DEPORTATION OF CRIMINAL ALIENS:
A GEOPOLITICAL PERSPECTIVE

BY MARGARET H. TAYLOR AND
T. ALEXANDER ALENIKOFF

JUNE 1998
FOREWORD

The April 1997 implementation of the Illegal Immigration Reform and Immigrant Responsibility Act caused great concern in parts of the hemisphere, as well as in the large immigrant communities of the United States. The law, which increases border interdiction efforts, expedites deportation proceedings, and cracks down on illegal immigration, threatens hundreds of thousands of mostly Mexican, Central American and Caribbean migrants with possible 'detention and removal' from U.S. soil. In fiscal year 1997, the U.S. Immigration and Naturalization Service (INS) deported over 10,000 aliens. Almost half of these deportees had been convicted of a crime in the United States.

While there is strong domestic support for the policy of deporting immigrants convicted of crimes, the practice has caused concern among the receiving countries. A large share of those deported have been hard-core criminals, and their return has contributed to escalating gang violence and increased drug trafficking in the region. The authorities in the receiving countries complain that not only are their criminal justice systems ill-equipped to deal with these individuals, but they are not even provided with proper background information on the deportees.

The growing awareness of the foreign policy implications of U.S. immigration initiatives led the Inter-American Dialogue to commission a study on the deportation of criminal aliens. The resulting paper, by Margaret H. Taylor and T. Alexander Aleinikoff was presented and discussed in draft form at a November 1997 conference jointly sponsored by the Inter-American Dialogue, the Carnegie Endowment for International Peace, the Tomás Rivera Policy Institute, and the Hispanic Council on International Relations. The authors present several policy options to effectively deal with the criminal deportation question, including analyzing U.S. immigration policy from a geopolitical context, improving procedures for deportation to receiving countries, and maintaining the ongoing dialogue between foreign diplomats and INS officials to discuss the implementation of U.S. immigration laws.

We believe that the information presented in this paper is timely and useful to decisionmakers, both in the countries receiving and sending criminal deportees. In an effort to increase understanding of this controversial issue, to promote a continued debate on mechanisms to manage deportations, and to lessen the negative impact on the receiving countries, we are making this paper available to a wider audience.

This paper represents the personal opinions of the authors, and does not necessarily reflect the views of the Inter-American Dialogue. We would like to express our gratitude to the Ford Foundation for their support of this project.

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DEPORTATION OF CRIMINAL ALIENS:  
A GEOPOLITICAL PERSPECTIVE

MARGARET H. TAYLOR AND T. ALEXANDER ALENIKOFF

With the recent enactment of new 
immigration legislation and a significant 
increase in resources, the Immigration and 
Naturalization Service is deporting a record 
number of aliens who have been convicted 
of crimes in the United States. There is 
strong domestic support for this policy. 
The "speedy and effective deportation of 
criminal aliens is seen universally to be a 
worthy federal priority."1

At the same time, there is a growing 
awareness of the foreign policy 
implications of U.S. immigration 
initiatives. The deportation of criminals 
can contribute to a host of problems in 
their countries of origin, including 
establishing criminal violence and increased drug 
trafficking. The law enforcement and 
criminal justice systems of receiving 
countries are often ill-equipped to deal 
with these concerns. This paper examines 
the deportation of criminal aliens from a 
geopolitical perspective, identifying policy 
options for further discussion.

I. The Increase in Criminal 
Alien Deportations

In fiscal year 1997, the INS—for the very 
first time—deported over 100,000 aliens 
in a single year. Almost half of these 
deportees had been convicted of a crime in the 
United States. A decade ago, these 
figures were simply inconceivable. In 
1984, for example, the INS deported just 
over a thousand aliens on criminal 
grounds.2 Even four years ago, when INS 
removal statistics were half of what they are 
today, most observers would not have 
predicted the present scale of immigration 
 enforcement efforts. The dramatic rise in 
deportations in recent years is reflected in 
the following table:3

Table 1
Total Deportations 
1994-1997

<table>
<thead>
<tr>
<th></th>
<th>Total Deportees</th>
<th>Criminal Deportees</th>
<th>Non-criminal Deportees</th>
<th>% Criminal Deportees</th>
</tr>
</thead>
<tbody>
<tr>
<td>FY 1994</td>
<td>45,368</td>
<td>30,948</td>
<td>14,420</td>
<td>68%</td>
</tr>
<tr>
<td>FY 1995</td>
<td>50,460</td>
<td>32,539</td>
<td>17,921</td>
<td>64%</td>
</tr>
<tr>
<td>FY 1996</td>
<td>68,837</td>
<td>36,967</td>
<td>31,870</td>
<td>54%</td>
</tr>
<tr>
<td>FY 1997</td>
<td>111,794</td>
<td>50,165</td>
<td>61,629</td>
<td>45%</td>
</tr>
<tr>
<td>Total FY 94-FY 97</td>
<td>276,459</td>
<td>150,619</td>
<td>125,840</td>
<td>54%</td>
</tr>
</tbody>
</table>

1 Associate Professor of Law, Wake Forest University 
School of Law.

2 Professor of Law, Georgetown University Law Center 
and Senior Associate, Carnegie Endowment for 
International Peace.

3 U.S. Commission on Immigration Reform, Report to 
Congress, U.S. Immigration Policy: Restoring Credibil-
ity, at 153 (1994).

2 One thousand and sixty-one aliens were deported on 
criminal grounds in fiscal 1984. This number rose slightly the following two years, and then jumped to 4,385 in 
fiscal year 1987. See U.S. Immigration and Naturalization Service, Statistical Yearbook of the Immigration and Naturali-
zation Service, 1995, at 170. The INS has since changed the way that it defines "criminal aliens." Today's statistics 
include any alien who has been convicted of a crime in the United States, even if the deportation or exclusion order is 
not based on that criminal conviction. In other words, an "illegal alien" who has committed a crime in the United States 
could be removed on the grounds that he entered without proper inspection, but would now be counted as a "criminal 
alien."

