72,000 of which were matched to INS data which showed that just under 25,000 were LPRs and another 5,000 were otherwise in the country legally. The INS estimates that only five percent of the 34,000 unmatched names were legally in the country. If so, LPRs constituted less than thirty percent of the total foreign-born population in state prisons. See Telephone Interview with Alison Morris, Policy Analyst, INS Office of Program Planning (Mar. 8, 1999) [hereinafter Morris Interview].

65. See Telephone Interview with Lydia St. John-Mellado, Special Assistant to the Associate Comm'r for Enforcement, INS (June 7, 1995) [hereinafter St. John-Mellado Interview I].

66. See Telephone Interview with Anthony Annucci, New York State Corrections Dep't (June 6, 1995) [hereinafter Annucci Interview].

67. See SOURCEBOOK 1996, *supra* note 44, at 2.

68. The average inflation rate over the period was approximately three percent. See U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1997, at 487 (117th ed. 1997).

spending approximately \$118 billion on law enforcement in 1999. Because removable criminal aliens constitute roughly 5.5 percent of the total United States population under criminal supervision,<sup>69</sup> state, local, and federal law enforcement expenditures on criminal aliens may be as high as \$6.5 billion.

To judge solely from prosecution, detention, and incarceration costs, law enforcement agencies spend a minimum of nearly \$3 billion annually on criminal aliens. The roughly 100,000 removable criminal-alien prisoners currently housed in federal, state, and local facilities cost governments about \$2.2 billion in incarceration expenses each year.<sup>70</sup> One must add to these incarceration costs the costs of apprehension and prosecution. The Los Angeles County jail, which houses about one-twelfth of the nation's removable jail inmates, was processing 22,000 removable aliens annually by the early 1990s, according to a number of studies.<sup>71</sup> This implies that there were more than 264,000 arrests of removable criminal aliens nationwide that year. At that rate, the annual cost of arrest and prosecution could have been \$300 million.<sup>72</sup> Taken together, these estimates suggest that government annually spends between \$2.5 and \$6.5 billion in criminal justice costs attributable to removable criminal aliens.

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69. In 1995, there were 3.1 million individuals on probation and 700,000 on parole, for a total of roughly 3.8 million on supervised release. See BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CORRECTIONAL POPULATIONS IN THE UNITED STATES: 1995 (1996). At the same time, there were roughly 1.5 million persons in prison or jail (1,026,037 state prisoners; 507,044 jail inmates; and 100,250 federal prisoners). See BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, JAILS & JAIL INMATES: 1994 (1995). As noted earlier, approximately 290,000 of the 5.3 million persons under criminal justice supervision in 1994 (5.5%) were removable criminal aliens.

70. Current per-bed annual cost is \$22,494. See Telephone Interview with Steve Mertins, Office of Management and the Budget (Feb. 2, 1998) [hereinafter Mertins Interview I]. Because aliens serve longer sentences than their American counterparts, Butcher & Piehl, *supra* note 3, these estimates, which are based on averages, tend to understate the costs of incarcerating aliens.

71. See *Criminal Aliens in the United States* *supra* note 37, at 14. This Article assumes that the Los Angeles county jail has about one-twelfth the national population of jailed removable aliens because evidence from the hearings puts the population of removable criminal aliens in that jail at just over 2,000 at any given time in 1993. See *id.* at 18. This Article's earlier calculations suggest the population of removable aliens in local jails nationally was roughly 23,600 (60% of 39,400 in 1996). See *supra* text accompanying notes 40 and 56.

72. A 1990 study of the New York City criminal justice system conducted by the Enforth Corporation found that criminal justice costs totaled nearly \$1,000 per person from arrest to arraignment. This estimate did not include the legal and court costs beyond the arraignment. See Telephone Interview with Michelle Sviridoff, Center for Court Innovation (June 6, 1997). Assuming some additional court costs and inflation, \$300 million is a reasonable estimate.

These costs are not spread evenly across local and state governments. Although California has roughly one-eighth of the national population, its prisons house roughly twenty-five percent of the criminal aliens held in state or federal prison.<sup>73</sup> A California congressman stated that projected incarceration costs for criminal aliens in FY 95 and FY 96 alone would be \$375 million.<sup>74</sup> Certain localities are hit even harder. Los Angeles County, for example, estimated that it spent \$75 million in 1993 on incarceration and prosecution costs related to removable criminal aliens.<sup>75</sup> When costs are so concentrated, the criminal-alien problem affects government services in certain localities more than the \$2.5-\$6.5 billion national cost figure would suggest.

### C. *Little Removal*

As the number of criminal aliens has grown, the INS has accelerated the pace of removals. Then-Deputy Attorney General Jamie Gorelick called 1995 "a banner year"<sup>76</sup> for removals and declared that the government was on its way to "creat[ing] a seamless web of enforcement."<sup>77</sup> In FY 96, the INS removed more than five times as many criminal aliens as it had in FY 89, and by FY 98, removals were more than seven times the FY 89 total.

Table 3:

#### *Fiscal Year Criminal Removals*<sup>78</sup>

73. See Sontag, *supra* note 54, at A1.

74. See 1994 *Hearings on Criminal Aliens*, *supra* note 40, at 133 (statement of Rep. Richard H. Lehman).

75. See Dianne Klein, *A Hit or Miss Approach to Curbing Deportable Felons*, L.A. TIMES, Nov. 27, 1993, at B1.

76. David. G. Savage, *More Illegal Immigrants Deported*, L.A. TIMES, Dec. 29, 1995, at A19.

77. *U.S. Deports Record Number of Illegal Immigrants in '95*, CHI. TRIB., Dec. 29, 1995, § 1, at 9.

78. See *Criminal Aliens in the United States*, *supra* note 37, at 77 (1993); see also IMMIGRATION AND NATURALIZATION SERVICE, DEP'T OF JUSTICE, REMOVAL OF CRIMINAL ALIENS 4 (1995) (budget briefing document on file with authors) (figures for FY 94); IMMIGRATION AND NATURALIZATION SERVICE, DEP'T OF JUSTICE, REMOVAL OF CRIMINAL AND OTHER ILLEGAL ALIENS 3 (July 1996) [hereinafter REMOVAL OF ILLEGAL ALIENS] (FY 95 figures); IMMIGRATION AND NATURALIZATION SERVICE, DEP'T OF JUSTICE, PRESS RELEASE: 67,094 ILLEGAL ALIENS REMOVED IN FY 96, at 1 (Oct. 26, 1996) (FY 96 figures); IMMIGRATION AND NATURALIZATION SERVICE, U.S. DEP'T OF JUSTICE, MONTHLY REMOVALS REPORT: APRIL 1998, at 2 (1998) [hereinafter REMOVALS REPORT: APRIL 1998]

1989	7,338
1990	8,558
1991	13,198
1992	18,378
1993	19,199
1994	22,000
1995	32,285
1996	37,063
1997	51,272
1998	56,011 <sup>79</sup>

Despite its substantial progress, however, the INS cannot credibly claim to have succeeded. It still removes fewer than twenty percent of the criminal aliens who are *currently under law enforcement supervision*. Its performance is even worse when one takes into account several other considerations. First, the vast majority of removable criminal aliens are at large in the community, either on probation or parole or free from criminal-justice supervision altogether. Second, the problem is not simply one of removing the stock of criminal aliens already in the country. New immigration flows constantly replenish and augment the stock of such aliens, while those not removed before the end of their sentences are simply released into the population at large.

As the next section of our analysis details, the causes of this slow progress lie in the complicated structure of the criminal-alien removal system.

### III. THE CRIMINAL-ALIEN REMOVAL SYSTEM

Like many legal institutions, the "criminal-alien removal system" consists of a legal framework and a thicket of organizational structures. Some of these organizations, such as the immigration courts that oversee the removal process, are

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(FY 97 figures).

79. See REMOVALS REPORT: APRIL 1998, *supra* note 78 at 2; MIGRATION NEWS, *supra* note 26.

creatures of the immigration statute. Others, such as state and local law enforcement, help to shape the system but are fundamentally independent of it. Although each institution in the system (local police departments, state and federal prison agencies, the INS, the immigration court, and local U. S. Attorneys) may see itself as separate from the others, both the average citizen and the alien accused of a crime probably view them as parts of an integrated whole. To understand this system, then, this Article examines both the basic structure of immigration law and the concrete practices of the institutional actors that affect the apprehension, identification, detention, adjudication, supervision, and removal of criminal aliens.

### A. *The INA from IRCA to IIRIRA*

Because the immigration statute is the best evidence of the policy that Congress expects the INS to implement, this Section begins by examining the legal framework. To organize the analysis, the provisions of the INA relating to criminal aliens are divided into four categories: (1) grounds for removal; (2) removal procedures; (3) opportunities for relief; and (4) rules regarding re-entry. In each category, this Article describes the INA prior to the passage of the Immigration Reform and Control Act (IRCA) in 1986 and then highlights the important changes since then, especially IIRIRA, which was enacted in October, 1996. This overview reveals two important features of the law pertaining to criminal aliens. First, the last dozen years of legislative change reveal Congress's growing demand and heightened priority for the swift removal of criminal aliens. Second, although the INA is complex and has become even more so during this period of frequent changes, it continues to provide the INS with sufficient legal authority to accomplish its task.

#### 1. *Grounds for Removal*

Broadly speaking, the INS prior to IRCA was authorized to remove aliens either because they were present in the country illegally or because they had been convicted of a removable offense.<sup>80</sup> Aliens in the country illegally included (1) aliens who

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80. This Article focuses only on these two categories because they describe the bulk of criminal aliens. Before Nov. 29, 1990, 8 U.S.C. § 1251(a) (redesignated 8 U.S.C. § 1227 in

had entered the country without inspection at a border-crossing station;<sup>81</sup> (2) any alien who violated the conditions of his entry, for example, by overstaying his visa,<sup>82</sup> or by violating the conditional status of an alien who entered on the basis of a marriage to a United States citizen or LPR;<sup>83</sup> and (3) any alien who was excludable at the time of entry.<sup>84</sup> Criminal offenses that could trigger removal included: (1) conviction (within five years after the date of entry) for a crime of "moral turpitude" for which the alien was sentenced to at least one year in prison;<sup>85</sup> (2) conviction (at any time after entry) for two crimes of "moral turpitude," regardless of the sentence;<sup>86</sup> (3) conviction (at any time after entry) for any violation of any law relating to controlled substances;<sup>87</sup> or (4) conviction (at any time after entry) for unlawful possession of an automatic weapon.<sup>88</sup>

Since 1986, Congress has substantially increased the range and number of crimes for which an alien may be removed. Furthermore, because criminal aliens have always had fewer opportunities than other aliens for relief from removal by showing "good moral character," the expansion of criminal grounds for removal also limits the procedural rights of aliens who previously would have been removable only on other grounds. The first of these changes came in the Anti-Drug Abuse Act (ADA) of 1988, in which Congress stipulated that any alien convicted of an "aggravated felony" at any time after

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1996) also contained several other grounds for removal, such as becoming a public charge, affiliation with anarchist or communist organizations, failure to register under the Alien Registration Act of 1940, posing a threat to national security, and smuggling other aliens into the country. IMMACT90 revised and reorganized some of these categories and removed others (most notably those having to do with affiliation with political groups). See IMMACT § 602(a) (current version at 8 U.S.C. § 1227, as amended by IIRIRA § 305(a)(2)).

81. See 8 U.S.C. § 1251(a)(2) (1986) (current version at 8 U.S.C. § 1227 (1994)).

82. See 8 U.S.C. § 1251(a)(9) (1986) (current version at 8 U.S.C. § 1227 (1994)).

83. The Immigration Marriage Fraud Amendments of 1986, Pub. L. 99-639, 100 Stat. 3537 (1986), were adopted just days before the IRCA was enacted. It is now codified at 8 U.S.C. §§ 1227(a)(1)(G), 1186a, 1255(d),(e), 1325(c). Under the latter provision, marriage fraud is a felony, although it may not constitute an "aggravated felony" under 8 U.S.C. § 1101(a)(43)(O).

84. See 8 U.S.C. § 1227(a)(1)(B) (1994).

85. See 8 U.S.C. § 1227(a)(2)(A) (1994). The term "crime of moral turpitude" has never been clearly defined. Crimes such as murder, rape, larceny, and fraud all generally fall in the category, whereas aggravated assault usually does not.

86. See *id.*

87. See 8 U.S.C. § 1227(a)(2)(B) (1994).

88. See 8 U.S.C. § 1227(a)(2)(C) (1994).

entry would be removable.<sup>89</sup> The new category of "aggravated felony" included most of the drug and firearms crimes previously covered by the statute, "crimes of moral turpitude," and some other crimes.<sup>90</sup> Having created the category of aggravated felony, Congress continued to expand it, adding money laundering and trafficking in any controlled substances,<sup>91</sup> certain burglary, tax evasion and fraud convictions,<sup>92</sup> some gambling, prostitution, and document fraud crimes,<sup>93</sup> and rape and sexual abuse.<sup>94</sup> Congress also broadened the grounds for removal based on a crime of moral turpitude to include all such crimes for which a sentence of a year or more *might* have been imposed, rather than only those for which a sentence of a year or more had actually been imposed.<sup>96</sup> This category includes some relatively minor offenses, including, in New York City, subway turnstile jumping.<sup>97</sup> Congress also made the crimes of domestic violence, stalking, child abuse, child neglect, child abandonment, and violation of certain protective orders grounds for removal.<sup>98</sup>

## 2. Removal Procedures

Under the INA prior to the IRCA, an alien could be removed only after a hearing before an Immigration Judge (IJ). The alien was entitled to notice of the charges of removability against him, had the right to counsel at his own expense, and had the right to examine witnesses and other evidence. During the course of the proceedings, the alien could be detained, released on bond, or released on other conditions, subject to the

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89. ADA of 1988 § 7344(a) (codified as amended at 8 U.S.C. § 1227(a)(2)(A)(iii)).

90. When first added to the statute, the new category included murder and any drug or firearms trafficking crimes. See DAN KESSELBRENNER & LORY D. ROSENBERG, IMMIGRATION LAW AND CRIMES § 7.4 (1984).

91. See IMMACT90 § 501(a) (codified at 8 U.S.C. § 1101(a)(43), as amended by IIRIRA § 321(a)). Furthermore, the new definition included crimes under federal, state or foreign law. See *id.* at § 501(a)(5),(6) (codified as amended at 8 U.S.C. § 1101(a)(43) (1994)).

92. See INCTA § 222 (codified as amended at 8 U.S.C. § 1101(a)(43) (1994)).

93. See AEDPA § 440(e) (codified as amended at 8 U.S.C. § 1101(a)(43) (1994)).

94. See IIRIRA § 321 (codified as amended at 8 U.S.C. § 1101(a)(43) (1994 & Supp. II 1996)).

96. See IMMACT90 § 501(a) (codified as amended at 8 U.S.C. § 1101(a)(43) (1994)).

97. See discussion in *Yesil v. Reno*, 973 F. Supp. 372 (S.D.N.Y. 1997), *aff'd sub nom. Henderson v. INS*, 157 F. 3d 106 (2d Cir. 1998), *cert. denied Reno v. Navas* 119 S.Ct. 1141, (Mar. 8, 1999).

98. See IIRIRA § 350(a) (codified at 8 U.S.C. § 1227(a)(2)(E)).

discretion of the IJ.<sup>99</sup> Once a final order of removal had been entered by the IJ, the alien could appeal to the Board of Immigration Appeals (BIA), an administrative court independent of the INS but within the Department of Justice.<sup>100</sup> Once the BIA reached its decision, the alien could seek judicial review in the United States Court of Appeals. His appeal had to be filed within six months of the final BIA order.<sup>101</sup> Any appeal from a removal order triggered an automatic stay of removal.<sup>102</sup>

Since 1986, Congress has focused special attention on streamlining this removal process. The revisions have been especially severe for criminal aliens. In each round of legislative change, and especially in 1996, Congress invented new, swifter removal procedures that progressively narrowed aliens' procedural rights. Congress's first move, in 1988, was to direct the INS to obtain final orders of removal for aggravated felons prior to their release from incarceration in state or federal prison.<sup>103</sup> Aggravated felons whose removal hearings were not complete by the date of their release from state or federal criminal custody were to be taken into INS custody until the INS could obtain a final order.<sup>104</sup> To further expedite these removals, Congress shortened the available time to appeal a final order of removal from six months to sixty days for all aggravated felons.<sup>105</sup>

In 1990, Congress attempted to prevent perceived abuses by aliens, their lawyers, and the INS by overhauling the entire

99. See 8 U.S.C. § 1252(a) (1994).

100. See 8 C.F.R. § 242.21 (1997) (removed and reserved by 62 Fed. Reg. 10,382).

101. See 8 U.S.C. § 1105a(a)(1) (1994) (amended to ninety days by ADA of 1988).

102. See 8 C.F.R. § 3.6 (1997).

103. See ADA of 1988 § 7347(d) (codified as amended at 8 U.S.C. § 1228 (Supp. II 1996)). This measure was inspired by an experimental program—the Institutional Hearing Program (IHP)—that began as a collaboration between the INS and New York state prison officials in 1986. See Robert Pear, *U.S. Plans to Speed Deportation of Drug Offenders*, N.Y. TIMES, July 31, 1986, at B3.

104. See ADA of 1988 § 7343 (codified as amended at 8 U.S.C. § 1252(a)(2)(A)). This requirement was later relaxed for aggravated felons who were LPRs. Such aliens could be released pending removal if they could show they were likely to appear at immigration hearings and were not a danger to the community. See IMMACT90 § 504(a) (codified at 8 U.S.C. § 1252(a)(2), as amended by IIRIRA § 308(g)(10)(H)); MTINA § 306(a)(4) (amending 8 U.S.C. § 1252(a)(2)), repealed by IIRIRA § 306(a)(2). Release was still not allowed for aggravated felons who were not LPRs, and the INS declared that detaining these aliens was its "first priority." UNDERSTANDING THE IMMIGRATION ACT OF 1990, at 10-5 (Stephen Yale-Loehr ed., 1991) [hereinafter UNDERSTANDING IMMACT90].

105. See ADA of 1988 § 7347(b) (repealed 1996).

removal hearing process. The time for appeals was reduced for all aliens,<sup>106</sup> including aggravated felons, to thirty days.<sup>107</sup> Congress also formalized deportation hearing procedures and established severe consequences for non-complying aliens. Stricter notice requirements were established to insure that aliens would know of the time, place, and importance of removal hearings.<sup>108</sup> Aliens were required to keep the INS informed of changes of address or phone number. Aliens not appearing for their removal hearings could be ordered removed in absentia; such orders were subject to judicial review only in very limited circumstances, and only if the appeal was filed within sixty days.<sup>109</sup>

In 1994, Congress created two new procedures to further expedite criminal-alien removals. The first was a streamlined administrative removal procedure that allows the INS to issue a final order of removal without conducting a hearing before an IJ.<sup>110</sup> The procedure applies to aliens who are: (1) aggravated felons; (2) not LPRs; and (3) not eligible for other forms of relief. Appeals to the courts from an administrative removal order (which must be filed within thirty days) are only available on the most basic issues, such as whether the alien was actually convicted of an aggravated felony. Second, Congress added a "judicial removal" procedure giving United States district court judges the authority to order, at the request of the prosecuting attorney, the removal of a criminal alien as part of the sentence in a criminal trial if the criminal conviction would render the alien removable.<sup>111</sup> In 1996, Congress expanded judicial removal to all removable criminal aliens and formally authorized the use of stipulated orders of removal as part of a plea bargain in a criminal case.<sup>112</sup>

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106. Administrative appeals had to be filed within ninety days, *see* IMMACT90 § 545(b)(1),(d), *repealed by* IIRIRA § 306(b), as did appeals for judicial review, *see* IMMACT90 § 545(b)(1). Rather than receiving an automatic stay of removal upon the filing of an appeal, aliens had to ask for it separately. *See* IMMACT90 § 513 (a),(b).

107. *See* IMMACT90 § 502(a) (codified at 8 U.S.C. § 1152a(a)(1)).

108. *See* IMMACT90 § 545(a), *repealed by* IIRIRA § 308(b)(6).

109. *See id.* Certain exceptions were provided.

110. *See* VCCLEA § 130004 (codified as amended at 8 U.S.C. § 1228(b) (1998) (formerly 8 U.S.C. § 1252a(b),(d) (1994))). In an administrative removal, the alien retains his other hearing rights, such as the right to counsel and to inspect the evidence against him. *See* 8 U.S.C. § 1228(b)(4)(B),(C).

111. *See* INCTA § 222 (codified as amended at 8 U.S.C. § 1228(b) (1998) (formerly 8 U.S.C. § 1252a(d) (1994))).

112. *See* IIRIRA § 374 (codified as amended at 8 U.S.C. § 1228(c)(5)). Stipulated

The most significant revisions in removal procedures were made in the two most recent laws affecting criminal aliens, the Anti-terrorism and Effective Death Penalty Act of 1996 (AEDPA) and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA). By changing the definition of "entry" to include only entry with inspection, Congress subjected all of the numerous aliens who had entered without inspection (EWIs) to more rapid and less procedurally demanding removal processes.<sup>113</sup> It also drastically altered these procedures, potentially subjecting EWIs who cannot establish two years continuous presence in the United States to a purely administrative removal process,<sup>114</sup> with no express right to appeal unless the alien claims asylum.<sup>115</sup> Judicial review of such a removal is available only to LPRs and to aliens previously granted refugee status.<sup>116</sup>

These revisions, taken together, create a summary removal process that operates against most criminal aliens.<sup>117</sup> The new law forecloses judicial review of removal orders for almost all criminal aliens. AEDPA apparently subjected all EWIs present in the United States for less than two years to the expedited removal process, but before that provision took effect, IIRIRA was enacted, applying expedited removal to EWIs only if the Attorney General makes a specific determination to this effect. As of late March, 1999, no such determination had been issued. The law strips the courts of jurisdiction to review any discretionary judgments of the INS, including the denial of any forms of discretionary relief.<sup>118</sup> The new law also expands

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removal is analogous to a plea bargain in which the alien agrees to be removed in exchange for a lighter sentence on the criminal charge. Stipulated removal orders had already been used by the INS and U.S. Attorneys in some parts of the country prior to their recognition in the immigration law. See Morton Interview, *supra* note 31.

113. See AEDPA § 414 (amending 8 U.S.C. § 1251) (codified as amended at 8 U.S.C. § 1227(a)(1)(B)). Previously, EWIs present in the United States were subject to deportation, and only aliens caught trying to enter the United States were subject to exclusion.

114. See IIRIRA § 302 (codified at 8 U.S.C. § 1225).

115. Even a claim for asylum, however, only entitles the alien to an interview with an asylum officer. If the officer determines the alien has a credible fear of persecution, the alien receives a hearing before an Immigration Judge (IJ) within seven days. If the asylum officer remains unconvinced, the alien has no further right of appeal. See 8 U.S.C. § 1225(b)(1)(B)(ii).

116. See IIRIRA § 306 (codified at 8 U.S.C. § 1252).

117. Aspects of this new expedited removal procedure were upheld in *American Immigration Lawyers Association v. Reno*, 18 F. Supp.2d 38 (D.D.C. 1998).

