

THE DEPORTATION DILEMMA

RECONCILING TOUGH AND HUMANE ENFORCEMENT



By Marc R. Rosenblum and Doris Meissner
with Claire Bergeron and Faye Hipsman

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Executive Summary

More than 4.5 million noncitizens have been deported from the United States since Congress passed sweeping legislation in 1996 to toughen the nation's immigration enforcement system. As a result, the pace of formal removals has quickened tremendously over the intervening years, rising from about 70,000 in 1996 to nearly 420,000 in 2012.

Three factors have been the key drivers of deportation¹ policies during the last two decades: passage of major new laws expanding the grounds for removal and speeding the removals process; sizeable, sustained increases in immigration enforcement personnel, infrastructure, and technology; and operational and policy decisions by three successive administrations to shape enforcement outcomes.

The result has been the removal of a record number of unauthorized immigrants and other removable noncitizens. Deportation under the current administration represents a story of both continuity and change.

The administration inherited—and further expanded upon—unprecedented capacity to identify, apprehend, and deport unauthorized immigrants. Nearly as many people were formally deported during the first five years of the current administration (over 1.9 million) as during the entire eight years of the prior administration (2.0 million).

The pace of formal removals has quickened tremendously...rising from about 70,000 in 1996 to nearly 420,000 in 2012.

What is new is that the Obama administration also has implemented prosecutorial discretion policies to focus enforcement efforts, even as the overall scope of enforcement has grown. These policies provide guidelines for exercising discretion *not* to deport certain people in cases that are outside established priority categories.

The result is sharply different enforcement pictures at the border and within the United States. At the border, there is a near zero-tolerance system, where unauthorized immigrants are increasingly subject to formal removal and criminal charges. Within the country, there is greater flexibility, with priorities and resources focused on a smaller share of the population subject to removal. Such differences are consistent with the different goals and circumstances confronting border and interior enforcement. But the impacts of these differing systems have begun to converge, raising increasingly complex questions and choices for policymakers and the public.

A. *The Deportation Dilemma*

Amid the quickened pace of removals and after a decade of failed efforts to enact comprehensive immigration reform, demands by immigrant advocates that the Department of Homeland Security (DHS) scale back or even suspend deportations have increased in frequency and intensity. In March 2014, President Obama announced a review of DHS deportation operations to see how the department “can conduct enforcement more humanely within the confines of the law.”

¹ This report uses the term “deportation” to refer to any type of mandatory repatriation of a noncitizen from the United States, including the legal processes of “removal” and “return,” both defined in Box 1.



At the same time, the administration’s immigration enforcement record has been challenged as insufficient by congressional Republicans and others advocating stricter immigration control, including more deportations. They question the commitment of this and prior administrations to upholding the rule of law, and demand a system that “ensures that a President cannot unilaterally stop immigration enforcement.”

These conflicting views reflect basic disagreements about what a successful immigration enforcement system should look like, and how it should respond to the reality that the United States is now home to millions of unauthorized immigrants, many of whom have deep roots here.

The deportation dilemma is that more humane enforcement is fundamentally in tension with stricter immigration control. A robust enforcement system inevitably inflicts damage on U.S.-citizen and immigrant families and communities. How does the government carry out its enforcement responsibilities and mandates while also shielding immigrant communities from undue harm?

The deportation dilemma is that more humane enforcement is fundamentally in tension with stricter immigration control.

This report explores this dilemma by describing in detail the actual state of U.S. immigration enforcement. Who is being deported and where and how are they being apprehended? How is the current administration carrying out its enforcement mandates?

In addressing these questions, the report analyzes the current pipelines for removal; key trends in border and interior apprehensions, deportations, and criminal prosecutions; and the policy levers the administration has to influence deportation policies, practices, and results going forward.

B. Key Drivers of the Rise in Deportations

Immigration enforcement has changed in fundamental ways since 1996, with three factors most prominently driving the rise in deportations.

1. Pipelines for Deportation

A key driver of today’s deportation trends has been the statutory framework for deportation, one significantly shaped by the *Illegal Immigration Reform and Immigrant Responsibility Act of 1996* (IIRIRA). The 1996 law codified changes to the *Immigration and Nationality Act* (INA) by greatly expanding administrative authority for nonjudicial deportation decisions by DHS immigration enforcement officers and by limiting grounds for relief from removal.

2. Appropriations

A second key driver shaping deportation trends has been sizeable budgets for U.S. Customs and Border Protection (CBP) and U.S. Immigration and Customs Enforcement (ICE), the two DHS immigration agencies that apprehend, detain, and deport people subject to removal. Total appropriations to CBP and ICE are highly correlated with overall removals, especially since 9/11.

While the CBP and ICE budgets have grown dramatically, funding for the work of immigration judges (the Executive Office of Immigration Review, EOIR) has not kept pace. EOIR funding grew about 70 percent between fiscal year (FY) 2002 and FY 2013, while budgets for ICE and CBP (and before 2002 for their predecessor agency, the U.S. Immigration and Naturalization Service [INS]), rose about 300 percent. As a result, judicial removals are a significant choke point in the deportation system.



3. Executive-Branch Policy and Implementation Decisions

The final driver boosting the performance of the deportation system has been policy and implementation decisions made by the executive-branch agencies charged with administering the nation's immigration laws, principally CBP, ICE, and their parent agency, DHS. Implementation decisions involve both border enforcement, around which there has been overall policy continuity since 1996, and enforcement within the country—interior enforcement—where the current administration has introduced prosecutorial discretion, a significant policy change.

C. *The Rise in Deportations: Key Trends*

This report identifies and examines three key trends that have developed since the mid-1990s:

- The surge in formal removals, which have more severe consequences for those who are repatriated. Historically, most removals consisted of informal “returns.”
- The shift from judicial removals to nonjudicial, administrative removals. Most formal deportations previously were ordered by an immigration judge following a hearing. Now most result from decisions carried out by DHS enforcement officials.
- The increased use of previously little-used immigration-related criminal charges for unauthorized immigrants. The result has been a growing population of “criminal aliens” who are a priority for immigration enforcement actions.

I. More Formal Removals

There has been a fundamental shift from a deportation system that focused pre-1996 on informal returns (i.e. voluntary return and departure) to one that mainly emphasizes formal removals—a change at the center of the 1996 IIRIRA law.

Formal removals averaged 3 percent of total deportations in FY 1970-96, and never exceeded 5 percent. Formal removals rose to 10 percent of all apprehensions in FY 1998, jumped to about 19 percent in FY 2003-06, and spiked sharply beginning in 2006 to a high of 65 percent in 2012.

The significance of this shift is that people formally removed are ineligible for a visa to return and are subject to reinstatement of their removal order and/or criminal charges if they are apprehended in the future.

2. The Deployment of Nonjudicial Removal Procedures

The rise in formal removals reflects aggressive deployment by INS and DHS of the nonjudicial removal procedures created or augmented by IIRIRA, especially expedited removal and reinstatement of removal. Total removals increased from about 51,000 in FY 1995 to about 419,000 in FY 2012—an eight-fold increase. About 84 percent of the growth in total removals resulted from nonjudicial removals, which increased from about 1,400 in FY 1995 to about 313,000 in FY 2012.

Expedited removal was created by IIRIRA and initially applied only to those who were inadmissible arriving at ports of entry, which led to an average of about 80,000 cases per year in FY 1998-2001. In 2002 and 2004, DHS extended its use to those arriving by sea and to those apprehended within 14 days of illegal entry without proper documents within 100 miles of the land border. Expedited removals rose to about 111,000 in FY 2006 and grew to 163,000 in FY 2012, representing 39 percent of all formal removals.

Reinstatements of removal increased particularly in the post-9/11 period. The number of noncitizens



removed under previously existing removal orders increased from about 11,000 annually prior to FY 2002 to a yearly average of about 58,000 in FY 2002-06. Reinstatements have surged since FY 2006, growing by an average of 20 percent per year to 149,000 in FY 2012, when they accounted for 36 percent of all removals.

Together, expedited removal and reinstatements accounted for 75 percent of all deportations in 2012—the highest proportion ever. By comparison, nonjudicial removals accounted for just 3 percent of removals in FY 1995 and FY 1996, as almost all formal removals were decided by judges in the pre-IIRIRA period.

3. The Intersection of Immigration Enforcement with the Federal Criminal Justice System

A further trend has been a sharp increase in prosecutions for immigration-related criminal offenses—mainly consisting of illegal entry and illegal re-entry charges against those apprehended at the Southwest border.²

Rising immigration-related charges have had significant impacts on the federal court system. At the district court level, immigration cases increased from 11 percent of the caseload (7,328 of 69,437 cases) in FY 1997 to 26 percent (23,942 of 90,992 cases) in FY 2013. This pattern is even more dramatic at the magistrate court level which handles most illegal entry and illegal re-entry cases. Immigration cases grew from 15 percent of all cases (11,145 of 75,080) in FY 1997 to 63 percent (72,278 of 114,771) in FY 2013. Nonimmigration cases in federal magistrate courts *declined* 33 percent during this period, meaning immigration prosecutions accounted for 154 percent of the growth in magistrate cases.

The growth in criminal immigration cases has been driven by border prosecutions, including the Operation Streamline program. The proportion of people apprehended along the Southwest border who are charged with criminal violations increased from 1 percent in FY 1997 to 22 percent in FY 2013.

D. Enforcement Results at the Border and in the Interior

As sketched above, the current administration inherited and further expanded a formidable enforcement machinery that is unprecedented in its streamlined framework for formal deportations, substantial front-line enforcement resources, and a federal court system heavily given over to the prosecution of immigration-related crimes. To this enforcement machinery, the administration added explicit DHS enforcement priorities and updated guidelines for exercising prosecutorial discretion. Prosecutorial discretion refers to the authority of a law enforcement agency to decide to what degree to enforce the law against a particular individual.

The DHS immigration enforcement priorities are to focus on:

- noncitizens who pose a danger to national security or a risk to public safety, including those who have been convicted of a crime (including an immigration-related offense);
- recent illegal entrants, including recent border crossers; and
- persons who “obstruct immigration controls,” including fugitives, those who re-enter illegally after removal, and individuals who engage in visa fraud.

At the border, where CBP is the lead enforcement agency, the agency confronts declining apprehensions (i.e. a smaller pool of enforcement targets), and places a *larger* share of those it apprehends in formal removal proceedings and/or brings criminal charges against them. In the interior, where ICE is the lead enforcement agency, these trends are reversed. With its enhanced capacity to identify those who

² Immigration-related crimes include illegal entry (8 U.S.C. § 1325), illegal re-entry (8 U.S.C. § 1326), visa or document fraud or misuse (8 U.S.C. § 1546), and alien smuggling, harboring, and transportation (8 U.S.C. §§ 1322-1324 and 1327). Since 2006, about 92 percent of federal immigration-related cases have been for illegal entry and illegal re-entry.



are subject to removal (i.e. a larger pool of enforcement targets), ICE has set priorities to guide its enforcement practices, resulting in the repatriation of a *smaller* share of the potential enforcement pool. Overall, these policies have reshaped the deportation system in important ways.

1. Border Enforcement

Two of the three DHS-wide priorities for enforcement (recent illegal entrants and those re-entering illegally) apply to border enforcement.

In 2005, CBP began increasing the consequences for those it apprehended in order to strengthen deterrence against repeat crossing, disrupt smuggling networks, and raise the cost of illegal entry. CBP's strategy is to discourage recidivism by replacing more lenient consequences with ones that are tougher in order to discourage migrants from re-entering following deportation.

As inflows and apprehensions at the Southwest border have declined since 2005, CBP has sharply reduced its use of voluntary return, which the agency treats as its lowest-consequence enforcement response. Whereas 82 percent (956,470 of 1,171,428) of those apprehended at the Southwest border were granted voluntary return in FY 2005, only 21 percent (76,664 of 356,873) were permitted voluntary return in FY 2012. During the same period:

- formal removals increased from 19 percent of cases (226,226) to 76 percent (270,463);
- those subject to criminal charges increased from 3 percent (35,266) to 22 percent (80,209); and
- those subject to remote repatriation³ increased from 2 percent (20,592) to 29 percent (102,057).⁴

Border Patrol analyses suggest that these tougher enforcement measures contribute to reduced recidivism among repeat crossers. They have been made a centerpiece of the effort to “secure the border first.”

2. Interior Enforcement

While a near zero-tolerance approach exists in border enforcement, fewer formal removals originate within the United States. Most people apprehended through interior enforcement are not recent illegal entrants, and many do not fall into any of DHS's three priority enforcement categories.

The most common way ICE identifies and arrests those subject to removal is through cooperation with state and local law enforcement in carrying out screening programs, such as Secure Communities. Secure Communities identifies noncitizens in the U.S. criminal justice system. The program expanded from being deployed in 88 jurisdictions in 2009 to all 3,181 law enforcement jurisdictions in the country in 2013.

The number of noncitizens identified through Secure Communities—not all of whom are unauthorized or deportable—increased from 95,664 in FY 2009 to 530,019 in FY 2013. Total Secure Communities deportations averaged about 81,000 people per year in FY 2011-13, representing 23 percent of noncitizen identifications in FY 2011 and 15 percent in FY 2013. Thus, 85 percent of those identified through Secure Communities in FY 2013 were not deported.

Most of those deported after being identified through Secure Communities have been convicted of a crime or met other DHS enforcement priorities. Between FY 2009 and FY 2011, 75 percent of all Secure Communities removals were of people who had been convicted of a crime. This rate increased to 80 percent in FY 2012 and 88 percent in FY 2013. Almost all other Secure Communities deportations had

³ Remote repatriation is the removal or return of a Mexican national apprehended at the border to either the interior of Mexico, or to a port of entry along the U.S.-Mexico border that is far from the area where the individual initially crossed the border.

⁴ Numbers do not add to 100 percent because some individuals are subject to more than one consequence.



previous removal orders or related violations. Altogether, more than 99 percent of Secure Communities repatriations between FY 2008-13 either had been convicted of a crime or fell into one of the other two DHS priority categories.