3 Removal statistics for fiscal years 1994-1997 were compiled for the authors by the Office of Policy and Planning, 
Immigration and Naturalization Service. The INS fiscal year runs from October 1 to September 30. While statistics 
for fiscal year 1997 have recently been released, these figures are subject to revision.

Inter-American Dialogue
Mexico is uniquely affected by this dramatic transformation in U.S. immigration policy because of its shared border with the United States. Seventy-seven percent of all criminal offenders deported from the United States are Mexican nationals. From October 1993 to September 1997, over 112,000 individuals convicted of a crime in the United States were returned to Mexico pursuant to a final removal order. During fiscal year 1997, 38,475 Mexican nationals with criminal records were removed. That number translates into approximately 740 criminals deported every week to Mexico.

Countries in Central America and the Caribbean also bear the brunt of the increase in criminal alien deportations. Over the last four years, the INS deported 5,524 criminal aliens to the Dominican Republic; the vast majority of them had been convicted of drug offenses in the United States. El Salvador received 4,428 criminal deportees and Jamaica received 3,918 criminal deportees during that same time period. For some countries, the number of criminal aliens repatriated each year may now approach or even surpass the number of criminals who are released from domestic prisons.

The mix of criminal aliens and other immigration violators varies greatly among receiving countries. Approximately one-quarter of all deportees returned to Guatemala and Honduras have criminal records. In contrast, 80% of all aliens deported to Jamaica and 72% of those deported to the Dominican Republic over the past four years have been convicted of a crime. Removal statistics for Mexico and the most heavily impacted Central American and Caribbean countries are summarized on pages 3 and 4.

II. Reasons for the Rise in Criminal Alien Deportations

A. Political Initiatives

As these figures suggest, the deportation of foreign nationals who commit crimes in the United States is now a top priority of Congress and the INS. Because the states must pay for prosecuting and incarcerating criminal aliens, they too are pressing for increased immigration enforcement. These shared interests have translated into several initiatives that together have fueled the trend toward more criminal alien deportations.

1. Resources

The INS budget has increased fifty percent in the last two years and has more than tripled over the last decade, an influx of resources that is unprecedented among federal agencies. Much of this money has been channeled to the Detention and Deportation division, which had a budget of $637 million for fiscal year 1997. The INS’s detention capacity has increased from 6,000 beds three years ago to over 12,000 beds today. Through a combination of new legislation and oversight measures, Congress has directed the INS to focus much of its augmented enforcement capacity on criminal alien removals.

2. Statutory changes

Significant restrictions on discretionary relief from deportation (now called “cancellation of removal”) enacted in 1996 mean that many aliens convicted of crimes in the United States are ineligible for relief, regardless of their length of residence or ties to the community. The primary
Table 2
Deportations by Country
1994

<table>
<thead>
<tr>
<th>Fiscal Year 1994</th>
<th>Total Deportations</th>
<th>Criminal Deportees</th>
<th>Non-criminal Deportees</th>
<th>% Criminal Deportees</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mexico</td>
<td>30,013</td>
<td>22,529</td>
<td>7,484</td>
<td>75</td>
</tr>
<tr>
<td>Dominican Republic</td>
<td>1,534</td>
<td>968</td>
<td>566</td>
<td>63</td>
</tr>
<tr>
<td>El Salvador</td>
<td>1,862</td>
<td>947</td>
<td>915</td>
<td>51</td>
</tr>
<tr>
<td>Guatemala</td>
<td>1,265</td>
<td>458</td>
<td>807</td>
<td>36</td>
</tr>
<tr>
<td>Honduras</td>
<td>1,629</td>
<td>497</td>
<td>1,132</td>
<td>30</td>
</tr>
<tr>
<td>Jamaica</td>
<td>963</td>
<td>839</td>
<td>124</td>
<td>87</td>
</tr>
</tbody>
</table>

Table 3
Deportations by Country
1995

<table>
<thead>
<tr>
<th>Fiscal Year 1995</th>
<th>Total Deportees</th>
<th>Criminal Deportees</th>
<th>Non-criminal Deportees</th>
<th>% Criminal Deportees</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mexico</td>
<td>34,495</td>
<td>23,804</td>
<td>10,691</td>
<td>69</td>
</tr>
<tr>
<td>Dominican Republic</td>
<td>1,603</td>
<td>1,163</td>
<td>440</td>
<td>73</td>
</tr>
<tr>
<td>El Salvador</td>
<td>1,900</td>
<td>956</td>
<td>944</td>
<td>50</td>
</tr>
<tr>
<td>Guatemala</td>
<td>1,714</td>
<td>496</td>
<td>1,245</td>
<td>28</td>
</tr>
<tr>
<td>Honduras</td>
<td>1,908</td>
<td>535</td>
<td>1,373</td>
<td>28</td>
</tr>
<tr>
<td>Jamaica</td>
<td>1,037</td>
<td>919</td>
<td>118</td>
<td>89</td>
</tr>
</tbody>
</table>
Table 4
Deportations by Country
1996

<table>
<thead>
<tr>
<th>Fiscal Year 1996</th>
<th>Total Deportees</th>
<th>Criminal Deportees</th>
<th>Non-criminal Deportees</th>
<th>% Criminal Deportees</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mexico</td>
<td>50,573</td>
<td>28,143</td>
<td>22,430</td>
<td>55</td>
</tr>
<tr>
<td>Dominican Republic</td>
<td>1,934</td>
<td>1,468</td>
<td>466</td>
<td>76</td>
</tr>
<tr>
<td>El Salvador</td>
<td>2,452</td>
<td>1,034</td>
<td>1,418</td>
<td>42</td>
</tr>
<tr>
<td>Guatemala</td>
<td>2,082</td>
<td>488</td>
<td>1,594</td>
<td>23</td>
</tr>
<tr>
<td>Honduras</td>
<td>2,739</td>
<td>584</td>
<td>2,155</td>
<td>21</td>
</tr>
<tr>
<td>Jamaica</td>
<td>1,166</td>
<td>985</td>
<td>181</td>
<td>85</td>
</tr>
</tbody>
</table>