118. See 8 U.S.C. § 1252(a)(2)(B). The Supreme Court has held that this provision in

detention. Since transitional rules expired in October of 1998, the INS has been required to detain virtually all criminal aliens upon the completion of their criminal sentences.<sup>119</sup>

### 3. *Opportunities for Relief*

Under the INA as it stood in 1986, several means to delay or preclude an attempted removal order were available to criminal aliens threatened with deportation:

*Judicial Recommendation Against Deportation (JRAD):* Under § 241(b) of the INA, a judge who convicted an alien of a crime of moral turpitude could issue a binding recommendation that the conviction not trigger deportation.<sup>120</sup>

*Asylum:* Any alien could file for asylum by claiming that he had a well-founded fear of persecution "on account of [the alien's] race, religion, nationality, membership in a particular social group, or political opinion" if forced to return to his country of origin. Criminal aliens were not barred outright from seeking asylum, but their criminal records were weighed in the ultimate discretionary decision of an IJ on whether to grant asylum.<sup>121</sup>

*Withholding of Deportation:* The INS could not deport an alien whose life or freedom would be threatened in the country of return because of one of the first five grounds for asylum. However, relief was unavailable to aliens convicted of a "particularly serious crime."<sup>122</sup>

*Suspension of Deportation under § 244 of the INA:* An alien could apply for a discretionary suspension of deportation by demonstrating that his deportation would result in "extreme hardship." Certain minimum residency periods were

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effect bars review of selective enforcement claims, even by LPRs. See *Reno v. American-Arab Anti-Discrimination Committee*, 1999 U.S. Lexis 1514, Feb. 24, 1999.

119. See IIRIRA § 303 (codified at 8 U.S.C. § 1226).

120. See 8 U.S.C. § 1251(b) (1986), *repealed by* IMMACT90 § 505(a)(1) (1990).

121. See 8 U.S.C. § 1158.

122. 8 U.S.C. § 1253(h). The term "particularly serious crime" had not been defined, except on a case-by-case basis. As a result, it was not necessarily equivalent to either a "crime of moral turpitude" or an "aggravated felony." In IMMACT90, however, Congress clarified the definition, saying that any "aggravated felony" was a "particularly serious crime." William R. Robie & Ira Sandron, *Criminal Aliens in the Immigration System: Examining the Significant Role of the Criminal Alien Hearing Program*, 38 FED. B. NEWS & J. 449, 452 (1991). When IIRIRA expanded the list of crimes that qualify as aggravated felonies, it made the bar for "particularly serious crime" applicable only if the crime leads to a sentence of five years or more. 8 U.S.C. § 1231(b)(3).

required.<sup>123</sup>

*Waiver of Deportation under § 212(h) of the INA:* Any alien who was a spouse, parent, or child of a U.S. citizen or LPR and was eligible to adjust status could seek to have an IJ waive deportation based on a conviction for a crime of moral turpitude or possession of thirty grams or less of marijuana.<sup>124</sup> As in suspension of deportation cases, the alien had to show that his deportation would result in "extreme hardship."<sup>125</sup>

*Waiver of Deportation under § 212(c) of the INA:* A lawful permanent resident who had lived in the United States lawfully for seven years and could demonstrate substantial social and humane considerations in his favor could petition the IJ for a discretionary waiver of deportation.<sup>126</sup> Except for long-term residents eligible for suspension of deportation under sec. 244, this waiver provision was the only means of avoiding deportation on the grounds of a narcotics conviction (other than those for possession of less than thirty grams of marijuana).<sup>127</sup>

The last decade of legislative changes has deprived most criminal aliens of nearly all of these opportunities for relief. In 1990, Congress eliminated JRADs<sup>128</sup> and rendered aggravated felons ineligible for asylum or withholding of deportation.<sup>129</sup> Furthermore, aliens convicted of aggravated felonies for which

123. An alien who entered the country without inspection or overstayed a visa had to have been present in the United States for seven years prior to the date of application. An alien who became deportable due to a criminal conviction had to have been present in the United States for ten years since the date of the crime that triggered his deportability. In both cases, the alien had to show that he had been a person of "good moral character" during that time. See 8 U.S.C. § 1254(a)(1), (2) (repealed 1996).

124. See 8 U.S.C. § 1182(h) (repealed 1996).

125. KESSELBRENNER & ROSENBERG, *supra* note 90, at § 11.3(d)(2).

126. See 8 U.S.C. § 1182(c), *repealed by* IIRIRA § 304. Considerations weighing in the alien's favor have included such factors as family ties within the United States, residence in the United States for a long period (particularly when the inception of United States residence occurred at a young age), hardship to the alien's family if deportation occurred, service in the U.S. armed forces, a history of stable employment, and other evidence attesting to the respondent's good character. Adverse factors include the seriousness of the crime, the presence of additional immigration violations, the existence of a criminal record, and other evidence indicative of bad character. Although this section of the INA refers to exclusion cases, case law has extended it to deportation cases where the basis for deportation tracks that for exclusion. See *Matter of Marin* 16 I. & N. Dec. 581 (BIA 1978).

127. See generally, KESSELBRENNER & ROSENBERG, *supra* note 90, at § 11.4(a).

128. See IMMACT90 § 505(a)(1).

129. This was achieved by defining an aggravated felony as a "particularly serious crime." IMMACT90 § 515(a)(1), (2) (codified at 8 U.S.C. § 1158 *as amended by* IIRIRA § 604(a)); 8 U.S.C. § 1253(h)(2), *as amended by* IIRIRA § 307(a)).

they had served five years or more in prison were no longer eligible for relief under § 212(c) of the INA<sup>130</sup> and were prevented from establishing "good moral character," a prerequisite to obtaining suspension of deportation.<sup>131</sup> Effectively, then, aliens who had served five years in prison for an aggravated felony at any time in the past had no relief available under the immigration law.<sup>132</sup>

But the most significant restrictions on relief occurred in 1996. The new analogue of § 212(c) relief, cancellation of removal under § 240A(a), makes far fewer criminal aliens eligible to seek relief than the earlier version did.<sup>133</sup> "Aggravated felons" are barred from eligibility, at a time when Congress has greatly expanded that category. Section 240A(b) provides an analogue, cancellation of removal, but also on very restricted terms; it is available only to aliens who have been present in the United States for ten years.<sup>134</sup> Furthermore, an alien seeking relief under the new provision must now meet a higher standard; rather than showing that removal would result in "extreme hardship" to himself or to a United States citizen or LPR family member, he must show that the removal will cause "exceptional and extremely unusual" hardship to the relative. Hardship caused to the alien himself is no longer relevant.<sup>135</sup> Congress also limited the scope of § 212(h) of the INA by making waivers unavailable to LPRs who, since admission, have been convicted of an aggravated felony or who have not lawfully and continuously resided in the United States for at least seven years.<sup>136</sup>

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130. See IMMACT90 § 511(a) (codified at 8 U.S.C. § 1182(c)), repealed by IIRIRA § 304(b).

131. See IMMACT90 § 509(a) (codified at 8 U.S.C. § 1101(f)(8)).

132. The only tactic available to such an alien was to attack the validity of his previous criminal conviction, perhaps on the grounds that he had received inadequate assistance of counsel at the time of his plea or conviction. See generally KESSELBRENNER & ROSENBERG, *supra* note 90, at § 4. This five-year sentence requirement was later broadened to include any combination of aggravated felony sentences totaling five years. See MTINA § 306(a)(10) (amending 8 U.S.C. § 1182).

133. They can still apply to the district director for "deferred action" status or seek private legislation from Congress.

134. See IIRIRA § 304 (codified at 8 U.S.C. § 1250(a)).

135. See *id.*

136. See IIRIRA § 348.

#### 4. Rules Regarding Re-Entry

Prior to IRCA, a deported alien was not permitted to re-enter the country for five years. Premature re-entry was a felony carrying a sentence of up to two years in prison,<sup>137</sup> or ten years for criminal aliens.<sup>138</sup> Those aliens not ultimately removed on criminal grounds were eligible to depart voluntarily, without the burden of a formal deportation order.<sup>139</sup> Because aliens who are not formally removed are eligible to apply for re-entry immediately, voluntary departure was and remains perhaps the most sought-after form of relief. The INS routinely uses it to encourage aliens not to contest removal.<sup>140</sup>

Stricter re-entry rules and more severe penalties for their violation have been imposed during the last decade. In 1988, Congress increased the maximum penalty for illegal re-entry by a non-aggravated felon to five years in prison from the previous limit of two.<sup>141</sup> Aggravated felons were made excludable for ten years,<sup>142</sup> and the maximum penalty for illegal re-entry in their case was extended to fifteen years in prison.<sup>143</sup> In addition, aggravated felons were barred from receiving voluntary departure.<sup>144</sup> In 1994, Congress increased the penalties for illegal re-entry to ten years in prison, twenty years for aggravated felons.<sup>145</sup> In 1996, with some exceptions, Congress extended the re-entry bar for deported aliens from five years to ten, and aggravated felons were barred from re-entry for twenty years.<sup>146</sup> Aliens "unlawfully present" (due to overstaying a visa or entering without inspection) in the United States for more than 180 days but less than a year, and who depart from the United States, are now barred for three years, and aliens unlawfully present for one year or more who depart are inadmissible for ten years. Aliens removed twice are barred

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137. See 8 U.S.C. 1326(a)(2).

138. See 8 U.S.C. 1326 (amending 8 U.S.C. § 1252(e)).

139. See 8 U.S.C. 1229(c) (amending 8 U.S.C. § 1252(b)).

140. From 1981 through 1989, an average of over 900,000 aliens chose this option each year. See UNDERSTANDING IMMIGRATION, *supra* note 104, at 10-8.

141. See ADA of 1988 § 7345(b)(1) (amending 8 U.S.C. § 1326(b)) (later increased to ten years by VCCLEA).

142. See ADA of 1988 § 7349(a) (amending 8 U.S.C. § 1182(a)(17)).

143. See ADA of 1988 § 7345(b)(2) (amending 8 U.S.C. § 1326).

144. See ADA of 1988 § 7343(b)(2) (amending 8 U.S.C. § 1254(e)).

145. See VCCLEA § 130001(b)(2) (amending 8 U.S.C. § 1326(b)).

146. See IIRIRA § 301(b)(1) (codified at 8 U.S.C. § 1182(a)(9)).

for twenty years, and aggravated felons are barred for life.<sup>147</sup> Aliens who re-enter illegally after having previously been removed or granted voluntary departure may be removed immediately under the prior removal order.<sup>148</sup>

### 5. *A Strong Legal Foundation*

On its face, then, the INA grants the INS ample legal authority to remove most criminal aliens expeditiously. First, the legal impediments to removing criminal aliens who are illegally present in the country have never been great under the INA, and recent legislative changes have made removal even easier by reducing the available procedural defenses, streamlining removal procedures, and foreclosing relief for an ever-broader range of aliens. Under current law, the definition of an "aggravated felony" is now "so broad that conduct which might not appear 'aggravated' to a criminal defense practitioner will nevertheless incur harsh consequences under the immigration laws."<sup>149</sup> Aggravated felons now have no relief available under the statute and must be detained by the INS upon the completion of their criminal sentences in most circumstances. Once removed, aggravated felons are permanently barred from re-entering the country and face a prison sentence of twenty years if they attempt to do so. These sanctions now apply categorically to all aggravated felons, and no official in any branch of government is authorized to mitigate them.

But these recent changes have not been limited to aggravated felons. With the creation of summary administrative removal, the expansion of judicial removal, and the change in the definition of "entry," most criminal aliens who are apprehended now face nearly immediate removal. Criminal aliens who entered without inspection (as most did) may remain in the country only if asylum is granted.<sup>150</sup> The only

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147. See IIRIRA § 301. These bars to re-entry may significantly affect the country to which the criminal alien is returned. For a fuller discussion of this difficult but often ignored issue, see Margaret H. Taylor & T. Alexander Aleinikoff, *Deportation of Criminal Aliens: A Geopolitical Perspective* (unpublished manuscript, on file with authors).

148. See 8 U.S.C. § 1231(a)(5) (1998).

149. KESSELBRENNER & ROSENBERG, *supra* note 90, at § 7.4(a).

150. Even before IIRIRA, only about ten percent of criminal aliens in deportation hearings succeed in their asylum claims. See DEPARTMENT OF JUSTICE, EXECUTIVE OFFICE OF IMMIGRATION REVIEW, DECISIONS ON APPLICATIONS BEFORE IJS IN THE STATED TIME

aliens retaining any real possibility of avoiding removal after a criminal conviction are misdemeanor aliens and non-aggravated felon LPRs who have resided legally in the country for at least ten years and can show that an immediate relative citizen or LPR would sustain "exceptional and extremely unusual" hardship if the alien were removed. This group is small indeed.

At the same time, the INA's peculiar categorization of crimes continues to confuse law enforcement. The concepts of "moral turpitude" and "aggravated felony" appear only in immigration law, and the former has never been clearly defined. Courts have held that not all felonies are crimes of moral turpitude, and not all crimes of moral turpitude are felonies.<sup>151</sup> Murder, rape, larceny, and fraud are considered crimes of moral turpitude, whereas aggravated assault often is not.<sup>152</sup> Severity of the punishment is also not controlling. Predicting the immigration consequences of a criminal conviction has therefore been difficult for aliens and law enforcement officials alike. Indeed, the very definition of "conviction" has been expanded.<sup>153</sup>

The recent amendments to the INA have increased this complexity. The definition of an aggravated felony has changed every few years over the last decade, triggering consequences that even immigration lawyers find confusing. Moreover, because many of the new definitions are retroactive, crimes committed long ago may subject even long-term LPRs to exclusion or removal. State and local law enforcement officials who do not specialize in immigration law will be even more perplexed. Even within the INS, administrative resources have been directed toward writing new regulations, adjusting procedures, and retaining personnel to accommodate these legal changes. Such a complex and unstable body of law makes coordination of the criminal-alien removal system an even more difficult task than it otherwise would be.

Still, the law's complexity is an inadequate explanation for policy failure when, as here, it provides the INS with such

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PERIODS (1995) (on file with authors).

151. See, e.g., *United States ex rel. Griffo v. McCandless*, 28 F.(2d) 287 (E.D. Pa. 1928).

152. For a more thorough discussion of the meaning of "moral turpitude," see KESSELBRENNER & ROSENBERG, *supra* note 90, at § 6.2.

153. See Ira J. Kurzban, *Kurzban's Immigration Law Sourcebook*, at 125-26 (6th ed. 1998).

powerful implementation tools. A better answer lies instead with the institutional framework on which the criminal-alien removal system is built.

### B. *The Institutional Framework*

To enforce immigration law, government must: (1) apprehend and identify; (2) prosecute and adjudicate (on immigration charges); (3) detain or supervise; (4) remove; and (5) prevent the re-entry of hundreds of thousands of criminal aliens spread throughout the fifty states. No single agency can hope to accomplish all of these tasks. Indeed, the INS is only the first among equals in a multitude of federal, state, and local agencies powerless to administer the criminal-alien removal system on their own. In its current form, the INS has primary responsibility only for determinations of removability, actual removal, and prevention of re-entry. Even the removability determination ordinarily must be coordinated with immigration judges from EOIR, a separate agency within the Justice Department, and then with the federal courts. To identify, apprehend, and detain criminal aliens, the INS must rely on federal, state and local law enforcement agencies. Two important constraints necessitate this reliance. First, the INS does not determine in the first instance which aliens are criminals; that is the job of local police and of prosecutors and judges at all levels of government. Second, the INS controls only a tiny fraction of the resources dedicated nationally to criminal law enforcement.<sup>154</sup> Although the INS can and does use its own resources to locate and arrest criminal aliens, it often looks to local law enforcement agencies to do so; in any event, it must rely primarily on such agencies to apprehend, identify, and detain them. Recent legislative changes have done little to mitigate the need for case-by-case coordination; indeed, they have increased it.

The resulting removal system is complex and fragmented. Especially at the early stages of the process—apprehension, identification, detention, prosecution and adjudication—the INS must accommodate its efforts to the organizational

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154. In 1993, all levels of government in the United States spent \$97.5 billion on law enforcement. See SOURCEBOOK 1996, *supra* note 44, at 2. The INS, by contrast, spent less than one percent of that figure (\$934 million) on enforcement in 1993. See IMMIGRATION AND NATURALIZATION SERVICE, U.S. DEP'T OF JUSTICE, INS FACT BOOK 36 (1995).

demands of its external collaborators. Although direct policy disputes are rare, the incentives of local police officers, state corrections officials, immigration judges, and other parties essential to the criminal-alien removal process are often poorly aligned with those of the INS. The difficulties of coordinating such a fragmented group of decisionmakers have prevented the INS from removing more than a small fraction of the criminal aliens who move into and out of law enforcement custody each year.

### 1. *Problems of Apprehension and Identification*

Coordination problems begin with identification. If an effective national system of identification were in place, the INS could rely on state and local law enforcement agents, already in the business of arresting criminals, to apprehend those who turn out to be criminal aliens as well. Nevertheless, despite some progress, twelve years of sustained managerial and congressional attention have failed to develop a coherent system for identifying which criminals are aliens. To understand why, it is helpful to review the criminal justice process, assessing the coordination problems that impede this identification at each stage.

#### a. *Arrest*

To coordinate the removal system at the initial stage, the INS must provide arresting officers with an easy way to determine the immigration status of arrestees<sup>155</sup> while also giving police an incentive to align their post-arrest detention decision with INS priorities. On its face, this appears difficult. Given the actual structure of INS information and management systems, it is nearly impossible.

The lack of an effective system for determining the alienage and immigration status of an arrestee is particularly harmful to coordination. For all but the most petty offenses, most police departments supplement the identification of an arrestee by checking his fingerprints against a central database. Maintained by state governments, these automated fingerprint

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155. This involves: first, a determination of whether the arrestee is an alien; and second, whether he may be removable. The arrestee may be removable: (1) if convicted of the instant offense; (2) due to previous criminal convictions; or (3) because he is illegally present in the United States.

records allow arresting officers to find the arrestee's prior arrests, convictions, and outstanding warrants, as well as any aliases or prior addresses.<sup>156</sup> Though not perfect, this system gives law enforcement officers the information they need to process an arrest quickly.

No comparable system exists to support the identification of criminal aliens. Without a detailed knowledge of immigration law and access to reliable information regarding the arrestee's immigration status, arresting officers cannot assess whether the arrestee might be removable. Only in rare circumstances can local law enforcement officers find out whether a final order of removal is outstanding against the arrestee. State-run criminal databases contain no information regarding aliens' immigration status and, until recently, did not even have records of previous removals.<sup>157</sup> Although arresting officers sometimes record immigration information offered by the arrestee or found on his person, no national system is in place to allow local law enforcement officers to verify an alien's immigration status.<sup>158</sup>

There are several ways the INS could insure accurate identification of removable criminal aliens at arrest. First, local law enforcement officials could be trained to assess the

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156. If the arrestee has been previously arrested and fingerprinted in the state, the system takes only a short time to find previous arrests in the same state or in any other, including arrests by federal law enforcement. If the current arrest is the first time the arrestee has been fingerprinted in the state, the system will usually be unable to match the arrestee to arrests in other states until the FBI has processed the fingerprints and searched its own databases. State databases do carry warrants from other states and from federal law enforcement. These records usually include name, address, date of birth and other descriptive information, but are not as reliable as fingerprint records for matching purposes. See Telephone Interview with Karen Stark, New York State Division of Criminal Justice Services (Jan. 31, 1997).

157. In August, 1994, the INS began adding fingerprint records of deported criminal aliens to the California criminal justice database. In 1996, this project was expanded to a few other states and the FBI. See REMOVAL OF ILLEGAL ALIENS, *supra* note 78, at 5. Nevertheless, these improvements affect only a minority of those arrestees previously ordered deported.

158. In the 1980s, the INS received over 100,000 calls a year from law enforcement, but its response was generally ad-hoc. See *Criminal Aliens: Hearings before the Subcomm. on Immigration, Refugees, and International Law of the House Comm. on the Judiciary*, 101st Cong. 20 (1989) (testimony of Jack Shaw, Assistant Comm'r for Investigations) [hereinafter *1989 Judiciary Comm. Hearings on Criminal Aliens*]. Since July, 1994, the INS has operated a pilot program known as the Law Enforcement Support Center (LESC), designed to respond to inquiries from local law enforcement. See U.S. GEN. ACCOUNTING OFFICE, LAW ENFORCEMENT SUPPORT CENTER: NAME-BASED SYSTEMS LIMIT ABILITY TO IDENTIFY ARRESTED ALIENS 4 (1995). For more on the progress and effectiveness of this project, see Section IV.C.3., *infra*.

immigration consequences of an arrest. Such an approach would require that hundreds of thousands of law enforcement officers be trained in immigration law. The complexity and rapid pace of change of immigration law would make such training even more daunting. More importantly, law enforcement officers would need access to immigration records to determine the status of aliens who claim they entered legally. Designing an automated system to serve such a far-flung and diverse array of users would be difficult for any agency, let alone one with a record-keeping system as woefully antiquated and ineffective as that of the INS.<sup>159</sup>

Alternatively, local law enforcement officers could contact the INS whenever they arrest someone who, they believe, is not a citizen. The INS would have to search its files, review the current arrest charges, and determine whether the alien is likely to be removable. To make such a system work, the INS would need up-to-date central files on all aliens known to it, as well as enough trained operators to respond quickly to calls from arresting officers.<sup>160</sup> Unfortunately, the INS has neither. Its record-keeping system is decentralized and only partially automated.<sup>161</sup> Even with the right data system in place, staffing such a service would require several hundred operators.<sup>162</sup>

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159. A 1990 study by the U.S. General Accounting Office (GAO) found that "INS managers and field officials do not have adequate, reliable, and timely information" to help them carry out their responsibilities effectively because INS data systems "contain incomplete and inaccurate data which cannot be efficiently accessed or shared." U.S. GEN. ACCOUNTING OFFICE, INFORMATION MANAGEMENT: IMMIGRATION AND NATURALIZATION SERVICE LACKS READY ACCESS TO ESSENTIAL DATA 1 (1990) [hereinafter INS INFORMATION MANAGEMENT]. According to INS officials surveyed for the GAO study, "sharing and exchange of data from six INS information systems and seven external law enforcement systems . . . is needed to effectively investigate criminal aliens." *Id.* at 4. Although the INS has launched several efforts to improve its information systems, most are not complete. See Telephone Interview with William Griffin, Director of the Law Enforcement Support Center (LESC) (Feb. 14, 1997) [hereinafter Griffin Interview].

160. In New York, for example, criminal justice officials expect a full criminal history to be available within eight hours of arrest, meaning that state officials must match the defendant's fingerprints to their databases and send the arresting agency the results within four to five hours after receiving the request.

161. INS staff must still consult a variety of separate databases to determine whether an individual has a record with the INS, and some case information is only available in paper files which may be located at any of dozens of INS offices around the country. The specialized knowledge needed to understand the data in these systems is an important reason the INS has been reluctant to link its data systems with those of law enforcement. See Griffin Interview, *supra* note 159.

162. This estimate is based on the following assumptions. INS operators at the LESL, which functions on the model described in the text, spend an average of twenty minutes on each case. See Griffin Interview, *supra* note 159. Thus, each operator handles

Furthermore, many alien arrestees, having entered without inspection, would be unknown even to the INS. These identification problems have led the INS to require a face-to-face interview by an INS investigator before initiating removal proceedings against any alien.<sup>163</sup> To conduct these interviews at arrest, the INS would need enough investigators to visit police holding facilities all over the country. Even if face-to-face interviews were not required, the INS would need some way to pick up removable aliens whom law enforcement chose to release.<sup>164</sup> The INS has never had enough resources to staff such a system, even under its current budget.<sup>165</sup>

Detention problems also hamper coordination at arrest. If the INS were to identify removable criminal aliens at arrest, police officers would have to arrange for INS detention before releasing an alien who would not otherwise be detained. In such cases, two issues would arise. First, the arresting officer would have to be sure the decision to detain was warranted on immigration grounds. In close cases, an INS interview would

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about twenty calls a day. In 1994, there were over 14,000,000 arrests in the United States. See U.S. DEPT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1995, at 394 (1996) [hereinafter SOURCEBOOK 1995]. If 1,000,000 of these (seven percent) result in calls to the INS each year, and the INS staff members handle an average of twenty calls each per day, this approach would require forty-six operators per shift. Covering a shift twenty-four hours a day, 365 days a year generally requires five staff members per position, including sick time and vacation, for a total of 230.

