The Immigration Reform Act and INS Detention

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It is tragic that the United States, in its effort to deal with immigration problems, resorted to punishing asylum seekers in inhumane ways.

America has long prided itself on being called the land of immigrants, a melting pot of diverse cultures, a respite from dictatorial regimes, and an upholder of human rights. Thus, it is not surprising that millions of immigrants have come to America. However, faced with an unprecedented multitude of immigrants straining the economy, Congress had to pass laws restricting immigration to the United States. Like most other developed Western countries, the United States granted refuge to asylum seekers who were able to demonstrate a credible fear of persecution of any kind in their home country. This policy soon began to be abused as too many immigrants started to obtain refugee status in this country on meritless claims. Further, many resident immigrants were allowed to stay in the country after having committed crimes here. In 1996, the total removable population in the United States, which includes resident as well as illegal immigrants, had reached approximately five million. Therefore, in an effort to curb this tide, Congress enacted two comprehensive statutes in 1996, the Antiterrorism and Effective Death Penalty Act and the Illegal Immigration Reform and Immigrant Act. While these acts successfully made it harder to obtain asylum to the United States, there were some unpleasant repercussions of these acts as well, such as limited judicial review of asylum cases, crowded
Immigration and Naturalization Services (INS) detention centers, mandatory detention of certain asylum seekers, and a depletion of INS resources. It is tragic that the United States, in its effort to deal with immigration problems, resorted to punishing asylum seekers in inhumane ways. The detrimental effects of the two acts warrant a change in the current immigration policies. The United States' policies must be modified to be more compliant with its high standard of human rights.

One of the main consequences of the Reform Act is the mandatory detention of some immigrants in local prisons and INS detention facilities. The new act also established the “expedited removal” policy, which requires the INS to promptly remove certain aliens, and limits the judicial review of removal orders for certain immigrants.

Aliens who had committed crimes in the U.S. have always been subject to deportation. The Reform Act makes it easier for INS to deport aliens who have been convicted of a crime. It broadens the definition of deportable crimes and requires that the INS act promptly to remove the criminal aliens. A big problem arises with this broad definition as any immigrant who has served a year or more in prison can be subjected to deportation. This problem is further aggravated, as a criminal whose sentence has been suspended is as likely to be deported as any other immigrant who has served his entire sentence. This act becomes further unjust, as an immigrant may be deported for a crime that, according to present laws, incurs a one-year prison sentence but did not at the time of conviction. While it may seem reasonable to deport an alien based on present laws, the legal authorities should not ignore the fact that the immigrant may not have committed the crime if he knew that a crime incurred a one-year prison sentence. This policy affronts fairness in dealings with immigrants.

While the act has been successful at deterring meritless asylums, the new system might also have resulted in genuine cases being rejected due to limited judicial review. If an immigrant requests asylum, she is interviewed by an agent who determines her eligibility for refuge. The immigrant is detained while awaiting the agent's response. During this detention time, her contact with the outside world is limited by the rules of the detention facilities. If the agent determines that she does not qualify for asylum, the immigrant may request a review from an
immigration judge, and she is again detained while she awaits the judge's decision. If the judge agrees with the officer, the removal order is carried out.\(^{14}\) Even though the asylum seeker is given another chance after being determined ineligible the first time, it must be understood that a slight human error might be throwing a person into an abyss of despair and persecution. The new act severely restricts judicial review of removal decisions. The Reform Act restricts the issues that a court may review on *habeas corpus*, which would allow many detained immigrants judicial review. Hence, a court may not review a removal decision even if the immigrant has a true fear of persecution.

Additionally, the Reform Act has increased the tasks of the INS. INS detainees represent a significant and growing part of the today's jail population in the United States. In late October 1998, there were more than 16,400 persons in INS custody, triple the number five years ago.\(^{15}\) Over 155,000 detainees passed through INS facilities in 1997 alone.\(^{16}\) An INS spokesperson in Washington announced, "We apprehend and take into custody more people than any other agency in the world."\(^{17}\) The INS also has the largest armed federal agent force in the United States.\(^{18}\) The need for a larger INS came with the passing of these two acts, which made detention more likely for asylum seekers and convicted criminal aliens. Behind these scary numbers are certain detainees who cannot be released and might be "facing a virtual life sentence."\(^{19}\) While these acts sharply increased the number of detainees, the INS did not get a proportionate increase in funding. This resulted in crowded detention centers and even more problems for the detainees.