Table 5
Deportations by Country
1997

<table>
<thead>
<tr>
<th>Fiscal Year 1997</th>
<th>Total Deportees</th>
<th>Criminal Deportees</th>
<th>Non-criminal Deportees</th>
<th>% Criminal Deportees</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mexico</td>
<td>84899</td>
<td>38475</td>
<td>46424</td>
<td>45</td>
</tr>
<tr>
<td>Dominican Republic</td>
<td>2603</td>
<td>1925</td>
<td>678</td>
<td>74</td>
</tr>
<tr>
<td>El Salvador</td>
<td>3743</td>
<td>1491</td>
<td>2552</td>
<td>40</td>
</tr>
<tr>
<td>Guatemala</td>
<td>3391</td>
<td>786</td>
<td>2605</td>
<td>23</td>
</tr>
<tr>
<td>Honduras</td>
<td>3732</td>
<td>1078</td>
<td>2654</td>
<td>29</td>
</tr>
<tr>
<td>Jamaica</td>
<td>1730</td>
<td>1175</td>
<td>555</td>
<td>68</td>
</tr>
</tbody>
</table>
obstacle is an expanded definition of an
"aggravated felony" conviction, which is an
absolute bar to cancellation of removal
under the new law. In addition, Congress
has established "administrative removal"
procedures that allow the INS to deport
those convicted of aggravated felonies who
are not lawful permanent residents without
a full-blown hearing, and has enacted
numerous restrictions on judicial review of
immigration court decisions. Finally, in an
effort to ensure that removal orders are
actually enforced, Congress has mandated
that the INS detain most criminal
offenders from the time they are placed in
proceedings until they are deported.

3. Federal/State Cooperation

Criminal aliens' first contact with the
INS now usually comes while they are
incarcerated in a state prison. Through an
enhanced Institutional Hearing Program
(IHP), states cooperate with the INS to
commence deportation proceedings for
foreign-born inmates before they get out of
prison. The INS has also developed
initiatives to screen the populations of
major metropolitan jails in an effort to
identify offenders who may never be
sentenced to prison for their crimes but
nevertheless are subject to deportation.

B. The Supposition that "Early Release"
Programs are a Contributing Factor

As the Institutional Hearing Program
becomes more effective, state prison
systems increasingly are releasing foreign-
born offenders directly to the custody of
the INS. This process ensures that many
more criminal aliens are removed from the
country. It also might motivate states to
release inmates who would otherwise
remain incarcerated in exchange for
immediate deportation. There is a
widespread perception among foreign
diplomats that the prison terms of
incarcerated aliens are routinely reduced as
a cost-saving measure, and that the "early
release" of foreign-born offenders has
fueled the dramatic increase in criminal
alien removals in recent years.

Most states (but not the federal
government) allow inmates to be released
early under a practice known as "parole."
In general, most foreign-born offenders are
paroled before they have served the
maximum sentence imposed by a court,
but it appears that relatively few are
afforded special consideration for release
based on their status as deportable aliens.

1. Special Early Release Programs

Criminal aliens who have been
sentenced to a term of incarceration in the
United States cannot be removed by the
INS until they are released from prison.
But the new immigration law explicitly
authorizes the INS to deport nonviolent
offenders who are not otherwise eligible for
release from incarceration when early
removal "is appropriate and in the best
interest" of the United States or the state
where the alien is incarcerated. At least
three states—Florida, New York, and
Connecticut—presently have special
programs that single out foreign-born
inmates to receive clemency or early parole
in exchange for immediate deportation.

While Florida and New York house a
large percentage of the foreign-born prison
population, the number of inmates who
have been released under these programs is
small. Only 426 Florida inmates received
executive clemency in exchange for
immediate deportation from April 1994 to
August 1, 1997. In New York, 518
criminal aliens received early conditional
parole for deportation only (early CPDO)
from January 1995 to March 1997,
pursuant to a state statute that allows foreign-born inmates to be transferred to the custody of the INS even before they have completed their “mandatory minimum” prison term.

A few individual countries absorb most of the early deportees from these programs. The Dominican Republic, for example, has received 45% of all participants (a total of 233 inmates) in New York’s early CPDO program. Still, these early releases account for only 6% of the total foreign-born inmates released from New York prisons during the relevant time period. Moreover, the Florida, New York, and Connecticut programs constitute a drop in the bucket of the total criminal alien deportations each year. The impact of special early release procedures could become much greater, however, if other states or the federal government instituted similar programs.

2. Deportability as a Factor that Favors Parole

In most states, criminal aliens must meet the same eligibility requirements for parole as all other inmates. “Early release” might still occur, however, if criminal aliens who meet the threshold criteria receive parole sooner than similarly situated U.S. citizens based on an understanding that they will be immediately deported. Information about the nationality of an inmate, along with the existence of an INS detainer or outstanding removal order, is routinely included in the records considered by state parole boards. These officials might conclude that a foreign-born offender who will be deported immediately presents less of a risk to public safety than an inmate who will be released into the community.

It is difficult to determine the extent to which deportability influences parole decisions. The available data do not include comparisons between the release dates for foreign-born offenders and similarly situated U.S. nationals. More information is needed to confirm or refute a hypothesis that we frequently encountered: that deportable criminal aliens get special consideration for parole even when they must qualify on the same terms as other offenders.


In most state penal systems, the amount of time inmates actually serve in prison is typically only a fraction of the sentence reflected in court records. In states that impose an indeterminate sentence, the judge specifies a minimum and/or maximum sentence length, and a parole board later decides when an inmate will actually be released. In addition, most states allow prisoners to gain early release through time credits that they receive automatically or that are granted for good behavior. (The Uniform Sentencing Guidelines, adopted in 1987, abolished these measures for federal offenders). As a result of these sentence reduction mechanisms, on average state prison inmates serve an estimated 38% of their total sentence. This figure is 46% for violent offenses, and 33% for drug offenses.  