163. INS budget models indicate that this process takes an average of eight hours per case for aliens incarcerated in state facilities. See St. John-Mellado Interview I, *supra* note 65.

164. In Arizona, where the INS began in 1994 to use the centralized information resources of the LESC, investigators do not interview aliens at arrest. Instead, a determination of deportability is made via computer, based on INS records. If the alien is an aggravated felon or has previously been deported and Arizona police choose not to detain the alien, an INS detention and deportation officer takes the alien into INS custody. Although this program saves INS investigator time, its expansion has been contained by the lack of sufficient INS resources in other areas, such as detention and deportation officers and detention space. See Griffin Interview, *supra* note 159.

165. See Morton Interview, *supra* note 31. The Investigations Division of the INS had only 1,100 staff in FY 86, evenly divided between employer sanctions, document fraud, and criminal-alien cases. By FY 96, the total had reached only 2,800. See IMMIGRATION AND NATURALIZATION SERVICE, IMMIGRATION AND NATURALIZATION SERVICE SALARIES AND EXPENSES—CROSSWALK OF BUDGET CHANGES, 1986-1996, at 2-4, 25 (1996) [hereinafter CROSSWALK] (on file with authors). Only about two-thirds of these staff members were investigative officers; the rest are support staff. See Telephone Interview with Tom Klausung, INS Budget Office (Oct. 28, 1996). Even if more resources were available, an accurate projection of what it would take to run such a system would elude the INS because it has no systematic workload statistics or budget models for investigative staff. See Telephone Interview with Kathleen Hibbard, INS Budget Office (Feb. 18, 1997).

probably be required. Second, if the INS asked the arresting agency to hold the arrestee on immigration grounds alone, it would need to take the alien into custody or make arrangements for detention by the local correction agency. Local authorities would resist such an arrangement, especially if it delayed the normal justice process or became an unfunded mandate. Even if the INS were to pay for these services, the resulting reimbursement scheme would take time to negotiate and might create perverse incentives for law enforcement to exaggerate its claims for immigration-related detention.

Concerns such as these have led the INS not to screen for criminal aliens at the arrest stage. Avoiding the arrest stage allows the INS to ignore cases in which criminal charges are dropped, and it allows arresting officers to make detention decisions based solely on local criminal justice policy. It also prevents the INS from delaying the criminal justice process, which local law enforcement would vigorously resist. On the other hand, the INS remains ignorant of any removable aliens released just after arrest and misses an opportunity to start the removal process sooner for those who are detained on criminal justice grounds.

#### b. *Arraignment*

Like an arrest, the arraignment (or its equivalent)<sup>166</sup> provides an opportunity for the INS to coordinate its objectives with those of local law enforcement agencies. Coordination at this stage must include prosecuting attorneys and representatives of the judiciary. Both prosecutors and judges use the arraignment to sort serious cases from minor ones and strong cases from weak ones. Weaker cases and those involving less serious crimes will tend to be disposed of quickly. If the INS were a party to the arraignment proceeding, however, it might weigh the cases differently, focusing on previously removed aliens, regardless of the crime charged in the instant case, or on aliens who can be removed quickly on grounds unrelated to the strength of the instant criminal case. Even on the surface,

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166. Although the details of criminal procedure differ substantially from one jurisdiction to another, all jurisdictions require some early determination of probable cause by a judge or grand jury. See *Gerstein v. Pugh*, 420 U.S. 103 (1975). Those differences are glossed over here, however, because any variations are likely to produce the same difficulties of coordination.

then, coordination at arraignment is likely to be difficult. In practice, the INS avoids it altogether.

In most jurisdictions, arraignment is designed to bring together all of the relevant parties and as much information as possible, so that case-processing decisions can be made quickly. Most arraignment judges handle dozens of cases in a day, spending only a few minutes on each. All parties are reluctant to delay the process to wait for input from outsiders. Injecting immigration concerns into this process would require significant changes and might trigger costly and unwelcome delays. Although the parties in the courtroom know the defendant's criminal history, they do not know his immigration status and have no easy way to learn it. Furthermore, because local defense attorneys, prosecutors, and criminal court judges do not specialize in immigration law, they are unlikely to know the immigration consequences of a particular criminal disposition. Even if they had this information and were willing to use it as a case disposal tool, they would have little authority to do so.<sup>167</sup> Under the current institutional framework, then, both the INS and local law enforcement officials find it impractical to use arraignment to coordinate criminal and immigration case processing.

Policymakers hoping to change this situation confront several obstacles. First, training local attorneys and judges in immigration law would be nearly as difficult as training law enforcement officers. Furthermore, like police officers, court personnel across the country would need access to INS files—an impossibility under current conditions. Responding to phone calls from local courts would be just as costly as responding to calls from arresting officers, and it would be prohibitively costly for the INS to staff arraignment courts

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167. State officials could attempt to get an alien defendant to agree to removal as part of a plea bargain in a criminal case, but, until recently, such stipulations were often subject to attack in immigration proceedings. Under the law passed in September, 1996, such stipulations will now be considered conclusive proof of removability. See IIRIRA § 304(a)(3) (codified at 8 U.S.C. § 1229a (Supp. II 1996)). In the past, most prosecutors have found aliens unwilling to agree to removal as part of a plea bargain. See, e.g., U.S. GEN. ACCOUNTING OFFICE, CRIMINAL ALIENS: INS' ENFORCEMENT ACTIVITIES 31 (1987) [hereinafter INS' ENFORCEMENT ACTIVITIES]. Although this may change now that aliens have so few defenses to removal, unless local prosecutors themselves can credibly threaten to press the removal claims, stipulated removal is unlikely to be a real factor in the removal system.

across the country.<sup>168</sup> Even making case processing advisory services available on a voluntary basis to local jurisdictions is unlikely to be effective. Without a constant INS presence or a full set of immigration information, local criminal-justice professionals will continue to process cases according to their own priorities.

These coordination problems mean that in nearly all cases, criminal aliens are processed at local courts before the INS and local law enforcement have exchanged any information regarding the immigration status of the defendant. By not screening cases at this stage, the INS misses a chance to deal with any aliens whose cases are disposed of at arraignment, except for those sentenced to jail immediately.

### *c. Pre-trial*

Coordination between law enforcement agencies and the INS is also possible during the pre-trial period when the defendant may be in custody in a local jail or released on bail or on his own recognizance. The important parties at this stage include the parties present at arraignment—the judge, prosecutor and defense attorney—as well as the agency responsible for the local jail. These parties are likely to have strong detention priorities driven by local criminal justice policies and case-specific factors that are related to the underlying criminal charges but unrelated to immigration policy. Nevertheless, there are more opportunities for coordination because case processing moves more slowly during the pre-trial phase than at arrest or arraignment.

Immigration agents, for example, could work with local criminal justice officials to use pre-trial appearances to screen for removable criminal aliens. Using some simple profiles, local officials could identify defendants likely to be aliens and group their court appearances together on a single day each week or month when INS screening staff would visit. Although such a system would be more cost-effective than the blanket coverage required at arrest or arraignment, it would still be expensive. Furthermore, coordination problems would arise whenever the

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168. One San Diego County judge did manage to arrange this, however, with apparently positive results. See *1989 Judiciary Comm. Hearings on Criminal Aliens*, *supra* note 158, at 84.

schedules of judges or attorneys failed to mesh with that of the INS.

Screening defendants at local jails is more promising. There are far fewer jails than criminal court rooms, and the larger jail systems hold numerous criminal aliens. Accordingly, the INS has established screening projects at local jails in several jurisdictions whose jails house a high proportion of criminal aliens. In New York City; Los Angeles County; Orange County, California; Dade County, Florida; and other such jurisdictions, INS investigators stationed at the local jails screen for foreign-born inmates. If the INS determines that an inmate is removable prior to the disposition of his current criminal case, the county may drop the current charges and release the alien into INS custody. If the alien is not released, the INS can lodge a detainer with the local correctional agency requiring that the alien be turned over to the INS upon release.<sup>169</sup> Although more efficient than screening efforts at earlier stages, jail house screening is labor intensive. INS investigators spend an average of eight hours on each case, including preliminary identification, paperwork review, interview of the alien, and collection of the necessary paperwork to support the removal process.<sup>170</sup> The resource demands of this jail house screening process have left its promise largely unfulfilled. Although the INS has recently expanded its jail screening projects, the vast majority of jail inmates continue to go unscreened. Moreover, even the existing jail house screening programs miss many removable criminal aliens because more than half of felony defendants are not detained prior to the disposition of their cases.<sup>171</sup>

#### d. *Post-conviction*

Finally, the INS could wait to screen for removable aliens until after conviction and sentencing of criminal defendants. Coordination with those who supervise convicted offenders—correction officials, probation agencies and parole offices—is simpler than coordination with court personnel, but presents its own problems. Because offenders remain under the

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169. See Telephone Interview with Russell Bergeron, Office of Public Affairs, INS (Jan. 31, 1997) [hereinafter Jan. 31, 1997 Bergeron Interview].

170. See St. John-Mellado Interview I, *supra* note 65.

171. See SOURCEBOOK 1995, *supra* note 162, at 510.

supervision of the same agency for several months or longer, there is less need to screen cases quickly. But once offenders are sentenced, they are usually dispersed in facilities and communities across the state. Although INS investigators want prisoners grouped together to facilitate interviews and record collection, state officials prefer to group them according to other criteria that have little to do with immigration.

Nevertheless, the INS has long recognized the value of conducting screenings in state prisons and now screens the prison populations at fifteen federal and sixty-one state prisons in the five states with the largest populations of incarcerated criminal aliens.<sup>172</sup> Although prison screenings would seem relatively easy to coordinate, the INS failed to screen more than a third of the foreign-born prisoners even in the four most heavily affected states as recently as June, 1997. From the IHP program's inception in New York in 1986, it has been hampered by a lack of INS investigators and by the fact that state prison systems do not always accord high priority to INS administrative preferences. Criminal aliens are spread throughout state correctional systems, often requiring INS investigators to travel to dozens of facilities across the state. Only through painstaking negotiations with prison officials in each state and the Federal Bureau of Prisons has the INS been able to encourage the seven states to adopt procedures that maximize INS efficiency by consolidating prisoner entry and exit points, sharing criminal records with the INS on a regular basis, and making space for INS staff at the intake and discharge facilities.<sup>173</sup> By July, 1997, several states did, in fact, reduce the number of intake sites,<sup>174</sup> but still others did not make reductions to the extent the INS wanted.<sup>175</sup> Mindful of the effort required to establish the IHP program, INS officials are

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172. See *Criminal Aliens: INS's Efforts to Identify and Remove Imprisoned Aliens Need to be Improved: Testimony of Norman J. Rabkin Before the Immigration and Claims Subcommittee of the House Committee on the Judiciary* (July 15, 1997) <<http://www.gao.gov/reports/htm>> [hereinafter Rabkin Testimony]; *Criminal Aliens: Ins' Efforts to Remove Imprisoned Aliens Continue to Need Improvement, GAO Letter Report to the Chairman, Subcommittee on Immigration and Claims of the House Committee on the Judiciary* sec. 2.1 (Oct. 16, 1998) <<http://www.gao.gov/reports.htm>> [hereinafter GAO Report].

173. See GAO Report, *supra* note 172, at § 1.

174. For example, Texas reduced the number of its intake facilities from twenty-five to one. See Rabkin Testimony, *supra* note 172, at 9.

175. See *id.*

loathe to commit new managerial resources to tackle the similar problems inherent in screening the probation and parole populations.

e. *The Identification Process Overall*

At each stage of the criminal justice process, the success of criminal-alien identification efforts depends on the INS gaining the cooperation of officials with divergent goals and incentives. Although opportunities for cooperation exist at each stage, legal and organizational factors prevent smooth coordination. Local officials lack access to essential immigration information and, in any case, lack authority to make immigration determinations on their own. At the same time, geographic and organizational dispersion prevents the INS from covering the justice system's myriad choke points with its own agents. Coordinating such a system is not impossible, but success is bound to be slow.

These difficulties have left the INS to adopt practices that fail to identify most removable criminal aliens. Rather than using local law enforcement to identify criminal aliens early in the criminal enforcement process, the INS is forced to wait until the aliens are sentenced to jail or prison. This reactive approach allows the INS to focus its resources on the most serious criminals, but INS screening continues to miss most removable criminal aliens arrested by law enforcement agencies. Just how many are missed is difficult to know, but some educated guesses can be made. First, about forty-five percent of arrestees are released or sentenced at arraignment to some non-incarcerative sanction.<sup>176</sup> The INS also misses any aliens whose cases are dismissed during the pre-trial phase, probably another seventeen percent of arrestees overall.<sup>177</sup> Defendants

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176. Most of these are misdemeanants, who constitute about seventy percent of arrestees overall. See Telephone Interview with Michelle Sviridoff, Center for Court Innovation (Jan. 15, 1997) [hereinafter Sviridoff Interview]. Because detailed data on misdemeanor case processing across the country is not available, Sviridoff's estimates are based on case processing patterns in the New York City Criminal Court. Patterns in other jurisdictions may vary somewhat, but a more scientific estimate would not alter the thrust of this analysis—specifically, that the INS screens few arrestees.

177. A sample of adjudication outcomes for the seventy-five largest counties in the United States shows that thirty-two percent of felony arrests do not result in conviction. See SOURCEBOOK 1995, *supra* note 162, at 514. This is just under ten percent of cases overall. About a third of misdemeanor cases not disposed of at arraignment result in dismissal. See Sviridoff Interview, *supra* note 176. Because only thirty percent of misdemeanor cases survive arraignment, this is about seven percent of cases overall.

sentenced only to probation or some other non-incarcerative sentence—approximately thirteen percent overall<sup>178</sup>—are not screened by the INS unless they are first held at one of the few jails with an INS screening program. Defendants sentenced to jail—another seventeen percent overall<sup>179</sup>—are screened in only a few jurisdictions. The remaining nine percent of arrestees are sentenced to prison, where most are indeed screened by the INS.<sup>180</sup> All told, then, the current INS policy of screening only in federal and state prisons and a few local jails probably means that almost ninety percent of removable criminal-alien arrestees—several hundred thousand, according to estimates in Section II above—enter and leave law enforcement custody without any determination regarding their removability.<sup>181</sup>

## 2. *The Prosecution and Adjudication Process*

Identifying removable criminal aliens is, of course, only the first step in the removal process. The INS still must prove that the alien is indeed removable. INS attorneys, defense attorneys, immigration judges at EOIR, and the aliens themselves all must participate in the process, which is plagued by delay and poor coordination.

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178. Thirty percent of felony convictions end in probation sentences. See SOURCEBOOK 1995, *supra* note 162, at 499. This represents about twenty percent of all felony cases, or about six percent of all cases. About a third of misdemeanor cases surviving arraignment, roughly seven percent overall, result in probation or some other non-incarcerative sentence. See Sviridoff Interview, *supra* note 176.

179. Twenty six percent of felony convictions result in jail sentences. See SOURCEBOOK 1995, *supra* note 162, at 499. This is about seventeen percent of all felony cases, or about five percent of cases overall. Roughly seventeen percent of misdemeanants, about twelve percent of cases overall, are sentenced to jail. See Sviridoff Interview, *supra* note 176.

180. It is worth noting, however, that the INS screens only those prisoners whom local officials report as being foreign-born, a method likely to miss at least some removable aliens because the state's count of foreign-born inmates is based on the prisoners' self-reports and because alien prisoners are likely to try to conceal their immigration status. See *supra* note 37.

181. A calculation based on the following assumptions suggests a figure of over half a million. In 1994, over 14,000,000 arrests were made in the United States. See SOURCEBOOK 1995, *supra* note 162, at 394. If seven percent of these arrestees were foreign-born, and if sixty percent of those were removable criminal aliens, then roughly 600,000 were criminal aliens. If, conservatively, eighty-five percent were not screened, then 510,000 removable criminal aliens were arrested and not screened. Of course, there are several reasons to be wary of such a calculation. First, many of these incidents involve the same people, as a single individual might be arrested and released more than once in the same year. Second, with so many low-level arrests included, the actual proportion of foreign-born arrestees who are removable criminal aliens is probably lower than sixty percent.

The hearing process begins when an INS attorney issues to the alien a Notice to Appear.<sup>182</sup> (Prior to the enactment of IIRIRA § 304(a), the document was known as the Order to Show Cause (OSC)). The INS sends a copy to EOIR, which schedules an initial hearing date. INS personnel also decide whether to detain the alien or, if not, what bond or condition should be set for his release. The EOIR then sends a notice to the alien explaining the time and place of the initial hearing. At the hearing, the immigration judge explains the process to the alien and informs him of his rights, including his right to apply for relief of various types, including asylum. The judge also informs the alien of his right to be represented by counsel at his own expense and may supply a list of local counsel. The immigration judge may make his own determination regarding bond at the initial hearing, or the alien may request a hearing on the issue later. One or more adjournments are granted in the vast majority of cases.<sup>183</sup>

The alien may apply for various forms of relief from removal, including asylum. If removal has been conceded or established and the immigration judge has denied all forms of relief, a final order of removal is entered against the alien. The alien then has thirty days to appeal the decision to the BIA. If that fails, the alien has thirty days to petition for review in the United States Court of Appeals.<sup>184</sup> While each appeal is pending, the alien may request a stay of removal.<sup>185</sup>

This process appears simple, but actually it has generated enormous delays.<sup>186</sup> Until recent reforms were instituted, these

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182. See 8 U.S.C. § 1229(a)(1).

183. A 1989 study found that over eighty percent of deportation cases were adjourned at least once. See U.S. GEN. ACCOUNTING OFFICE, IMMIGRATION CONTROL: DEPORTING AND EXCLUDING ALIENS FROM THE UNITED STATES 43 (1989) [*hereinafter* DEPORTING AND EXCLUDING].

184. See 8 U.S.C. § 1252(b)(1). This assumes that Congress has not deprived the courts of all review jurisdiction, a question that is currently under intense litigation in a number of circuits. Prior to the enactment of IMMACT90, an alien had six months to appeal. See IMMACT90 § 545(d) (codified at 8 U.S.C. § 1252).

185. See 8 U.S.C. § 1252(b)(3)(B). Prior to IMMACT90, the stay of deportation was granted automatically for aggravated felons. See IMMACT90 § 513(a), *repealed by* IIRIRA § 306(b).

186. A 1989 GAO study found that fifty-nine percent of deportation cases took more than a year to resolve. When appealed to the BIA, eighty-one percent of the cases took more than two years to resolve, and twenty-one percent took more than five years. See DEPORTING AND EXCLUDING, *supra* note 183, at 39. As a result, more than 220,000 deportation and exclusion cases were pending in September, 1987, and, although 85,000 aliens were placed in deportation proceedings each year in the late 1980s, only 22,000

delays stemmed primarily from two sources: (1) a lack of coordination between the INS and EOIR; and (2) the ability of aliens to delay the hearing process by requesting relief or appealing adverse decisions.

The lack of coordination between EOIR and INS, though not extreme, has been sufficient to create substantial delays in the removal process. Most significantly, the two agencies have failed to coordinate the issuance of the Notice to Appear with the scheduling of the first appearance. In most cases, an INS agent issues the Notice and sends a copy of it to EOIR, and EOIR then sets the first appearance date and sends the notice to the alien.<sup>187</sup> Only in late 1993 did the INS and EOIR launch a pilot effort to coordinate electronically the scheduling of the initial hearing and the issuance of the OSC.<sup>188</sup> By early 1997, electronic schedule coordination was taking place in only four cities, and it was not uncommon for the EOIR to receive an OSC for calendaring more than a year after it had been issued by the INS.<sup>189</sup>

More serious problems arose from the failure of the INS and EOIR to maintain reliable address information for aliens involved in the deportation process.<sup>190</sup> In the Immigration Act of 1990 (IMMACT90), Congress addressed the problem by

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were removed annually. *See id.* at 10, 16.

The procedural reforms of IMMACT90, discussed *infra* at text accompanying notes 359-62, allowed the EOIR to reduce these backlogs substantially. By 1996, only 125,000 cases were pending in deportation proceedings. *See* Telephone Interview with Lynn Petersburg, Program Planning & Analysis, Executive Office of Immigration Review (Mar. 18, 1997) [hereinafter Petersburg Interview]. Nevertheless, the hearing process continues to provide opportunities for delay and was certainly an important source of the poor performance of the removal system during much of the period studied here.

187. Immigration officials in the New York office explained in 1986 that the first hearing in a deportation case often was not scheduled until six weeks after filing of the OSC. Furthermore, cases were rarely decided at the first hearing, and second hearings were usually scheduled four months later. *See* INVESTIGATIVE, *supra* note 21, at 20.

188. *See* 1994 Hearings on Criminal Aliens, *supra* note 40, at 231 (response of Chris Sale, Deputy Commissioner, INS, to questions from Rep. Sangmeister).

189. *See* Petersburg Interview, *supra* note 186. For discussion of other INS-EDIR coordination problems, see Peter H. Schuck, *INS Detention and Removal: A White Paper*, 11 GEO. IMMIGR. L.J. 667 (1997).

190. In September, 1987, for example, the INS did not know the whereabouts of twenty-five percent of the aliens in deportation or exclusion proceedings. *See* DEPORTING AND EXCLUDING, *supra* note 183, at 23. Because immigration judges doubted the effectiveness of notices issued to aliens, they were reluctant to order aliens removed in absentia when they failed to appear at hearings. This resulted in the administrative closure of thirty-five percent of cases in New York and eighteen percent in Los Angeles. *Id.* at 30. As the failure-to-appear rate rose, aliens realized that no substantial negative consequences attached to missing appearances. *Id.* at 31.

revamping the notice requirements and increasing the penalties for aliens who failed to appear at deportation hearings.<sup>191</sup>

Applications for relief and appeals of EOIR decisions also contribute to much delay.<sup>192</sup> The IMMACT90 reforms improved the hearing process in one key respect: administrative closings (essentially dismissals of inactive cases) declined sharply while *in-absentia* removal orders increased.<sup>193</sup> At the same time, the hearing process shortened, with most cases taking about six months to reach disposition before the IJ.<sup>194</sup> Appeals, which remained rare, added an average of six months to the process.<sup>195</sup> As in the past, applications for relief extended the hearing process (usually from one month to six), but the aggregate delays caused by such applications were now much smaller than in the past.<sup>196</sup>

Like the identification of criminal aliens by local law enforcement agencies, the removal adjudication process also suffers from problems of inter-agency coordination. The separation of INS and EOIR into separate entities and the adversarial nature of the hearing process magnify managerial errors (such as the inadequate alien notification system) and lead to greater delay and mistrust. Against such a backdrop,

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191. See *infra* note 359 and accompanying text.