E. Enforcement Priorities and Discretion: How Have They Worked Overall?

On a systemic level, the great majority of the nearly 2 million people removed by the current administration during its first five years appear to fall into one or more of the DHS enforcement priority categories.

With the broad implementation of nonjudicial removal procedures, almost two-thirds of all removals in FY 2009-12 were either expedited removals (i.e., recent illegal entrants) or reinstatements of removal (i.e., people who have violated prior removal orders in some capacity)—two of the categories identified by DHS as enforcement priorities.

A growing proportion of deportees fall into the third enforcement priority category of convicted criminals. Noncitizens with criminal convictions accounted for 34 percent of people removed in FY 2009, growing to 48 percent in FY 2012. (Some people fall into more than one enforcement priority category.)

These numbers reverse a long-standing trend, as a substantial majority of those removed between FY 1996 and FY 2008 were *noncriminals*. The proportion of noncriminals as a share of formal deportations grew from 36 percent in FY 1995, the year before IIRIRA's passage, to a record high of 71 percent in FY 2008.

At the same time, most of the recent shift from noncriminal to criminal removals has been driven by increased removals of people convicted exclusively of immigration-related crimes. Deportations of people convicted of immigration-related crimes grew at an average rate of 31 percent per year between FY 2008 and FY 2013 (from 15,969 to 60,300), compared to growth of 7 percent per year over the same period for removals of people convicted of nonimmigration crimes (from 103,264 cases to 138,545). Thus, immigration-related crimes accounted for 55 percent of the increase in criminal removals during this period.

F. Impact of Enforcement on Immigrant Communities

Most deportations since 2009 have been of people who fall into one or more of DHS's enforcement priorities. But even focused enforcement has a substantial impact on U.S.-citizen and immigrant families and communities because many unauthorized immigrants are deeply rooted in the United States. DHS estimated in 2012 that 86 percent of the unauthorized population as of January 2011 had been in the United States six years or more. Other estimates show that about half (46 percent) of adult unauthorized immigrants are parents of minor children (mostly U.S.-citizen children). A 2013 survey of unauthorized immigrants found that 95 percent had at least one other family member in the United States. About 74 percent of adult unauthorized immigrants are in the U.S. labor force.

Thus, deportations have ripple effects throughout U.S.-based immigrant communities and beyond. This is particularly true of interior enforcement, which primarily affects unauthorized immigrants who are settled into established communities, and where enforcement may create a broad atmosphere of fear and vulnerability. And while the administration's policies have focused enforcement on high-priority cases, the record has been mixed when it comes to taking low-priority cases out of enforcement pipelines.

Border enforcement also affects immigrant communities. More than one-quarter of people removed by CBP are reinstatements of removal, and many therefore have previous ties to the United States. Toughened border enforcement likely has deterred many casual crossers and would-be first-time entrants, but a higher proportion of remaining border crossers may be *returning* to the United States



because their homes and families are here. In these cases, formal removal and criminal prosecutions may do little to deter future crossing attempts, and they contribute to an escalating criminalization of the unauthorized immigrant population, generating a growing class that may be ineligible for future immigration relief (on the basis of multiple removals or criminal convictions) despite strong connections to the United States.

G. Policy Levers to Influence the Deportation System

The capacity of the current deportation system to remove approximately 400,000 or more unauthorized immigrants per year represents a new reality, in which enforcement has fundamentally altered the performance of the immigration system and has heightened levels of fear and vulnerability for U.S.-citizen and immigrant families and communities. In calling for a review of deportation policies to make them more “humane,” consistent with the responsibility to enforce the law, the president is acknowledging the impact that immigration enforcement is having.

Where does the immigration enforcement system go from here?

New immigration laws are the most powerful tool for influencing immigration enforcement, as evidenced by the impact of IIRIRA on the deportation system. Congress also could substantially shape enforcement through the appropriations process. Nonetheless, with Congress seemingly deadlocked, much of the current focus is on steps the executive branch may take to bring greater focus to immigration enforcement. While a number of additional such measures are possible, there is a wide gap between the actual policy flexibility available to the executive branch in the current circumstances and the expectations of those who argue that the president can stop all deportations with the stroke of a pen.

This report does not make recommendations for policy changes; it reviews some of the leading policy ideas proposed and examines their advantages and disadvantages. Some examples of those policy proposals are outlined below.

I. Proposals to Refine Enforcement Priorities

The administration has been largely successful in focusing deportations on the priorities it established. Thus, refining these priorities in some ways could have a substantial impact on future enforcement.

About 21 percent of the criminal aliens deported in FY 2009-12 had been convicted exclusively of immigration-related crimes, and about 23 percent of *nonimmigration* crimes have consisted of minor, nonviolent offenses. One potential refinement would be to revise the enforcement priorities to focus on *serious* criminals—i.e., crimes of violence and national security threats—rather than anyone ever convicted of a crime.⁵ Similarly, further guidance could identify certain types of crimes that would no longer be prioritized, such as traffic offenses other than driving under the influence (DUI) and illegal entry/re-entry.

Some have called for revising the definitions of “recent illegal entrants” and/or of “aliens who are fugitives or otherwise obstruct immigration controls.” As they are currently defined, these categories include many people with deep ties to the United States.

However, modifying these priorities could drive substantial change in the number and characteristics of people apprehended at the border. Congress and public opinion repeatedly reinforce the view that immigration enforcement should prioritize border security first and foremost. Changes that affect border enforcement could jeopardize recent border gains and undermine the administration’s argument that adequate enforcement resources and successes are in place to turn to a broader immigration reform agenda.

⁵ The March 2011 enforcement priorities memo distinguishes among different types of criminal aliens—defining Level 1, Level 2, and Level 3 offenses—but all three types of offenses are included in the memo’s definition of aliens who pose a risk to public safety, the top enforcement priority.



2. Proposals to Expand the Use of Prosecutorial Discretion

DHS has demonstrated its ability to influence outcomes by exercising prosecutorial discretion. At the same time, the department continues to remove a significant number of people who may be good candidates for relief. The department could strengthen its exercise of prosecutorial discretion in several ways.

It could clarify the relationship between its enforcement priorities and its guidelines for discretion. For example, should a minor criminal or a recent border crosser with long-standing ties to the United States and U.S.-citizen children be considered an enforcement priority or a candidate for discretion?

Second, implementation of prosecutorial discretion has been uneven across ICE jurisdictions. One way to achieve greater consistency would be to require that ICE attorneys review all removal cases against the prosecutorial discretion guidelines.

Unlike ICE, CBP has not developed guidance to implement the DHS discretion policy. Uneven—or nonexistent—policies to exercise discretion at the border are a particularly important gap, given the high share of removals that originate there.

Expanded use of discretion at the border risks limiting the deterrent effect the current system is achieving, however. A more modest modification, then, might be to treat CBP operations at interior locations—i.e., up to 100 miles inland, where CBP agents may operate—as akin to interior enforcement and subject to policies more closely aligned with those of ICE operations at similar interior locations.

3. Proposals to Modify Enforcement Processes

The expansion of nonjudicial forms of removal has played a major role in the overall growth of the deportation system, and nonjudicial removals are an important enforcement tool in light of limited funding for immigration judges and DHS detention space. But nonjudicial removals are not well suited to identifying people with strong ties to the United States. DHS could develop screening tools to identify those with compelling U.S. equities—long periods of U.S. residence, U.S.-based families—who are apprehended near the border or who have previously been removed to ensure that such people have a chance to seek relief before an immigration judge.

A potential reform in response to the increasing criminalization of the unauthorized population would be to provide greater due process to persons facing criminal charges. Operation Streamline, which provides for a fast-track judicial process, is an example of a program whose scope could be reduced in favor of standard criminal prosecutions reserved for those accused of serious crimes.

4. Proposals to Expand DACA-Style Relief

Many immigrant advocates and community leaders are calling for a larger version of the Deferred Action for Childhood Arrivals (DACA) program.⁶ DACA differs from the other forms of prosecutorial discretion because it authorizes certain people to *apply* for relief, rather than to be considered for relief after becoming targets of immigration enforcement.

DACA beneficiaries are a highly sympathetic population, in that these are young people who have grown up in the United States and gone through its schools, and are disadvantaged by being in the country illegally through the actions of their parents. Even under those circumstances, DACA has been the target of bitter political attacks as “administrative amnesty” and has been characterized as the administration disregarding enforcement of immigration laws.

⁶ For an overview of the criteria for relief under DACA and implementation of the DACA program, see Jeanne Batalova, Sarah Hooker, and Randy Capps, *Deferred Action for Childhood Arrivals at the One-Year Mark: A Profile of Currently Eligible Youth and Applicants* (Washington, D.C.: Migration Policy Institute, 2013), www.migrationpolicy.org/research/deferred-action-childhood-arrivals-one-year-mark-profile-currently-eligible-youth-and-applicants.



Extending DACA would make many members of Congress and others even more critical of the president's handling of immigration policy as a usurpation of congressional authority. To the extent that there is any remaining chance of progress toward immigration reform legislation in the months ahead, such a decision likely would bring it to a halt.

H. Conclusion

The *Illegal Immigration Reform and Immigrant Responsibility Act of 1996*, which did much to shape today's deportation system by providing powerful new enforcement tools, was passed at a time of high and rising illegal immigration. These reforms have been augmented by generous congressional appropriations and by toughened enforcement programs and policies implemented by three successive administrations. Over time, the cumulative effect of these changes has been the deployment of a fully mature deportation system that represents a new reality historically.

At the same time, this new system has criminalized a large and growing portion of the unauthorized immigrant population. With close to 400,000 formal removals per year, including many people with deep ties in the United States, deportation practices raise ever higher barriers for people who might otherwise be candidates for an eventual legalization program.

The Obama administration has taken significant steps to make adjustments to this system. Without rolling back major initiatives introduced by prior administrations—including a near-zero tolerance deportation system at the border and the universal deployment of Secure Communities—DHS has largely restricted enforcement to three priorities: noncitizens previously convicted of a crime, apprehended near the border, or who failed to comply with immigration enforcement proceedings.

The cumulative effect of these changes has been the deployment of a fully mature deportation system that represents a new reality historically.

The resulting system is deeply unsatisfying to both sides in the immigration debate. Those who favor tougher enforcement object to the low priority placed on deporting unauthorized immigrants who fall outside these three categories. Those who are concerned about the harsh effects of deportation object to the continued removal of large numbers of people with strong ties to American families and communities.

While adjustments to DHS enforcement priorities can be made, actions by the executive branch alone cannot reconcile the fundamentally competing policy demands the immigration enforcement system now confronts. The deportation dilemma is this: How does the government carry out its enforcement responsibilities and mandates while also shielding U.S.-citizen and immigrant families and communities from the inevitable damage that a robust enforcement system inflicts?

The question at the heart of the administration's review of its deportation policies is how can a system that is predicated on repatriating people to deter illegal immigration and uphold the integrity of the nation's immigration laws also minimize the impact of enforcement on U.S.-citizen and immigrant families and communities?

Whatever answer the administration gives is not likely to diminish controversy and disagreements over issues of deportation until the real solution—a rationalized, updated immigration law—is one day politically possible.



I. Introduction

A primary function of immigration enforcement is to apprehend and repatriate noncitizens who are unauthorized or are otherwise removable from the country. Deportation⁷ operations are a key cog in what the Migration Policy Institute (MPI) has described as the “formidable machinery” for immigration enforcement that has emerged under the Department of Homeland Security (DHS) in the post-9/11 era. An estimated 4.3 million people were formally removed between fiscal year (FY) 1997 (the year implementation of new statutory mandates for deportation began) and FY 2012.⁸ Annual removal numbers have trended up over this period, from 70,000 in FY 1996 to nearly 420,000 in FY 2012, before declining somewhat in FY 2013.⁹ About the same numbers of people were formally removed during the first five years of the current administration (more than 1.9 million) as during the entire eight years of the prior administration (2.0 million).¹⁰

These figures represent historic highs in both the rise and overall pace of removals. Yet despite high removal numbers in recent years, the United States was still home to about 11.7 million unauthorized immigrants in 2012.¹¹ This estimate is up by about 500,000 from 2011, as a five-year trend of stable or falling illegal immigration flows that began in 2007 appears to have come to an end.¹²

About the same numbers of people were formally removed during the first five years of the current administration...as during the entire eight years of the prior administration.

After a decade of failed congressional efforts to pass a comprehensive immigration reform (CIR) bill that would legalize certain unauthorized immigrants, some advocates for less restrictive immigration policies have called on the administration to scale back enforcement—or even to suspend deportations—until Congress enacts a legalization program. In March 2014, President Obama called for a review of DHS’s removal operations “to see how it can conduct enforcement more humanely within the confines of the law.”¹³

Those advocating stricter immigration controls question the commitment of this and prior administrations to immigration enforcement, and some have described the Obama administration’s exercise of prosecutorial discretion in immigration cases as “administrative amnesty.”¹⁴ An April 2014 letter signed by 22 Senate Republicans accused the administration of “incrementally nullifying immigration enforcement

⁷ This report uses the term “deportation” colloquially to refer to any type of mandatory repatriation of a noncitizen from the United States. See Box 1 and Appendix 1 for a complete definition.

⁸ Migration Policy Institute (MPI) calculations based on data in the Department of Homeland Security (DHS) *2012 Yearbook of Immigration Statistics*. See DHS, *2012 Yearbook of Immigration Statistics*, www.dhs.gov/yearbook-immigration-statistics. The total includes the number of removal events, not the number of unique individuals removed, which would be a lower figure.

⁹ DHS has not yet published complete removal data for fiscal year (FY) 2013.

¹⁰ MPI calculations from DHS, *2012 Yearbook of Immigration Statistics*, and from ICE data obtained by *The New York Times* through a Freedom of Information Act request.

¹¹ Jeffrey S. Passel, D’Vera Cohn, and Ana Gonzalez-Barrera, *Population Decline of Unauthorized Immigrants Stalls, May Have Reversed* (Washington, DC: Pew Hispanic Center, 2013), www.pewhispanic.org/2013/09/23/population-decline-of-unauthorized-immigrants-stalls-may-have-reversed/.