It is this kind of “early release”—which in no way singles out or provides special consideration to deportable criminals—that accounts for most of the discrepancies between “sentence imposed” and “time served,” which are of significant concern to countries that must reintegrate criminal deportees. In this sense, the perception

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that criminal deportees are routinely released before they complete their formal sentence is certainly accurate. In most cases, however, early release occurs as part of the general sentencing and parole procedures rather than as a special effort to clear U.S. prisons of foreign-born offenders.

In sum, the dramatic rise in criminal alien deportations is fueled by a remarkable increase in INS enforcement resources, coupled with statutory changes to “crack down” on foreign-born offenders. Increased federal-state cooperation has also made it possible for the INS to deport more criminal aliens directly from prison. Receiving countries are concerned about whether they can successfully reintegrate thousands of criminal offenders deported each year pursuant to these changes in U.S. immigration policy.

III. Impact on Receiving Countries and Repercussions in the United States

Countries in the Western Hemisphere report a number of problems stemming from the increase in criminal alien deportations. Many deportees return as strangers to their country of origin. A lack of advance notice and the absence of any programs to monitor recently-returned offenders impedes receiving countries from assisting with their reintegration. The result, according to many foreign diplomats, is a high rate of recidivism that contributes to sharply rising crime rates. These problems implicate U.S. interests and raise concerns for the international community.

A. Obstacles to Successful Reintegration

1. Lack of Advance Notice

Until recently, it was not at all uncommon for the INS to deport criminal aliens on commercial flights without notifying the receiving country, so that serious offenders were deposited unannounced at international airports. Some INS districts have also transported busloads of Mexican nationals across the border, where they are told to disembark in the middle of the night with no notice to Mexican authorities. These practices deprive receiving countries of the opportunity to register the presence of criminal offenders, to check for outstanding warrants on deportees, and to assist their reintegration into society.

2. Absence of Community Ties in Country of Origin

Long-term permanent residents of the United States, including those who immigrated as children, can be deported for criminal activity. Deportees who have lived in the U.S. for many years often lack family and social ties in their country of origin and have no means of support once they return. Those who do not speak the language of their “home” country are particularly disadvantaged.

3. Inability to Monitor Recent Offenders

The U.S. criminal justice system recognizes the need for special assistance and monitoring of recently-released criminal offenders. In most states, paroled inmates must serve the remaining portion
of their sentences under some form of community supervision. Even the federal system, which no longer provides for parole, often imposes a component of "supervised release" at the end of a completed prison term.

Foreign diplomats express concern that criminal aliens are essentially exempt from these requirements. The Immigration and Nationality Act provides that parole or supervised release is not a reason to defer removal. Thus, foreign-born offenders who are released from prison directly to the custody of the INS for immediate deportation are returned to their country of origin free from the restrictions imposed on many U.S. offenders, who remain subject to monitoring and supervision after their release from prison.

B. Rising Crime Rates

Recidivism among offenders deported from the United States is a significant concern to receiving countries. There is a widespread sentiment that deportees are responsible for a disproportionate amount of crime committed in their countries of origin. Foreign diplomats report that criminal activity among recent deportees is "a major factor" or "the main reason" for sharply rising crime rates throughout Central America and the Caribbean.

It is unclear, however, how much of this increase in crime is linked to criminal aliens removed from the United States and how much is committed by "home grown" criminals. Crime is often associated with poverty, unemployment, and other domestic problems (although it is a politically attractive option, as it is in the United States, to try to shift some of the blame to immigration). At present, there is no empirical study that measures the impact of increased deportations on the crime rates of receiving countries.

Nevertheless, the deportation of thousands of criminal offenders from the United States surely tends to exacerbate the very serious crime problem throughout the Western Hemisphere. The growing presence of U.S. gangs in El Salvador (and to a lesser extent throughout the region) is perhaps the most visible example. The Salvadoran Civilian National Police force, which was rebuilt from scratch as part of the 1992 peace accord, simply does not have the training or equipment to stem the tide of violent crime that is sweeping the country. As criminal alien deportations increase, the sheer numbers can overwhelm the already insufficient law enforcement capabilities of many receiving countries.

C. Impact on U.S. Interests

"Out of sight, out of mind" perhaps best describes the traditional U.S. response to these problems. If the presence of foreign-born offenders within the United States poses a threat, then removing them from our streets is the obvious "solution"—or at least the prevailing political rhetoric frames the issue this way. But there are several reasons why U.S. policy makers should be concerned about foreign-born offenders even after they are deported from the United States.

First, as the spread of U.S. gangs to El Salvador demonstrates, the deportation of criminal offenders helps to create and reinforce international criminal syndicates. Many drug traffickers also continue their trade once they are deported, and their

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8 Deportation of Criminal Aliens: A Geopolitical Perspective
effectiveness is only enhanced by their ties to the U.S. In addition, an influx of deportees with criminal records exacerbates an already volatile situation along the U.S./Mexico border, where criminals routinely prey on a vulnerable population. Cross-border criminal networks are common, and an increase in crime plagues residents of Mexico and the United States.

Second, pervasive crime can undermine the rule of law, especially in fledgling democracies in Central America. An unprecedented influx of criminal offenders heightens this threat. Even those countries with some measure of political stability may nevertheless have ineffective criminal justice systems, which are ill-equipped to deal with an increase in crime linked to deportees from the United States.

Third, the dramatic rise in criminal alien deportations is seen as a serious problem in receiving countries. Foreign countries looking to draw attention to their concerns may respond with measures that impede INS efforts to remove criminal offenders.