192. The 1989 GAO study found that cases in which the alien requested some form of relief took five times longer than cases in which no relief was sought. See DEPORTING AND EXCLUDING, *supra* note 183, at 44. Furthermore, the study found that an appeal to the BIA generally added more than a year to the duration of a deportation case. See *id.* at 45. An appeal to the federal courts added another year. See *id.* at 46. Of these two causes for delay, applications for relief, especially asylum, were far more significant than the opportunity to appeal. In 1989, roughly half of the aliens sought relief of some type, see *id.* at 44, but only a handful (fewer than five percent) appealed to the BIA. See *id.* at 40, 41. Although appeals delayed the process, only about twenty-five percent (thirty out of 115) were ultimately successful. See DEPORTING AND EXCLUDING, *supra* note 183, at 42.

In early February, 1999, an already large backlog of appeals to the BIA was growing worse, as the BIA sought to reduce to 180 days the time from filing of the notice of appeal to BIA decision in cases of detained aliens. For other cases, the BIA's goal is nineteen months. See Remarks of Paul Schmidt, Chairman of the BIA, to New York chapter of American Immigration Lawyers Association, Feb. 1, 1999.

193. In FY 89, administrative closings outnumbered *in-absentia* deportation orders four-to-one. By FY 95, despite a larger caseload, administrative closings had fallen by seventy-five percent and *in absentia* deportation orders outnumbered administrative closings six-to-one. See DEPARTMENT OF JUSTICE, EXECUTIVE OFFICE OF IMMIGRATION REVIEW, COMPLETION TREND ANALYSIS—DEPORTATION (Sept. 4, 1995) (on file with authors).

194. See Petersburg Interview, *supra* note 186.

195. See *id.*

196. See *id.*

even the simple task of scheduling an alien's initial appearance becomes an opportunity for inter-agency friction. Although the legal maneuverings of the aliens themselves have contributed to the sluggish pace of deportation adjudications, they are not its chief cause. Furthermore, legislative changes over the last decade have curtailed the potential for such delays, and the 1996 legislation will have an even more drastic effect. Nevertheless, problems of administrative coordination are likely to remain.<sup>197</sup>

### 3. Detention

As criminal aliens wend their way through the removal process, the INS must keep track of them. It has three choices: (1) release aliens on bond or on their own recognizance; (2) detain them; or (3) track them while they remain in custody in a local jail or state or federal prison. Each option poses managerial challenges.

#### a. Community Release

Until recently, the INS had so little detention space that it had to release most criminal aliens during the hearing process.<sup>198</sup> Unfortunately, many failed to appear for hearings, and even more absconded when actually ordered removed.<sup>199</sup> Aliens ordered removed are far less likely to surrender. One 1996 report found that ninety-four percent of removable detained aliens were actually removed, whereas only eleven percent of released removable aliens were.<sup>200</sup>

Furthermore, the primary method the INS uses to insure the appearance of aliens in detention hearings—the posting of money bonds—is clearly a failure.<sup>201</sup> Problems with the system

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197. For discussions of, and possible solutions to, these problems, see generally Schuck, *supra* note 189; U.S. GEN. ACCOUNTING OFFICE, CRIMINAL ALIENS: INS'S EFFORTS TO IDENTIFY AND REMOVE IMPRISONED ALIENS NEED TO BE IMPROVED (1997) [*hereinafter* EFFORTS TO IDENTIFY].

198. See *infra* section III.B.3.

199. The 1989 GAO study estimated that twenty-seven percent of cases are closed due to the alien's non-appearance. See DEPORTING AND EXCLUDING, *supra* note 183, at 22. In New York, during FY 93, for example, eighty-seven percent of aliens receiving final orders of deportation failed to appear for removal. See *Criminal Aliens in the United States*, *supra* note 37, at 21. Between 1989 and 1993, over 18,000 criminal aliens were ordered deported but avoided actual removal. See *id.* at 22.

200. See Schuck, *supra* note 189, at 673 n.5.

201. Over fifty percent of those failing to appear did so despite having posted bond.

stem from four sources. First, bond levels are too low to induce compliance. The statutory minimum was long set at \$500; the 1996 law raised it to \$1,500. For a ten percent fee, most aliens can obtain a commercial bond.<sup>202</sup> Second, bonds set by the INS are routinely reduced by immigration judges. One study found that, although the INS set bonds at an average of \$3,000, IJs reduced them by an average of sixty-eight percent.<sup>203</sup> This "by-play," in which bond levels set by INS officers are routinely reduced by IJs, only leads each party to over-compensate, reducing the rationality of the bail system and encouraging costly and time-consuming appeals. Third, even when bonds are breached, the INS rarely seeks to enforce them, and the bondsmen, in turn, rarely bother to pursue the alien.<sup>204</sup> Finally, the problems of information management and coordination at the identification stage (discussed earlier) insure that most alien absconders will not trigger special attention from law enforcement should they ever be arrested again. Together, these problems led Congress in 1996 to abandon community release in favor of mandated detention for most criminal aliens.<sup>205</sup>

#### b. *Lack of Detention Space*

A harsh but effective alternative to release, of course, would be to detain aliens pending their removal. The INS, however, has always been short of detention space, and detaining aliens unnecessarily is both harsh and expensive. In 1993, the INS had a total of 3,500 beds in INS-operated and separately contracted detention facilities.<sup>206</sup> The GAO estimated that in 1990, over

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See DEPORTING AND EXCLUDING, *supra* note 183, at 26.

202. See Schuck, *supra* note 189, at 683.

203. See Janet Gilboy, *Setting Bail in Deportation Cases: The Role of Immigration Judges*, 24 U. SAN DIEGO L. REV. 347, 370 (1987).

204. See Schuck, *supra* note 189, at 684.

205. See, e.g., IIRIRA § 303 (codified at 8 U.S.C. § 1226). This policy, however, has not gone unchallenged. On December 14, 1998, a federal district court in Denver ruled that the Constitution requires individualized bond hearings. See *Martinez v. Greene*, 28 F. Supp. 2d 1275 (D. Colo. 1998). The INS has been exploring alternatives to mandatory detention. One alternative, the Vera Institute of Justice's Appearance Assistance Project (AAP), claims that supervised release of 122 AAP participants, consisting predominantly of LPR's, resulted in 92-100 percent appearance rates at immigration court hearings. Telephone interview with Ajay Kahashu, Policy Analyst, AAP of the Vera Institute of Justice, Feb. 10, 1999.

206. See *Criminal Aliens in the United States*, *supra* note 37, at 21.

480,000 aliens were potentially subject to detention.<sup>207</sup> With the average length of detention at twenty-three days,<sup>208</sup> the INS would have needed roughly 30,000 beds to detain them.<sup>209</sup> Furthermore, the agency must reserve many detention beds for long-term detainees and to insure the presence of a detention deterrent for other groups of removable aliens, such as those attempting to enter the country illegally. These pressures only worsen the shortfall of detention space available for criminal aliens.

The detention situation remains dire despite the addition of many beds and a top priority in the allocation of new resources.<sup>210</sup> When IIRIRA was passed at the end of 1996, requiring the INS to detain virtually all criminal aliens leaving state prisons, the INS promptly certified that detention space was inadequate in order to invoke the law's transition provisions allowing the INS to release some criminal aliens who are LPRs.<sup>211</sup>

As of January 22, 1999, the detained population had ballooned to 16,116,<sup>212</sup> including more than 12,000 aggravated felons.<sup>213</sup> The agency claimed an urgent need for 3,700 additional beds<sup>214</sup> to detain criminal aliens due to the expiration of the "Transition Period Custody Rules" (TPCR) on October 9, 1998.<sup>215</sup> The TPCR permitted the INS to refrain from

207. See U.S. GEN. ACCOUNTING OFFICE, IMMIGRATION CONTROL: IMMIGRATION POLICIES AFFECT INS DETENTION EFFORTS 3 (1992) [hereinafter IMMIGRATION POLICIES]. The number must be far greater today with increased illegal migration and the detention mandated by the 1996 laws.

208. See *id.*

209. Of course, placing so many aliens in detention would have severely strained other parts of the removal system, leading to an inevitable increase in average detention periods.

210. See Morton Interview, *supra* note 31. The crowded conditions of detention are also dangerous. See, e.g., Mirta Ojito, *Immigrant's Death in Detention Prompts New Criticism*, N.Y. TIMES, Feb. 9, 1999, at B3.

211. See 73 INTERPRETER RELEASES 1418-19 (1996).

212. As of January, 1999, ninety-three percent of the beds the INS uses for the detention of immigrants are occupied. See Ojito, *supra* note 210.

213. See *supra* note 26.

214. See Telephone Interview with Barbara Francis, Office of Public Affairs, INS (Feb. 10, 1999).

215. See Donald Kerwin & Charles Wheeler, *The Detention Mandates of the 1996 Immigration Act: An Exercise in Overkill*, 75 INTERPRETER RELEASES 1433, 1435 (Oct. 19, 1998). According to the INS, the problem is not bed capacity, but funding. For FY 99, Congress has funded only 14,570 beds. See Feb. 11, 1999; Bergeron Interview, *supra* note 25; see also Testimony of Doris Meissner, Commissioner, INS, *Before the Subcomm. on Immigration of the Senate Comm. on the Judiciary* (1998) (visited on Feb. 10, 1999) <<http://www.aila.org/infonet>> [hereinafter INS Testimony on Detention].

fully implementing the new mandatory detention provisions and to release criminal aliens who were not a danger to the community. Shortly after the TPCR expired, the INS issued new guidelines revising its detention priorities.<sup>216</sup> Despite the new mandate, however, the INS was preparing in February, 1999, to release criminal aliens due to intolerable overcrowding.<sup>217</sup> It estimates that 3,000 to 18,000 additional detention beds are needed to comply with the IIRIRA.<sup>218</sup>

Another difficult detention problem is presented by so-called "lifers," criminal aliens who are removable to countries such as Vietnam and Cuba that refuse to accept them. As of late 1998, almost 3,500 lifers were in INS custody.<sup>219</sup>

### c. Law Enforcement Custody

A third way to track aliens awaiting removal is to complete the removal process while the aliens are still incarcerated in federal, state and local facilities. The INS has increasingly pursued this sensible strategy since 1986.<sup>220</sup> Under the IHP, INS investigators screen prisoners in state and federal prisons (and now in some jails), beginning proceedings against any who are removable.<sup>221</sup> Hearings take place at or near the detention facility. If the process is completed prior to the alien's release, the alien can be removed directly from prison upon the completion of his sentence.<sup>222</sup> The program has expanded to most states and the federal system, though IHP resources are concentrated in the seven states with the largest numbers of incarcerated criminal aliens—California, Arizona, Texas, Florida, New York, New Jersey, and Illinois.<sup>223</sup>

Although the IHP has increased the number of removals, it is

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216. See *INS Detention Use Policy*, reprinted in 77 INTERPRETER RELEASES 1524 Appendix I (Nov. 2, 1998).

217. See, e.g., Valerie Alvord, *Money Woes Will Force INS to Free Criminals*, SAN DIEGO UNION-TRIB., Feb. 7, 1999, at A23.

218. See Kerwin & Wheeler, *supra* note 215, at 1436.

219. As of January 18, 1999, the number of non-Cuban "lifers" was 1,992. See <<http://www.mercurycenter.com/premium/local/docs/lifers07.htm>> These long-term detainees contribute to an increasing average stay. The average stay for criminal aliens is now forty-five to sixty days. See Feb. 11, 1999, Bergeron Interview, *supra* note 25.

220. See Pear, *supra* note 103, at B3.

221. See generally GAO Report, *supra* note 172.

222. See *id.*

223. See St. John-Mellado Interview I, *supra* note 65; see also *Hearings on Removal*, *supra* note 49, at 4 (testimony of T. Alexander Aleinikoff, General Counsel, INS).

also a case study in the grindingly difficult process of coordination among the INS, EOIR, and state and local law enforcement agencies. Despite agreement on the merits of the program, these officials have struggled over administrative details. To make the program work, the INS must make separate arrangements with each state, with EOIR, and with its own investigators and attorneys. Space must be obtained and records exchanged in a timely manner. Automated information systems must be purchased and installed. For the first four years of the IHP, these obstacles, along with the lack of dedicated resources, were disabling.<sup>224</sup> Improvements came only after Congress dedicated new resources in FY 94 and the INS, EOIR, and each of the seven states completed detailed negotiations to arrange for limited intake and release points and to assign adequate space for the hearings in penal institutions.<sup>225</sup> The IHP has recently been integrated with an institutional removal program (IRP), which uses not only EOIR hearings but other, faster removal techniques, mainly administrative removal and reinstatement of prior removal orders for re-entering aliens.<sup>226</sup> As recently as October, 1998, the GAO reported that the program had still not been fully implemented even in the seven high-priority states, and the INS still failed to screen roughly one-third of the target population of foreign-born prisoners even in the BOP and the four largest states.<sup>227</sup>

#### 4. Preventing Re-Entry

To prevent the re-entry of previously removed criminal aliens, the INS must guard the border and apprehend those removed aliens who nevertheless manage to enter. Effective

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224. Despite focusing only on aliens with at least one year remaining on their sentences, the INS in 1990 was able to complete only 3.6 percent of IHP cases prior to release. By February of 1991, the figure was six percent. See IMMIGRATION POLICIES, *supra* note 207, at 39. A study of the Los Angeles County jail program found that, although an immigration judge traveled to the jail once a week, he often had as few as six cases a day in a jail system estimated to house over 2,000 removable aliens at a time. See *Criminal Aliens in the United States*, *supra* note 37, at 19.

225. See St. John-Mellado Interview I, *supra* note 65; see also *Hearings on Removal*, *supra* note 49, at 11-17. With the increased funding, there has been a rise in the number of criminal aliens in federal and state BOP facilities for which the INS has completed IHP and which it has ultimately removed. But in FY 96, completions remained at the thirty-two-percent level. See EFFORTS TO IDENTIFY, *supra* note 197, at 8.

226. See discussion *infra* at text accompanying note 473.

227. See GAO Report, *supra* note 172, § 1.

border surveillance requires enormous resources and adequate coordination within the INS. Effective interior surveillance requires the INS to coordinate its own apprehension and prosecution efforts with those of other law enforcement agencies. The INS has trouble on both counts.

Its efforts to stop illegal re-entry at the border have suffered both from a lack of resources and from the INS's own management failures. Preventing illegal entry is the primary responsibility of the Border Patrol. Although the Border Patrol has traditionally received the lion's share of the INS budget, these resources have not prevented aliens from entering the country. United States borders are thousands of miles long; few people would expect the Border Patrol to seal them. Furthermore, United States citizens and foreign visitors expect an atmosphere of free travel at airports and across the borders, limiting the Border Patrol's ability to control traffic.

But as difficult as the Border Patrol's task is, it is not impossible. Congress has vastly increased its size and resources in recent years,<sup>228</sup> and the southern border, which is largely impassable, need not be monitored along its entire length. In 1999, the Border Patrol had nearly 9,000 agents, more than double the level in 1993, and well above the level that the President had requested.<sup>229</sup>

To insure that a removed alien does not return to the country, INS border inspectors and Border Patrol agents also must know which aliens to look for. Unfortunately, the INS has often failed to use even the rudimentary systems it possesses to pass news of a removal from the deportation staff to officers on the border.<sup>230</sup> Recently, however, the INS has improved its

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228. The actual amount spent on border patrol in FY 96 was \$536 million. The actual budget figure for FY 98 was \$877 million. See Telephone Interview with Steven Mertins, OMB (Apr. 1, 1998) [hereinafter Mertins Interview II]. The Border Control currently has 9,000 agents in 1998, a 127 percent increase from the level in 1993. See BUDGET OF THE U.S. GOVERNMENT, FY 2000 <<http://www.access.gpo.gov>> [hereinafter Budget]. The President's proposed budget figure for FY 99 was \$998 million.

229. See DEPT. OF JUSTICE, INS, FACT SHEET, FEB. 1999.

230. GAO studies in 1986 and 1987 found that information regarding removal of criminal aliens was routinely missing from the systems used by inspections staff to prevent re-entry of those who had been deported. See, e.g., U.S. GEN. ACCOUNTING OFFICE, CRIMINAL ALIENS: MAJORITY DEPORTED FROM THE NEW YORK CITY AREA NOT LISTED IN INS'S INFORMATION SYSTEMS 8 (1987) [hereinafter MAJORITY DEPORTED]; INS' ENFORCEMENT ACTIVITIES, *supra* note 167, at 34-39. As a result, it has always been easy for those investigating the issue (reporters or congressional staff members, for example) to find criminal aliens who have crossed and re-crossed the border with impunity;

performance by installing a new fingerprint identification system (IDENT) at key border locations and at many ports of entry.<sup>231</sup>

Because previously removed criminal aliens can readily re-enter, the INS must rely on local law enforcement agencies to apprehend aliens in the interior. To enforce the INA's re-entry penalties, U. S. Attorneys in border districts must prosecute those aliens who are re-arrested.<sup>232</sup> For most of the last decade, the criminal-alien removal system has stumbled on both of these steps.

As discussed earlier, local law enforcement officers have no way of knowing the immigration status of an arrestee.<sup>233</sup> They have little access to INS records, and INS personnel are seldom available to answer their inquiries. In most cases, the INS makes no attempt to identify arrestees until they have been sent to jail or prison.<sup>234</sup> As a result, most previously removed aliens arrested by law enforcement will escape detection by the INS.<sup>235</sup> Only recently has the INS developed a means to prevent this. In a special project with the state of California, fingerprints of removed aliens are now entered into California's criminal records system so that local law enforcement agencies requesting an arrestee's criminal record will know that he was previously removed and re-entered illegally.<sup>236</sup>

Even when the INS apprehends a previously removed alien,

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despite being removed and frequently arrested. See, e.g., Mark Fineman, *Mexico Rages over U.S. Law on Immigration*, L.A. TIMES, April 12, 1997, at 1 (citing research by the Tijuana Research Institute finding the "overwhelming majority" of illegal migrants had been caught several times).

231. See Telephone Interview with Tim Biggs, IDENT Project Manager, INS (Mar. 30, 1999) [hereinafter Biggs Interview]. See also discussion at text accompanying notes 468-69, *infra*.

232. See, e.g., *U.S. v. Diaz-Diaz*, 135 F.2d 572, 577 (8th Cir. 1998) (upholding a conviction for unlawful re-entry of a criminal alien).

233. See *supra* section III.B.1.a.

234. See generally *supra* section III.B.1.e.

235. See generally *id.*

236. See IMMIGRATION AND NATURALIZATION SERV., DEP'T OF JUSTICE, IMMIGRATION ENFORCEMENT: MEETING THE CHALLENGE, A RECORD OF PROGRESS 8-9 (1996) [hereinafter RECORD OF PROGRESS]. An earlier project with the FBI, which focused on sharing INS records of aliens who absconded during the removal process, took over five years to implement. Compare *Emerging Criminal Groups: Hearings Before the Subcomm. on Investigations of the Senate Comm. on Governmental Affairs*, 99th Cong. 303 (1986) (claiming that FBI and INS had begun discussions on data sharing project) [hereinafter *Emerging*], with *Oversight Hearing on the Immigration and Naturalization Service and Immigration Issues: Hearing Before the Subcomm. on Immigration and Refugee Affairs of the Senate Comm. on the Judiciary*, 102nd Cong. 21 (1991) (explaining that FBI-INS data-sharing project was just getting started) [hereinafter *1991 INS Oversight Hearing*].

it has difficulty demonstrating that re-entry laws have bite. In 1993, a congressional investigation into the criminal-alien problem found no significant deterrent to re-entry, because illegal re-entrants were rarely prosecuted.<sup>237</sup> Several U. S. Attorneys located along the border had policies in place that limited the number of re-entry cases they would prosecute, or chose to prosecute only those cases in which the alien had already been convicted of illegal re-entry on several occasions.<sup>238</sup> Even completed prosecutions were usually plea bargained to light sentences. Only after the Justice Department began beefing up the prosecutorial staffs of key U. S. Attorney's offices in San Diego and elsewhere along the border in 1995 did prosecution for illegal re-entry start to become a real deterrent.<sup>239</sup>

### 5. *A Difficult System to Coordinate*

The failures of the criminal-alien removal system, then, stem from three sources—the difficulty of the task, the ineffectiveness of INS's management, and a scarcity of resources.

In their famous study of policy implementation, Pressman and Wildavsky showed how problems of coordination between government entities can quickly turn the enthusiasm of a public initiative into the frustration of a bureaucratic fiasco.<sup>240</sup> Despite broad public support for a public works and jobs program, the authors found, it ground to a halt over countless minor coordination problems. Agreement endured on the program's goals, but the means sowed contention and sources of delay. Although most participants agreed most of the time, each new step in the process produced minor disagreements among the numerous parties involved in implementation. As the need for coordination increased, opportunities for delay multiplied geometrically.<sup>241</sup>

Pressman and Wildavsky's analysis explains the failures of

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237. See *Criminal Aliens in the United States*, *supra* note 37, at 14.

238. See Ronald Ostrow, *INS Assailed for Not Deporting Criminal Immigrants*, L.A. TIMES, Nov. 10, 1993, at A13.

239. See RECORD OF PROGRESS, *supra* note 236, at 9; see also, Schuck, *supra* note 189, at 698-700.

240. See PRESSMAN & WILDAVSKY, *supra* note 28.

241. See *id.* at 87-110.

the criminal-alien removal system. Like the public works project they analyzed, the goal of criminal-alien removal enjoys almost universal support, yet the coordination challenges are enormous. Local police officers, state court judges, local prosecutors, county jail officials, state corrections agencies, federal and state information systems, and federal prosecutors must all align the logistical details of their operational systems with those of the INS. By expanding the IHP program in state and federal prisons, establishing the LESC project, and sharing removal data with the FBI and state recordkeepers, the INS has addressed some of these problems. But with so many parties participating, even minor disagreements over means or slight variations in priorities can interact to create enormous delays.

The evidence also suggests that the INS's managerial failures have exacerbated the difficulty of coordinating this complicated system. Such failures may be endemic to most government programs. Political scientist James Q. Wilson points out that government managers respond more to constraints than to mission.<sup>242</sup> Because government managers cannot allocate surplus revenues as they wish, and because their priorities are set by outsiders, they often adopt a short-term perspective at the expense of the agency's long-term mission.<sup>243</sup> The INS has suffered this fate. Several of its most serious implementation problems stem from two projects—data management and detention space—that require careful planning and long-term resource commitments. Despite the obvious importance of automated data systems and adequate detention space, the INS has consistently failed until recently to invest in effective information systems and has always been desperately short of detention space.<sup>244</sup> Had it allocated sufficient resources to developing an adequate criminal-alien identification system usable by other law enforcement officers, the criminal-alien removal system would be considerably more effective today. Similarly, adequate detention space would have made the removal system far more credible to aliens and the public alike.

For most of the last decade, however, lack of managerial

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242. See JAMES Q. WILSON, *BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT* 115 (1989).

243. See *id.*

244. See *infra* Section IV.A. and IV.B ; *supra* Section III.B.3.b.

foresight at the INS has been overshadowed by a chronic lack of resources in the criminal-alien removal system as a whole. Despite a more than five-fold increase in the INS budget between FY 85 and FY 99—the current budget is \$3.86 billion, and the President's FY 2000 budget proposes \$4.1 billion<sup>245</sup>—it was not until 1994 that significant new resources were targeted at the criminal-alien problem.<sup>246</sup> This has meant a crippling of nearly every stage of the system. Poor information technology makes it difficult to identify criminal aliens even when they were arrested. A shortage of investigative staff prevents identification at an early stage and even slows INS efforts to screen aliens in jails and prisons. The lack of adequate detention and deportation staff and a serious shortage of beds keeps the INS from taking most criminal aliens into custody. Without sufficient space to detain newly identified criminal aliens, the efficacy of new programs, such as the LESC, is compromised. With a dearth of detention and deportation officers, the INS fails to execute most of the final removal orders that it manages to obtain; there is no one to pick up non-detained aliens before they can flee or to take them to the airport for removal. Finally, a shortage of manpower and information resources at the border makes it difficult for the INS to prevent illegal re-entry. Only recently has this chronic resource shortage been alleviated somewhat. More mysterious is the question of why it was allowed to persist for so long. That is the subject of the next section.

