

Detention Crisis at INS

There is an increasing backlog of persons who are in legal limbo

by Dan Stein

[As executive director of FAIR, the Federation for American Immigration Reform, Dan Stein gave this testimony before the Immigration and Claims Subcommittee of the House Judiciary Committee.]

This statement is intended to address preparations by the Immigration and Naturalization Service for the possible release of detained criminal aliens, and the manner in which the INS has enforced new provisions of the Immigration and Nationality Act.

Release of Criminal Aliens and Illegal Entrants

The INS has acknowledged that it has developed plans for the release of deportable aliens, invoking a shortage of detention space as the justification. This action, should it occur, will violate INA section 236 (c), a new section that mandates the continued detention of criminal aliens until final deportation. The INS would be releasing aliens convicted of crimes of moral turpitude and aggravated felonies, including narcotics trafficking, espionage or terrorism, back onto our streets, where they could commit additional crimes and very likely will disappear, perhaps permanently.

Detention is the fulcrum on which all aspects of immigration policy enforcement depend. If the INS is forced by lack of detention space to release or not take into custody deportable aliens — or others in the country illegally who are being allowed to depart voluntarily — the immigration laws will become even more ignored than they are today. We must remember that those laws are designed to protect the American people from unwelcome gate-crashers and guests who seriously violate the nation's hospitality.

The current detention situation is an indication that the efforts of the INS to portray itself as being on top of the criminal alien problem — with record numbers of

deportations — are misleading. Mr. Chairman, the number of criminal aliens in detention is increasing — not decreasing. The number of criminal aliens in detention in federal and state prisons rose by nearly 15 percent over the past fiscal year and by about 60 percent (to more than 125,000) since the beginning of fiscal year 1994. Neither the judicial process, nor the detention space available, have been able to keep pace with this disturbing trend.

The INS claims that it currently has only about 14,000 detention beds and a deportable population of nearly 16,000. It seems reasonable to ask what happened to the 20,000 detention beds that were projected to be available in fiscal year 1999 in the "Final Detention Plan: Fiscal years 1997-2001" that was submitted to Congress in May, 1997. Congress foresaw that the new detention criteria it adopted in 1996 could create detention problems and responsibly wrote transition policies into the law to deal with the need for new resources. The INS had over two years to plan for the new provisions. The May, 1997 Detention Plan charted a course for meeting the new detention space requirements. But the INS has failed to meet its own plan.

It seems clear that the bed deficit is the result of deliberately adopted policies. That is the only way to explain the fact that available beds operated and contracted for by INS are not keeping up with the growing need. Rather than the projected 20,000 planned-for detention beds, the INS puts the funded level of beds at 14,000 (down from 15,000 in fiscal year 1998) and is in the process of making further cuts that will reduce the detention space to 13,500 beds. Contrary to efforts of the INS to characterize the bed shortage as due to events outside of its control, it should be recognized that the situation is entirely a product of the INS decision-making process.

According to an account in the *San Diego Union-Tribune* on February 7, 1999, the funding for one of the planned new INS detention facilities in San Francisco

was shelved last June when the INS decided to divert the \$30 million set aside for its construction to its program to speed up citizenship processing operations. Although the San Francisco facility would not yet be open if construction plans had gone ahead, the re-allocation of funds demonstrates how INS has had the power to shape the current situation. The bulk of the increased detention facilities that were planned to be available to meet the current demand were to be leased from state and local

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agencies. Although current funding for detention space may be suffering from increased costs and decreased receipts, it also seems clear that the INS has failed to make the necessary budget decisions to meet its legal obligations.

But, even if the shortage of beds were not the result of deliberate INS decisions resulting from its failure to increase its own facilities at its Service Processing Centers as planned, and to increase its leased space with state and local governments as projected, it still has other remedies besides the release of deportable criminal aliens onto the streets.

Part of the INS detention problem arises from an Executive Branch decision to suspend the deportation of Central Americans following the devastation of Hurricane Mitch. Apparently, the INS now has in the neighborhood of 1,500 of these deportable aliens on its hands. While we are sympathetic with the people of Central America for their loss of lives and property, we believe there are more appropriate ways to show our solidarity with our neighbors in their reconstruction effort than to indefinitely house their nationals who should be deported under our law. Extending temporary protection for criminals is far beyond any neighborly courtesy that might be expected in the hurricane's aftermath. If the alternative is to release these detainees back onto our streets, it is obvious that the preferable policy would be to resume deporting back to their home country. Some

have requested to be sent home to be able to help their families in the recovery effort but are being held against their will.