¹² Ibid.

¹³ The White House, “Readout of the President’s Meeting with Congressional Hispanic Caucus Leadership,” March 13, 2014, www.whitehouse.gov/the-press-office/2014/03/13/readout-presidents-meeting-congressional-hispanic-caucus-leadership.

¹⁴ See House Committee on Homeland Security, Subcommittee on Border and Maritime Security, *Does Administrative Amnesty Harm our Efforts to Gain and Maintain Operational Control of the Border?*, 112th Cong., 1st sess., Oct. 4, 2011, <http://homeland.house.gov/hearing/subcommittee-hearing-does-administrative-amnesty-harm-our-efforts-gain-and-maintain>.



in the interior of the United States” and of demonstrating “an astonishing disregard for the Constitution, the rule of law, and the rights of American citizens and legal residents.”¹⁵ In March 2014, the House of Representatives passed a pair of bills designed in part to pressure the executive branch to more aggressively enforce immigration restrictions.¹⁶

These conflicting views partly reflect basic disagreements about what a successful immigration enforcement system should look like. The gap between these narratives also reflects a lack of understanding and information about the actual state of U.S. immigration enforcement. Who is being deported and where and how are they being apprehended? Is the Obama administration meeting congressional enforcement mandates, or has it exercised undue discretion?

In addressing these questions, this report describes today’s pipelines for deportation; analyzes the changing nature of the deportation system and new trends in apprehensions, removals, returns, and criminal prosecutions; and examines the tools Congress and the president have to influence immigration enforcement going forward.

Conflicting views partly reflect basic disagreements about what a successful immigration enforcement system should look like.

II. Deportation Drivers: IIRIRA and Pipelines for Removal

The current legal framework for deportation was significantly shaped by the *Illegal Immigration Reform and Immigrant Responsibility Act of 1996* (IIRIRA) and is mostly described in sections 235-41 of the *Immigration and Nationality Act* (INA).¹⁷ IIRIRA was passed at a time of steeply rising illegal immigration, and was the cornerstone of broad legislative reforms designed to check unauthorized inflows. Among other changes, IIRIRA consolidated previous INA provisions for excluding and deporting people into a single “removal” proceeding applicable to unauthorized immigrants, status violators, and lawful permanent residents (LPRs) who commit certain crimes.¹⁸

15 Senator Charles Grassley (R-IA), Senator Mitch McConnell (R-KY), Senator David Vitter (R-LA), et al., “Letter to President Barack Obama,” April 24, 2014, http://images.politico.com/global/2014/04/24/letter_to_president_obama_on_april_24_2014.html.

16 H.R. 4138, *Executive Needs to Faithfully Observe and Respect Congressional Enactments of the Law Act* (ENFORCE the Law Act), 113th Cong., 2d sess., *Congressional Record* 160, no. 36, March 4, 2014: H 2147; H.R. 3973, *Faithful Execution of the Law Act of 2014*, 113th Cong., 2d sess., *Congressional Record* 160, no. 17, January 29, 2014: H 1512.

17 The *Immigration and Nationality Act* (INA) was enacted in 1952 and has been amended many times since then; it is the basic body of U.S. immigration law.

18 All noncitizens who lack legal status in the United States (i.e. individuals who entered the country without inspection or by using fraudulent documents, or who have overstayed a temporary period of authorized admission in the United States) are technically removable, regardless of whether they have committed additional criminal offenses or can show mitigating circumstances. INA §§ 240, 212(a)(6), 212(a)(7). Noncitizens with legal status (e.g., nonimmigrant visa holders or lawful permanent residents) may also be removable if they violate the terms of their visa or if they commit certain criminal offenses, such as controlled substance violations or “crimes involving moral turpitude.” See INA §237.

**Box 1. Terminology**

This report uses the terms “deportation” and “repatriation” when describing the general phenomena of the departure of inadmissible or deportable noncitizens from the United States back to their countries of origin, as required and administered by the federal government. Deportations include “removals and “returns.” The term “removal,” interchangeable with “formal removal,” refers to the compulsory and confirmed departure of an inadmissible or deportable noncitizen from the United States based on a formal order of removal. “Returns,” on the other hand, refer to the compulsory and confirmed departure of an inadmissible or deportable noncitizen not based on a formal order of removal.

This report uses “judicial removal” to refer to a final removal order issued by an administrative law judge within the Department of Justice’s Executive Office for Immigration Review (EOIR). Such judges are known as immigration judges (IJs). Although immigration judges are technically administrative officers in the executive branch, and are not part of the federal judiciary, the term “judicial removal” is used for purposes of simplicity. Under the INA, federal judges also may issue final orders of removal in limited circumstances; INA § 238(c). As used in this report, the term “judicial removal” refers to orders of removal issued by immigration judges, not to those issued by federal judges.

The term “nonjudicial removal,” as used throughout this report, refers to the type of removal issued and carried out by DHS immigration officials with no involvement of immigration judges. Nonjudicial removals include expedited removals, reinstatement of removals, and administrative removals, and (in some respects) stipulated orders of removal.

In addition to the standard removal process before an immigration judge (“judicial removals” in the terminology of this report),¹⁹ the INA authorizes DHS to issue formal orders of removal in certain circumstances without immigration judge involvement (“nonjudicial removals”).²⁰ Long-standing provisions of the INA also provide for informal returns from the United States, and for immigration-related crimes that may involve fines and/or incarceration.

A. The Judicial Removal Process

The judicial removal process is initiated when a DHS officer serves an individual with a charging document, known as a notice to appear (NTA), that describes the immigration charges (i.e., grounds for inadmissibility or deportability) being brought against the potentially removable noncitizen. Persons facing judicial removal typically appear in a removal hearing before an immigration judge, who is an administrative judge within the Department of Justice’s Executive Office for Immigration Review (EOIR).

The immigration judge reviews evidence of the noncitizen’s removability, and the individual may introduce evidence, call witnesses, and contest the removal charges or apply for relief from removal on humanitarian or other established statutory grounds.²¹

19 As discussed in Box 1, the term “judicial removal,” as used throughout this report, refers to a final removal order issued by an immigration judge. Although immigration judges are administrative officers serving within the executive branch, and are not part of the federal judiciary, the term “judicial removal” is used to make this report accessible to a broad audience. Under the INA, federal judges may issue final orders of removal in limited circumstances; INA § 238(c). As used throughout the report, “judicial removal” refers to orders of removal issued by immigration judges, not those issued by federal judges.

20 The term “nonjudicial removal,” as used throughout this report, refers to a final order of removal issued by DHS without any immigration judge involvement.

21 For example, noncitizens may demonstrate that although they are removable, they fear persecution in their home countries and qualify to apply for asylum status, withholding of removal, or protection under the Convention Against Torture; INA §§ 208, 241(b)(3); 8 C.F.R. §208.18. Some individuals who have resided in the United States for lengthy periods of time and have extensive connections with the country may qualify to apply for cancellation of removal; INA § 240A. In FY 2013, 24,006 out



Absent an appeal,²² a noncitizen found to be removable and ineligible for relief is deported from the United States, and is generally ineligible for a visa (i.e., is inadmissible) for at least ten years.²³ A person who re-enters the United States in violation of a removal order may be subject to criminal charges.²⁴

Hearings in which people seek relief or contest removal charges may be spread out over multiple appearances, and may take months or even years to resolve.²⁵ Prolonged removal proceedings are problematic because, among other reasons, some people “abscond” by failing to appear at their scheduled hearing.²⁶ DHS may detain individuals during removal proceedings or may order a person released on bond, which is set in a hearing before an immigration judge. Immigration law also requires that certain noncitizens be detained during removal proceedings.²⁷ But limits on detention resources mean that most people who do not fall into one of these categories and who are awaiting the resolution of judicial removal proceedings are either released on their own recognizance or on bond, or are monitored in one of the alternatives-to-detention (ATD) programs operated by U.S. Immigration and Customs Enforcement (ICE).²⁸

Although removal proceedings can resemble criminal court cases, they are civil proceedings. Thus, the government is not required to provide free legal counsel and the proceedings are not bound by the established rules of evidence that govern criminal proceedings.²⁹

of 143,678 (17 percent) of cases completed by immigration judges resulted in relief from removal; U.S. Department of Justice (DOJ), Executive Office of Immigration Review, *FY 2013 Statistics Yearbook*, www.justice.gov/eoir/statspub/fy13syb.pdf.

22 After an immigration judge issues an order of removal, a noncitizen may appeal that order to the DOJ Executive Office for Immigration Review (EOIR) Board of Immigration Appeals (BIA). BIA decisions that affirm an order of removal may be appealed to the U.S. Circuit Courts of Appeals. DOJ, *Board of Immigration Appeals Practice Manual* (Washington, DC: DOJ, EOIR), 45, www.justice.gov/eoir/vll/qapracmanual/BIAPracticeManual.pdf. Orders of removal are automatically stayed while a case is pending with BIA, but not if the noncitizen chooses to appeal a BIA order to a federal court of appeals. See DOJ, “Fact Sheet: Relief from Removal,” August 3, 2004, www.justice.gov/eoir/press/04/ReliefFromRemoval.htm.

23 INA §212(a)(9). Noncitizens who are ordered removed a second time through removal proceedings initiated upon their arrival in the United States are inadmissible for 20 years, as are those who have committed aggravated felonies. Those who are ordered removed through the expedited removal process are inadmissible for five years; INA §212(a)(9)(A). Individuals who unlawfully re-enter the United States following the issuance of a prior order of removal or following unlawful presence in the United States for an aggregate period of more than one year are permanently barred from readmission; INA §212(a)(9)(C).

24 INA §276.

25 For example, according to the Transactional Records Access Clearinghouse (TRAC) at Syracuse University, the average amount of time a case was pending with the immigration courts as of February 2014, was 577 days. TRAC, “Immigration Court Backlog Tool,” accessed March 27, 2014, http://trac.syr.edu/phptools/immigration/court_backlog/.

26 Individuals who fail to appear at a scheduled removal hearing or fail to depart under a final order of removal or voluntary departure are classified as U.S. Immigration and Customs Enforcement (ICE) fugitives; about 470,000 such fugitives were thought to be in the country as of the end of 2012. ICE, “Fact Sheet: ICE Fugitive Operations Program,” July 2, 2013, www.ice.gov/news/library/factsheets/fugops.htm.

27 Under INA § 236, detention is mandatory for people facing expedited removal, people known to be removable on criminal or national security grounds (including suspected terrorists), and people under final orders of removal.

28 The EOIR annual yearbook does not track the absconder rates for individuals who are placed in alternatives-to-detention (ATD) programs; but available research suggests ATD programs substantially reduce absconder rates relative to the nondetained population. A pilot ATD program conducted between 1997 and 2000 by the Vera Institute of Justice found that 91 percent of the 500 participating noncitizens appeared in court, compared to 71 percent of nonparticipants; see Oren Root, *The Appearance Assistance Program: An Alternative to Detention for Noncitizens in U.S. Immigration Proceedings* (New York: Vera Institute of Justice), 5, www.vera.org/sites/default/files/resources/downloads/aap_speech.pdf. In 2010, ICE reported that two ATD programs it operated that year resulted in compliance rates with removal orders of 91 percent (for the Intensive Supervision Assistance Program) and 65 percent (for the Enhanced Supervision Reporting Program); ICE, *Fiscal Year 2011 Congressional Budget Justification* (Washington, DC: ICE), S&E 60-61, www.dhs.gov/xlibrary/assets/dhs_congressional_budget_justification_fy2011.pdf. Other researchers have questioned ICE’s data; Susan Carroll, “Flaws Found in Options for Immigrant Detention,” *Houston Chronicle*, October 19, 2009, www.chron.com/news/houston-texas/article/Flaws-found-in-options-for-immigrant-detention-1587363.php. More recent data indicate that 96 percent of active participants in the current version of the ICE ATD programs showed up for their removal hearings, and that 84 percent complied with final court orders; see Julie Myers Wood and Steve J. Martin, “Smart Alternatives to Immigrant Detention,” *Washington Times*, March 28, 2013, www.washingtontimes.com/news/2013/mar/28/smart-alternatives-to-immigrant-detention/.

29 An alien in removal proceedings has a right to counsel at his or her own expense or pro bono counsel, if available.



B. Nonjudicial Forms of Removal

One goal of IIRIRA was to provide for more streamlined removal proceedings for certain people with limited equities in the United States and for people who had committed certain serious criminal offenses.³⁰ Thus, IIRIRA amended the INA to establish or strengthen such proceedings for three primary classes of noncitizens who may be ordered removed under specified procedures conducted by DHS officers directly, instead of appearing before an immigration judge:

- Certain *arriving aliens* who lack valid entry documents may be subject to “expedited removal.”³¹
- Aliens who *unlawfully re-enter the United States after having been previously removed* may be subject to “reinstatement of removal.”³²
- Aliens who *are not lawful permanent residents (LPRs) and who have committed aggravated felonies* may be subject to “administrative removal.”³³

In general, these nonjudicial removal procedures have narrow grounds for immigration judge review and limited opportunities for discretionary relief from removal.³⁴ Those charged under the nonjudicial removal provisions usually are required to be detained until the removal order is executed.³⁵ They face similar penalties (i.e., inadmissibility for a future visa, criminal penalties for re-entry) as those removed through the judicial removal process.

In addition, individuals who sign a *stipulated order of removal*, acknowledging their removability, may be removed by order of an immigration judge without a formal hearing, though a judge must review the stipulated order and sign it.³⁶ Thus, stipulated removal involves an immigration judge, like the judicial removal process, but it resembles nonjudicial removal in that it permits cases to be resolved quickly, without a formal hearing.