#### IV. POLITICAL AND POLICY RESPONSES TO THE CRIMINAL-ALIEN PROBLEM

If coordination problems in the criminal-alien removal system were so severe, why did Congress not move earlier to solve them? Congressional attention might have aligned the efforts of state and federal law enforcement; larger INS appropriations, particularly for detention and information management, would have made the removal system more effective. Better legislative oversight would surely have smoothed the transition from policy to implementation.

Instead, Congress has pursued blame avoidance more

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245. See Feb. 11, 1999, Bergeron Interview, *supra* note 25.

246. See generally *infra* Section IV.

ardently than effective oversight for most of the last decade. Despite considerable attention and frequent legislation, Congress left a few states and localities to bear most of the costs of the system's failure.<sup>247</sup> Real progress did not occur until 1994, after several heavily affected states forced the issue.<sup>248</sup> Without their concerted efforts, congressional oversight would not have produced even the limited improvements for which the Clinton Administration has taken credit.

The failures of the criminal-alien removal system are emphatically *not* the result of congressional inattention. Congress debated and passed laws targeting criminal aliens and INS enforcement in 1986, 1988, 1990, 1991, 1994, and twice in 1996. Key committees held hearings on the subject nearly every year from 1986 to 1998. Members commissioned detailed reports from the GAO as early as 1985.<sup>249</sup> Immigration officials have frequently testified on the subject before congressional committees.<sup>250</sup> The failures of the system were no secret.

Neither were the potential solutions. Early investigations into the criminal-alien problem informed Congress about the outlines of the problem and some possible solutions. Although no comprehensive legislative blueprint was ever produced, outlines of workable solutions were made clear in testimony and reports prepared for Congress as early as 1986.<sup>251</sup> These solutions may have required substantial new resources or a different relationship between federal immigration authorities and local law enforcement agencies, but they were neither unknown nor particularly difficult to implement. Unlike some policy problems, such as domestic violence, inner-city schooling, or protecting the ozone layer, the criminal-alien problem could be easily solved.

Until quite recently, however, the federal government failed to pursue these solutions seriously. Despite clear indications that the primary weaknesses in the criminal-alien removal system lay in identification, information management, and detention, both Congress and the INS focused instead on restricting aliens' procedural rights. Compared to the costly

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247. See *supra* notes 53-54, 73-75, and accompanying text.

248. See *infra* Section IV.C.

249. See *infra* Section IV.A.

250. See *infra* Sections IV.A.2., IV.B., and IV.C.1.

251. See, e.g., *Emerging*, *supra* note 236, at 261.

reforms necessary to improve the system, procedural fixes seemed easy and cheap. Creating an effective identification system, building a new information system, and expanding the detention system required substantial new funding and a re-thinking of intergovernmental roles. By legislating a procedural crackdown, Congress could claim to be getting tough on criminal aliens. This strategy was even more appealing because criminal aliens had few political defenders and because some procedural problems really did need fixing. Yet, by focusing almost exclusively on procedural reform, Congress and the INS ignored the early evidence that the removal system needed structural change and considerably more resources.

In 1994, Congress and the INS finally turned to the gritty implementation problems. Despite budgetary austerity throughout the federal government, Congress more than doubled the size of the INS budget in the last six years, from \$1.5 billion in 1993 to \$3.86 billion in 1999.<sup>252</sup> Much of this increase has flowed to the removal system.<sup>253</sup> At the same time, the INS has begun to improve coordination with state and local law enforcement agencies. The result of these reforms is a substantial increase in removals.<sup>254</sup> Such progress, however, would have been unlikely without the concerted efforts of state governments long saddled with the costs of the federal government's failure to remove criminal aliens.

#### A. 1985-1988: Congress Learns about the Criminal-Alien Problem

During the mid-1980s, most immigration policymakers focused on the problem of increased illegal immigration. In its March, 1981 report, the Select Commission on Immigration and Refugee Policy proposed a system of sanctions on employers who hired illegal aliens, a broad amnesty for long-resident illegal aliens, and a new agricultural worker program,<sup>255</sup> while Congress attacked immigration-related marriage fraud.<sup>256</sup> These four measures, ultimately enacted in 1986, stirred

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252. See Budget, *supra* note 228, at 124. The President's budget request for FY 2000 totals \$4.27 billion. See *id.*

253. See *infra* Section IV.C.3.

254. See *supra* text accompanying notes 78-79.

255. See NANCY HUMEL MONTWIELER, THE IMMIGRATION REFORM LAW OF 1986: ANALYSIS, TEXT, AND LEGISLATIVE HISTORY (1987).

256. See *id.*

considerable controversy; their passage required five years of steady work by legislators and immigration policy experts.<sup>257</sup>

### 1. *Drawing Attention to the Problem*

As the Immigration Reform and Control Act (IRCA) was being debated and the magnitude of the illegal alien problem grew, a few politicians noticed that aliens were committing many crimes. The first formal inquiry into alien crime came from Senator Alfonse D'Amato, who asked the GAO in July of 1985 to investigate how the INS was dealing with criminal aliens in the New York City area.<sup>258</sup> The GAO reported that, although many aliens were arrested on felony charges,<sup>259</sup> few were removed from the country,<sup>260</sup> and the INS often failed to prevent the re-entry of those it did manage to remove.<sup>261</sup>

The 1986 report traced these failures to a lack of INS investigative resources, insufficient detention space, and inadequate information systems.<sup>262</sup> During one period of fifteen months, as many as ten percent of arrested felons in New York City were aliens.<sup>263</sup> Without sufficient investigative staff to interview these alien arrestees,<sup>264</sup> the INS district office screened only about one in nine of them before local law enforcement agencies released them.<sup>265</sup> Those criminal aliens who did wind up in deportation proceedings languished there for months,<sup>266</sup> and, with only 400 detention beds available to

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257. *See id.* at 3-18.

258. *See* INVESTIGATIVE, *supra* note 21, at 1.

259. *See id.* at 2.

260. *See* U.S. GEN. ACCOUNTING OFFICE, CRIMINAL ALIENS: INS'S DETENTION AND DEPORTATION ACTIVITIES IN THE NEW YORK CITY AREA 31 (1986) [hereinafter NYC DETENTION].

261. *See* MAJORITY DEPORTED, *supra* note 230.

262. *See generally* NYC DETENTION, *supra* note 260.

263. *See* INVESTIGATIVE, *supra* note 21, at 2.

264. The INS's New York district office had only 119 investigators, including supervisors (twenty percent fewer than in 1983), and these staff spent only about sixteen percent of their time on criminal-alien matters. *See id.* at 22, 16.

265. *See id.* at 12-13. Instead, the district office directed most of its resources to screening the prison population even though, as the GAO pointed out, eighty-seven percent of those arrested on felonies never entered prison. *See id.* at 2. Meanwhile, most aliens who evaded INS screening continued to commit crimes, with seventy-seven percent of one sample rearrested at least once, and eleven percent rearrested at least five times between the initial request for INS assistance and the completion of the GAO study. *See id.* at 3.

266. In one group of cases, eighty-four percent had waited more than three months, and thirty-one percent had waited more than a year. *See id.* at 2.

the district office,<sup>267</sup> many were released. Although aliens who remained in detention were generally removed within ninety days of apprehension,<sup>268</sup> only 17.5 percent of aliens released over the three years prior to the study were actually removed.<sup>269</sup> Of those released, twenty-four percent absconded, and thirty-five percent were arrested for new crimes.<sup>270</sup> Adding to the picture of disarray, the GAO found that many removed criminal aliens returned to commit more crimes. In one sample of arrestees investigated by the INS, twenty-one percent had been previously removed.<sup>271</sup> Unsurprisingly, the GAO found that a high percentage of the criminal aliens removed from the New York City area were not even listed in the information systems used to screen aliens' entry into the country.<sup>272</sup>

These accounts led to sustained media attention to the issue throughout 1986, much of which portrayed the INS as overwhelmed and unprepared to deal with a rapidly rising caseload of criminal aliens. In January, Senator D'Amato criticized the INS for not devoting enough time to the problem.<sup>273</sup> In March, he stepped up his attack, claiming that criminal aliens were "savaging our society" and pointing to reports that over 12,000 aliens had been arrested on felony charges in New York City over a fifteen-month period, though the INS district office there had removed only 304 criminal aliens in 1985.<sup>274</sup> By mid-July, New York City officials were admitting that they had given up trying to get the INS to remove criminal aliens due to widespread recognition that its resources were inadequate.<sup>275</sup> The drumbeat continued throughout the year, with articles contrasting the growing criminal-alien problem with the stark lack of INS investigation and detention resources.<sup>276</sup> Public frustration was not limited to

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267. *See id.* at 20.

268. *See* NYC DETENTION, *supra* note 260, at 29.

269. *See id.* at 30. Relief was granted to the alien only in a small fraction (2.5 percent) of the cases not resulting in deportation. *See id.* at 30.

270. *See id.* at 29.

271. *See* INVESTIGATIVE, *supra* note 21, at 14.

272. *See* MAJORITY DEPORTED, *supra* note 230, at 8.

273. *See* UPI, Jan. 14, 1986, available in LEXIS, News Library, Wires File.

274. *See* UPI, Mar. 23, 1986, available in LEXIS, News Library, Wires File.

275. *See* Kerr, *supra* note 22.

276. *See, e.g.,* Robert Pear, *Immigration Aides Seek Money to Stop Terrorists*, N.Y. TIMES, Sept. 7, 1986, at A15 (citing twenty-six-percent drop in INS investigative staff since 1976); Lenny Savino, *Not Enough Jail Cells for all the Illegal Aliens*, N.Y. TIMES, Dec. 21,

New York; county supervisors in San Diego even considered suing the federal government for reimbursement of criminal-justice system costs absorbed by illegal aliens.<sup>277</sup>

At the same time, efforts by INS administrators and local officials pointed toward solutions. In New York, the INS unveiled the prototype for the IHP, which would allow deportation hearings for incarcerated criminal aliens to take place while the alien remained in prison.<sup>278</sup> At the same time, the INS made arrangements to remove any criminal alien for whom the Manhattan District Attorney would waive prosecution.<sup>279</sup> Walter Ezell, then Director of the Western Region, announced a new initiative to screen state prisons and local jails for removable criminal aliens. At the same time, he called attention to the fact that INS manpower had dropped from 111 to 41 investigators in Los Angeles over the last few years, and that, as a result of similar manpower reductions across the region, the INS had given up on prison and jail screening in California and other western states.<sup>280</sup> Ezell suggested, however, that an investment in new investigators, placed at state and local facilities, would reap benefits for the criminal-alien removal system.<sup>281</sup>

## 2. *The First Attempts at a Solution*

On Capitol Hill, Senator D'Amato pressed his concerns further by adding to a supplemental INS appropriations bill a requirement that the INS provide a report by September detailing its strategy for investigating, apprehending, and removing criminal aliens.<sup>282</sup> The INS response, known as the Alien Criminal Apprehension Program (ACAP), prefigured INS and congressional attention to the criminal-alien problem over the next decade. Though lacking in detail, the report outlined a coherent strategy for attacking the criminal-alien problem.<sup>283</sup> The INS recognized the need to build on the efforts of local law enforcement agencies in apprehending, identifying

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1986, Long Island Section, at 14.

277. See Weintraub, *supra* note 4, at B3.

278. See Pear, *supra* note 103, at B3.

279. See *id.*

280. See Ramos, *supra* note 22, at B1.

281. See *id.*

282. See S. REP. NO. 99-301, at 23 (1986).

283. See *Emerging*, *supra* note 236, at 261.

and detaining criminal aliens. INS districts were instructed to cooperate with the local agencies in establishing efficient procedures for INS investigators to respond to local requests at each point in the criminal-justice process. INS agents would respond at an early stage rather than waiting to screen only those aliens who were incarcerated. The INS even recognized the need to develop compatible information systems with the FBI and local law enforcement agencies.<sup>284</sup>

The report also revealed that the INS could not effectively implement the strategy it had devised. First, the volume of criminal-alien work was enormous. Even without a coordinated system for responding to local agencies, the INS had received nearly 150,000 criminal-alien referrals during FY 85.<sup>285</sup> Yet it had only 690 investigative agents on duty nationwide (twenty-six percent fewer than in 1976), and almost eighty percent of their time was spent on issues other than criminal aliens.<sup>286</sup> The poor quality of its central information systems was equally clear. The field offices could only estimate the number of law enforcement referrals,<sup>287</sup> and the INS had no idea how many detainees it had placed on aliens in state or local custody.<sup>288</sup> A centralized alien database accessible to law enforcement officers confronting criminal aliens was clearly needed.<sup>289</sup>

Inexplicably, however, the INS report asserted that the necessary reforms could be implemented without new resources and without a significant change in the roles of state and local government in immigration enforcement.<sup>290</sup> In response to a direct question on the topic, then-INS Commissioner Alan Nelson mentioned only that some additional hearing officers might be helpful.<sup>291</sup> Whether due to unfounded optimism, fiscal pressure from within the executive branch, or institutional tunnel vision, INS's timidity in honestly assessing its capabilities at this early junction is striking.

Congress acted quickly on the GAO findings and the

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284. *See id.* at 300-03.

285. *See id.* at 267-68.

286. *See id.* at 282, 298.

287. *See id.* at 276.

288. *See id.* at 281.

289. *See id.* at 6.

290. *See id.* at 299.

291. *See id.* at 252.

strategic direction suggested by the INS, enacting several provisions in 1986 designed to improve cooperation on the criminal-alien problem between federal and state government. The Anti-Drug Abuse Act of 1986 directed the Service to set up formal pilot programs to cooperate with local law enforcement agencies in four cities.<sup>292</sup> In response to complaints from those agencies (especially the Florida Sheriff's Association),<sup>293</sup> Congress required the INS to respond to all law enforcement requests regarding the immigration status of aliens arrested on drug charges and to determine promptly whether the Service would detain them.<sup>294</sup> The new law required the INS to "begin any deportation proceeding [against a criminal alien] as expeditiously as possible after the date of conviction."<sup>295</sup> Finally, the Attorney General was authorized to reimburse states for the costs of incarcerating illegal aliens.<sup>296</sup> Representative Buddy MacKay of Florida, the latter provision's sponsor, explained that states bore the consequences of federal inaction regarding criminal aliens and that the new legislation would mean "the consequences of the INS failure [would now] be felt by the federal [government]."<sup>297</sup>

In November, 1987, a GAO study examining criminal-alien enforcement in Miami, Houston, Los Angeles, Denver, and Chicago revealed that other cities also experienced the problems discovered in New York City.<sup>298</sup> In all the jurisdictions studied, a large number of arrestees were foreign-born.<sup>299</sup> Furthermore, the low quality of INS data systems impaired criminal-alien enforcement efforts in all five offices.<sup>300</sup> The GAO's analysis of investigation tactics was even more revealing. Faced with large numbers of aliens in the local criminal-justice systems, the Houston, Miami, and Los Angeles

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292. See ADA of 1986 § 1751.

293. See Robert D. Lystad, States News Service, Oct. 10, 1986, available in LEXIS, News Library, SNS File.

294. See 8 U.S.C. § 1357(d) (1994).

295. See IRCA § 701 (codified at 8 U.S.C. § 1252(i) (1994)).

296. See IRCA § 501(a) (codified at 8 U.S.C. § 1365 (1994)).

297. See Lystad, *supra* note 293.

298. See generally INS' ENFORCEMENT ACTIVITIES, *supra* note 167.

299. See *id.* at 3. In Houston and Los Angeles, about twenty percent were foreign-born, while thirty-eight percent in Miami were. The GAO estimated that about half of these were aliens. See *id.* at 17.

300. As in New York, the GAO found that the INS often failed to keep its re-entry screening systems up to date in these cities, and that, as a result, "the INS' ability to prevent previously deported aliens from entering . . . was severely limited." *Id.* at 3-4.

districts followed procedures similar to those of the New York office, generally limiting their efforts to screening incarcerated aliens in jails or prisons, while simply accepting that most criminal aliens escaped their attention.<sup>301</sup> In Denver and Chicago, however, fewer aliens were present in the criminal justice system, and INS officers attempted to identify aliens soon after arrest.<sup>302</sup> A lack of detention and deportation funds, however, required the Denver and Chicago offices to redeploy their resources toward those aliens already convicted, forcing these offices to curtail these early identification efforts.<sup>303</sup>

Hearings organized in 1987 and 1988 by Senator Lawton Chiles of Florida further revealed the implementation problems facing the removal system.<sup>304</sup> Janet Reno, then a Dade County prosecutor, reported that the INS consistently failed to support local law enforcement. In line with the ACAP report, Reno highlighted the importance of identifying aliens early in the criminal-justice process and flagged the need for adequate INS detention facilities.<sup>305</sup> John Shaw and John Simon, senior INS officials, acknowledged the Service's failures but blamed coordination difficulties throughout the removal process. Shaw pointed out that merging INS data with the FBI's National Crime Information Center (NCIC) system to distribute immigration warrants to local law enforcement agencies would be complicated<sup>306</sup> and cited difficulties in coordinating schedules with EOIR.<sup>307</sup> Simon explained that developing the IHP required detailed logistical coordination with federal and

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301. *See id.* at 3.

302. *See id.* at 21-22. In both Denver and Chicago, local INS officials had developed efficient methods of screening offenders, either at booking facilities or as part of the pre-arraignment process. INS officials in those locations noted that local criminal justice agencies were satisfied with the assistance they received from the INS and were continuing to cooperate.

303. *See id.* at 22. Officials from the Denver and Chicago offices complained to GAO investigators that this realignment of effort would result in greater frustration among local law enforcement officers and a less effective removal system overall.

304. *See Federal Responsibility*, *supra* note 4 (statement of Sen. Lawton Chiles).

305. *See Federal Responsibility*, *supra* note 4, at 40-60 (statement of Janet Reno). One Florida sheriff detailed how early identification of criminal aliens would improve law enforcement and asked for more INS support. *See Implementation of Immigration Reform: Hearing Before the Subcomm. on Immigration and Refugee Affairs of the Comm. on the Judiciary*, 100th Cong. 21-23, 31 (1988) [hereinafter *Implementation Hearing*].

306. *See Federal Responsibility*, *supra* note 4, at 27.

307. *See id.* at 24; *see also Haitian Narcotics Activities: Hearing Before the Caucus on International Narcotics Control*, 100th Cong. 42-43 (1988) [hereinafter *Haitian Narcotics*].

state prison officials.<sup>308</sup> By September of 1988, even the four-city pilot project was foundering, as computer incompatibilities and resource shortages slowed implementation to a crawl.<sup>309</sup> In response, Senator Chiles called for further INS appropriations<sup>310</sup> and introduced legislation requiring INS detention of certain criminal aliens and a tighter linkage between INS and criminal law enforcement information systems.<sup>311</sup>

Despite the attention to the criminal-alien problem, concrete efforts to attack the problem were overwhelmed by the implementation demands of IRCA. Rather than simply asking the INS to patrol the borders and to apprehend those immigrants who entered illegally, IRCA attempted to shut down the illegal immigration magnet by sanctioning employers who hired undocumented workers, while also requiring the INS to implement an amnesty for millions of illegal aliens who had been in the country for years.<sup>312</sup> These two new programs absorbed much of the Service's attention from 1986 to 1988. Nearly all of the new resources allocated to investigations went to IRCA implementation,<sup>313</sup> and the burden of implementing IRCA was a frequent explanation for the failures of the criminal-alien removal system.<sup>314</sup> The INS became so focused on implementing IRCA that it sought to divert investigative resources from the criminal-alien program to its employer sanctions program.<sup>315</sup> Although Congress halted that move,<sup>316</sup> the INS did manage to divert funds allocated for the improvement of information systems—a key component of the criminal-alien strategy—to IRCA-related programs.<sup>317</sup>

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308. See *Federal Responsibility*, *supra* note 4, at 25-26. Shaw reiterated the point a year later. See *Haitian Narcotics*, *supra* note 307, at 42-43.

309. See *INS Increases Efforts Against Criminal Aliens*, 65 INTERPRETER RELEASES 955, 956 (1988).

310. See *Federal Responsibility*, *supra* note 4, at 28.

311. See *Implementation Hearing*, *supra* note 305, at 27-28.

312. See 8 U.S.C. §§ 1255a, 1324b.

313. See *Federal Responsibility*, *supra* note 4, at 20.

314. See, e.g., *Haitian Narcotics*, *supra* note 307, at 43.

315. See *Senate Approves FY 88 INS Appropriations Bill*, 64 INTERPRETER RELEASES 1170, 1170 (1987).

316. See *id.*

317. See *1991 INS Oversight Hearing*, *supra* note 236, at 39.

### 3. Early Lessons

An overview of the first few years of serious attention to the criminal-alien problem reveals several important lessons. First, as early as 1986, the causes and nature of the problem were well understood, most of the implementation challenges were evident, and solutions had begun to emerge. The ACAP proposal sought to piggyback on the identification and apprehension efforts of local law enforcement agencies, called for coordination with local agencies at key "choke points" in the criminal-justice process, and flagged the need for improved information system linkage. Though lacking detailed cost estimates, the ACAP report established a promising policy framework.<sup>318</sup>

Neither branch of the government, however, was prepared to fund its plans. Although some members of Congress seemed eager to increase the agency's resources, INS requests were timid.<sup>319</sup> Even when committee members urged Commissioner Nelson to specify other resource needs, he declined.<sup>320</sup> At no point during this period did the INS request additional investigators beyond those added under IRCA, and requests for funds to improve its information systems were also limited.<sup>321</sup> Although Congress granted all INS requests for new criminal-alien money, most new resources were dedicated disproportionately to the Border Patrol and to IRCA implementation.<sup>322</sup> Despite having authorized the Attorney General to reimburse the states for incarcerating criminal aliens, Congress appropriated no money for the program, eliminating the federal fiscal incentive that Congress had authorized.

The early history of the criminal-alien problem also reveals a mismatch of incentives between the federal and state governments. Although the states bore most of the costs of

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318. See *Emerging*, *supra* note 236, at 261.

319. Its FY 88 request was only half the amount authorized by IRCA, and the Service requested only \$9.2 million in new money for FY 89, mostly for rehabilitation of existing facilities. See *INS and the Budgetary Impact of Implementing the Immigration and Control Act of 1986: Hearing before the House Comm. on the Budget, 100th Cong. 2-3 (1987)* (statement of Rep. Frost); See *Implementation Hearing*, *supra* note 305, at 112.

320. See *id.* at 59.

321. See *CROSSWALK*, *supra* note 165, at 21-25.

322. The INS budget grew from \$594 million in FY 86 to \$822 million in FY 89. See *id.* at 21, 25.

dealing with criminal aliens, primary responsibility for a solution still lay with the federal government. As a result, pressure for solutions came largely from local interests rather than national ones. Politicians from states with large numbers of immigrants—New York's Alfonse D'Amato and Florida's Lawton Chiles—first focused attention on the issue and proposed solutions. INS oversight and appropriations hearings did not even mention the criminal-alien problem until late 1986.<sup>323</sup> This misalignment of incentives, left unresolved when Congress failed to fund Representative MacKay's criminal-alien reimbursement program, is perhaps the most important reason why the federal government failed to make headway against criminal aliens over the next six years.