Most countries concede that they cannot properly refuse to accept the return of their citizens and nationals deported from another country, including those who have committed crimes abroad. They can, however, make the process more difficult to carry out. Countries that are slow to verify the identity of potential deportees and to issue them necessary documentation can frustrate INS efforts to deport—sometimes indefinitely. Delays in securing travel documents also greatly increase the cost of deportations, since the INS generally must detain aliens subject to final deportation orders until their removal can be effectuated. Finally, receiving countries might link criminal alien deportations to ongoing negotiations over extradition treaties, so that increased U.S. attention to the problems of repatriating criminals would be reciprocated with increased cooperation on the issue of extraditing criminals to the United States.

IV. The Geopolitical Response to Date: Procedural Reform

To date, the international dialogue on criminal alien removals has primarily focused on a mutual need for procedural reform. After a summit with Caribbean leaders in May 1997, President Clinton directed that the United States provide advance notification of criminal alien deportations. The INS has since instructed its field officials to provide at least three days' notice to Central American and Caribbean countries on a form that states the legal ground for removal and lists the criminal convictions of the alien. These new procedures will allow for more orderly processing of deportees.

The INS has also proposed a Memorandum of Understanding for Criminal Alien Returns, in an attempt to secure commitments from the countries of origin to meet certain deadlines for processing requests for travel documents: 3 business days for individuals with an alien registration file or other immigration documents; 5 business days for individuals with passports, birth certifications, or other identifying information; and 30 business days when no documents are available to accompany the presentation. This proposal has been presented to receiving countries for their discussion and consideration.

It seems unlikely, however, that receiving countries will sign on to these deadlines—or if they do, that they can or will comply with short time frames for issuing travel documents. A time lag in processing INS requests can temporarily
stem the flow or slow the pace of criminal alien deportations, a point of leverage that receiving countries may be unwilling to sacrifice. Moreover, some delays responding to requests for travel documents are inevitable. Verifying identity can be a time-consuming task, especially in countries where data is not stored electronically and many births are not recorded. In addition, one might expect increasing delays stemming from a mismatch in priorities and resources: the embassy staff and investigative personnel of receiving countries simply cannot keep pace with the INS’s increased operations.

V. Expanding the Dialogue on Criminal Alien Removals: A Survey of Policy Options

We now examine ways to ameliorate the problems caused by the increased deportation of criminal aliens from the United States. Our analysis centers on four options: (1) additional procedural reforms to improve the process of criminal alien removals; (2) U.S. aid to receiving countries; (3) incarcerating foreign-born offenders in their country of origin; and (4) easing up on INS enforcement efforts or restoring relief from deportation. We offer these ideas not as concrete proposals, but rather to spark further research and discussion.

A. Additional Procedural Reforms

1. Enhanced Notification

Receiving countries are interested in securing as much information as possible about criminal deportees. Some have suggested that the INS should provide more extensive criminal history information, including photographs and fingerprints of criminal deportees.

Mexico in particular could benefit from greater access to criminal history information. Mexico is not included among those countries that must receive three days’ notice of impending deportations. The INS sees this requirement as unrealistic given that over seven hundred Mexican nationals who have committed crimes in the U.S. are formally deported each week. Moreover, short-term notification of every impending removal may not be particularly useful to Mexican officials, because they have no way of processing such a large volume of information expeditiously.

Mexico is interested, however, in receiving sufficient notice and detailed criminal histories for the most serious criminal offenders. The INS and Mexican officials have recently agreed to establish a task force to determine how best to provide adequate notice. One option is for the INS to make criminal history information more readily available through its Institutional Hearing Program, which is now consolidated at a relatively small number of prison facilities in the border states. As part of IHP processing, foreign consulates could be provided the opportunity to review criminal records and perhaps interview their nationals while they still are incarcerated in the United States. Through this process, Mexico could identify those serious offenders who should not be removed without notice from the INS a few days prior to deportation.

2. Border Processing and Interior Repatriation

The INS is presently negotiating with Mexican officials to establish a more orderly system of return at various points along the border, which would end the occasional “midnight dump” of criminal aliens across the border and allow Mexican officials to search their records for
outstanding warrants on deportees. In addition, the U.S. might use charter flights to return criminal deportees to the interior of Mexico. At present, the interior repatriation program uses commercial flights and excludes individuals who have been convicted of a crime. U.S. interests might be better served if serious criminal offenders were not simply ushered across the border.

B. U.S. Aid for Law Enforcement or to Assist in Reintegrating Deportees

Another policy option would be to provide U.S. aid to ameliorate some of the problems created by the increase in criminal alien deportations. This aid could take many forms, depending on the needs of the receiving country. One possibility is to help establish social services that would assist the reintegration of deportees—whether a “halfway house” to assist new arrivals or public works projects to address problems of unemployment.

U.S. aid could also be used to fight crime in countries that are receiving an increasing number of criminal deportees. Some countries might be interested in computers and technical support to help create and maintain databases on criminal offenders. In addition, U.S. assistance might help receiving countries to register criminal deportees and establish some form of monitoring and community supervision. Finally, money could be used to support police efforts.

This sort of aid is problematic, however. The U.S. is understandably reluctant to fund law enforcement efforts in countries where the police do not always respect human rights and the rule of law. Limiting aid to technical support for registering and monitoring deportees does not necessarily answer this concern. It is not clear whether receiving countries have the legal authority to impose these requirements on individuals who have not been convicted of any crime in their home country. In addition, it may be difficult to determine whether the money earmarked for such programs is in fact spent for the intended purpose.

Direct U.S. involvement in law enforcement abroad can circumvent some of these problems, and may be justified where the link to crime in the United States is clear. U.S. officials might, for example, spearhead cooperative efforts against deported drug traffickers who build international networks to enhance their trade.

C. Incarcerating Foreign-Born Offenders in Their Country of Origin

U.S. aid might also be linked to participation in the treaty transfer program. Members of Congress and state officials increasingly have emphasized the option of permitting or requiring criminal aliens to serve out their sentence in their home country as a way to save prison costs in the United States. This proposal is not aimed at reducing the numbers or alleviating the problems created by criminal alien deportations, although it may have some marginal benefit in terms of reintegrating offenders into their country of origin. We evaluate this option primarily because it is so prevalent in the current policy discussions about criminal aliens.