30 One of the *Illegal Immigration Reform and Immigrant Responsibility Act of 1996* (IIRIRA) reforms was to make individuals who had committed “aggravated felonies” ineligible for almost all forms of immigration relief. The term “aggravated felon” originated in the *Anti-Drug Abuse Act of 1988* and was limited to four categories of crimes—murder, drug trafficking, firearms trafficking, and attempt or conspiracy to commit any of these three. See *Anti-Drug Abuse Act of 1988*, Pub. L. No. 100-690, *U.S. Statutes at Large* 102 (1988): 4181. Through a series of legislative changes in the 1980s and 1990s, the definition was expanded considerably and now includes crimes that fall into 21 general classes that encompass some relatively minor offenses, including misdemeanors. See Doris Meissner, Donald M. Kerwin, Muzaffar Chishti, and Claire Bergeron, *Immigration Enforcement in the United States: The Rise of a Formidable Machinery* (Washington, DC: MPI, 2013), 103, www.migrationpolicy.org/research/immigration-enforcement-united-states-rise-formidable-machinery.

31 INA §235. Expedited removal applies to arriving noncitizens who officers from U.S. Customs and Border Protection (CBP) deem inadmissible as individuals seeking immigration benefits through misrepresentation or as noncitizens present without valid entry documents. Any person subject to expedited removal may be removed by CBP without the opportunity to go before an immigration judge. The only exception is for noncitizens who express a credible fear of persecution in their home countries, or an intention to apply for asylum.

32 INA §241(a)(5).

33 INA §238(b).

34 There is no review of an expedited removal order, except for individuals who claim under oath to be lawful permanent residents (LPRs) or hold refugee or asylee status; INA §235(C). Reinstatements under INA §241(a)(5) are not subject to being reopened or reviewed administratively, and individuals whose removals are reinstated are not permitted to apply for any immigration relief; INA §241(a)(5). However, individuals ordered removed pursuant to the reinstatement of removal process or the removal of nonpermanent resident aggravated felons via the expedited removal process may raise constitutional and legal claims in the federal courts of appeals. See American Immigration Law Foundation, “How to File a Petition for Review,” updated August 13, 2009, 3, www.aifl.org/lac/pa/lac_pa_041706.pdf.

35 Noncitizens found to have a credible fear of persecution may be released on bond during removal proceedings at the discretion of DHS.

36 INA §240(d).



C. *Informal Returns*

In certain cases, noncitizens may be permitted to depart the country without a formal order of removal. In particular, a CBP officer at a port of entry may permit an inadmissible noncitizen to “withdraw” his or her application for admission, rather than being found inadmissible and potentially being placed in removal proceedings.³⁷ A CBP agent or ICE officer generally may permit individuals apprehended at the border or within the United States to “voluntarily return” to their home country in lieu of being placed in removal proceedings.³⁸ And DHS or an immigration judge may allow “voluntary departure” under certain conditions in lieu of a pending removal charge or at the conclusion of a removal proceeding.³⁹

Those granted voluntary return or voluntary departure are *required* to depart. In the voluntary return context, individuals usually are physically escorted to the border or placed on an airplane. In the case of voluntary departure, individuals make their own travel arrangements but are subject to civil penalties if they fail to depart.⁴⁰ To some extent, these modes of deportation resemble a plea bargain: the noncitizen acknowledges being removable and agrees to leave the country in exchange for not being formally removed (thereby avoiding the five-year or longer prohibition on return). Individuals also may accept voluntary departure or voluntary return to avoid being detained during removal proceedings. Thus, ICE considers voluntary departure a form of prosecutorial discretion, and CBP—without using the vocabulary of “discretion”—typically reserves voluntary return for certain specified populations.

Unlawful presence in the United States is a civil violation, not a criminal offense, and removal is a civil, administrative proceeding

Table 1 summarizes the pipelines through which noncitizens may be deported. The major enforcement provisions under which people are deported differ with respect to whether and to what degree the order is reviewed by an immigration judge; whether they render a person inadmissible for a future visa for some period of time; and whether they typically result in civil detention. With the exception of noncitizens in judicial proceedings granted relief from removal, all of these pipelines result in a person’s required departure from the United States.

37 INA §235.

38 INA §240B.

39 Ibid.

40 In addition, for noncitizens granted voluntary departure by an immigration judge, if the individual fails to depart the United States within a given period of time, the order of voluntary departure may automatically convert into a formal removal order; 8 C.F.R. § 1240.6(d). Individuals granted voluntary departure by an immigration judge at the conclusion of removal proceedings are also required to pay a bond, which is refunded to them only after they have departed the United States and registered their presence at a U.S. consulate in their home country.

**Table 1. Post-IIRIRA Deportation Pipelines**

	Reviewed by Immigration Judge	Subject to Bars on Re-Entry for Varying Periods of Time	Subject to Civil Detention	Required to Depart the Country
Judicial Removals				
Standard removal	Yes	Yes	Yes	Yes ^a
Stipulated order^b	Yes ^b	Yes	Yes	Yes
Nonjudicial Removals				
Expedited removal	No ^c	Yes	Yes	Yes
Reinstatement of removal	No ^d	Yes	Yes	Yes
Administrative removal	No ^d	Yes	Yes	Yes
Informal Returns				
Withdrawal of application for admission	No	No	No	Yes ^e
Voluntary return	No	No	No ^f	Yes
Voluntary departure	Yes ^g	No	No ^f	Yes

^a Individuals in standard removal proceedings may be granted relief from removal, in which case they are not expelled.

^b Stipulated removals are judicial removals technically overseen by an immigration judge, but they typically do not involve a full removal hearing and thus resemble nonjudicial removals.

^c Individuals who express a credible fear of persecution in their home countries or an intention to apply for asylum are placed in judicial removal proceedings rather than facing expedited removal.

^d Individuals who express a “reasonable fear” of persecution in the reinstatement of removal and administrative removal processes are placed in judicial removal proceedings rather than facing expedited removal.

^e Individuals who withdraw their application for admission depart prior to entering the United States, so technically are not expelled.

^f Individuals accepting voluntary departure or voluntary return may be detained prior to agreeing to their departure or return; agreeing to one of these provisions involves the termination of such detention (i.e., during the repatriation process).

^g A voluntary departure order may be issued by the Department of Homeland Security (DHS), with limited judicial processing, or may be issued by an immigration judge.

Source: Authors’ analysis of the *Immigration and Nationality Act*.

D. Immigration-Related Criminal Charges

Unlawful presence in the United States is a civil violation, not a criminal offense, and removal is a civil, administrative proceeding; certain immigration offenses also violate federal *criminal* statutes. Such



violations include a misdemeanor improper entry charge⁴¹ and three types of felony charges: re-entry of a person previously removed;⁴² visa or document fraud or misuse;⁴³ and alien smuggling, harboring, and transportation.⁴⁴

In general, DHS may refer people suspected of violating these statutes to a U.S. attorney, who may file charges against the suspect in U.S. district court or before a U.S. magistrate judge.⁴⁵ Charges under these statutes are adjudicated in criminal proceedings, and thus are subject to a fuller set of due-process protections, such as the right to counsel at the government's expense. Likewise, these criminal charges may result in additional penalties, including criminal fines and incarceration. The most common immigration-related criminal offense—misdemeanor illegal entry—is punishable by imprisonment for up to six months, while the next most common offense—felony illegal re-entry—is punishable by imprisonment for up to two years (or up to 20 years if the previous removal was for certain types of criminal convictions).

People convicted of immigration-related criminal charges generally also are removable based on the conviction, and ICE typically places such persons directly into removal proceedings while they are serving their criminal sentences or at the conclusion of their sentences.

III. Deportation Drivers: Congressional Appropriations

Beyond IIRIRA's amendments to the INA, a second key driver that has shaped deportation trends since 1996 is congressional appropriations, which establish budgets for immigration enforcement agencies and the broader infrastructure of immigration enforcement—whether staffing, technology, or detention beds. Appropriations shape outcomes in two main ways.

First, appropriations influence the system's capacity to bring unauthorized and removable immigrants into the enforcement system by setting personnel numbers for the Border Patrol, ICE, and other enforcement agencies, and through other spending decisions on front-line enforcement (e.g., technology, equipment, etc.). For example, increased spending on Border Patrol functions has permitted the agency to grow from 4,139 agents in FY 1992 to 21,391 in FY 2013⁴⁶—more than a fivefold increase.

A...key driver that has shaped deportation trends since 1996 is congressional appropriations.

Second, appropriations also influence the capacity of the system to complete the deportation process. This relationship is complex because the different removal pipelines entail different costs. Procedures that involve more judicial processing (i.e., standard removal, standard criminal prosecutions) require greater

41 8 U.S.C. § 1325.

42 8 U.S.C. § 1326.

43 8 U.S.C. § 1546.

44 8 U.S.C. §§ 1322-1324 and 1327.

45 Magistrate judges are judicial officers to whom federal judges may assign certain types of cases. Some statutes also assign magistrate judges jurisdiction over specific types of cases. Like district court judges, magistrate judges may hear evidence and issue rulings. Unlike federal judges, magistrate judges serve for defined terms and are not appointed by the president or confirmed by the Senate. See United States Courts, "Frequently Asked Questions," accessed March 28, 2014, www.uscourts.gov/Common/FAQs.aspx.

46 U.S. Border Patrol, "Border Patrol Agent Staffing by Fiscal Year (Oct. 1st through Sept. 30)," accessed April 17, 2014, www.cbp.gov/sites/default/files/documents/U.S.%20Border%20Patrol%20Fiscal%20Year%20Staffing%20Statistics%201992-2013.pdf.



prosecutorial and judicial resources than procedures involving more limited processing (i.e., informal returns, and nonjudicial forms of removal).

With the judicial removal process, EOIR resources and procedures are a significant choke point in the removal system because they control the pace of cases for which orders of removal are issued. EOIR historically has been under-resourced. While CBP and ICE budgets have grown dramatically, funding for immigration judges' work has not kept pace with front-line enforcement spending. EOIR appropriations grew about 70 percent between FY 2002-13 (from \$175 million to \$304 million), while enforcement operations rose approximately 300 percent (from \$4.5 billion to \$18.0 billion) over the same period.⁴⁷

As a result, people flow into the system more quickly than courts can process them, and the backlog of pending removal cases in the immigration court system grew from 166,061 in FY 2002 to 363,239 in FY 2014.⁴⁸ Similarly, the average wait time for people in removal proceedings to have their cases adjudicated increased from 413 days in FY 2002 to 577 days during the current fiscal year.⁴⁹ Nonjudicial removal procedures such as expedited removal and reinstatement of removal were designed in part to address these resource challenges. Nonjudicial removals are a faster and more reliable form of deportation because they allow DHS to deport people without waiting for a judicial hearing. Yet these gains in "efficiency" come at a cost in terms of the ability of the system to identify people with strong equities in the United States who, prior to IIRIRA, might have been able to petition an immigration judge for relief from removal.

Funding for immigration judges' work has not kept pace with front-line enforcement spending.

Another way in which appropriations affect the flow of cases through the deportation system is by setting the number of beds available for immigration detention.⁵⁰ As noted above, the INA requires that certain noncitizens be detained during removal proceedings to make their deportation faster and more reliable, but limited detention resources mean that most people who don't fall into one of these categories are released on bond or on their own recognizance, or are placed in an ATD program. Increased detention space—provided in both ICE-run facilities and through contracts with state and local jurisdictions and private contractors—translates into more removals because individuals who are not detained while removal charges are pending against them may fail to appear at a removal hearing.⁵¹

In addition, the removal process for detainees is much faster than that for nondetained individuals because immigration courts manage their limited resources and the high costs of detention by

47 MPI analysis of data from DHS and DOJ, *Budgets-in-Brief*, various years. Immigration enforcement appropriations are defined to include CBP, ICE, and US-VISIT appropriations (since 2003) and related INS budget lines (prior to 2003). Also see Meissner, Kerwin, Chishti, and Bergeron, *Immigration Enforcement in the United States: The Rise of a Formidable Machinery*, 103. In March 2013, US-VISIT was replaced with the Office of Biometric Identity Management (OBIM), housed within DHS's National Protection and Programs Directorate.

48 TRAC, "Immigration Court Backlog Tool."

49 Ibid. This number represents the amount of time that people who are currently in the immigration backlog *have waited*, and it includes data for both the detained and nondetained dockets; the number does not account for how much longer individuals may *need to wait* before their cases are actually resolved.

50 Detention beds have roughly kept pace with removals since 2003, with funded detention space increasing from 19,444 beds in fiscal year (FY) 2003 (9 percent of 211,098 removals that year) to 34,000 in FY 2012 (8 percent of 419,384 removals that year). Alison Siskin, *Immigration-Related Detention: Current Legislative Issues* (Washington, DC: Congressional Research Service, 2012), http://digitalcommons.ilr.cornell.edu/key_workplace/882/.