### B. 1988-1993: From Infrastructure to Procedure

Instead of improving the criminal-alien removal system substantially during the next five years, Congress and the INS stressed reform of the removal process. Although these efforts marginally improved the system, they did almost nothing to solve the core problems of poor coordination, inadequate information management, and lack of detention space.

#### 1. *Daunted by the Details of Implementation, Congress Moves to Procedure*

The immigration provisions of the Anti-Drug Abuse Act of 1988 foreshadowed five years of legislative and administrative concern with the criminal-alien problem. Frustrated by the INS's "well documented" inability to arrest, detain and remove criminal aliens, Senator D'Amato and others turned their attention away from the tedious, gritty details of policy implementation and focused instead on curtailing the procedural rights of aliens.<sup>324</sup> The 1988 law, much of which stemmed from legislation proposed by Senator Chiles,<sup>325</sup>

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323. See, e.g., *Immigration and Naturalization Service: Budget and Oversight Issues for Fiscal Year 1987: Oversight Hearing Before the Subcomm. on Immigration and Refugee Policy of the Senate Comm. on the Judiciary*, 99th Cong. 1-2 (1986) (statement of Sen. Simpson). According to a GAO evaluator active in the early studies, INS officials acted as if "there was no criminal-alien problem" until Senators D'Amato and Chiles demanded action. Telephone Interview with Jay Jennings, Evaluator, GAO (Feb. 14, 1997).

324. *Senate Drug Bill Would Restrict Aliens' Rights*, 65 INTERPRETER RELEASES 1039, 1040 (1988).

325. See *Implementation Hearing*, *supra* note 305, at 27-28.

created a new class of criminal alien: the "aggravated felon."<sup>326</sup> The law sharply curtailed relief for aggravated felons,<sup>327</sup> forced them to file expedited appeals,<sup>328</sup> and subjected them to more stringent re-entry conditions and penalties.<sup>329</sup> Had a conference with the House not revised it, the law also would have created an expedited "administrative deportation procedure" allowing for removal without a hearing before an immigration judge.<sup>330</sup>

The few managerial directives in the law brought little concrete improvement to the criminal-alien removal system. First, the law gave formal approval to the IHP program already established by the INS, requiring the Service to conduct special removal hearings for all aggravated felons while they were still in state custody.<sup>331</sup> Second, Congress directed the INS to take all aggravated felons into custody (without bail) upon completion of their criminal sentences if their removal hearings had not been completed.<sup>332</sup> Finally, the new law required the INS to establish a program to respond (on a 24-hour basis) to local law enforcement requests regarding the immigration status of alien arrestees suspected of being aggravated felons.<sup>333</sup> Tellingly, however, Congress appropriated no new funds to expand the INS detention facilities necessitated by these mandates nor to establish the law enforcement response program. The only new funds appropriated for criminal aliens—\$26 million intended to fund new investigators and an automated criminal-alien tracking system—were later diverted to other Justice Department programs by incoming Attorney

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326. See *supra* Section III.A.1.

327. Under § 7347 of the ADA of 1988, aggravated felons were to be "conclusively presumed to be deportable," making them ineligible for several forms of relief, including withholding of deportation under INA § 243(h)(2) and suspension of deportation under INA § 244(a). See ADA of 1988 § 7347(c), 8 U.S.C. §§ 1105(a), 1252(a)(1994)). They also were no longer eligible for voluntary departure. See *id.* at § 7343(b), 8 U.S.C. § 1105(a) (1994).

328. Aggravated felons were required to file any appeals with the federal courts within sixty days, rather than the previous limit of six months, after their deportation orders became final. See ADA of 1988 § 7347(b), 8 U.S.C. § 1254 (1994).

329. Aggravated felons were not allowed to return to the country for ten years from the time of their deportation. See ADA of 1988 § 7349, 8 U.S.C. § 1182(a)(17) (1994). Penalties for re-entry were also stiffened. See *id.* at § 7345, 8 U.S.C. § 1326 (1994).

330. *Final Anti-Drug Bill Less Anti-Alien*, 65 INTERPRETER RELEASES 1092, 1092 (1988). But the provision was enacted in 1994. See VCCLEA § 130004, 8 U.S.C. §§ 1105a, 1252a (1994).

331. See ADA of 1988 § 7347, 8 U.S.C. § 1252a (a) (1994).

332. See ADA of 1988 § 7343, 8 U.S.C. § 1252(a)(2)(A) (1994).

333. See ADA of 1988 § 7350, 8 U.S.C. § 1103 (1994).

General Richard Thornburgh.<sup>334</sup> At the same time, the Chiles proposal targeting the concrete implementation problems of the removal system—to facilitate identification of criminal aliens at arrest by linking the INS and FBI computer systems<sup>335</sup>—was dropped due to FBI complaints about system compatibility and INS misgivings about how the data would be used.<sup>336</sup> Whether by design or accident, then, the 1988 legislation and the dearth of resources necessary to support it shifted the focus of immigration policymakers toward procedural reform.

As some scholars have noted, the role of procedure in immigration policy had already been changing dramatically.<sup>337</sup> Prior to 1981, courts had not rigorously reviewed immigration policy, viewing it as an area of United States sovereignty to which ordinary constitutional principles did not apply. As Professor Schuck pointed out, “policies that in other contexts would have been flatly unconstitutional easily passed judicial muster.”<sup>338</sup> In the 1980’s, however, this began to change. “Drawing upon constitutional and administrative law norms long established in other policy areas, the courts invalidated key INS policies and practices . . . and enlarged the procedural rights of aliens resisting expulsion.”<sup>339</sup> Although Congress might have accepted these procedural rulings with respect to immigrants in general, it resisted applying them to criminal aliens.

Furthermore, the removal process was notoriously ineffective. The GAO’s New York studies revealed that delays could occur at each stage in the hearing process and that many cases had languished for years. In response to congressional inquiries, INS staff were quick to blame aliens’ appeals and applications for relief. Asked how criminal aliens could be

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334. See *Refugees Win, INS Loses in New Supplemental Appropriations Law*, 66 INTERPRETER RELEASES 739, 740 (1989).

335. See *Implementation Hearing*, *supra* note 305, at 27-28.

336. See Griffin Interview, *supra* note 159; Biggs Interview, *supra* note 231.

337. See, e.g., Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1 (1984), reprinted in Schuck, *supra* note 2, at ch. 2; Peter H. Schuck, *The Emerging Political Consensus on Immigration Law*, 5 GEO. IMMIGR. L.J. 1 (1991); Hiroshi Motomura, *Immigration Law after a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L. J. 545 (1990).

338. Peter H. Schuck, *The Politics of Rapid Legal Change: Immigration Policy in the 1980’s*, 6 STUD. AMER. POL. DEV. 37, 85 (1992), reprinted in Schuck, *supra* note 2, at ch. 4.

339. *Id.* (footnotes omitted).

removed quickly, Commissioner Nelson suggested restricting the hearing process: "By statutorily extending due process to illegal aliens beyond constitutional requirements, we have invited abuse of our legal system . . . . It is not unusual for an INS special agent to execute an order of deportation on a criminal alien who has been in proceedings for six to eight years."<sup>340</sup> His answer was often repeated by other INS staff pressed to explain the failures of the removal system.<sup>341</sup> The image of aliens abusing the process gained further support from a 1989 GAO report finding that the hearing process sometimes lasted five years or more and that, in the end, few aliens were removed.<sup>342</sup> Senator Alan Simpson, a key immigration policymaker, insisted that the government was facing "a situation in deportation where the deportees had more due process than did an American citizen."<sup>343</sup>

Meanwhile, both the INS and key legislators were aware that the core problems of the removal system remained unsolved. At a November, 1989 hearing, Congress and the INS reviewed the system's failings in painful detail. Despite an increasing volume of referrals from local law enforcement, the number of INS investigators available to deal with criminal aliens approximated the same low level of 1986,<sup>344</sup> leaving the INS unable even to identify most criminal aliens.<sup>345</sup> Although acknowledging the need for an information system that would allow local law enforcement officers to flag foreign-born offenders for INS screening, INS officials reiterated that no funds had been appropriated for the task and that coordination with other branches of government continued to be slow and difficult. The FBI still had not placed INS warrants on its computer system, and the IHP program had failed to identify removable criminal aliens.<sup>346</sup> The GAO recommended immediate reform of the chaotic and ineffective INS/EOIR

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340. *Emerging*, *supra* note 236, at 261.

341. *See, e.g., Haitian Narcotics*, *supra* note 307, at 42.

342. *See* DEPORTING AND EXCLUDING, *supra* note 183, at 2. The report found that aliens' requests for relief increased case-processing times five-fold. *See id.* at 43. Appeals to the BIA added more than a year to the duration of a deportation case. *See id.* at 45. An appeal to the federal courts added another year. *See id.* at 46. Despite these delays, only about fifteen percent of aliens managed to obtain any real relief. *See id.* at 42.

343. 136 Cong. Rec. S17,106, S17,109 (1990).

344. *See* 1989 Judiciary Comm. Hearing on Criminal Aliens, *supra* note 158, at 20-22.

345. *See id.* at 37.

346. *See id.* at 40, 43, 47, 50.

appearance control system.<sup>347</sup> Noting the high rate of absconding, committee members also pushed to expand INS detention space.<sup>348</sup> Surveying these failures, GAO investigators nevertheless found INS efforts reasonable under the circumstances; any improvements would require significantly more resources.<sup>349</sup>

Having detailed the removal implementation snags, both Congress and the INS seemed to lose heart. Representative Bruce Morrison, who would sponsor the next major piece of immigration legislation, IMMACT90, acknowledged that current INS efforts seemed only to “scratc[h] the surface” of the problem.<sup>350</sup> Representative Lamar Smith, the ranking Republican on the committee, proclaimed, “if you can’t deport the criminal aliens who are in jail now, the only place really to stop them is at the border coming into the country.”<sup>351</sup> With little hope of success, Morrison implored INS officials to come up with solutions “[s]o that we will know at the end of the day that we won’t, in fact, be losing ground on deportation . . .”<sup>352</sup> Though acknowledging that more could be done, the INS used the hearing only to request formal arrest authority for immigration agents and greater reductions in aliens’ procedural rights.<sup>353</sup>

From the beginning of his tenure in 1989, INS Commissioner Gene McNary focused on streamlining the removal process rather than on other aspects of the system.<sup>354</sup> In an early statement of priorities, McNary complained that “the way the INS handles cases is absurd. A lawyer can keep a case in the

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347. See DEPORTING AND EXCLUDING, *supra* note 183, at 5. At the time of the report, the INS could not locate 56,000 of the 220,000 aliens in the deportation hearing process. See *id.* at 16. Over a quarter of aliens in the sample had failed to appear at hearings as required. Most of these cases resulted only in administrative closures, rather than deportation orders, because immigration judges could not be sure that the INS had effectively notified the alien of the hearing. See *id.* at 4.

348. See 1989 *Judiciary Comm. Hearings on Criminal Aliens*, *supra* note 158, at 74.

349. See *id.* at 55.

350. *Id.* at 75.

351. *Id.* at 79.

352. See *id.* at 49.

353. See *id.* at 25, 27.

354. See Telephone Interview with Gene McNary, former INS Comm’r (Dec. 13, 1996); see also *McNary Working to Gain Control Over INS*, 66 INTERPRETER RELEASES 1403, 1404 (1989) (describing McNary’s decision to scrap INS detention study) [hereinafter *McNary Gaining Control*].

system for years.<sup>355</sup> Accordingly, the INS in 1990 urged the adoption of the expedited administrative removal procedure stricken in conference from the 1988 legislation.<sup>356</sup> The Bush Administration also proposed an expedited exclusion procedure to be used against aliens who entered without inspection and suggested limiting many forms of relief from removal for an expanded class of aggravated felons.<sup>357</sup>

This focus on issues of procedure shaped the criminal-alien provisions of IMMACT90. Like IRCA, IMMACT90 was a substantial revision of United States immigration policy. It increased overall levels of immigration and streamlined the immigrant visa and naturalization processes.<sup>358</sup> Following the GAO's recommendations, the law called for a reliable appearance notification system backed by penalties for nonappearance.<sup>359</sup> Convinced that aliens' procedural rights had gotten out of hand, Congress eliminated JRAD relief,<sup>360</sup> expanded the aggravated felony definition,<sup>361</sup> and further penalized any alien who committed one.<sup>362</sup> IMMACT90 included only one significant non-procedural reform. Responding to INS complaints about a lack of cooperation from state and local law enforcement agencies and disapproving of the sanctuary laws adopted by San Francisco and other localities, Congress required state and local governments (on pain of losing federal crime funds) to furnish the INS with certified conviction records within thirty days of conviction for

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355. *McNary Gaining Control*, *supra* note 354, at 1403, 1404.

356. See *Administration Proposes Tough New Criminal Alien Bill*, 67 INTERPRETER RELEASES 577 (1990).

357. See *id.* at 577-78.

358. See Schuck, *supra* note 2, at ch. 4 for the political and legislative history of IMMACT90.

359. See IMMACT90 § 545(a), *repealed by* IIRIRA § 308(b)(6).

360. See IMMACT90 § 505(a)(1) (now codified at 8 U.S.C. § 1227) (allowing an alien to avoid deportation on criminal grounds by convincing a judge (usually in state court) to recommend that the alien's conviction not trigger deportation). For a review of the JRAD provision and an argument for reinstating it, see Lisa R. Fine, *Preventing Miscarriage of Justice: Reinstating the Use of Judicial Recommendations Against Deportation*, 12 GEO. L. J. 491 (1998).

361. The new definition included a variety of drug charges, money laundering, and any violent crime for which an alien served five years or more in prison. See IMMACT90 § 501(a) (codified at 8 U.S.C. § 1101(a)(43), as amended by IIRIRA § 321(a)).

362. Aggravated felons were barred from seeking asylum. See IMMACT90 § 515(a)(1) (codified at 8 U.S.C. § 1158 (d)). The time limit for appeals to federal court was also shortened from sixty to thirty days. See IMMACT90 § 502(a) (codified at 8 U.S.C. § 1152a(a)(1)).

all foreign-born offenders,<sup>363</sup> and required states to provide the INS with lists of incarcerated foreign-born offenders.<sup>364</sup> Neither provision assisted the states in obtaining this information or gave the INS new money to process it. As in 1988, then, legislators preferred procedural reform to adequately funding the removal system.<sup>365</sup>

## 2. *The INS is Slow to Request New Money*

The Administration's FY 90 budget proposal amounted to an overall reduction in INS resources, requesting only \$9.2 million in new money for a limited expansion of INS detention facilities.<sup>366</sup> Pressed by legislators, Commissioner Nelson acknowledged that resource reductions would primarily mean reduced enforcement.<sup>367</sup> Congress responded by giving the INS the \$9 million it had requested as well as \$12 million for new EOIR judges.<sup>368</sup> Despite congressional support for larger increases,<sup>369</sup> the FY 91 budget proposed by the new Commissioner, Gene McNary, requested only a \$42 million increase over FY 90.<sup>370</sup> Most new funds were to go to the Border Patrol; the detention and deportation division budget would actually decline by \$4 million.<sup>371</sup> Congress appropriated the amount requested.<sup>372</sup>

By the spring of 1991, the INS began to focus its requests more directly on the criminal-alien problem. For FY 92, McNary requested an overall increase of \$121 million. Citing the 1989 GAO report on the deportation process, McNary

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363. See IMMACT90 § 507 (codified as amended at 42 U.S.C. § 3753(a)(11)).

364. See *id.* Prior to IMMACT90, such data had never been collected on a systematic basis.

365. See H.R. REP. NO. 101-681, at 145-48 (1990) (expressing conference committee's awareness of INS's lack of investigative resources and difficulty in coordination with states).

366. See *Immigration and Naturalization Service Budget and the Naturalization Process: Hearing Before the Subcomm. on Immigration, Refugees and International Law of the House Comm. on the Judiciary*, 101st Cong. 10 (1989).

367. See *id.* at 48.

368. See *Congress on Verge of Approving INS, State Dept. Funding*, 66 INTERPRETER RELEASES 1229 (1989).

369. See *McNary Reviews Issues and Challenges Facing INS*, 67 INTERPRETER RELEASES 745, 747 (1990).

370. See *House Appropriations Subcommittee Holds Hearing on INS Budget*, 67 INTERPRETER RELEASES 385 (1990).

371. See *id.*

372. See *Congress Approves Funding for INS, State Dept.*, 67 INTERPRETER RELEASES 1215 (1990) [hereinafter *Congress Approves Funding*].

earmarked \$36 million of the increase for detention.<sup>373</sup> Congress agreed to only a \$54 million increase in FY 92, but the detention program received a substantial share of those funds.<sup>374</sup> No funds were allocated for more investigators, however, until the INS did so by reprogramming FY 92 funds.<sup>375</sup> Only in its FY 93 request—asking for more money for detention, investigators, EOIR judges and information system development—did the INS begin to budget for an integrated strategy to reform the criminal-alien system.<sup>376</sup>

The surprising modesty of INS budget requests may have reflected the agency's poor relationship with the Department of Justice. Before inclusion in the Administration's official budget requests, INS priorities are reviewed by both DOJ and the Office of Management of Budget (OMB). Although INS management enjoyed support from OMB throughout most of this period, it was often at odds with DOJ.<sup>377</sup> Throughout the early years of the Bush Administration, DOJ managers displayed little faith in INS management, sometimes sparking open confrontation.<sup>378</sup> The Department diverted new INS appropriations to its own uses<sup>379</sup> and even moved INS investigators away from their regular work to participate in more high-profile law enforcement task forces.<sup>380</sup> In this environment, INS had difficulty moving its budget requests past DOJ.<sup>381</sup> INS requests for automation funds or additional investigators fared particularly poorly.<sup>382</sup> DOJ's hostility was so serious that McNary declared in 1993 that the INS would not be effective as long as it was part of the Justice Department.<sup>383</sup>

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373. See *INS Commissioner Discusses INS Budget and Management; Justice Dept. to Create Oversight Positions*, 68 INTERPRETER RELEASES 341, 342 (1991).

374. See *Congress Clears FY 92 Funding for INS, State Dept.*, 68 INTERPRETER RELEASES 1477 (1991).

375. See *Immigration and Naturalization Service's General Operations and Fiscal 1993 Budget: Hearing Before the Subcomm. on International Law, Immigration and Refugees of the House Comm. on the Judiciary*, 102d Cong. 2 (1992) [hereinafter *INS General Operations and FY 93 Budget*].

376. See *House Panel Hears INS Budget Request for FY 1993*, 69 INTERPRETER RELEASES 293 (1992).

377. See Telephone Interview with Gene McNary, former INS Commissioner (June 10, 1997) [hereinafter June 10, 1997 McNary Interview].

378. For more a detailed discussion of these problems, see section IV.B.3, *infra*.

379. See *supra* text accompanying note 317.

380. See *INS General Operations and FY 93 Budget*, *supra* note 375, at 23-26.

381. See June 10, 1997 McNary Interview, *supra* note 377.

382. See *id.*

383. See *Congressional Panel Probes INS Management, Other Immigration Issues*, 70

Whatever the cause of the Administration's modest funding requests, key elements of the criminal-alien removal system continued to languish. The investigations program, for example, received no new resources after the IRCA-driven enhancement of 1988. In fact, in 1989, 1990, and 1991, the number of investigators actually declined.<sup>384</sup> By April of 1992, only about one-third of the 1,100 investigators were available to work on criminal-alien matters.<sup>385</sup> When the INS finally added more investigators later that year, Representative William McCollum of Florida, a keen observer of criminal-alien policy, remarked that the increase was long overdue.<sup>386</sup> Information systems also went untended. In June of 1991, McNary admitted that most new funds for information management had been siphoned off for other purposes, and little new system development had occurred.<sup>387</sup> As a result, the INS did not begin automating its criminal-alien tracking system (ENFORCE) until 1991.<sup>388</sup> Despite the 1986 ACAP strategy of improved coordination with local law enforcement, the INS by 1992 still could only guess at the size of the criminal-alien problem.<sup>389</sup> Even the relatively simple matter of disseminating INS warrants for alien absconders through the FBI system was not arranged until December of 1991, and even then only on a pilot basis.<sup>390</sup> Despite the clear requirement of the 1986 and 1988 legislation, the lack of automation resources continued to prevent development of the LESC as late as 1992.<sup>391</sup>

### 3. *INS Management Problems Contribute to Delay*

Management upheaval at the INS exacerbated neglect of the criminal-alien removal system. Even before Gene McNary took over as Commissioner, friction between DOJ and INS erupted when DOJ published a scathing audit of several INS

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INTERPRETER RELEASES 449, 451 (1993) [hereinafter *Congressional Panel Probes INS*].

384. See *INS General Operations and FY 93 Budget*, *supra* note 375, at 21-22.

385. See IMMIGRATION AND NATURALIZATION SERV., DEP'T OF JUSTICE, IMMIGRATION ACT OF 1990, REPORT ON CRIMINAL ALIENS 3 (1992) [hereinafter REPORT ON CRIMINAL ALIENS].

386. See *INS General Operations and FY 93 Budget*, *supra* note 375, at 52.

387. See *1991 INS Oversight Hearing*, *supra* note 236, at 39.

388. See REPORT ON CRIMINAL ALIENS, *supra* note 385, at 12; see also *Congress Approves Funding*, *supra* note 372, at 1215, 1216.

389. See REPORT ON CRIMINAL ALIENS, *supra* note 385, at 5.

390. See *id.* at 10.

391. See *id.* at 11 (discussing development of LESC).

programs.<sup>392</sup> Seeking to address these and other problems, McNary launched a broad reorganization,<sup>393</sup> but his efforts failed to silence the critics. Between September and November, 1990, the GAO released two reports highly critical of INS management systems, programming and leadership,<sup>394</sup> finding that several programs essential to criminal-alien enforcement were in serious disarray.<sup>395</sup>

Commissioner McNary and the new INS General Counsel, William P. Cook, were at loggerheads. In a set of memos sent secretly to the Justice Department, Cook partly confirmed the GAO findings and suggested that McNary and the INS could not avoid the "tendency toward self-destruction" that had characterized the agency's history.<sup>396</sup> In response, Attorney General Thornburgh appointed a DOJ task force to oversee the reorganization.<sup>397</sup> The upheaval ended only when the Attorney General approved McNary's reorganization plan in April of 1991.<sup>398</sup> Finally, in May of 1991, the House Appropriations Committee issued its own report, casting doubt on McNary's reorganization.<sup>399</sup>

Meanwhile, the criminal-alien problem was continuing to

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392. The audit charged that INS's computer systems had "major problems," that its investigations division suffered from overlapping responsibilities and a lack of coordination, and that its ability to track investigations was inadequate. *Justice Department Audit Criticizes INS*, 66 INTERPRETER RELEASES 245 (1989). The INS responded with uncharacteristic venom two weeks later, calling the audit "myopic," "incorrect" and "an outrageous misrepresentation of facts." *INS Rebutts Justice Dept. Audit*, 66 INTERPRETER RELEASES 325 (1989).