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6 These concerns have limited U.S. military aid to Colombia, although recently the United States committed to send more than $50 million in equipment to help the Colombian military fight guerrillas involved in drug trafficking. See Diana Jean Schemo, “U.S. Is to Help Army in Colombia Fight Drugs But Skeptics Abound,” New York Times, Oct. 25, 1997 at A1.
1. The Current Treaty Transfer Program

The United States is a party to several treaties that permit foreign-born offenders to serve out their prison terms in their country of origin. These agreements authorize treaty transfers between the United States and over thirty different countries. Actual utilization of the treaty transfer option is quite low, however. In fiscal year 1996, 103 U.S.-born offenders were transferred to the United States, and 472 inmates were transferred from the U.S. to other countries.\(^7\)

The treaty transfer process is triggered by a request from the foreign-born inmate, who must consent to any transfer. This pool of volunteers is narrowed significantly by a complicated approval process at the state and federal level. Some applicants are winnowed out because they do not meet the requirements of the relevant treaty. (Offenders with less than six months left in their sentence and those who have been sentenced to life imprisonment, for example, cannot be transferred to Mexico.) And many applicants are refused because the sending state or the Justice Department has determined that they are inappropriate candidates for transfer, often because they have strong ties to the U.S. or are considered to be serious offenders. Any transfer request that gets past this careful evaluation must also be approved by the receiving country.

2. Possible Benefits of More Treaty Transfers

States with large populations of foreign-born inmates are strong proponents of increased use of treaty transfer provisions.

In California, an estimated 20,000 inmates (20 percent of the state prison population) are criminal aliens. In New York, 9,052 inmates claimed birth in a foreign country. These states could save money and alleviate prison overcrowding (or simply incarcerate more U.S.-born offenders) if foreign-born offenders were regularly incarcerated in their country of origin.

At least some receiving countries give their qualified support to this idea. Some foreign diplomats believe that the harsh conditions of their local prisons are a better deterrent to future crime. They also see treaty transfers as a means to ensure that those offenders who eventually must be reintegrated into their society first serve out their entire prison term. (This runs counter to a common perception within the United States that receiving countries are motivated to release transferred inmates early.) In fact, existing treaties provide that the administration of the transferred offender's sentence, including the method and date of final release, are to be carried out according to the laws and procedures of the receiving country. In addition, prisoner transfer treaties alleviate the hardships that fall upon inmates incarcerated far from home, and may help to further their rehabilitation and reintegration into their country of origin.

3. Options to Incarcerate More Foreign-Born Offenders Abroad

(a) U.S. Reimbursement or Aid for Prison Construction and Rehabilitation Programs: One factor that limits participation in treaty transfer programs is the prison capacity of receiving states. Mexico, for example, has a cap on the number of requests it will approve because

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\(^7\) These statistics, and the general description of the treaty transfer program, are derived from a Justice Department report to Congress. See Report of the Attorney General on the Effectiveness of Prisoner Transfer Treaties to Which the United States Is A Party, Submitted to the Committees on the Judiciary of the United States Senate and House of Representatives (Dec. 1996).
of prison overcrowding. The new immigration act provides that the president "may consider providing appropriate compensation" when foreign countries incarcerate their citizens who have been convicted in U.S. courts (although Congress has not yet appropriated money for this purpose).

The U.S. might also help to finance prison construction projects in foreign countries if some of the new facilities were dedicated to house inmates transferred from the United States. In addition, U.S. aid could support rehabilitation programs in treaty transfer prisons. Money spent to improve prison operations in other countries might encourage more volunteers for transfers, especially among those inmates interested in retaining family and cultural ties with their countries of origin.

(b) Eliminate the requirement of prisoner consent. There is no guarantee, however, that these efforts will generate higher participation in prisoner treaty transfer programs. Eliminating the requirement of inmate consent, however, would create a larger pool of potential transferes. The new immigration law directs the President to negotiate new transfer treaties and renegotiate existing ones, expressing the "sense of Congress" that the requirement of inmate consent be eliminated.

This option may not generate a huge increase in treaty transfers, as its proponents hope, and is subject to constitutional challenge. First, eliminating the requirement of inmate consent would not change the fact that many foreign-born offenders do not meet the technical requirements for transfer or should remain incarcerated in U.S. prisons for public safety reasons. Indeed, under the present system the vast majority of inmates who volunteer to serve out their sentence in their home country are turned down as inappropriate candidates for transfer.

Second, unilateral efforts to reduce domestic prison costs by transferring more foreign-born inmates likely will be resisted by receiving countries. A dramatic increase in prisoner treaty transfers would create problems in countries that already face severe prison overcrowding. And even if prisoner consent could be eliminated, the cooperation of receiving countries is essential for transfers to take effect. As a practical matter, it is well nigh impossible to force another sovereignty to take custody of a prisoner (a fact well-known to state governors who have attempted to foist custody of foreign-born offenders onto the Federal Bureau of Prisons).

Finally, involuntary treaty transfers will also be resisted in court. Foreign-born offenders who are transferred to their country of origin give up valuable rights under the U.S. criminal justice system. They can no longer bring collateral challenges to their conviction or contest their conditions of confinement under the Constitution. Inmates who volunteer for a transfer essentially agree to serve out their sentence outside the jurisdiction of the U.S. courts. The current transfer procedures (which include the opportunity to consult with counsel and a formal hearing before a U.S. magistrate) are designed to ensure a knowing and voluntary waiver of these rights. Even assuming that treaties could be renegotiated and receiving countries were willing to cooperate, the involuntary treaty transfers that Congress has proposed would be subject to significant constitutional challenges and would be costly to defend.

(c) U.S. prisons on foreign soil. A third alternative is to build U.S. prisons in foreign countries. Both Arizona and California have considered the idea of
incarcerating Mexican nationals at a state prison facility in Mexico. They project significant savings (primarily in labor costs) if state prisons run by private contractors could be erected across the border.