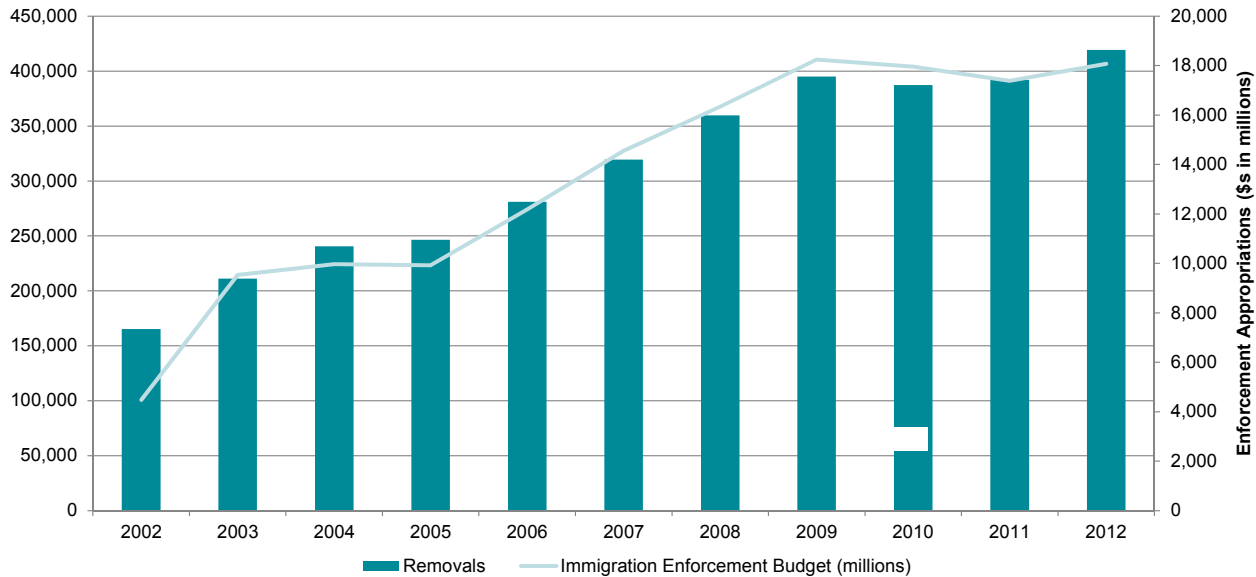
51 During FY 2013 (the latest data available), 15 percent of all decisions rendered by immigration judges involved noncitizens who failed to appear at a removal hearing. The failure to appear rate was somewhat higher (23 percent) for noncitizens who had never been detained, and higher still (32 percent) for noncitizens who were detained at some point and then released on bond. The total failure to appear rate for all nondetained noncitizens (those who were never detained and those who were detained and then released on bond) was 26 percent. See EOIR, *FY 2012 Statistics Yearbook* (Falls Church, VA: DOJ, EOIR, 2013), P-1-P-4, www.justice.gov/eoir/statspub/fy13syb.pdf.



maintaining separate dockets for detained and nondetained individuals. While overall wait times for immigration hearings are often a year or more, people who are detained during removal proceedings may be scheduled for a hearing within a few weeks.⁵²

Overall, then, rising removal numbers are closely related to funding allocations, which increased substantially after 9/11. This relationship is illustrated in Figure 1, which shows that DHS's enforcement budget (defined here as total appropriations to CBP, ICE, and US-VISIT) is highly correlated with total removals.

Figure 1. Immigration Enforcement Appropriations and Removals, FY 2002-12



Notes: Appropriations include total appropriations to U.S. Customs and Border Protection (CBP), U.S. Immigration and Customs Enforcement (ICE), and US-VISIT. The 2002 budget estimate is based on prior Migration Policy Institute (MPI) analysis of U.S. Immigration and Naturalization Service (INS) appropriations that were directly targeted to immigration enforcement or border control activities.

Sources: MPI analysis of Department of Homeland Security (DHS) *Budgets-in-Brief* for fiscal years 2005-14, www.dhs.gov/dhs-budget; David Dixon and Julia Gelatt, *Immigration Enforcement Spending Since IRCA* (Washington, DC: MPI 2005), www.migrationpolicy.org/research/immigration-enforcement-spending-irca; ICE, "Fact Sheet: US-VISIT Program" (Washington, DC: ICE, 2003), www.ice.gov/news/library/factsheets/us-visit.htm.

IV. Deportation Drivers: Executive-Branch Implementation and Key Enforcement Trends

The streamlined enforcement authority conferred under IIRIRA and the build-up of enforcement resources in the post-9/11 era have boosted the performance of the immigration enforcement system by unprecedented orders of magnitude. The system's output has been further shaped by policy and implementation decisions made by the executive-branch agencies charged with administering the nation's immigration laws, principally CBP and ICE, and their parent agency, DHS.

⁵² In its 2012 review of immigration court cases, the DOJ Office of the Inspector General (OIG) examined a sample of 1,785 immigration court cases that were closed during FY 2009. OIG found that the average amount of time that a case on the detained docket had been pending was 48 days, though cases involving applications for relief were pending for an average of 113 days. The average amount of time that a case on the nondetained docket had been pending was 526 days. DOJ, OIG, *Management of Immigration Cases and Appeals by the Executive Office for Immigration Review* (Washington, DC: Department of Justice, OIG, 2012), 28, www.justice.gov/oig/reports/2012/e1301.pdf.



Three broad trends that span the last three administrations have emerged as a result. First, while overall apprehensions at the border have fallen, the number of people formally removed from the United States has risen. Second, these increased removals have been accomplished, in large part, by relying on nonjudicial removal pipelines such as expedited removal and reinstatement of removal that are occurring throughout the system, but in particular at the border. Third, successive administrations have brought immigration-related criminal charges against increasing numbers of unauthorized immigrants apprehended at the border.

The current administration has introduced new policies designed to modify the immigration enforcement system in important ways. The Obama administration continues to set records for immigrant removals and for immigration-related criminal charges. But it also has established enforcement priorities to focus enforcement efforts on certain high-priority categories of noncitizens and has issued guidance regarding the exercise of discretion to *forego* deportation of others who do not represent high-priority cases. These changes have resulted in significantly different enforcement systems at the border and within the United States.

Box 2. Data

Except as otherwise indicated, all enforcement data discussed in this report come from DHS's Office of Immigration Statistics (OIS), rather than the data released individually by CBP and ICE.

OIS data serve as the official record-keeping of immigration enforcement activity. OIS measures and reports on key enforcement indicators (including apprehensions, returns, and removals) using the same definitions and methodology employed by the legacy Immigration and Naturalization Service (INS) beginning in the 1920s. Thus, OIS data allow for meaningful "apples-to-apples" comparisons over time. The disadvantage of OIS data is that OIS has yet to publish FY 2013 enforcement statistics and generally provides less detailed information about immigration enforcement than was the case under the INS.

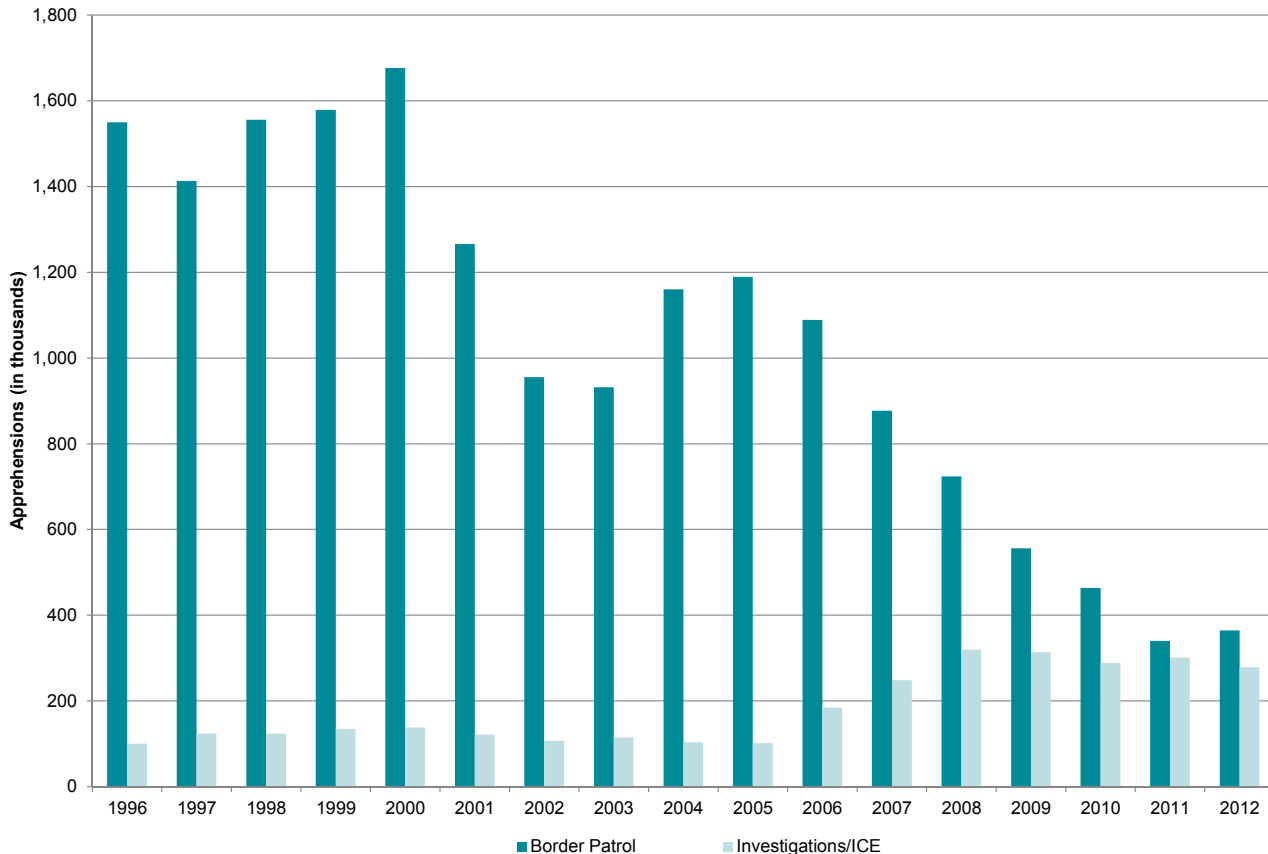
A. Rising Removals as Apprehensions Decline

Immigration enforcement begins with "alien apprehensions." Apprehensions made at the U.S.-Mexico border by CBP Border Patrol agents account for the most common way that people enter the deportation system. Noncitizens also may be apprehended by CBP officers at ports of entry (e.g., people being smuggled into the United States in a vehicle or attempting to enter with a fraudulent document). Finally, apprehensions take place within the United States (e.g., when unauthorized immigrants are identified in jails or prisons), typically falling under the jurisdiction of ICE, a separate agency within DHS.

Apprehensions made at the U.S.-Mexico border...account for the most common way that people enter the deportation system.



Figure 2. Border and Interior Apprehensions, FY 1996-2012



Notes: Investigations/ICE data are for INS Office of Investigations FY 1996-2002, for ICE Homeland Security Investigations (HSI) and Detention and Removal Office FY 2003-08, and for HSI and ICE Enforcement and Removal Office FY 2009-12. Data for 2006-07 also include administrative arrests by ICE's Criminal Alien Program (CAP), published in ICE's *Fiscal Year 2008 Annual Report*, but not included in DHS *Statistical Yearbook* data for those years. *Source:* MPI analysis of INS and DHS *Yearbook of Immigration Statistics*, various years, www.dhs.gov/yearbook-immigration-statistics; ICE, *Fiscal Year 2008 Annual Report*, <http://cdm16064.contentdm.oclc.org/cdm/ref/collection/p266901coll4/id/2170>.

Figure 2, which depicts border and interior apprehensions since 1996, reveals three notable trends. First, total apprehensions have fallen by almost two-thirds from their peak of 1.8 million in 2000. Apprehensions fell sharply after the September 11, 2001 terrorist attacks, rebounded somewhat between FY 2004-06, and then dropped by an average of about 13 percent per year between FY 2007-11 before flattening out in 2012.⁵³ The beginning of the most recent downward trend corresponds with major new investments at the border following passage of the *Secure Fence Act of 2006*, the collapse of comprehensive immigration reform legislation, and the onset of the Great Recession in late 2007.

Total apprehensions have fallen by almost two-thirds from their peak of 1.8 million in 2000.

Second, the drop in total apprehensions has been driven entirely by falling Border Patrol numbers, which plunged 80 percent from their high of 1.7 million in FY 2000 to a 40-year low of 340,000 in FY 2011, before rebounding somewhat to 365,000 in FY 2012. Border Patrol data indicate a further increase in

⁵³ Border apprehensions increased in FY 2013, likely resulting in higher apprehensions overall; interior apprehensions data from the DHS Office of Immigration Statistics (OIS) were not available at this report's publication.



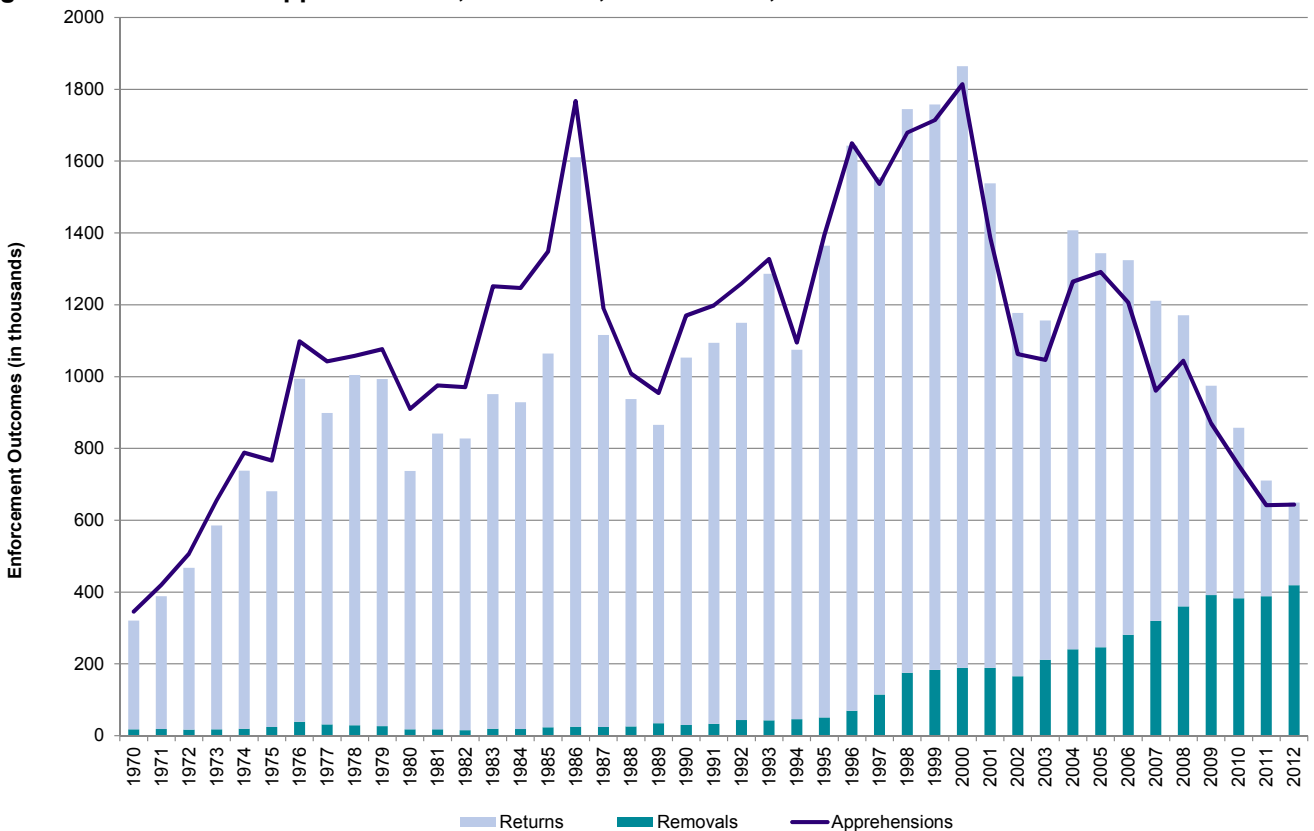
border apprehensions to 421,000 in FY 2013.⁵⁴

Third, conversely, while there were an average 117,000 interior apprehensions annually between FY 1996-2005 with very little variation, ICE’s arrests tripled between FY 2005-08 to an all-time high of 320,000 in FY 2008. Interior apprehensions dropped to 279,000 in FY 2012, but remain more than double their annual average for FY 1996-2005.