393. See *McNary Proposes Massive INS Reorganization*, 67 INTERPRETER RELEASES 605 (1990).

394. See INS INFORMATION MANAGEMENT, *supra* note 159, at 1; U.S. GEN. ACCOUNTING OFFICE, IMMIGRATION MANAGEMENT: STRONG LEADERSHIP AND MANAGEMENT REFORMS NEEDED TO ADDRESS SERIOUS PROBLEMS 3 (1991); see also GAO, *INS General Counsel Both Blast INS as Poorly Run*, 67 INTERPRETER RELEASES 1325 (1990) [hereinafter *INS Poorly Run*].

395. The GAO pointed to overlapping enforcement duties and noted that the INS had not kept up with increased detention demands. See *INS Poorly Run*, *supra* note 394, at 1326. Despite the shortage of investigations resources, the GAO found that fifty-seven percent of investigators' time was spent on activities that could be accomplished by lower-grade personnel. See *Final GAO Management Report Critical of INS*, 68 INTERPRETER RELEASES 218 (1991).

396. *INS Poorly Run*, *supra* note 394, at 1325, 1327 (quoting memorandum from INS General Counsel William P. Cook to Deputy Attorney General William P. Barr).

397. See *id.* at 1328.

398. See *1991 INS Oversight Hearing*, *supra* note 236, at 11.

399. See *Congressional Report Finds Skepticism for Reorganization Efforts at INS*, 68 INTERPRETER RELEASES 585 (1991).

grow, outstripping the agency's modest improvements.<sup>400</sup> By the time Doris Meissner became INS Commissioner in late 1993, a new congressional investigation had found "serious and in some cases long-running problems with the INS criminal alien program . . . at the initial identification stage, the final deportation stage, and most points in-between."<sup>401</sup> Despite the steady growth in the INS's budget, almost no new positions had been added for investigators or detention and deportation officers.<sup>402</sup> Like the GAO seven years earlier, the congressional staff found that the INS still did not even know the number of detainees currently lodged against criminal aliens in state or local custody.<sup>403</sup> Only six percent of the criminal aliens identified through the IHP program completed the hearing process prior to being released,<sup>404</sup> and with only 3,500 detention spaces, the INS still could not detain most criminal aliens in the early 1990s.<sup>405</sup> Contrary to Representative Morrison's hopes, the INS was losing ground against criminal aliens.

### C. 1994-1998: State Pressure Triggers Action.

By the beginning of 1994, however, Congress's detachment and the INS's prostration were coming to an end. The INS began to request substantial new resources to build a new removal infrastructure. Congress began to support the agency, meeting or exceeding the Administration's large requests each

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400. See *id.* at 587-99. In its April 1992 progress report to Congress on the criminal-alien problem, the INS could do little more than observe the "noted disparity between the size of the diverse criminal-alien population and the INS's resources available to address the problem." REPORT ON CRIMINAL ALIENS, *supra* note 385, at 5. In June of 1992, a GAO report on INS detention policies noted in a similarly hopeless tone that even the INS's plan to increase its detention capacity by nearly thirty percent would "not significantly alleviate the shortage of detention space" and that detaining all the aliens who needed to be detained would be impractical and "cost prohibitive." U.S. GEN. ACCOUNTING OFFICE, IMMIGRATION CONTROL: IMMIGRATION POLICIES AFFECT INS DETENTION EFFORTS 3 (1992).

401. *Criminal Aliens in the United States*, *supra* note 37, at 17.

402. See CROSSWALK, *supra* note 165, at 16, 23.

403. See *Criminal Aliens in the United States*, *supra* note 37, at 27.

404. See *id.* at 20. Some criminal aliens have even brought suit to force the INS to deport them more quickly. See *Recent Decisions*, 70 INTERPRETER RELEASES 828 (1993); cf. John Kim, *Requiring the INS to Do Its Job: Expedient Deportation Proceedings and INA § 242(j)*, 70 INTERPRETER RELEASES 1225 (1993) (noting that a number of aliens are detained past the ends of their sentences).

405. See *Criminal Aliens in the United States*, *supra* note 37, at 21; Feb. 11, 1999, Bergeron Interview, *supra* note 25.

year. The most important cause of the political shift was the political muscle exerted by the California and Florida state governments.<sup>406</sup>

### 1. *Rising Local Frustration*

From the beginning, public frustration with the criminal-alien problem had been articulated primarily by politicians and officials from those states with the largest alien populations, especially New York and Florida. Though their efforts helped Congress and the INS focus on the need to coordinate with local law enforcement, they did not persuade Congress to make concrete investments. Local governments in California that shouldered a disproportionate share of the criminal-alien problem were also deeply dissatisfied with the puny federal response, and they began to complain publicly.<sup>407</sup>

But it was not until Pete Wilson began his tenure as California's governor that these calls for reimbursement began to attract national attention. Taking office in the midst of a recession, Wilson faced a seriously strained state budget.<sup>408</sup> Despite having advocated increased immigration as a senator,<sup>409</sup> Governor Wilson turned to Washington to obtain

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406. In the view of some congressional staff members, the new focus on criminal-alien enforcement was an early manifestation of the conservative shift of the electorate soon to be expressed in the 1994 elections. See Telephone Interviews with Carmel Fisk and Carl Kaufman, legislative assistants to Rep. William McCollum (Nov. 20, 1996). It is not clear, however, that those sentiments should automatically have fixed themselves on criminal aliens nor that they would have been translated into governmental action even before they were expressed at the ballot box.

407. In October of 1989, for example, Los Angeles County undertook a study of the population of criminal aliens in its justice system. See generally COUNTYWIDE CRIMINAL JUSTICE COORDINATION COMM., LOS ANGELES COUNTY, CRIMINAL ALIENS IN THE LOS ANGELES COUNTY JAIL POPULATION ii (1990). Finding that eleven percent of those released from L.A. County jail facilities were deportable aliens and that over half had been convicted of narcotics or other serious offenses, the report called for federal reimbursement for the substantial local costs of arresting, prosecuting and incarcerating criminal aliens. See *id.* at iv-v. The California state legislature held hearings decrying the impact of criminal aliens on overworked state courts. See Ernesto Portillo, Jr., *Illegal Migrants Add to Court Burden: System Already Is Overloaded, Assembly Panel Told*, SAN DIEGO UNION-TRIB., June 2, 1990, at B1. Legislators introduced bills requiring local police to notify the INS of any aliens arrested on drug charges and encouraging local courts to use INS personnel to screen defendants at arraignment, as one San Diego court had done. See *House Approves Tough Criminal Alien Bill*, 67 INTERPRETER RELEASES 1155, 1156 (1990). Another legislator went so far as to suggest that California sue the federal government to force reimbursement. See Smith, *Clutching at Straws*, SAN DIEGO UNION-TRIB., Nov. 18, 1990, at C2.

408. See George Skelton & Daniel M. Weintraub, *Wilson Proposes Increasing State Sales Tax 1 1/4 cents*, L.A. TIMES, Apr. 26, 1991, at A1.

409. See Schuck, *supra* note 2, at 108.

federal relief for immigration-related expenses, including incarceration of criminal aliens.<sup>410</sup> By early 1992, the issue had become a *Time* cover story.

Politicians from other highly affected states soon renewed their efforts to seek relief for their own constituencies. In early 1992, Senator D'Amato and then-Brooklyn Congressman (now Senator) Charles Schumer sponsored legislation to reimburse the states for costs associated with incarcerating criminal aliens and urged the federal government to take criminal aliens out of state custody and onto former military bases until they could be removed.<sup>411</sup> Increasing the pressure on the INS, New York sued the Justice Department in April of 1992, claiming that the INS failed to take custody of aliens released from state prisons as required under IMMACT90.<sup>412</sup> The court gave New York no relief, but the lawsuit raised the profile of the criminal-alien issue. In an effort to hone their own political cases against the federal government, Los Angeles,<sup>413</sup> San Diego,<sup>414</sup> and Orange<sup>415</sup> Counties in California launched detailed studies of the impact of illegal aliens on local services. As the Clinton Administration took office, the governors of the five states most heavily affected by immigration (California, Florida, Texas, New York, and Illinois) wrote to the new president, seeking relief from the increasing burdens of immigration on local justice, health care, and education services.<sup>416</sup>

Responding to complaints from these localities,

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410. See *Wilson Wants U.S. to Help State Support Immigrants*, SAN DIEGO UNION-TRIB., Nov. 21, 1991, at A9.

411. See *INS Reports to Congress on Criminal Alien Strategy*, 69 INTERPRETER RELEASES 479, 482 (1992).

412. See *Cuomo v. Barr*, 812 F.Supp. 324 (N.D.N.Y. 1993); see also *Albany Sues U.S. on Aliens Held in Prison*, N.Y. TIMES, Apr. 28, 1992, at B1. In 1986, New York State passed legislation allowing non-violent criminals to be released early on the condition that the INS would deport them. See *Change in N.Y. Law Permits Early Deportation*, 63 INTERPRETER RELEASES 741 (1986). Corrections officials, however, had been unable to use the law because the INS neither detained nor deported these aliens, and the State wound up taking them back into custody. See Annucci Interview, *supra* note 66.

413. See generally INTERNAL SERV. DEP'T, LOS ANGELES COUNTY, IMPACT OF UNDOCUMENTED PERSONS AND OTHER IMMIGRANTS ON COSTS, REVENUES, AND SERVICES IN LOS ANGELES COUNTY (1992).

414. See Lynn Neary, *Immigrant Services Burden California Economy*, NATIONAL PUBLIC RADIO, Aug. 26, 1992 (transcript on file with the editors of this Journal).

415. See Eric Lichtblau & Kevin Johnson, *O.C. to Study Cost of Services to Immigrants*, L.A. TIMES, Oct. 16, 1992, at A1.

416. See *Senate Approves Anti-Crime Legislation With Important Immigration Provisions*, 70 INTERPRETER RELEASES 1538, 1543 (1993) (citing 139 CONG. REC. S15,757 (daily ed. Nov. 16, 1993)) [hereinafter *Senate Approves Anti-Crime Legislation*].

Representative Gary Condit of California launched an extended investigation into the impact of illegal aliens on local services in March of 1993.<sup>417</sup> Chief among the problems Condit's committee uncovered was the inadequacy of the criminal-alien removal system.<sup>418</sup> It was equally clear, however, that the INS could not make substantial progress without additional funds. Testifying at the committee's first hearing, Assistant Commissioner Shaw repeated his 1988 conclusions that a lack of resources, along with IRCA's mandates, had prevented the INS from making any substantial progress in implementing its 1986 criminal-alien apprehension plan.<sup>419</sup> California's corrections agency supported the INS plea for resources and added that, in the meantime, states ought to be reimbursed for the costs imposed by a failed federal system.<sup>420</sup> Variations on these two themes, along with a more detailed review of the now-familiar problems of state and federal coordination, filled eight hearings and several hundred pages of testimony.

By the end of 1993, state frustrations had reached the boiling point. Governor Wilson wrote President Clinton an open letter, asking him to "end the insanity" of failed immigration policies. Florida's Governor, Lawton Chiles, announced plans to sue the federal government over its failure to prevent the entry of illegal aliens into the state.<sup>421</sup> Condit's committee concluded its work in the summer of 1994 by advocating greater resources for the INS to support criminal-alien removal and federal reimbursement of state incarceration and criminal-justice costs associated with illegal aliens.<sup>422</sup> The committee asked the INS to promulgate a detailed strategy and to request the new resources necessary to identify all criminal aliens in state

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417. See H.R. REP. NO. 103-645, at 6 (1994) (describing process that led to report); see also *Congressional Panel Probes INS*, *supra* note 383, at 449 (describing first of these hearings).

418. See H.R. REP. NO. 103-645, at 4 (1994) (reviewing some results of dysfunctional removal system).

419. See *The Impact of Federal Immigration Policy and INS Activities on Communities: Hearings before the Subcomm. on Information, Justice, Transportation, and Agriculture of the House Comm. on Gov't Operations*, 103d Cong. 7 (1993 and 1994).

420. See *id.* at 42-47.

421. See William Booth, *Florida Plans to Sue U.S. Over Illegal Immigrants*, WASH. POST, Dec. 30, 1993, at A1.

422. See H.R. REP. NO. 103-645, at 5 (1994).

custody and increase the removal rate.<sup>423</sup>

## 2. Real Progress Begins

As state and local frustration increased, the Clinton Administration focused more closely on criminal-alien removal. In its first budget request covering the INS, the Clinton Administration had requested an increase of only \$40 million, most of which was not targeted at criminal aliens.<sup>424</sup> The Administration, however, soon fashioned a more aggressive enforcement program to target criminal aliens and alien smugglers.<sup>425</sup> Despite serious budgetary constraints on other programs, it requested \$172.5 million in new INS funds.<sup>426</sup>

Congress was more prepared than ever to support the Administration. It further expanded the aggravated felony definition, creating a streamlined administrative deportation procedure, eliminating INA § 212(c) relief for certain aliens, and allowing judges in federal criminal cases to order deportation.<sup>427</sup> More importantly, Congress approved the Administration's full appropriation request for the INS, providing new resources for the criminal-alien program.<sup>428</sup> This action was all the more striking because it represented the first violation of the House's own allocation rule under the 1990 budget agreement.<sup>429</sup> Lawmakers also began another set of hearings to address the details of the criminal-alien removal system,<sup>430</sup> suggesting that Congress was finally prepared to

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423. *See id.*

424. *See House Panel Hears INS Budget Request for FY 94*, 70 INTERPRETER RELEASES 612 (1993).

425. One immigration policy analyst working at OMB at the time recalls that in the early days of the Clinton Administration, "no one expected immigration to be a hot issue." Telephone Interview with Lin Liu, Assistant Comm'r for Policy, INS (July 15, 1997) [hereinafter Liu Interview]. By the summer of 1993, however, after repeated pressure from the states (along with the high-profile grounding of the Golden Venture and the discovery that the World Trade Center bombing had been engineered by aliens), immigration initiatives had risen to the top of the Administration's agenda. *See id.*

426. *See Clinton Formally Announces Sweeping Immigration Initiative*, 70 INTERPRETER RELEASES 1001 (1993).

427. *See id.* at 1540.

428. *See Congress Clears Appropriations Bill Boosting Immigration Enforcement*, 70 INTERPRETER RELEASES 1433 (1993) [hereinafter *Congress Clears Appropriations Bill*].

429. *See House, Senate Approve 1994 Appropriations for INS, State Dept.*, 70 INTERPRETER RELEASES 1033, 1034 (1993).

430. *See, e.g., Criminal Aliens in the United States*, *supra* note 37, at 21 (1993); *see also*

tackle the system's chronic implementation problems. The INS immediately seized the opportunity, requesting a FY 95 increase of \$368 million, or twenty-two percent over the recently increased FY 94 level.<sup>431</sup> Much of the new money would be targeted at criminal-alien enforcement, and another substantial sum would support new removal system automation efforts.<sup>432</sup>

At the state level, however, anger continued to rise. In April of 1994, Florida filed the lawsuit it had threatened, charging that the federal government had forced the state to bear disproportionate expenses for the education and health care of illegal aliens by failing to enforce the immigration laws.<sup>433</sup> California, Texas, Arizona, and New Jersey soon filed similar lawsuits. Each state made similar arguments, and most cited the costs of incarcerating criminal aliens as one of their chief burdens. Although the lawsuits were dismissed, the Senate Appropriations Committee held hearings in June of 1994 to address the governors' concerns.<sup>434</sup> The hearings produced no specific agreements on federal reimbursement.<sup>435</sup>

Meanwhile, the Administration sought to appease the states. A week after the filing of the Florida lawsuit, the Clinton Administration announced that it would seek \$350 million to reimburse states for the cost of incarcerating illegal aliens—the first attempt by any Congress or administration to fund § 501 of IRCA, the long-ignored attempt to make the federal government pay the full costs of INS failure.<sup>436</sup> Although the Administration denied it was responding to the state lawsuits,<sup>437</sup> the pressures exerted by state politicians

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1994 Hearings on Criminal Aliens, *supra* note 40.

431. See *Reno, Meissner Announce Comprehensive Immigration Initiative*, 71 INTERPRETER RELEASES 209 (1994).

432. See *INS Testifies on its Budget and Resources for Next Year*, 71 INTERPRETER RELEASES 585, 586 (1994).

433. See *Chiles v. United States*, 874 F. Supp. 1334 (S.D. Fla. 1994).

434. See generally *Increasing Costs of Illegal Immigration: Hearing Before the Senate Comm. on Appropriations*, 103d Cong. (1994).

435. One senator praised the governors' efforts as "the only way to force the federal government to solve the immigration problem." *Governors Blast Federal Government on Failure to Curb Illegal Immigration*, 71 INTERPRETER RELEASES 894, 896 (1994) (statement of Sen. Harry Reid).

436. The program is now known as the State Criminal Alien Assistance Program (SCAAP). See *House Approves Omnibus Anti-Crime Legislation with Immigration Impact*, 71 INTERPRETER RELEASES 628, 630 (1994) [hereinafter *House Approves Anti-Crime Legislation*].

437. See *id.*

(particularly Pete Wilson) were critical.<sup>438</sup> Given the high profile that the criminal-alien issue had attained by 1994, the reimbursement program easily garnered funding in the final FY 95 budget, albeit at a level of only \$130 million.<sup>439</sup>

Congressional attention also produced progress. Congress continued to restrict criminal aliens' procedural defenses and granted several new routes for removal, including a streamlined "administrative deportation" procedure allowing the INS to skip an immigration hearing altogether for those aggravated felons who were not LPRs and for whom no relief was available.<sup>440</sup> Expressing an unprecedented faith in the INS and its new Commissioner, Doris Meissner, Congress exceeded the Administration's request and granted the Service a twenty-nine percent increase in its FY 95 budget.<sup>441</sup> Significantly, the new budget included substantial funds to improve the INS removal infrastructure, especially its lagging information systems, which received an unprecedented infusion of \$155 million<sup>442</sup>—over seven percent of the new INS budget of \$2.1 billion. After Congress passed the new budget, Meissner acknowledged that the huge increase was "about as much as any agency can effectively ingest," and promised substantial progress as a result.<sup>443</sup>

Near the end of 1994, with an attentive Congress watching, a stable management team in place, and improved relations with the Justice Department, the INS embarked on a period of rapid and steady growth. Having already focused much of its attention on enforcement, INS priorities were largely undisturbed by the Republican victory in the 1994 elections, and the relationship between the Service and Congress

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438. See Liu Interview, *supra* note 425.

439. See *Congress Clears Appropriations Bill*, *supra* note 428, at 1141, 1144.

440. See VCCLEA § 130004. Congress also added a "judicial deportation" procedure in which U.S. district court judges would have the authority to order a criminal alien deported as part of the sentence in a criminal trial if the criminal conviction would render the alien deportable. See INCTA § 222. The list of crimes considered aggravated felonies was expanded. See *id.* Penalties for unlawful re-entry by aggravated felons increased from a maximum of ten years to twenty. See VCCLEA § 130001 (amending 8 U.S.C. § 1326(b)(2)).

441. See *Congress Clears Appropriations Bill*, *supra* note 428, at 1141.

442. See *id.* at 1142. The infusion of new automation money in 1994 supported the issuance of the largest information system contract in INS history. See *INS Hopes New Contracts Will Improve Automated Systems*, 72 INTERPRETER RELEASES 8, 18 (1995).

443. *Commissioner Meissner Recaps First Year, Discusses Recent Developments*, 71 INTERPRETER RELEASES 1546 (1994).

remained strong. In the FY 96 budget, the Clinton Administration again requested a substantial expansion of the INS budget (twenty-four percent over FY 95),<sup>444</sup> and Congress agreed to a twenty-two percent hike, a seventy-two percent increase over FY 93 levels.<sup>445</sup> Coming in a year in which budget negotiations resulted in two government shut-downs, this increase was particularly remarkable. Rapid expansion has continued ever since.<sup>446</sup>

Accumulated frustration over criminal-alien removals also pushed Congress in 1996 to enact two laws—AEDPA and IIRIRA—creating the most stringent criminal-alien provisions ever adopted. The acts again expanded the definition of aggravated felony<sup>447</sup> and lowered the sentencing threshold required for certain crimes to trigger removability.<sup>448</sup> The new laws subjected most criminal aliens to summary removal proceedings and foreclosed all forms of relief (other than asylum) from removal for almost all criminal aliens except LPRs who had been in the country for ten years.<sup>449</sup> Congress also required the INS to take most incarcerated criminal aliens into custody upon completion of their sentences, although insufficient detention space forced the Service to postpone the effective date of the mandatory detention provisions.<sup>450</sup> Finally, AEDPA took the unprecedented step of allowing state and local law enforcement officers to arrest and detain aliens who had been previously convicted of a felony and removed.<sup>451</sup>

### 3. Recent Progress

With these new resources, the INS moved forward on a range of initiatives designed to tackle the removal system's serious coordination problems. By early 1995, the INS had

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444. See *Clinton Administration Announces FY 1996 Immigration Proposed Budget*, 72 INTERPRETER RELEASES 229 (1995).

445. See *Stalled Appropriations Bill Contains Significant Increases in INS Funding*, 73 INTERPRETER RELEASES 187 (1996).

446. See Feb. 11, 1999, Bergeron Interview, *supra* note 25.

447. See AEDPA § 440(e); see also IIRIRA § 321.

448. See AEDPA § 435(a).

449. See AEDPA § 440(d); IIRIRA § 304. For a discussion of the changes made by IIRIRA see Lenni B. Benson, *The "New World" of Judicial Review of Removal Orders*, 12 GEO. IMM. L.J. 233 (1998).

450. See AEDPA § 440(c); see also IIRIRA § 303.

451. The local law enforcement agency is required to obtain confirmation from INS regarding the alien's immigration status. See AEDPA § 440.

implemented some form of the IHP program in forty states.<sup>452</sup> By FY 96, as a result of these efforts, the INS was able to interview and make preliminary alienage determinations for a majority of foreign-born state prisoners in the seven states holding roughly eighty percent of the country's incarcerated criminal aliens.<sup>453</sup> In those states and in the federal prison system, the INS begins removal proceedings against almost all removable aliens identified through the IHP prior to their release from prison,<sup>454</sup> and proceedings for roughly a third are completed by the time of release.<sup>455</sup> The number of hearings conducted through the IHP has risen substantially in recent years.<sup>456</sup> INS staff now screen prisoners in some local jails with high populations of aliens.<sup>457</sup> These efforts could be supplemented on a state-by-state basis by programs allowing the removal of certain non-violent prisoners at the completion of their sentences, which the states have decided to reduce in order to expedite removal.<sup>458</sup> The first such program was established in 1994 in Florida, and another was established the next year in New York.<sup>459</sup> In 1996, Congress authorized such programs nationwide, but no other state has established one. This suggests that this approach has little appeal to most states. Border states like California and Texas fear that aliens removed in this fashion will simply re-enter illegally. In addition, most aggravated felons, now a very broad category, are statutorily ineligible for such programs.<sup>460</sup>

The INS has also recently addressed some of the information

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452. See *Hearings on Removal*, *supra* note 49, at 18.

453. See Telephone Interview with Lydia St. John-Mellado, Special Assistant to the Assoc. Comm'r for Enforcement, INS (June 30, 1997) [hereinafter St. John-Mellado Interview II]. As noted earlier, however, Illinois and New Jersey have been dropped from the program.

454. See *id.*

455. See *id.*

456. See *id.*; Interview with David A. Martin, former INS General Counsel (June 29, 1998).

457. Screening began at the Los Angeles County jail on a regular basis on June 1, 1995 and on Riker's Island in New York City later that year. In 1996 and early 1997, the INS opened jail screening projects in Orange County, California, Dade and Broward Counties in Florida, and in Dallas, Texas. See Telephone Interview with Russell Bergeron, Office of Pub. Affairs, INS (Mar. 19, 1997).