Proponents of this idea claim that inmates could be incarcerated at these prisons without their consent because they would not be transferred to the custody of another country. Instead, they simply would be assigned to a prison located in Mexico just as they would to any other facility in the state corrections system. The proposal is controversial, in part because the host country may view U.S.-run prisons as an unacceptable intrusion on its sovereignty. There also are significant concerns about prisoners' access to counsel and the courts, and whether U.S. prison standards could be enforced adequately in a privately-run prison in a foreign country.

D. Reducing the Number of Criminal Alien Deportations

There is a strong domestic consensus that the U.S. should continue its present policy of deporting criminal aliens. Nevertheless, there are humanitarian reasons to restore some relief from deportation—an option that may not have much impact on the overall numbers but could help to alleviate some of the problems experienced by receiving countries.

1. Easing Up on Enforcement Efforts

Foreign diplomats were unanimous in their belief that Congress and the INS should refocus their priorities away from criminal alien deportations. The costs far outweigh the benefits, they say, even from the perspective of the United States—which realistically cannot seal off its borders to prevent criminal deportees from returning. In part because of this "boomerang" effect, some have suggested that the INS's new emphasis on deporting criminal aliens has very little impact on crime rates within the U.S.8

At some point, budgetary constraints and a shortage of detention space may in fact slow the pace of criminal alien deportations somewhat. Indeed, the present trajectory, fueled by an enormous growth in INS's Detention and Deportation budget (from $367 million in fiscal year 1996 to $637 million in fiscal year 1997), probably cannot be sustained over the long run. But that does not mean that we will see a reduction in the total number of criminal alien deportations any time soon. Indeed, it seems highly unlikely that Congress and the INS will ever return to the prevailing posture of the 1980s—allowing many criminal aliens to remain in the United States simply because their case is never pursued. Nevertheless, the new emphasis on immigration enforcement, which results in many more criminal offenders being placed in deportation proceedings, should be coupled with a humanitarian "safety valve" in the form of appropriate avenues for relief from deportation.

2. Restoring Relief from Deportation

The Illegal Immigration and Immigrant Responsibility Act of 1996 increased INS detention, limited judicial review of removal orders, and severely restricted eligibility for relief from deportation for many foreign nationals residing in the United States. Congress passed these provisions without much thought to their geopolitical implications. Soon after

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IIRIRA's enactment, however, the specter of increased deportations to Central America—which could cause significant economic and political upheaval in the region—prompted calls for reform.

Initially, President Clinton promised that there would be no "mass deportations"—meaning no large-scale round ups to ensnare deportable aliens. To Central American officials, who view the present scale of INS operations as a threat to their stability, that promise did not go far enough. After significant lobbying, Congress agreed to ameliorate the impact of the new law on Central Americans who entered the United States illegally during a period of turmoil in their home country. The Nicaraguan Adjustment and Central American Relief Act of 1997 (NACARA) established a program that permits Nicaraguans and Cubans present in the United States for a continuous period since 1995 to become permanent residents, and renewed opportunities for Salvadorans and Guatemalans to apply for relief from deportation.

NACARA was not directed at long-term lawful residents who have committed crimes in the United States. Three options might be considered to restore equitable relief from deportation to some criminal offenders:

(a) Repeal the "aggravated felony" bar or amend the definition to encompass only the most serious criminal offenses. The concept of an "aggravated felony" in immigration law has changed significantly. Originally, the term applied to murder and certain drug and firearms trafficking offenses. After the 1996 act, many convictions that result in a one-year prison sentence (including theft and burglary) are considered aggravated felonies under immigration law. The law also designates some crimes as aggravated felonies regardless of the punishment imposed. Thus, in some instances even a misdemeanor conviction resulting in no prison term (such as a statutory rape conviction) can now be considered an "aggravated felony" under immigration law. Those convicted of aggravated felonies are ineligible to petition for "cancellation of removal" available to lawful permanent residents under the new Act.

Because an "aggravated felony" conviction has become a poor proxy for ascertaining whether an alien has been convicted of a particularly serious crime, this automatic bar to cancellation of removal could be repealed outright. Alternatively, the definition of an aggravated felony could be amended to restore its original connotation. These options would not result in a broad grant of "amnesty" to criminal aliens. Instead, they simply would permit more lawful permanent residents to petition an immigration judge for relief, allowing the judge to then balance the equities of their situation.

(b) Old crimes and young kids: tailoring relief to account for strong equities. Deportation of individuals who have resided lawfully within the United States for many years raises significant humanitarian concerns. Long-term residents of the United States become part of our community, build strong equities to support a claim that they should be allowed to remain, and may encounter difficulties reintegrating into what has become for them a "foreign" culture.

The case of Jesus Collado provides one example. In 1974, when he was nineteen, Mr. Collado was convicted of a misdemeanor offense for having sex with his teen-age girlfriend. He was not sentenced to any period of incarceration.

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In the twenty-three years since, he maintained a clean record, married a U.S. citizen, and had three citizen children. One week after the new immigration law went into effect, Mr. Collado returned from a three-week visit to the Dominican Republic—only to be detained and placed in removal proceedings for his 1974 conviction (which now may be considered an aggravated felony under immigration law). Mr. Collado’s situation has sparked outrage among those who think that the new law is too harsh on criminal offenders who were convicted many years ago and can show significant evidence of rehabilitation.

One way to account for these concerns is to incorporate time limits into some of the criminal grounds for deportation, which would (like a statute of limitations in the criminal context) insulate offenders who have committed crimes long ago and presumably have been rehabilitated. A second possibility is to prohibit removal for criminal conduct—regardless of when the crime was committed—for individuals who have been lawful permanent residents for a number of years. These proposals address two primary objections to present policy: the criticism that the United States is deporting criminals who are “more ours than theirs,” and the belief that foreign nationals who committed crimes many years ago should not be subject to deportation. Even those in sympathy with these concerns, however, might balk at extending broad protection from deportation based simply on the passage of time.