In general, long-term fluctuations in total deportations are linked to changes in the number of apprehensions, particularly since 1996.

Figure 3 depicts the disposition of border and interior apprehensions—via informal returns (voluntary departures and returns) and formal removals (including judicial and nonjudicial removals). Taken together, the sum of returns and removals represents *total deportations* of those who are unauthorized and removable, i.e. the number of individuals forcibly repatriated.

Figure 3. INS and DHS Apprehensions, Removals, and Returns, FY 1970-2012



Note: The line represents a trend line of total apprehensions.

Source: MPI analysis of data from the DHS 2012 Yearbook of Immigration Statistics (Washington, DC: DHS, 2013), www.dhs.gov/yearbook-immigration-statistics.

⁵⁴ The rise in Southwest border apprehensions in FY 2012-13 is driven almost entirely by rising apprehensions in the Rio Grande Valley sector in South Texas, where apprehensions increased from 59,000 in FY 2011 to 154,000 in FY 2013 (an increase of 95,000 apprehensions—as compared to an overall decrease of 8,000 for the other nine border sectors combined). Surging numbers in South Texas appear to be driven by stronger push factors and smuggling networks in Guatemala, El Salvador, and Honduras that represent a new challenge for CBP.

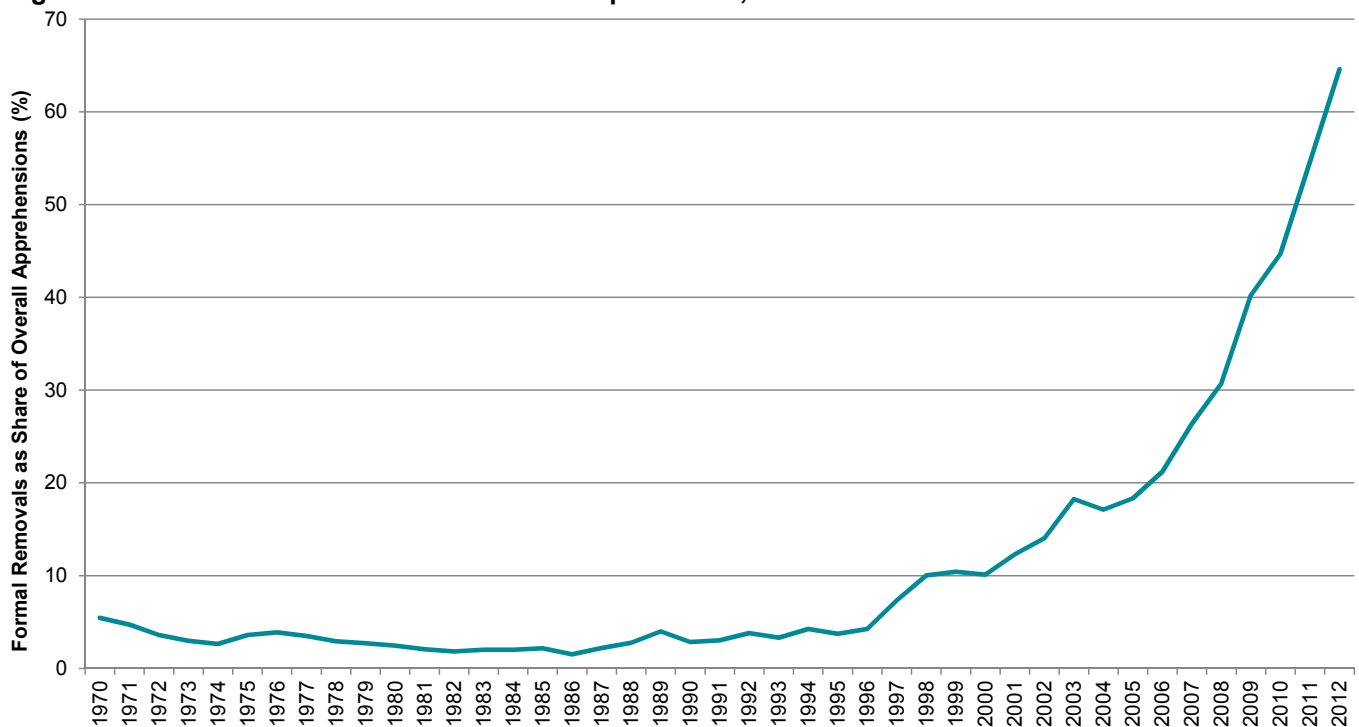


As Figure 3 shows, in general, long-term fluctuations in total deportations are linked to changes in the number of apprehensions, particularly since 1996. In addition, IIRIRA initiated a fundamental shift from a repatriation system that focused overwhelmingly on informal returns to one that emphasizes formal removals. Since 1996, formal removals have increased in 14 out of 16 years—even as total apprehensions have fallen sharply.

This shift is important because people who are formally removed, rather than being informally returned, are ineligible for a visa to return to the United States and may be subject to a rapid reinstatement of removal (making them ineligible for most forms of humanitarian relief) and/or criminal charges if they are apprehended in the future.

Figure 4 provides a further illustration of this transformation by depicting formal removals as a proportion of total deportations (i.e., removals plus returns), or the *formal removal rate*. As Figure 4 illustrates, formal removals averaged 3 percent of total deportations in FY 1970-96, and never exceeded 5 percent (because the great majority of people apprehended were permitted to informally return to their countries of origin). The formal removal rate doubled to an average of 11 percent in FY 1998-2002; jumped again to 19 percent in FY 2003-06; and rose sharply beginning in FY 2006, reaching a high of 65 percent in FY 2012.

Figure 4. Formal Removals as Share of Total Deportations, FY 1970-2012



Source: MPI analysis of data from DHS, *2012 Yearbook of Immigration Statistics*.

Thus, today's deportation system has been transformed from one that had relied overwhelmingly on informal returns to one that mainly emphasizes formal removal. These formal processes can have substantial downstream costs and consequences for both the enforcement agencies administering them and for the individuals who are repatriated. To the extent that increased use of formal removal was a primary goal of the 1996 law, it has succeeded.

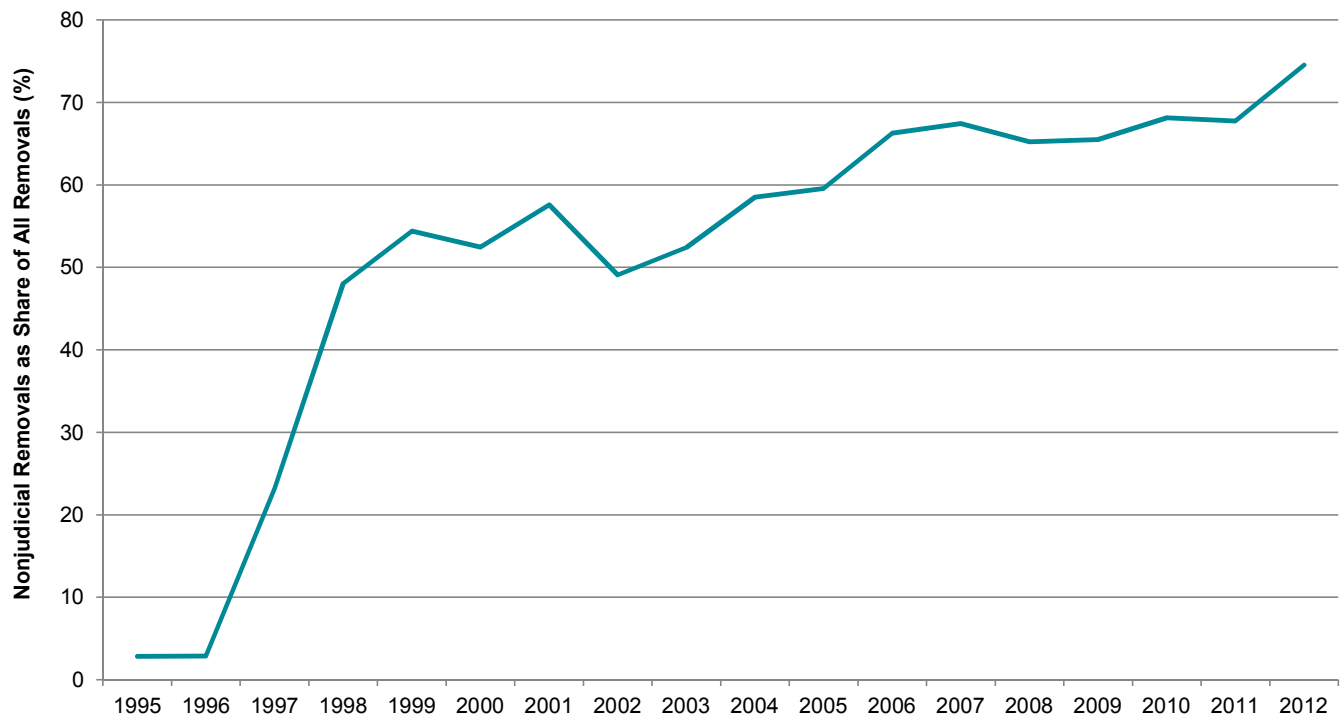


B. The Expansion of Nonjudicial Removal Pipelines

The rise in formal removals since 1996 reflects aggressive deployment by INS and later DHS of new authorities, created or augmented by IIRIRA, to conduct nonjudicial removals. These removal pipelines offer streamlined enforcement proceedings compared with judicial removal proceedings. Policies that advance the use of these procedures have been an important factor explaining the rise in formal removals.

As Figure 5 illustrates, nonjudicial removals represented 3 percent of all formal removals (then known as “deportations”) prior to IIRIRA, and jumped to 48 percent by FY 1998. Apart from a brief downturn in FY 2002-03 as DHS became operational, nonjudicial removals have increased steadily since that time, reaching an all-time high of 75 percent in 2012.

Figure 5. Nonjudicial Removals as Share of All Removals, FY 1995-2012



Notes: Nonjudicial removals include expedited removals, reinstatements of removal, and stipulated removals. Stipulated removal orders are signed by an immigration judge, but typically do not involve a removal hearing.

Sources: MPI analysis of calculations from DHS, Office of Immigration Statistics, *Immigration Enforcement Actions* reports for FY 2010-12 (Washington, DC: DHS, various years), www.dhs.gov/yearbook-immigration-statistics; Jayashri Srikantiah and Karen Tumlin, “Backgrounder: Stipulated Removal” (Stanford, CA: Stanford Immigrants’ Rights Clinic, 2008), www.law.stanford.edu/sites/default/files/child-page/163220/doc/sispublic/Stipulated_removal_background.pdf; Jennifer Lee Koh, Jayashri Srikantiah, and Karen C. Tumlin, *Deportation Without Due Process* (Washington, DC: National Immigration Law Center, 2011), <http://nilc.org/document.html?id=6>; Lenni B. Benson and Russell R. Wheeler, *Enhancing Quality and Timeliness in Immigration Removal Adjudication*, draft report (Washington, DC: Administrative Conference of the United States, 2012), www.acus.gov/sites/default/files/documents/Enhancing-Quality-and-Timeliness-in-Immigration-Removal-Adjudication-Final-June-72012.pdf.

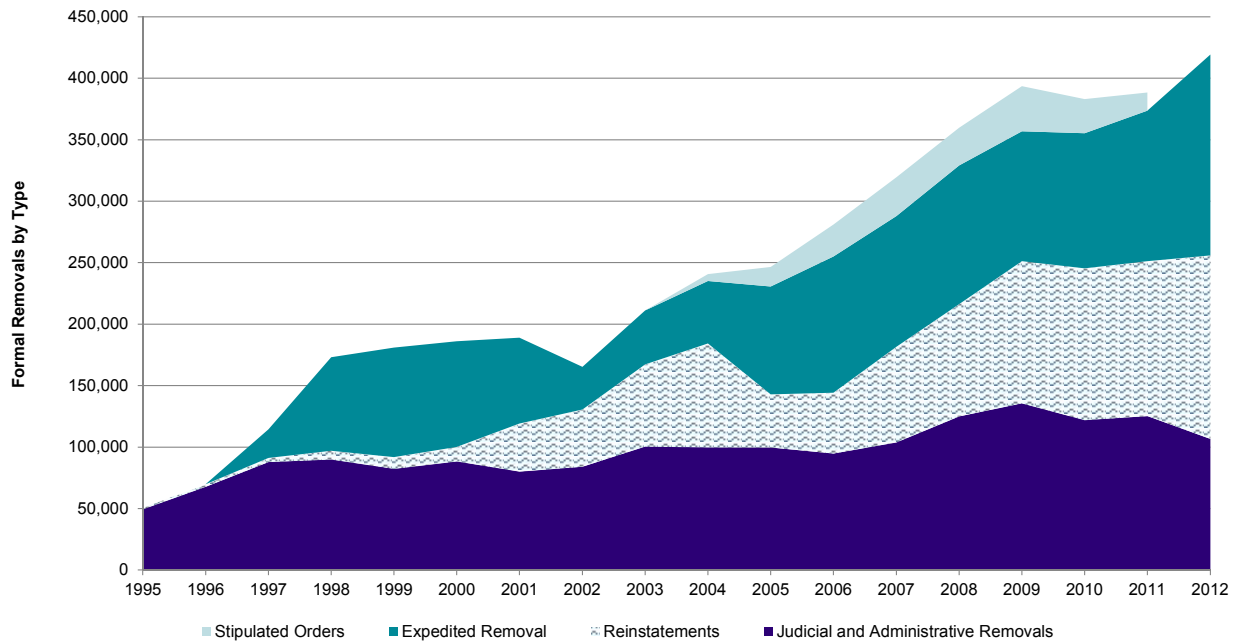
Figure 6 depicts total (i.e., judicial and nonjudicial) formal removals for FY 1995-2012, divided into the four primary removal pipelines: judicial removals, expedited removals, reinstatements of removal, and stipulated removals. Total removals (i.e., all four bands combined) increased from about 51,000 in FY 1995 to approximately 419,000 in FY 2012—an eightfold increase. About 16 percent of this growth came through increased judicial removals (and a small number of nonjudicial removals of aggravated felons), depicted in the bottom band in the figure, which doubled from about 49,000 in FY 1995 to about 107,000 in FY 2012.⁵⁵

⁵⁵ Data on administrative removals of aggravated felons under INA §238(b) are not available, but reportedly number fewer than a few thousand per year, so most of the bottom band in Figure 6 consists of standard judicial removals.