458. See 8 U.S.C. § 12311(a)(4)(B).

459. See *Florida to Try Early Deportation*, N.Y. TIMES, Oct. 28, 1994, at A25; Ian Fisher, *Pataki Announces Aliens' Expulsion*, N.Y. TIMES, Aug. 28, 1995, at A1.

460. See Telephone Interview with Ronald Dodson, Director of Evaluation and Support, Office of Programs, INS (Mar. 30, 1999).

system problems that have hampered coordination with local law enforcement and among branches of the INS. Funding in 1994 finally allowed the Service to implement Congress's 1988 directive that the INS establish a 24-hour service to respond to local law enforcement officers seeking information on the immigration status of arrested aliens. The Law Enforcement Support Center (LESC) opened on a pilot basis in 1989. Since then it has gone on to become a permanent unit with its own budget appropriated by Congress. The LESL provides information on criminal aliens to local, state, and federal law enforcement agencies (LEAs) twenty-four hours a day. It currently answers requests from fourteen states with a goal to reach all fifty by the end of 1999. Congress recently appropriated funding to double the staffing and provide a new building for the expanded center.<sup>461</sup>

Any LEAs may access the LESL by sending a query via NLETS, a pre-existing law enforcement information network. LESL staff then search INS and criminal databases for information on the alien. LESL staff finds records for more than sixty percent of the queries, and search times average about five to seven minutes. If the alien is not in the database, a local INS office is notified so that he or she can be interviewed. When the alien is found to be an aggravated felon or to have been previously deported, the INS staff in the local area may detain the alien pending removal or prosecution for re-entry. In Maricopa County, Arizona, where the project has functioned the longest, INS interviewed over 4,500 criminal aliens in 1998, a ten-fold increase since 1996.<sup>462</sup>

In 1998, the LESL acquired new responsibilities in accordance with the "Brady Bill." The LESL assists the FBI by running secondary checks on non-citizens to determine eligibility to purchase firearms. In addition, the LESL reviews about 1500 FBI rap sheets on criminal aliens weekly. The location of the alien is determined and, if the alien is in custody, LESL agents ensure that an INS detainer is placed. Often, agents find aggravated felons under prior orders of removal who have convictions for murder, rape, and other serious crimes. Agents notify local INS offices so that criminal

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461. See Information Received from Callie A. Gagnon, Public Affairs Specialist, Eastern Regional Office of Congressional and Public Affairs, INS (Mar. 5, 1999).

462. See *id.*

aliens are not released into the community. When discrepancies in identification occur, the LESC uses an image retrieval system that enables it to download pictures, prints, and signatures of certain criminal aliens from INS databases. These are then faxed to the requesting LEA for positive identification.<sup>463</sup>

Since 1991, the INS has used the FBI's NCIC system to disseminate information on Warrants of Deportation for criminal aliens who fail to appear for removal.<sup>464</sup> From a database of only a few thousand INS cases, the system has generated over 450 arrests of absconders.<sup>465</sup> Early in 1996, the INS expanded the program to include criminal aliens previously removed.<sup>466</sup> In September, 1994, the INS began a cooperative arrangement with California in which fingerprints of criminal aliens subject to removal orders are entered into the state's criminal history database. If the alien is arrested again, the arresting agency can see that the alien was previously ordered removed and can notify the INS, which has promised to take these aliens into federal custody for removal or criminal prosecution.<sup>467</sup>

The better-funded INS has also improved its own notoriously fragmented and ineffective information systems. It has enhanced the system used to track enforcement cases (ENFORCE) and has created an automated fingerprint system (IDENT) to track aliens caught crossing borders illegally.<sup>468</sup> The INS has made the IDENT program the backbone of all of its automated enforcement systems. When linked to the FBI's newly updated criminal database and to fingerprint experts at a Washington, D.C. biometric center, the IDENT system can generate positive identification of all criminal aliens at arrest without requiring investigative interviews.<sup>469</sup>

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463. *See id.*

464. *See id.*

465. *See* REMOVAL OF ILLEGAL ALIENS, *supra* note 78, at 4-5.

466. *See id.*

467. By October, 1996, the program had led to the federal detention and prosecution of more than 1,600 criminal aliens in California. *See* RECORD OF PROGRESS, *supra* note 236, at 9.

468. IDENT uses a two-fingerprint identification system and is more than 98 percent accurate even without auxiliary inputs by fingerprint experts. *See* Biggs Interview, *supra* note 231.

469. *See id.* As of March, 1999, IDENT had been installed at almost half of the relevant INS workstations in most or all Border Patrol offices, detention facilities, asylum offices, and district enforcement offices, but in only forty percent of the ports of entry. *See id.*

The increase in resources for enforcement operations (as distinct from central management and staff services) since FY 93 has also been dramatic. The INS has increased its investigative staff and detention and deportation staff.<sup>470</sup> Detention space had grown from 3,500 beds at the end of FY 93 to 16,100 beds by January, 1999.<sup>471</sup> As was discussed in Part II.C., these extra resources have had a measurable effect on the system's performance. Coordination with federal prosecutors has also improved, resulting in many more prosecutions for illegal re-entry.<sup>472</sup>

After long delays, the INS has also begun to use the new authority granted by the 1994 and 1996 legislation. In FY 98, the INS removed 5,686 criminal aliens under the administrative removal provisions, which obviate the need to go through the normal EOIR immigration court process, and under the authority to reinstate prior removal orders. This shift from the IHP to a more expedited institutional removal program (IRP) should become more pronounced in the future.<sup>473</sup>

## V. CONCLUSION

More than ten years after developing its Alien Criminal Apprehension Program in 1986, the INS has made some progress on criminal-alien removals. The INS now uses the LESC to help local law enforcement personnel identify alien arrestees. Under the IHP and IRP programs, a majority of removable criminal aliens in state and federal prisons now begin removal proceedings prior to their release. Many aliens who were previously removed or who fled during proceedings can now be identified through FBI information networks. The INS has expanded its detention space and accelerated the removal process for most aliens. It has begun to deploy a biometric identification system compatible with other law enforcement networks along the border. Better coordination with prosecutors is beginning to strengthen the deterrent against re-entry. But the agency's recent progress begs the question of why Congress waited until 1994 to pay the bill that made progress possible. After all, lawmakers began

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470. See CROSSWALK, *supra* note 165, at 2-4, 25.

471. See Feb. 11, 1999, Bergeron Interview, *supra* note 25.

472. See, e.g., text accompanying note 239, *supra*.

473. See Feb. 11, 1999, Bergeron Interview, *supra* note 25.

investigating the criminal-alien removal problem in 1985, and the resulting stream of GAO reports, internal DOJ critiques, INS plans, and committee testimony revealed the key implementation pitfalls early and often. Besides showing Congress which problems needed fixing, these investigations revealed the agency's urgent need for greater resources and suggested specific avenues for reform. Yet Congress responded by passing procedural fixes instead of assuring fiscal and administrative support for effective removal.

The new management at INS and DOJ deserves much credit for the turnaround.<sup>474</sup> Commissioner Meissner also enjoys a far better relationship with DOJ and the rest of the executive branch than most of her predecessors. Both Attorney General Janet Reno and President Bill Clinton are especially sensitive to the criminal-alien problem. As Dade County Prosecutor, Reno knew first-hand the coordination difficulties of the removal system and how much effort would be required to solve them. President Clinton, having lost his first bid for re-election as Governor of Arkansas partly because of public anger over the detention of Mariel immigrants at a military base in Arkansas, understood the political damage that immigration crises could cause.<sup>475</sup> With such sympathetic superiors, Meissner has been able to address some of the agency's management problems and push for large appropriations increases to support removal infrastructure.

But if simply improving the agency's management team were enough to attract new resources, the agency would have made more progress in the latter part of Commissioner McNary's leadership, after McNary reformed his own management structure. Yet McNary garnered only modest increases in funding, in stark contrast to the post-1993 pattern. The politics of federalism, it turns out, mattered more than improved management in stimulating new funding and

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474. A former INS General Counsel called Doris Meissner "the best qualified new INS Commissioner in the history of the agency." Grover Joseph Rees III, *Advice for the New INS Commissioner*, 70 INTERPRETER RELEASES 1533 (1993). One senator declared, "there is no better person to lead the INS at this critical time, bar none." *Senate Judiciary Committee Holds Meissner Confirmation Hearing*, 70 INTERPRETER RELEASES 1289 (1993).

475. Commissioner Meissner herself has attributed the agency's improvements partly to these coincidences. See *Carnegie Endowment for International Peace Briefing with Doris Meissner, Commissioner, Immigration and Naturalization Service*, FED. NEWS SERV., Sept. 10, 1996.

authority.

### A. *The Pitfalls of Federalism*

The criminal-alien problem sheds new light on the difficulties of policy implementation in our federal system. First, where policy implementation requires routine administrative cooperation, the separation between state and federal authority encourages difficulties and delay. At nearly every stage of the removal system, the INS must rely on agencies that share its goal of criminal-alien removal but do not share its programming priorities or its fiscal or political incentives. Even minor variations in emphasis can produce deadlock. The glacial implementation of so promising an approach as the IHP and IRP programs demonstrates how difficult it is for separate government entities to coordinate their efforts.

Second, separating legal authority from fiscal responsibility is a recipe for policy failure and local frustration. Although the federal government has sole authority to remove criminal aliens, state and local governments bear the costs of arresting, prosecuting, detaining, and punishing them. This mismatch would be small if local governments could pass criminal aliens on to the federal government once they were convicted, but local governments can seldom rely on INS assistance. Instead, a handful of states and localities are left with the wreckage of ineffective federal policies.

Congress is aware of these failures, but it ordinarily has little incentive to remedy them. Solving the problem costs the federal government money; leaving it to fester does not.<sup>476</sup> The political dynamics of the criminal-alien problem make federal inaction especially likely. Political pressure to maintain an adequate military, for example, comes from constituencies across the country; in contrast, improving criminal-alien removal matters only to the handful of jurisdictions where those aliens disproportionately reside. Although constituents from highly affected states will force their representatives to confront the issue, they may not hold legislators responsible if

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476. Indeed, a festering problem that Congress may blame on INS incompetence provides members with opportunities to play the attractive roles of investigator and reformer. See generally DAVID MAYHEW, *THE ELECTORAL CONNECTION* [GET SUBTITLE FOR THIS] (1974).

the federal government fails to respond. A senator who can produce legislation that looks tough on criminal aliens can win support back home even if the INS lacks the tools to implement the new law. As Congress passed round after round of tough new criminal-alien laws without appropriating sufficient funds to enforce them, federal politicians such as Lawton Chiles and Alfonse D'Amato could save tax dollars for other endeavors while credibly claiming to have confronted the criminal-alien problem. Legislative action was cheaper than managerial investment.

At the state level, of course, the political calculus was different. As governors, Pete Wilson and Lawton Chiles found that purely cosmetic legislation did little to help their cash-strapped states. As the failure of federal criminal-alien policy became increasingly clear to state politicians, they began pressing for changes through their own channels. By 1993, state politicians from high-impact states were speaking—and litigating—in unison on the criminal-alien problem. Only under the pressure of this concerted effort from the states did the federal government begin to allocate substantial resources to the criminal-alien problem. Thus, the Clinton Administration was the first to make good on IRCA's promise, unfulfilled since 1986, to reimburse the states for the incarceration costs of criminal aliens. Once the federal government began to bear the fiscal responsibility for the criminal-alien problem, Congress and the INS also began to invest seriously in managerial improvements.

State and local governments have not been the only victims of Congress's preference for procedural fixes over administrative reform: aliens have suffered as well. When these measures failed to improve the removal system and local frustration mounted, Congress provided more of the same, with equally meager results. After a decade of procedural restrictions culminating in IIRIRA, Congress produced a body of law that is harsher than necessary.<sup>477</sup> The INS must now seek to remove nearly every alien ever convicted of a crime, regardless of family relationships in the United States; even the prospect of persecution in the country of origin may be

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477. For the potential effects of various provisions of this new law, see Lenni B. Benson, *Back to the Future: Congress Attacks the Right to Judicial Review of Immigration Proceedings*, 29 CONN. L. REV. 1411 (1997).

unavailing.<sup>478</sup> Had legislators acted earlier to improve the removal system, frustration over criminal aliens might not have pushed the law to this extreme.

At its heart, then, the failure to address the criminal-alien problem reflects a mismatch in government incentives: even today, the INS's administrative resources are not equal to its mandated responsibilities. Although the INS is solely responsible for enforcing the nation's immigration laws, it cannot coordinate the radically fragmented removal system. Although local law enforcement agencies spend money arresting, identifying, detaining and supervising criminal aliens, they lack authority to enforce immigration policy unless the INS explicitly delegates it to them. Political incentives are also at odds with legal authority. State governments have strong fiscal incentives to remove criminal aliens as quickly as possible, but they lack any authority to do so. Yet even the federal politicians who must respond to frustrated constituents have little incentive to push for expensive reforms. Such a system provides all parties, whether at the political or administrative level, with too much opportunity to claim that the failure of the criminal-alien removal system is someone else's fault.<sup>479</sup>

### B. *A Federalist Solution*

This history of the criminal-alien problem also highlights an important, but often overlooked, feature of federalism: local interests can pressure national politicians to face issues they would rather ignore. If not for the political independence of a handful of state governments, Congress and the INS might never have reformed the criminal-alien removal system. In a unitary system, representatives of immigrant-receiving regions might have been able to get by with promoting inexpensive but

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478. The media have only recently begun to focus attention on the casualties of this policy. In one case, a 26-year-old Vietnamese former refugee-turned computer programmer faced certain deportation for a high-school fistfight. In another, a 54-year-old Spanish woman was likely to see her 34-year legal residence come to an end over the theft of a case of perfume. See *Years Later, Immigrants Pursued by Their Pasts; Even Minor Offenses Now Mean Deportation*, WASH. POST, Feb. 24, 1997, at B1.

479. For a description of the dynamics of this well-known excuse for policy failure in other areas, see EUGENE BARDACH, *THE IMPLEMENTATION GAME: WHAT HAPPENS AFTER A BILL BECOMES A LAW* 159-63 (1977).

ineffective procedural reforms. In a federal system, however, cost-bearing localities have their own champions—state and local politicians.<sup>480</sup> Furthermore, as evidenced by President Clinton's constant trips to California in pursuit of re-election, the state-based Electoral College gives high-impact, high-population states special leverage in presidential politics. This factor also helps to explain why President Clinton and the high-impact state governors succeeded in restoring many legal immigrants' eligibility for welfare benefits in 1997 and 1998.<sup>481</sup>

These most recent displays of political muscle are hardly the first times state governments have exercised independent political influence over immigration policy. In fact, state and local governments have often promoted immigration even at the risk of impeding criminal-alien removal. In some cases, they have provided social services and welfare benefits well beyond what was legally required—or even legally permitted.<sup>482</sup> In the mid-1980s, for example, many cities with large immigrant populations, such as New York City, Chicago, San Francisco, and Los Angeles passed ordinances declaring themselves to be sanctuaries, forbidding local officials, including police, to cooperate with the INS.<sup>483</sup> These non-cooperation statutes hampered early coordination efforts in the removal system.<sup>484</sup> As late as 1989, key federal policymakers still doubted that states would work to improve the criminal-alien removal system.<sup>485</sup> The fact that both Wilson and Chiles

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480. Peter Skerry has made a similar point. See Peter Skerry, *Many Borders to Cross: Is Immigration the Exclusive Responsibility of the Federal Government?*, 25 *PUBLIUS* 71, 85 (1995).

481. See Celia W. Dugger, *New Alliances and Attitudes on Aid*, *N.Y. TIMES*, Aug. 1, 1997, at A23.

482. See Peter H. Schuck, *The Re-Evaluation of American Citizenship*, 12 *GEO. IMM. L.J.*, 1, 29 (1997), reprinted in Schuck, *supra* note 2, at ch. 8; see also Skerry, *supra* note 480, at 79-80.

483. See, e.g., *Los Angeles and Seattle City Councils Adopt Sanctuary Resolutions*, 63 *INTERPRETER RELEASES* 118 (1985); see also Mike Royko, *Way to Fight Gangs is Alien to Chicago*, *CHI. TRIB.* June 7, 1988, at C3.

484. One INS official familiar with the history of deportation efforts in California found the difference between Wilson and his predecessor (fellow Republican George Deukmejian) to be striking. Under Deukmejian, California officials were openly reluctant to cooperate with the INS. Within a few months after Wilson took office, however, the state government changed its stance dramatically, launching an audit of the state prison population in search of aliens and pushing INS officials to increase enforcement. See Telephone Interview with Bill Boggs, IHP Coordinator for the INS W. Reg'l Office in Laguna-Niguel, Cal. (June 9, 1995).

485. See, e.g., *Criminal Aliens: Hearing Before the Subcomm. on Immigration, Refugees, and International Law of the House Comm. on the Judiciary*, 101st Cong. 43 (1989) (displaying

became outspoken and effective critics of the federal government only after they moved from federal to state government and faced different incentives there underlines how federalism can amplify and legitimate local views.

The independence of state governments does more than explain how the failure of the criminal-alien removal system came to be powerfully expressed. It also points the way to reform. If state and local governments have both the programming resources and the fiscal and political incentives to remove criminal aliens, why should they not also be given the legal authority to do so? If the federal government cannot effectively coordinate this system on its own, why not improve the states' incentives to cooperate? The analysis in this Article suggests that the criminal-alien problem cannot be solved unless states and localities are allowed and encouraged to play a greater role in immigration enforcement.<sup>486</sup> Although it is beyond the scope of this Article to explore in detail how this strategy might be implemented, a few possible approaches seem promising:

In order to align state resources with federal criminal-alien removal priorities, the INS could pay states for completed criminal-alien case files suitable for INS use in removal proceedings. Currently, INS investigators spend an average of several hours per case interviewing prisoners, pulling together state criminal records, and assembling case files in preparation for removal proceedings. At the same time, states can now seek reimbursement under SCAAP for the costs of incarcerating removable criminal aliens. SCAAP reimbursement levels depend upon the number of state prisoners shown (through a comparison of state lists with INS databases) to be either illegal aliens or LPRs currently in removal proceedings.<sup>487</sup> To better coordinate these systems, Congress could condition SCAAP reimbursement on the state or local government's delivery of a completed case file. To encourage rapid identification, the federal government could reimburse the state only for those incarceration expenses that the state incurred after it delivered

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Rep. Morrison's belief that states would not cooperate with INS unless required to do so).

<sup>486</sup>. See Spiro, *supra* note 29.

<sup>487</sup>. Statistical inferences are made to account for the fact that many illegal aliens are unknown to the INS. See Morris Interview, *supra* note 64.

the completed file to the INS. Such an arrangement would be more effective than the current mechanism embodied in IMMACT90 Section 507, which requires information not narrowly tailored to suit INS's removal needs and which uses the non-credible threat of a drastic cut in crime-fighting funds as its only incentive.

The INS could, under appropriate safeguards to prevent abuse, deputize state and local law enforcement officers to perform some INS investigatory and detention functions.<sup>488</sup> With some training and expanded INS information support functions along the lines of the LESC, local law enforcement agencies might be able to determine alienage. Aliens identified as removable could then be held or released as the INS directs. Such a system would still not assure that the INS would pick up, detain, and remove the aliens, but at least all criminal aliens would be identified at the time of arrest. Identifying information would then be available to other law enforcement agencies that might encounter the aliens, and the INS could begin the removal process earlier in most cases.

Congress could also deputize local prosecutors to press immigration charges and reimburse them for doing so. Participating prosecutors' offices would have to develop expertise in immigration law, but any locality where criminal aliens abound would have an incentive to do so. Moreover, the 1996 immigration reforms have, for better and for worse, greatly simplified the law governing the removal of criminal aliens, especially if they are not LPRs. Immigration hearings themselves could still take place in immigration court, though the large increase in caseload would necessitate more immigration judges. Such a system would allow local criminal-justice agencies to decide which criminal aliens to detain and would enable prosecutors to combine immigration and criminal law concerns in their prosecution of the case, making those prosecutions more effective.

Congress could permit states to certify some of their criminal courts as immigration courts, with the EOIR overseeing the necessary training and certifications. Even more than the previous suggestion, this would allow prosecutors to combine

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<sup>488</sup> The INS now possesses such authority under INA § 287(g), which was added by IIRIRA.

immigration and criminal law sanctions in their plea negotiations with criminal aliens.

Under any system in which local officials decided whom to hold for possible removal, the INS could also delegate detention responsibilities to the local level, not simply contract for local facilities as it does now. Depending on how strong an incentive for local participation the federal government desired, the INS could grant reimbursement for local detention.

The INS could also delegate to local authorities the responsibility for deciding which criminal aliens to hold on immigration charges. Under the current system, if the local authorities decide, based solely on local criminal-justice policy, that a criminal alien should not be detained, they must either release the alien or turn him over to the INS. In many cases, the INS is not prepared to pick up and detain the alien, who may then may be released even if he is clearly removable. To address this problem, the INS could allow local authorities to detain criminal aliens even in cases where detention is justified only on immigration law grounds. To encourage local authorities to participate, the federal government could reimburse them (either partially or fully) whenever they chose to use their own space to detain a criminal alien solely on immigration-related grounds. Such a system, which would require controls, would be far more flexible than the INS's current policy of centrally contracting for local jail space; locals could use their jail space as they saw fit.

Admittedly, devolving some immigration enforcement authority to the states would be a radical step, although Germany and Canada have long done so. In 1986, Congress declined to adopt an INS proposal that local law enforcement agents be authorized to arrest any alien subject to an outstanding final order of deportation.<sup>489</sup> More recently, the Interstate Criminal Alien Working Group, a group of state officials working with the INS to improve the criminal-alien removal system, proposed that state and local officials in jails, prisons, and probation offices be deputized to perform the identification function on behalf of the INS.<sup>490</sup> In the AEDPA legislation of 1996, Congress took a small step toward

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489. See *INS Drafts Bill with Drastic Enforcement Provisions*, 63 INTERPRETER RELEASES 452 (1986).

490. See ADDRESSING THE CRIMINAL ALIEN PROBLEM, *supra* note 39, at 25.

devolution, allowing state and local law enforcement officials to detain previously removed illegal aliens convicted of a felony.<sup>491</sup>

These and other devolutionary options merit further study, of course, for such incrementalism ill-serves the public where the incentives of government are so poorly aligned. Having proven its intractability over the last ten years, the criminal-alien problem is in need of more far-reaching review. As Charles Lindblom pointed out, incrementalists may "overlook excellent policies for no other reason than that they are not suggested by the chain of successive policy steps leading up to the present."<sup>492</sup>

A similar blindness may be affecting those charged with improving the criminal-alien removal system. Despite what has proven to be a serious misalignment of incentives, policymakers have proceeded as if the federal government, with sole responsibility for the identification, detention, and deportation of criminal aliens, can discharge that responsibility effectively. Even now, with the INS beginning to make slow progress in removing criminal aliens, this assumption seems doubtful. Unless policymakers review the criminal-alien removal system afresh, they will do little more than continue "muddling through."

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491. See AEDPA § 440.

492. For the classic exposition of incrementalism, see Charles E. Lindblom, *The Science of "Muddling Through,"* in *THE POLITICS OF THE FEDERAL BUREAUCRACY* 130 (Alan A. Altschuler & Norman C. Thomas eds., 1977).