In Florida, INS detainees stay either in Krome Processing Center (Krome) in Miami, Florida, or in a county jail.\(^{20}\) In 1996, when the Office of Inspector General (OIG) was conducting a study of the reality at Krome, INS prevented the group from seeing the true conditions, which posed a health and safety hazard to the detainees.\(^{21}\) The detainees at Krome do not have a proper list of legal services, which the detainees can use for help with the immigration matters. The list contains organizations that do not provide legal services or are at too great a distance to visit Krome. Calls to attorneys were cut off after fifteen minutes.\(^{22}\) However, recent INS Detention Standards allow detainees to make free calls to their legal agencies. Nevertheless, they
cannot make international collect calls. This poses a problem for those who have to get some identification documents from their families back home. Previously, detainees at Krome were required to waive their right to a meal if they spoke to an attorney during their mealtime. Fortunately, this practice has been discontinued.

Women and children suffer most primarily because they are the least in numbers. Approximately 7% of INS detainees are women and 3.5% of INS detainees are children under the age of eighteen. A memorandum from Detention Enforcement Officers, among other things, contained that criminal aliens and male detainees shared the same bathrooms with minors, that there were only six beds for thirty-nine women, that ventilation was poor in the room that housed women and children, and that there were no recreational facilities for women and children. Pregnant women remained without appropriate medical facilities and diet.

Innocent children pay a heavy price for the actions of their parents. Children spend their days in detention centers with little care for juvenile needs. INS has, however, opened children’s shelters around the country. One of these is the Liberty County Juvenile Correctional Center, about an hour and a half drive from Houston. Even though it is a juvenile center, the children have to wear prison uniforms, are pat searched, and live in cells for twenty-three hours a day. Although the INS has started to provide children with three hours of instructions every weekday, the service is of limited use as it is in English and the majority of the children don’t understand English.

No one can disagree that it is tragic for the United States, one of the richest countries in the world, to inflict such treatments on people who left their homes with hopes of better lives. Cheryl Little, Attorney and Executive Director of the Florida Immigrant Advocacy Center, Inc. (FIAC), expresses her pessimism in the University of Miami Inter-American Law Review:

Amnesty International has made repeated attempts to get a response to their June 11, 1998, letter to INS officials detailing a number of concerns about Krome. The recent resignation of Kristine Marcy, Senior Counsel for Detention and Deportation in the Office of Field
Operations, who worked diligently to improve conditions at Krome, further jeopardizes major changes underway.\textsuperscript{27}

It is not only the immigrants who have complained about the inhumane treatment at the detention centers, but even international organizations, such as Amnesty International, have been concerned by the situation at the detention facilities. As citizens, we enjoy our American freedom and many of the blessings of this land. Does the benefit we derive from such strict immigration laws, policies, and practices exceed the misery caused to its victims? Illegal immigration cannot be condoned, but we must not perpetrate such injustice. Unfortunately, the anguish of immigrants does not end there.

As the Krome facilities fell short, INS has started transferring detainees to Florida county jails. INS detainees are classified as maximum security prisoners and do not have access to many benefits many other criminal prisoners do. INS detainees cannot join work release program or become trustees.\textsuperscript{28} Also, detention in county jails prevents INS detainees from obtaining proper legal representation.\textsuperscript{29} The detainees in county jails, generally, do not have access to legal materials to help them become aware of the immigration laws.\textsuperscript{30} In the fall of 1998, the detainees at the Port Manatee Central Jail in Palmetto, Florida, filed a complaint against their jailers, alleging that they “were beaten, stripped naked, dragged through dog and human waste and left for 20 hours in flooded cells.”\textsuperscript{31} Even though these claims may seem exaggerated, the INS did acknowledge that some of those complaints were valid. The validity of even one of these complaints is a shameful mark against the honor of the United States.

