

Statement of Mark Krikorian  
Executive Director, Center for Immigration Studies  
Before the House of Representatives  
Committee on Homeland Security  
Subcommittee on Border, Maritime, and Global Counterterrorism  
On "Moving Toward More Effective Immigration Detention Management"  
December 10, 2009

Barbara Jordan, chairwoman of the U.S. Commission on Immigration Reform, told Congress in 1995:

Credibility in immigration policy can be summed up in one sentence: those who should get in, get in; those who should be kept out, are kept out; and those who should not be here will be required to leave.

Our immigration policy has never lagged in letting people in. And we have gotten a little better at keeping out those who should be kept out. But our progress in the third of Ms. Jordan's requirements – removing those who should not be here – still leaves much to be desired.

It's not just that we have 11 million illegal aliens living here. Even among those whom we have formally designated as "should not be here" – aliens who've gone through the immigration court process and been issued final orders of removal – more than half a million have expressed their contempt for American immigration law by absconding.

This is not a new problem. A 2006 report from the DHS Office of Inspector General found that:

Currently, DRO is unable to ensure the departure from the U.S. of all removable aliens. Of the 774,112 illegal aliens apprehended during the past three years, 280,987 (36%) were released largely due to a lack of personnel, bed space, and funding needed to detain illegal aliens while their immigration status is being adjudicated. ... Further, historical trends indicate that 62 percent of the aliens released will eventually be issued final orders of removal by the U.S. Department of Justice Executive Office of

Immigration Review (EOIR) and later fail to surrender for removal or abscond.

("Detention and Removal of Illegal Aliens," OIG-06-33 April 2006)

A few years earlier, in 2003, the Department of Justice's Office of Inspector General (before the reorganization of immigration functions in the Department of Homeland Security) found essentially the same thing:

Although the INS remains effective at removing detained aliens, it continues to be largely unsuccessful at removing nondetained aliens, removing only 13 percent of those we sampled. Moreover, the INS was deficient at removing important subgroups, removing only 6 percent of the nondetained aliens from countries that sponsor terrorism, 35 percent of nondetained criminal aliens, and only 3 percent of nondetained aliens denied asylum. ("The Immigration and Naturalization Service's Removal of Aliens Issued Final Orders," Report Number I-2003-004, February 2003)

The disregard for immigration law is so pervasive that the notification that a non-detained alien receives about his final order of removal is colloquially known as a "run letter" – because when he gets the letter, he runs. In a similar phenomenon, during the surge of non-Mexican illegal immigration on the southern border a few years back, a lack of money for detention forced the Border Patrol to release the apprehended illegal aliens with a summons requiring them to come back for an immigration hearing in 30 days – and that summons came to be known as the "diploma," since it permitted the holder to "graduate" into the U.S. and get lost in the large urban immigrant communities. Needless to say, very few of these people returned for their hearings.

And the lack of detention space can have serious consequences. For instance, Ghazi Ibrahim Abu Maizar was a Palestinian illegal alien who had been caught three times trying to sneak into Washington State from Canada. But on his third try, in 1996, Canadian authorities refused to take him back. Instead of detaining him, the Border patrol had no choice but to release him into the United States with a summons to appear before an immigration court. Because he was not detained, he was able to proceed with a plot to bomb the New York subways, which was averted at the last minute only when a roommate informed police.

In short, a majority of removable aliens who promise to appear for their court dates are simply lying to the immigration authorities. This is the reason immigration detention must not only continue, but must be expanded significantly. The only way to ensure that illegal aliens actually appear before an immigration court is to physically compel them to do so through detention. While it can be worth experimenting with various alternatives to detention, in the real world their likelihood of success is limited. Pilot programs to assess the viability of alternatives to detention often either include people who would not have been detained anyway (i.e., cream-skimming or cherry-picking those most likely to yield the "right" result) or fudge the statistics to make the results appear more favorable, or both. For instance, the *Houston Chronicle* had to make a Freedom of Information Act request to discover that:

Nearly one in five suspected illegal immigrants who went through an Immigration and Customs Enforcement intensive monitoring program absconded while under supervision during the past five years, newly disclosed records show. ...