Another of the categories of aliens clogging up the INS detention and deportation system is the Cuban Mariel excludable aliens. The 800-900 Cuban criminals who were pushed into the United States by Fidel Castro in 1980 (as part of the Mariel Boatlift), have been in detention ever since, and clearly should be returned to Cuba. The problem has been that Castro has refused to take them, notwithstanding a formal immigration agreement between the Castro regime and the Clinton Administration. How is it that the Clinton Administration agreed to give Castro a guaranteed annual allotment of 20,000 immigration visas for Cubans without obtaining in exchange at least the accepted return of those 800-900 Cuban excludable aliens? Congress should consider freezing these visas until the Administration negotiates some relief for American taxpayers who have been burdened with Castro's criminals for nearly 20 years. Section 243(d) was added to the Immigration and Naturalization Act precisely for this purpose.

Those two policy responses alone — removal of deportable Central Americans and the return of excludable Cubans to Cuba — would be sufficient by themselves to eliminate the detention bed shortage problem.

There are also other corrective measures that would allow the INS to solve its so-called detention crisis without the need to release criminal aliens back on the streets. That conclusion may be drawn from the findings of the General Accounting Office (GAO) in its October 1998 report on “Criminal Aliens.” The report charged that INS' efforts to remove imprisoned aliens continued to need improvement. The GAO found that approximately 250 beds per year were unnecessarily occupied by deportable aliens because the INS had not completed the administrative details necessary to accomplish deportation following the alien's release from prison. This inefficiency, which was estimated to have cost INS more than \$40 million in fiscal year 1997, is inexcusable. How difficult can it be to process the paperwork on people who are already in prison so that they can be deported immediately upon completion of their sentences?

As noted above, the INS does not house all of its detainees in its own facilities. It also rents space from

other law enforcement jurisdictions. That is largely a factor of funding. There can be no doubt that the INS has been provided with unprecedented increases to its budget in recent years. As an example, the INS resources for detention and deportation grew from \$193 million in fiscal year 1993 to \$729 million in the current fiscal year — more than a three-and-a-half-fold increase. The fact that the INS has failed to increase its own facilities at its Service Processing Centers, as planned, and to increase its leased space with state and local governments as projected, is not due to a lack of funds but rather a failure to allocate those funds prudently and in accordance with the requirements of law. Thus the issue must be understood as an INS funds management crisis, not one due to the unavailability of resources. Rather than being a detention bed space shortage, as portrayed by the INS, the crisis is a self-inflicted one by the INS. Whether it has been made deliberately or inadvertently, the result suggests malfeasance.

Rather than accept responsibility for this situation, the INS appears to find it more convenient to ask Congress for still more money and to propose the release of some deportable aliens. It is an attempt to lay responsibility for its own mismanagement on the doorstep of Congress. It also appears to be a policy that is responsive to the financial interests of immigration attorneys and immigrant-rights advocates who are committed to fighting the tougher deportation laws adopted in 1996 in the Illegal Immigration Reform and Immigrant Responsibility Act.

Immigration lawyers are currently trying to slow the removal process as they battle to maintain their ability to fend off deportation for their clients. This argument is a blatant attempt to hold the American judicial process responsible for something that was caused by the individual criminal acts of immigrants, who violated the conditions of their admission to this country. The American public is compassionate and accepts the release of convicts who appear to be rehabilitated — albeit with reservations. But for American citizens the

only alternative is permanent incarceration. The situation is entirely different for aliens who commit similar crimes. If they have not come here legally, they have not gained any right to be treated as if they were invited to join our society. And those immigrants who have come legally, but have not become U.S. citizens, remain guests in our society whose behavior will not be tolerated if they fail to respect our laws. Being an immigrant to the United States is not a right. It is a privilege. A condition of that privilege is to obey our laws. Deportation has long been accepted as appropriate and just for criminal aliens.

In some cases there may be family members also living here. Should that stand in the way of deportation? While all situations are different, the fact is that most immigrants have only arrived in the past fifteen years; many of those

who commit crimes are not long-term residents of 15 to 20 years or more. Past experience reflects that the waiver opportunities provided by Congress have been abused and become the rule rather than the exception. And to make a family member in the U.S. the sole criterion for the deportation waiver would lead to the absurd conclusion that we also must spare innumerable criminals from prison on the basis that they too have families. Unfortunately, innocent family members often end up paying a penalty for the actions of their kin who threaten the public safety. Deported criminal aliens retain full rights as citizens of their country of origin and may lead productive lives there. In most cases, their spouses and minor, unmarried children may join them there.