About 84 percent of the growth in total removals resulted from the nonjudicial removals and stipulated removals (the top three bands), which together increased from about 1,400 removals in FY 1995 to about 313,000 in FY 2012.

Figure 6. Formal Removals, by Type, FY 1995-2012



Notes: Separate stipulated removal data are not available for 1995-2000 or 2012; stipulated removals are included in the “judicial and administrative removals” category for those years.

Sources: MPI calculations from DHS, OIS, *Immigration Enforcement Actions* reports; Srikantiah and Tumlin, “Backgrounder: Stipulated Removal;” Koh, Srikantiah, and Tumlin, *Deportation Without Due Process*; and Benson and Wheeler, *Enhancing Quality and Timeliness in Immigration Removal Adjudication*.

The growth in each of these streamlined forms of removal has depended on a combination of increased legislative authority conferred by IIRIRA, enhanced appropriations, and specific policy efforts by successive administrations.

1. Expedited Removal

Expedited removal, which was created by IIRIRA, was initially applied only to those arriving at ports of entry who were inadmissible. This new authority led to an average of about 80,000 cases per year from FY 1998 through FY 2001.

In 2002 and 2004, DHS published regulatory changes that extended use of the procedure to those arriving by sea who were inadmissible as well as those entering without proper documents or inspection and apprehended within 100 miles of the land border within 14 days of illegal entry. Under the new rules, expedited removals rose to about 111,000 in FY 2006 and grew to 163,000 in FY 2012, representing 39 percent of all formal removals that year.

2. Reinstatements of Removal

Use of reinstatements of removal has also increased since 1996, and particularly in the post-9/11 period. While the INA permitted reinstatements prior to 1996, the process was nearly as complex as judicial removal proceedings. IIRIRA made it easier for immigration officers to issue such orders, and provided that previously existing orders were not subject to being reopened or reviewed (limiting an immigration judge’s authority to overturn a reinstatement). In addition, the deployment of DHS’s automated biometric



identification system (IDENT) database meant that digital fingerprint equipment became available to every CBP and ICE station and field office between 1998 and 2010. Thus, enforcement agencies developed improved capacity to identify individuals who were re-entering after previously having been ordered deported.

Expanded use of reinstatements also received a boost in 2006, when the Supreme Court in its *Fernandez-Vargas v. Gonzales* ruling affirmed DHS' authority to reinstate removal orders that had been executed prior to the enactment of IIRIRA in 1996.⁵⁶

A shift in illegal immigration patterns also may have contributed to increased use of reinstatements of removal. As the cost of crossing the border has risen sharply since 9/11, potential first-time or casual border crossers have been more easily deterred from attempting entry without authorization than long-time unauthorized immigrants with deep roots in the United States. As the latter represent a growing share of overall traffic, the pool of repeat apprehensions amenable to reinstatement thus expands.

For all of these reasons, the number of those removed under previously existing removal orders—more recently termed reinstatements of removal—increased from about 11,000 per year prior to FY 2002 to an average of about 58,000 per year in FY 2002-06. Reinstatements have particularly surged since 2006, growing by an average of 20 percent per year to 149,000 in FY 2012, when they accounted for 36 percent of all formal removals.

3. Stipulated Removals

A third trend depicted in Figure 6 is an uptick in stipulated orders of removal between 2004 and 2009. Stipulated orders had occasionally been issued prior to 1996 when those with legal counsel negotiated agreements with INS, subject to judicial approval, to expedite an individual's deportation in lieu of a formal hearing. The procedure was explicitly authorized by IIRIRA, and INS/EOIR regulations expanded the program to include certain noncitizens without legal counsel. But it was rarely used before 2004.⁵⁷

The predominant removal measures that explain the shift from informal returns to formal removals are expedited removal and reinstatement of removal.

The use of such orders surged between 2004 and 2008, apparently as a result of a series of ICE, DHS, and local ICE field office directives instructing “officers to maximize the use of stipulated removal in connection with efforts to enhance efficiency in the removal process” and to boost formal removal numbers.⁵⁸ The numbers jumped from one order in FY 2003, and 5,491 in FY 2004, to an average of 31,000 in FY 2006-09. Stipulated orders declined beginning in FY 2010 and fell to about 15,000 in FY 2011, the last year for which data are available.⁵⁹

Thus, the predominant removal measures that explain the shift from informal returns to formal removals are expedited removal and reinstatement of removal—procedures that generally do not permit an individual to petition an immigration judge for relief. Together they accounted for 75 percent

⁵⁶ 548 U.S. 30 (2006).

⁵⁷ Jennifer Koh, “Waiving Due Process (Goodbye): Stipulated Orders of Removal and the Crisis in Immigration Adjudication,” *North Carolina Law Review* 91, 2013: 475-548 and 503-10. The first data on stipulated orders of removal are from 1999, when one such order was issued; a total of five additional orders were issued in 2000-03; see Jayashri Srikantiah and Karen Tumlin, “Backgrounder: Stipulated Removal” (Stanford, CA: Stanford Immigrants’ Rights Clinic, 2008), www.law.stanford.edu/sites/default/files/child-page/163220/doc/slspublic/Stipulated_removal_backgrounder.pdf.

⁵⁸ Koh, “Waiving Due Process (Goodbye).”

⁵⁹ See Figure 6 for sources.



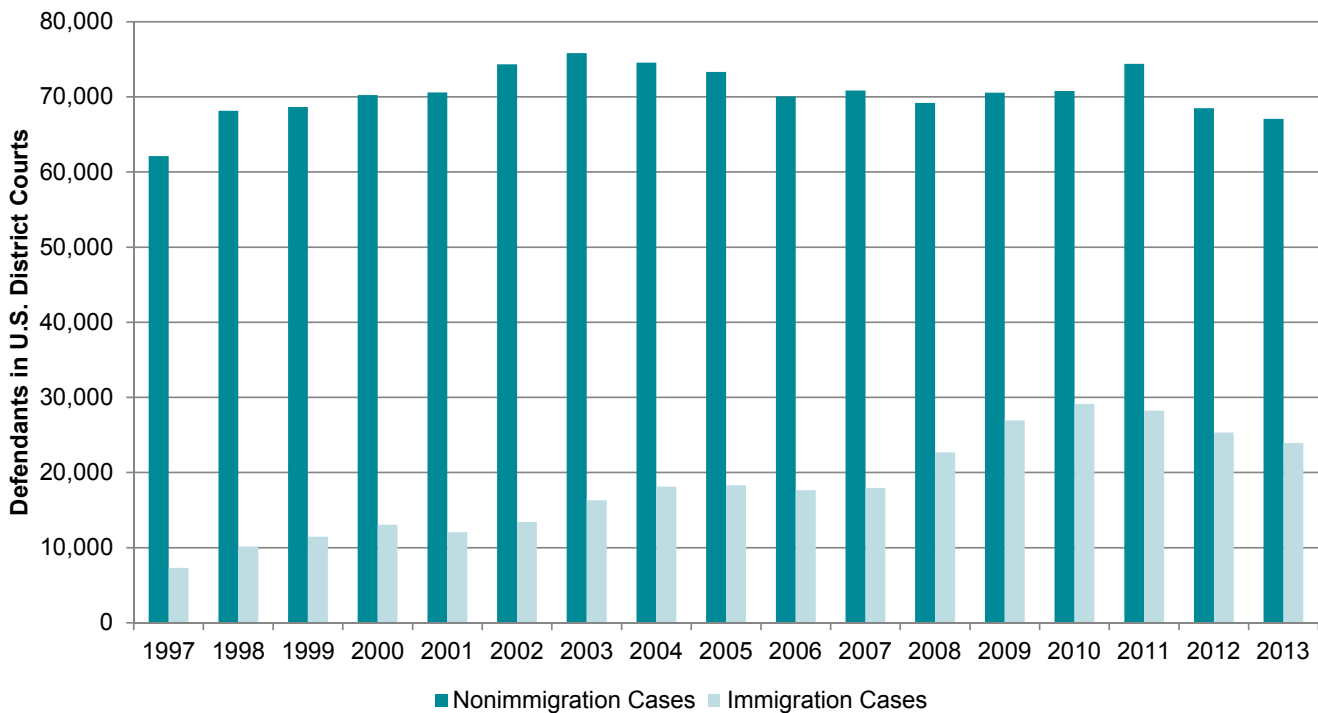
of all removals in FY 2012—the highest proportion ever. By comparison, nonjudicial forms of removal accounted for just 3 percent of all removals in FY 1995 and FY 1996, as almost all formal removals resulted from judicial hearings.

C. The Intersection of Immigration Enforcement with the Federal Criminal Justice System

A further trend since 1996 has been a sharp increase in prosecutions for immigration-related criminal offenses—mainly consisting of illegal entry and illegal re-entry charges against noncitizens apprehended at the Southwest border. Growth in the number of immigration-related criminal cases in the federal court system also reflects aggressive enforcement by successive administrations, in this case reflecting INS/DHS agency practices, as well as federal prosecution priorities within the Department of Justice (DOJ).

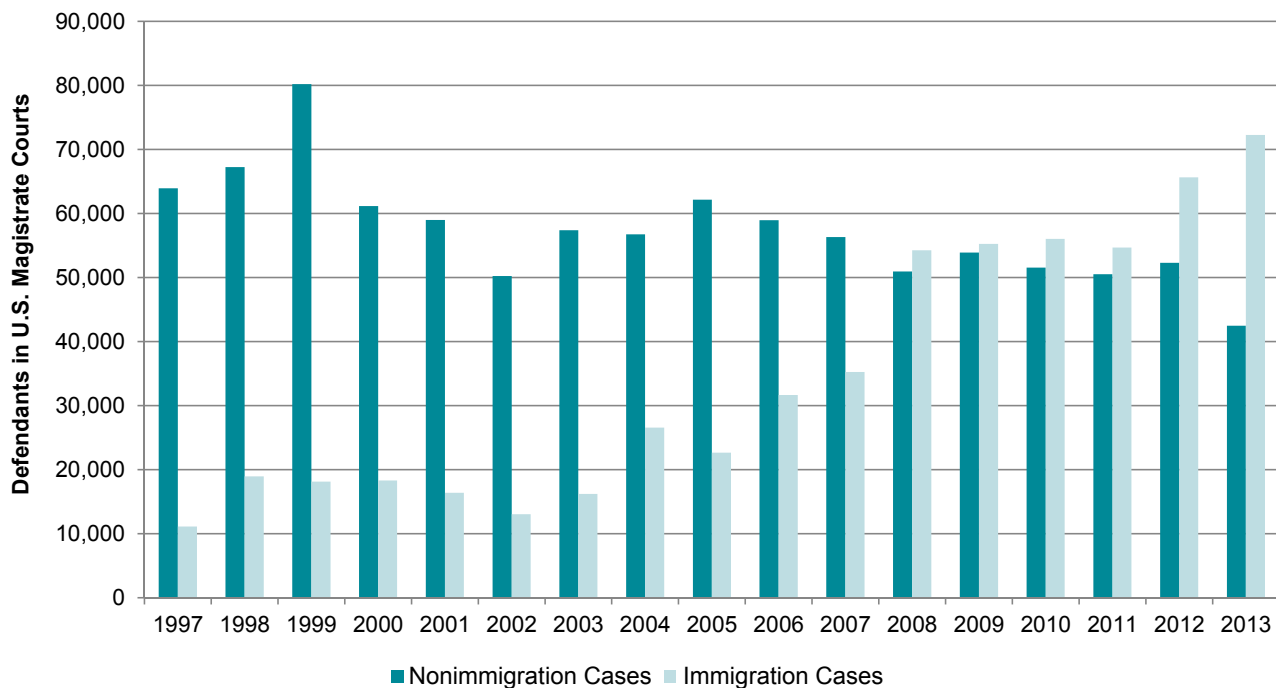
Rising immigration-related charges have had significant impacts on the federal court system. Figures 7 and 8 illustrate the growth in immigration-related cases adjudicated in the post-IIRIRA period. At the district court level (see Figure 7), defendants facing immigration-related charges increased from 11 percent of total defendants (7,328 of 69,437) in FY 1997 to 26 percent of total defendants (23,942 of 90,992) in FY 2013. Seen another way, the total number of defendants before federal district courts increased by 21,555 between FY1997-2013; immigration-related cases accounted for 77 percent of this growth.

Figure 7. Immigration and Nonimmigration Cases in U.S. District Courts, FY 1997-2013



Source: MPI calculations from United States Courts, “Judicial Business of the United States Courts,” detailed statistical appendices, FY 1997-2013, www.uscourts.gov/Statistics/JudicialBusiness/2013.aspx.