INS officials admit that they do not have the capacity to detain all the persons the new laws require them to detain.\textsuperscript{32} INS claims that they would need around 21,000 additional beds, 1,500 extra employees and $652 million dollars more to do what Congress requires.\textsuperscript{33}

It is ironic that the United States, which has acted as an international watchdog for human rights violations, is itself abusing human rights. The Reform Act’s consequences weaken the position of the United States to voice its concerns on international human rights violations. The United States is party to the United Nations’ 1967 Protocol on the Status of Refugees,\textsuperscript{34} the Covenant on Civil and
Political Rights, and Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

One of the fundamental obligations of these international treaties is non-refoulement, which requires that a country not return a refugee to his home country if the refugee would be persecuted or killed upon return. Hence, asylum seekers must demonstrate “that it is more likely than not” that they would face persecution upon returning to their country. Immigrants given withholding of removal from the United States, only because removing them would violate the Torture convention, still have to face mandatory detention. In such cases those immigrants might be better off to return to their home country and live in the fear of possible persecution, rather than live in the certainty of prison. Non-refoulement is further risked because of the Reform Act’s “expedited removal” requirement. The “expedited removal” process and lack of judicial review make it possible for asylum-seekers with a genuine need and sincere intent to be denied asylum. They may not be given enough time and legal support to establish the genuineness of their claim.

Another problem with the Reform Act is the diffusion of responsibility between the three branches of the Government. None of the branches is willing to assume consummate responsibility for the consequences of the Act, yet each has the power to rectify the Reform Act’s weaknesses. Separation of powers was inherently designed by the Constitution to ensure accountability. If any branch feels that an act severely punishes the immigrants, it can make an effort to reduce the severity on immigrants. Congress can pass laws to give the courts a proper and just direction to follow in immigration matters. Similarly, the courts can strike down any part of a legislative act that they feel violates any part of the U.S. Constitution. However, this has yet to happen.

A recent example in which the court did not use its power to stop INS from an unlawful act is the Elián González case. Like many Cubans, thirteen people, including Elián and his mother, left Cuba on a sea journey with the hope of making it to Miami. However, their dreams of living in America never materialized, as their boat capsized, leaving only three survivors. One of the survivors was the six-year-old Elián, who was rescued on 25 November 1999 by the U.S. Coast
Guard. The intense battle then started between Elián's Miami relatives, who wanted him to stay in the United States, and the government, who wanted Elián to be returned to the rightful guardian, his father. While the government demanded custody of the boy, Elián's relatives were not willing to let him go. On 22 April, 2000, INS agents stormed into the Miami relatives' residence and took Elián away at gunpoint.

The INS decision to return Elián to his father, recognizing that the father is the legal guardian in the absence of the mother, does make sense. However, when INS came to the relatives' home, they had a warrant issued by a federal magistrate judge, obtained pursuant to Rule 41 of the Federal Rules of Criminal Procedure. Such a warrant can be issued only for a federal crime. However, the government never argued that Elián or his relatives had committed a federal crime. In recent years Rule 41 has been used to warrant searches in which a person is physically restrained, such as kidnapped victims. But this was not the case with Elián. Elián did not qualify as kidnapped under the Federal law, in which the victim is "willfully transported in interstate or foreign commerce." Keeping Elián after the legal custody ended did not make Elián a kidnapped victim. The fact that the court allowed such a warrant when it had no legal foundation illustrates that there are times when the court turns a blind eye on many INS injustices. Action taken by any of the branches of government could have stopped or even prevented this injustice from occurring; however, as we see from the Elián case, the government allowed the INS policies to have priority over justice.

Another direct consequence of the Reform Act has been an increase in costs, both in the private sector as well as the public. Stephen Legomsky has very eloquently summed up the human costs of detention in his article "The Detention of Aliens: Theories, Rules, and Discretion" in the following words:

By definition, detention is a deprivation of liberty. Detainees cannot work, cannot go to school, cannot meaningfully socialize, cannot travel beyond the bounds of their facilities, and are cut off from family and friends. Of course, the deprivation is mutual. Family members and friends similarly lose the benefits of the detainee's companionship.
If the detainee is an asylum-seeker, then it sometimes defeats the purpose of her seeking asylum if she ends up losing her freedom in detention centers. It is for this reason that the Office of the United Nations High Commissioner for Refugees strongly discourages detaining asylum seekers. Lawful permanent residents, if they had not been detained would have been able to work. By being detained, they and their families suffer economic losses.