Mr. Chairman, the INS preparation for the release of criminal aliens is not an isolated example of policies being pursued by that agency that are incomprehensible to the American public. As you well know, INS operations are rife with serious problems.

The INS most recently has admitted to an increasing backlog of persons in legal limbo in the United States. This results from the fact that the INS is not able to keep up with applications for adjustment of status from aliens already here who are seeking green cards.

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INS can handle, and backlogs have grown. In some offices, waiting lists extend for more than two years after the immigrant has fulfilled the residency requirement to apply for citizenship. To try to speed up the process and qualify as many immigrants as possible to vote in the last presidential election, slipshod policies were adopted that led to the Citizenship USA scandal of thousands of aliens being naturalized despite criminal records that made them ineligible.

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The INS similarly can't cope with the surging wave of illegal aliens. As a result, while the illegal alien population grows by an estimated 275,000 each year, the INS does less to deter new illegal aliens and has opted instead to try to “manage” illegal immigration by implementing a strategy called the Phoenix Plan. This new operational strategy eliminates efforts to remove illegal aliens working here illegally.

Increasingly local law enforcement organizations which contact the INS in connection with detention of illegal aliens are told by INS that it does not have the resources to take custody of the aliens and that they should be released. Individuals who contact the INS with information about the activities of possible illegal aliens in local communities are told that individual cases do not have a high enough priority to justify action. The INS is abrogating its responsibility to protect the society from a wave of illegal immigrants.

It is reasonable to conclude, Mr. Chairman, that the above INS failures — in addition to the failure to manage detention of criminal aliens properly — point to repeated and gross INS incompetence that justifies a demand for new management. The agency management's schizophrenic focus on improving “customer service” has

lost sight of the fact that its real customers are the American people, and any immigration program must have as its primary beneficiary the general public.

Nevertheless, we are not sanguine that a change in the INS leadership by itself would correct the problems.

Reducing the immigration flow and relieving pressure on the agency

FAIR also sees this sorry record of INS failures as demonstrating clearly that immigration is out of control, and that something must be done to reduce the pressures on our society and on the agency. There are simply too many people pushing at the borders, crashing the borders and demanding immigration benefits at the same time. And international demographic pressures are only likely to worsen in the next ten years. It is unlikely that a new INS management could solve all of the agencies myriad problems until the unprecedented number of arriving immigrants — both legal and illegal — is reduced to a more manageable level.

As many members of this committee know, FAIR has argued that the cumulative stress on many of our nation's vital institutions is due to prolonged large-scale immigration and necessitates an immigration “time-out.” We note that H.R.41, Congressman Bob Stump's *Mass Immigration Reduction Act*, has 49 co-sponsors and merits serious consideration by this committee.

The idea of a timeout to allow institutions to catch up with reality is now being buttressed by arguments coming from the Clinton Administration. In its proposed FY 2000 budget, the Administration wants to slow the hiring of new immigration agents, because they are entering the system faster than INS can train them. If the Administration acknowledges that its capacity to train immigration agents has been overwhelmed by sheer numbers, and that a pause is necessary, it is logical to conclude that the system can be overwhelmed by the sheer number of immigrants who enter. In fact, I would suggest that the very reason we are sitting here today is because the system is overwhelmed by more legal and illegal immigrants entering the country than our law enforcement and social institutions can possibly manage.

If a “time-out” on hiring new immigration personnel is an idea the Administration is proposing and Congress is considering, why isn't a “time-out” on admitting immigrants worthy of serious consideration as well?

OTHER AREAS OF CONCERN

Legislative action will be necessary if we are to achieve a more manageable immigration environment. Efforts better to control the border are not enough by themselves — they need to be supported by effective deterrence at the worksite. Employers must be able to verify who is and who is not in a legal work status. The current test program for worker verification offers the means to achieve that objective, and it should be promptly implemented nationwide. We need to end the amnesties and grants of temporary protected status (TPS) that legitimate illegal entry and encourage others to follow.

That means Congress must demonstrate the resolve to repatriate TPS beneficiaries when conditions in the homeland improve, rather than turn TPS grants into permanent amnesty programs.

Mr. Chairman, we salute your leadership and appreciate the difficult task of pleasing all the contending parties that are organized to try to weaken the role of the INS and its enforcement mission. We stand ready to assist in whatever way we can to try to improve the performance of the INS in fulfilling its essential duties to the American people.

TSC