A narrower approach would be to enact special provisions to provide relief for criminal offenders who entered the United States as children. These individuals have even more difficulty reintegrating into their country of origin than long-term residents who immigrated as adults. Often they know very little about their “home country;” sometimes they do not speak the language. In most cases, the equities weigh against deportation of all but the most serious offenders (and perhaps even those) when the entry documents used years ago reveal the face of a small child who has lived in the United States virtually all of his life.

Anecdotal accounts suggest that “youthful entrants” (a term borrowed from the “youthful offender” status recognized in criminal law) constitute a significant but not overwhelming portion of lawful permanent residents deported on criminal grounds—perhaps ten to twenty percent. Because of the immense obstacles to their successful reintegration, however, foreign-born offenders who immigrated as children may be more of a destabilizing element in their countries of origin than other criminal deportees.

There are various ways that cancellation of removal could be tailored to better account for youthful entrants. An analog to a statute of limitations could be enacted, insulating from deportation those aliens who immigrated as children and have since resided in the United States without meaningful interruption. Another option would be to amend the Immigration and Nationality Act to remove the aggravated felony bar whenever the individual seeking cancellation of removal had entered as a child. Congress could also create a new category of relief for youthful entrants, perhaps establishing a presumption of relief when an individual was under a certain age when he entered the country, or otherwise specifying more liberal criteria for relief for immigrants who “grew up” in the United States.

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All of the options discussed in this section would replace the blunt instrument of automatic deportation with a more tailored approach in cases where the most compelling claims for relief can be made. Only a statute of limitations would completely insulate long-term residents from deportation on criminal grounds. The other options to restore relief would simply permit an immigration judge to balance the equities in each case, considering the seriousness of the crime, any evidence of rehabilitation, and an offender's family and community ties in the United States and the country of origin.

Whatever the merits of these proposals, however, they probably will not significantly reduce the total number of criminal alien removals. Restoring relief to lawful, permanent resident, criminal offenders will not have much of an impact because these LPRs constitute only a small fraction of total deportations by the INS each year. In addition, the INS was deporting record numbers of foreign-born offenders for several years before the 1996 Act. Given the dramatic increase in INS resources, criminal alien deportations will likely continue to rise even if the option of applying for relief is restored to some aliens who have been convicted of crimes in the United States.

Conclusion

The policy options identified in this paper share a common theme: that U.S. immigration policy should be analyzed within its geopolitical context. All too often, immigration is seen instead almost exclusively as a domestic issue. But this is changing as the impact of the 1996 Act and enhanced INS enforcement efforts are felt around the world.

When the Border Patrol announced a new initiative to police the border between Texas and Mexico, for example, Mexican consular officers met to plan a response and enhanced their consular services in the region. The Canadian government has protested a provision of the new immigration law that will dramatically slow cross-border traffic along the northern border. And, as previously noted, immigration issues were at the forefront of President Clinton's recent trip to the Caribbean and Central America, resulting in advance notification procedures and proposed legislation to avert the mass deportations to the region.

These examples illustrate the geopolitical implications of U.S. immigration policy. Within the United States, however, attention to these concerns is sporadic and generally comes only after major policy changes (often enacted in haste) take effect. Foreign policy interests are perhaps least likely to be recognized when it comes to criminal aliens, because the domestic interests are so strong and the debate is typically framed in law enforcement terms. After all, as one lawmaker asked rhetorically, "How do you oppose deporting people who are committing crimes?"10 Within the United States, there are few who would venture an answer.

There are, however, significant risks to continuing on the present course, turning a blind eye to the geopolitical implications of criminal alien deportations. An unprecedented influx of criminal offenders to Mexico, Central America, and the Caribbean creates problems that can redound back to the United States. Moreover, U.S. policymakers should be aware that the success of INS efforts to deport an increasing number of criminal

aliens depends on the cooperation of receiving countries.

In this paper, we have identified several options and empirical questions that are worthy of further study. The most promising proposals are those that are important to receiving countries but can be implemented at a relatively low cost to the United States:

- **Restoring some relief from deportation, particularly for “youthful entrants”:** Receiving countries are rightly concerned about the obstacles to reintegrating individuals who have been residing in the United States for many years. And they feel strongly that foreign nationals who immigrated as children are “home grown” criminals who belong fully to the United States. Prohibiting deportation or restoring relief to long term residents, or more particularly to “youthful entrants,” would reach only a subset of foreign-born criminal offenders. From the U.S. perspective, the numbers are not that significant in the context of some fifty thousand criminal aliens deported each year (although the number of aliens eligible for relief would vary depending on the proposal adopted). Restoring relief would, however, alleviate the harshness of the new immigration law on one group that matters a great deal to receiving countries—those who have few, if any, community and family ties and no means of support once they are deported.

- **Improved Procedures for Deportation to Mexico:*** Because of the huge number of criminals returned across the border each week, some system is needed to flag the most serious offenders and ensure that Mexico has time to prepare for their return. A two-step notification process for criminal offenders could serve this purpose. An INS officer could notify the Mexican consulate as soon as a charging document is issued for a criminal offender, providing detailed criminal history information and perhaps an opportunity to interview as part of IHP processing along the border. This process would help Mexican officials to identify those serious offenders who should not be returned without an additional notice from the INS a few days prior to deportation. Interior repatriation of criminal aliens and an agreement that criminal offenders would be returned only at certain points along the border would also assist Mexico in its efforts to reintegrate criminal deportees. The INS and Mexican officials are presently working to implement these ideas.

- **Ongoing Dialogue: A Working Group on Migration and Consular Affairs,** convened by the INS Office of International Affairs, has recently provided a forum for foreign diplomats and INS officials to discuss the implementation of U.S. immigration laws. This new spirit of cooperation should be expanded. The concerns of the U.S. and receiving countries should be aired at a regional summit that focuses on the geopolitical implications of criminal alien deportations. In addition, the INS should be subject to continued scrutiny to ensure that it adheres to agreed-upon procedures for repatriating criminal aliens.
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