Detention also creates huge economic costs on taxpayers. Firstly, by detaining persons who were legally allowed to work in the United States, the government loses tax revenue. Additionally, the government has to spend approximately $66 per person in detention costs. American taxpayer money is being used to finance detention, which many might view to be a breach of the American ideals of liberty. Many taxpayers may not want their money to be used to restrict the liberty of others, whom they do not deem guilty.

The responsibility to bring greater justice to INS detainees rests with Congress, the INS, and the courts. The legislative branch can amend the Act so as strengthen the constitutionality of the Act’s policies of expedited removal, mandatory detention, and limited judicial review. Congress can also define limitations to the interpretations of the Act (for example, it could prevent the retroactive application of the Act in cases of deportable crimes).

There are a number of ways in which INS could improve itself regarding the Reform Act. INS must look for alternatives to detention. While detention may be necessary for certain immigrants, it will be to INS’s benefit to reduce the size of the detained population. INS could collaborate with voluntary relief agencies to assist asylum-seekers with no criminal record. This would save INS huge costs as well as prevent unjust detention of innocent people. But then INS might risk releasing people who are likely to abscond. So the best solution is to evaluate each case individually, rather than trying to fit each asylum applicant into some category.

Furthermore, the INS should stop using local prisons to detain asylum-seekers and criminal immigrants. INS detainees have different needs and local facilities are inadequately prepared to meet those needs. Detainees in local prisons have no access to legal materials and it is difficult for immigration attorneys to reach their clients. The basic legal
needs of women and children should be met. Women should be provided with proper medical attention and female hygiene products. Every effort should be made to prevent child custody, particularly because children are more vulnerable to the traumatic detention experience. If those children are, at some later time, able to stay in the United States as free citizens, they may never develop love and patriotism for this country. If it becomes a matter of absolute necessity to detain children, then high priority should be given to children’s educational and recreational needs. The practice of prison uniform for juveniles should be discontinued.

The detrimental effects of the two Acts discussed in this article warrant a change in the current immigration policies. We must modify our policies to be more compliant with the United States’ high standard of human rights. As shown through the example of young Elián Gonzalez, the government could have then and should take steps to reform the unjust practices and policies of the INS. Although, the courts have a limited role in formulating immigration policies, they can ensure that there is a just application of the Reform Act to individual cases. The courts still have the power to strike out any part of the Act which it feels to be unconstitutional, like the expedited removal policy of the Act that radically opposes the due process clause of the United States Constitution.

Notes

22. Little, "INS detention in Florida," 557.
25. Little, "INS detention in Florida," 564.
29. The Executive Office of Immigration Review (EOIR) of the U.S. Department of Justice reported that less than 11% of INS detainees were represented in their immigration proceedings in 1996, compared with 52% of nondetained persons in immigration proceedings.
32. "With the expiration of the transition rules, the INS estimates that between 162,000 and 300,000 aliens will be subject to mandatory detention in fiscal 1998." (William Branigin, “Criminal aliens’ jam INS detention centers,” Washington Post, 2 Nov., 1998, A17). Congress gave INS the funds to add about 7,000 beds. (See “INS Chief didn’t make this mess,” St. Petersburg Times, 26 Feb., 1999, 18A.).
33. Marcy, “Remarks at the U.S. Immigration and Naturalization Service.”
37. See Regulations Concerning the Convention against Torture, 64 Fed. Reg. 8,480.
42. Matthew M. Hoffman, “When they came for Elián, INS was armed with a shaky warrant,” Legal Times 23 (8 May 2000): 68.
44. Hoffman, “When they came for Elián,” 68.
48. See Regulations Concerning the Convention against Torture, 64 Fed. Reg. 8,480.