On its Web site, ICE boasts a 99 percent appearance rate in immigration court for participants in its restrictive Intensive Supervision Appearance Program (ISAP). Yet records maintained by private contractors that administer ISAP show they were "unable to locate" 18 percent of 6,373 illegal immigrants who passed through the program between 2004 and the end of January. Five percent were re-arrested by ICE, records show. ("Flaws found in options for immigrant detention," *Houston Chronicle*, October 20, 2009)

Furthermore, alternatives to detention are not even plausible subjects for experiment unless the criminal penalties for failing to appear are employed. In other words, only when ordinary absconders – who aren't sexual predators or terrorists but just regular illegal aliens who ignored their court dates – are routinely given stiff prison sentences can alternatives to detention even be plausibly considered.

The pervasive unwillingness of illegal aliens to comply with immigration law in the absence of detention is not surprising. Unlike in the criminal justice setting, where failing to appear often results in additional penalties, a final order of removal is all an illegal alien realistically faces, whether he shows up to immigration court or not. Though the law provides for imprisonment of up to 10 years for aliens who fail to appear at their hearings, the chances that an immigration absconder not involved in additional crimes

will be prosecuted are vanishingly small. Furthermore, those failing to appear for immigration proceedings are likely to avoid detection for many years, perhaps for the rest of their lives, given authorities' still-frivolous approach to tracking down immigration absconders. For example, under pressure from local advocacy groups, many police departments refuse to serve ICE administrative warrants issued to absconders, thus shielding the scofflaws from facing the consequences of failing to depart. Thus, alternatives to detention are simply irrelevant for those likely to be rejected for asylum or cancellation of removal – i.e. the majority of those in removal proceedings.

In other words, "alternatives to detention" is simply a synonym for "catch and release."

Rather than focus on a futile search for alternatives to detention, we would be better advised to increase ICE's bed space. There was, in fact, an increase through FY 2009, albeit from a low starting point. ICE had funding for 18,500 detention beds in FY 2003, 32,000 beds by 2008, and 33,400 beds in FY 2009. But the growth has stopped, with the FY 2010 DHS budget allowing for no increase in detention beds. This despite the fact that the actual physical capacity to detain more illegal aliens exists in most parts of the country, much of it in unused county jail space. What's more, a number of states have offered to help ICE by covering the up-front cost of new jail construction in exchange for an understanding that ICE will use it.

The reluctance to increase detention capacity is curious, to say the least, in light of the Secure Communities initiative and the spread of jail-based 287(g) programs. These efforts ensure that the number of aliens ICE will have to detain is going to increase significantly. The mismatch between supply and demand for detention beds will likely have two results: first, illegal aliens not involved in other crimes will be even less likely to be detained than now, meaning the number of absconders will resume its growth. Second, there will be an increase in the number of criminal aliens whom local jurisdictions have alerted ICE to, but who have to be released because of a lack of funding for detention space. The result of both of these developments will not only be bad policy, but also bad politics – the public's confidence in the government's promises to enforce the law will be further eroded and, when a number of the released criminals inevitably commit new crimes after having been ordered released by ICE, the administration and Congress will rightly be subjected to public outrage. An example of how detention of certain illegal aliens can literally save lives: Davidson County, Tenn., has reported that 75 percent of the

vehicular homicides committed by illegal aliens would have been prevented if the illegal alien had been deported, presumably after detention, on the basis of prior offenses.

A final point on the supposedly inhumane nature of detention. Most aliens are detained for a short time, an average of one month. With a few exceptions, the small number who remain in detention for long periods are there because they continue to challenge their deportation. And they often do so because they are given false hope by open-borders advocacy groups intent on using such people as pawns in a political effort to hamper enforcement of American immigration laws. The humane thing to do would be to make clear to these illegal aliens that immigration to the United States is a false dream for them and help them return home and get on with their lives. Instead, they languish in detention – a needed detention, given the virtual certainty that they would ignore a negative decision on their cases – but languish nonetheless.

All Americans support efforts to make detention as humane as possible. But it is essential to emphasize that detention is a necessary tool and consequence for those who have violated our immigration laws.

###