The pattern is even more dramatic at the magistrate court level, as illustrated in Figure 8. For magistrate courts, which handle most illegal entry and illegal re-entry cases, immigration cases rose from 15 percent of all cases (11,145 of 75,080) in FY 1997 to 63 percent (72,278 of 114,771) in FY 2013. Nonimmigration cases in federal magistrate courts *declined* 33 percent during this period, meaning that immigration cases accounted for 154 percent of the growth in magistrate cases.

Figure 8. Immigration and Nonimmigration Cases in U.S. Magistrate Courts, FY 1997-2013

Source: MPI calculations from United States Courts, “Judicial Business of the United States Courts,” detailed statistical appendices, FY 1997-2013.

Many of these magistrate court cases have been prosecuted through Operation Streamline, a program launched by DHS and DOJ to deter repeat border crossers by charging more unauthorized entrants with the criminal offenses of illegal entry, a federal misdemeanor, and illegal re-entry, a felony. Under the program, now operating in most of the nine Southwest border sectors, hundreds of noncitizens caught crossing the border each day are charged with federal immigration crimes. Virtually all Operation Streamline defendants accept a guilty plea, and most receive prison sentences ranging from time served to six months (for misdemeanor illegal entry cases) to between two and 20 years in prison (for illegal re-entry offenses).

Immigrant advocates have criticized Operation Streamline for its high cost, and for its reliance on an especially swift judicial process in which defense attorneys have scant time to prepare clients for court, as multiple defendants enter pleas in the same hearing.⁶⁰ Proponents point to evidence that Operation Streamline deters noncitizens from repeatedly crossing the border illegally. For example, noncitizens charged through Operation Streamline in FY 2013 had a recidivism rate of 9.3 percent, compared with 28.5 percent for those who departed the country through voluntary return.⁶¹

The growth in criminal immigration cases has been driven by border prosecutions, and such cases increasingly dominate overall federal court caseloads. As Figure 9 illustrates, the total number of immigration cases (district and magistrate courts) in the five border judicial districts⁶² have increased

⁶⁰ There is marked variance in how Operation Streamline proceedings are administered across magistrate courts along the Southern border, with respect to the number of defendants per hearing, who is placed in the program, how court proceedings are structured, and sentencing outcomes. For example, Operation Streamline in Tucson tries approximately 70 defendants per day; they are called up before the judge ten at a time, advised of their rights en masse, and asked if they understand their rights and give pleas individually (pleas were taken en masse before a 9th U.S. Circuit Court of Appeals ruling in 2009 striking down the practice). In Las Cruces, New Mexico, Operation Streamline hearings process approximately 45 defendants per day, with five to seven called up a time. While Operation Streamline defendants in some courts are persistent crossers or criminal aliens, in other courts, defendants are placed into the program because they were apprehended in a specific geographical area.

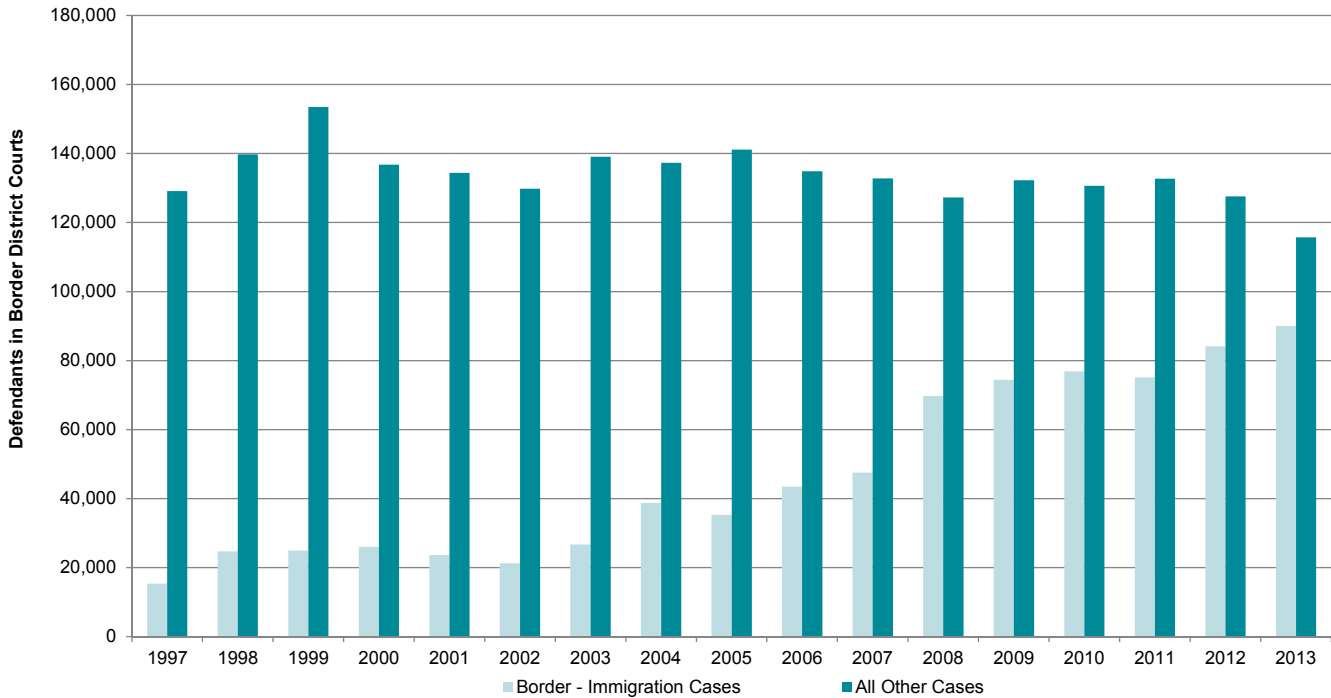
⁶¹ MPI analysis of data provided by CBP; see Table 2 in this report. Also see Fernanda Santos, “Detainees Sentenced in Seconds in ‘Streamline’ Justice at the Border,” *The New York Times*, February 11, 2014, www.nytimes.com/2014/02/12/us/split-second-justice-as-us-cracks-down-on-border-crossers.html?_r=0.

⁶² The five judicial districts along the Southwest border are Southern California, Arizona, New Mexico, West Texas, and South Texas.



sixfold since FY 1997, from 15,392 cases to 90,067. By comparison, the caseload for all other districts and types of crimes (i.e., nonimmigration crimes along the border, plus the entire caseload in the country's remaining 95 judicial districts) is *down* 10 percent, from 129,125 cases in FY 1997 to 115,696 in FY 2013.

Figure 9. Federal Immigration Cases in Border Districts and All Other Cases, FY 1997-2013

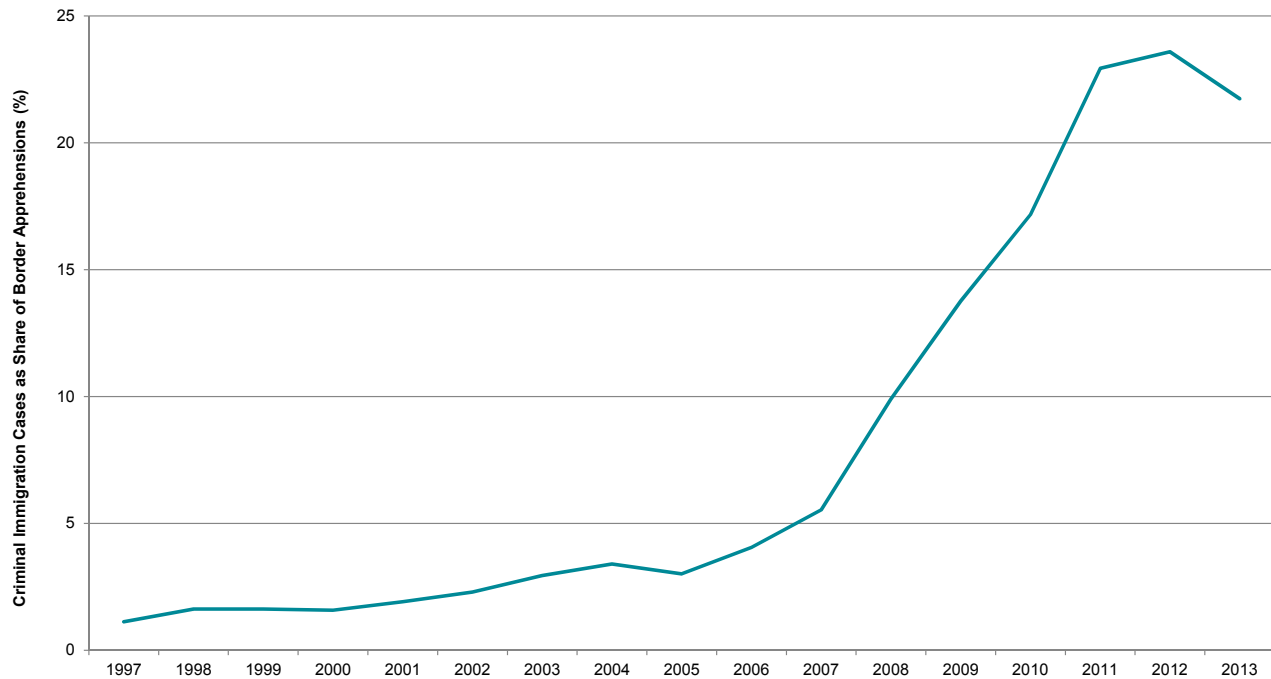


Source: MPI calculations from United States Courts, "Judicial Business of the United States Courts," detailed statistical appendices, FY 1997-2013.

This growth in immigration prosecutions at the border comes at a time of falling border apprehensions, as described above. Thus, as Figure 10 illustrates, the proportion of people apprehended at the Southwest border who are subject to criminal charges increased from 1 percent in 1997 to 24 percent in 2012, before declining somewhat to 22 percent in 2013.

The growth in criminal immigration cases has been driven by border prosecutions, and such cases increasingly dominate overall federal court caseloads.

Figure 10. Criminal Immigration Cases in Border Districts as Share of Border Apprehensions, FY 1997-2013



Source: MPI calculation from DHS, *Yearbook of Immigration Statistics*, various years; and United States Courts, “Judicial Business of the United States Courts,” detailed statistical appendices, FY 1997-2013.

D. Continuity and Change: Enforcement Priorities and Prosecutorial Discretion

The current administration inherited an enforcement machinery that has generated unprecedented levels of removals through aggressive use of a streamlined framework for formal removals, dramatic increases in front-line enforcement resources, and a federal court system increasingly driven by the prosecution of immigration-related crimes. To this machinery, the Obama administration introduced a new element: the exercise of prosecutorial discretion to establish explicit immigration enforcement priorities and determine low-priority cases for which DHS would not seek removal. Prosecutorial discretion refers to the authority of a law enforcement agency “to decide to what degree to enforce the law against a particular individual.”⁶³

One of the administration’s first assertions of prosecutorial discretion was to shift the focus of worksite enforcement operations. On April 30, 2009, ICE announced a new worksite enforcement strategy that would focus its resources primarily on employers that hired unauthorized workers, rather than on the workers themselves.⁶⁴ This marked a notable departure from prior policies, under which ICE had implemented large-scale worksite enforcement operations that resulted in the apprehension of thousands of unauthorized workers.

Beginning in August 2010, ICE issued additional memoranda outlining its policies for immigration enforcement. (See Appendix 2 for the complete list of 2010-14 memos.) In March 2011, then-ICE Assistant Secretary John Morton issued a memo on civil immigration enforcement priorities, identifying

⁶³ Memo from ICE Director John Morton to all ICE field office directors, special agents in charge, and chief counsel, “Exercising Prosecutorial Discretion Consistent with Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens” (memo, June 17, 2011), www.ice.gov/doclib/foia/prosecutorial-discretion/pd_cnstnt_w_civil_imm_enforce_ice_priorities.pdf.

⁶⁴ DHS, “Fact Sheet: Transforming the Immigration Enforcement System,” (fact sheet, June 15, 2012), www.dhs.gov/news/2012/06/15/fact-sheet-transforming-immigration-enforcement-system.



three categories of removable people to be targeted for immigration enforcement:⁶⁵

- those who pose a danger to national security or a risk to public safety, including having been convicted of a crime;
- recent illegal entrants, including recent border crossers; and
- persons who “obstruct immigration controls,” including fugitives, those who re-enter illegally after removal, and individuals who engage in visa fraud.

In June 2011, ICE issued follow-up guidance identifying factors ICE officers should consider when exercising prosecutorial discretion during immigration enforcement activities. They included characteristics such as long length of residence, prior military service, education in the United States, and having a close family member who was a U.S. citizen or lawful permanent resident.⁶⁶ In an August 18, 2011 letter to Senator Richard Durbin (D-IL), then-Homeland Security Secretary Janet Napolitano wrote that the prosecutorial discretion enforcement priorities and policies would apply to all DHS enforcement agencies, and that the policies also had the support of the president.⁶⁷

The letter also stated that as part of implementing the prosecutorial discretion guidance, DHS would review all cases pending before immigration courts. ICE guidance formally implementing this review process followed three months later.⁶⁸ Under the review, ICE agreed to “administratively close” cases that merited discretion—meaning that the case would not move forward in immigration court, and the person would not be ordered removed.⁶⁹

ICE reviewed nearly 400,000 cases during a ten-month period beginning in November 2011. Agency data released in July 2012 reflected that as of June 30, 2012, ICE had reviewed more than 356,000 cases, and had found 22,980 cases (6.44 percent) that met its criteria for consideration under the prosecutorial discretion criteria.⁷⁰ The number of cases administratively closed, however, was far lower: 7,180 (2 percent) of cases reviewed.⁷¹

A further, broad initiative was announced in June 2012. Named the Deferred Action for Childhood Arrivals (DACA) program, the initiative grants protection from deportation, in the form of deferred action and work authorization, to certain young unauthorized immigrants who came to the United States before the age of 16, have continually resided in the country since 2007, are pursuing an education or were honorably discharged from the military, and do not have a serious criminal history or pose threats to national security or public safety. DACA beneficiaries are protected for a period of two years and can reapply for renewal beginning in September 2014.⁷²

65 Memo from ICE Director John Morton to all ICE employees, “Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens” (memo, March 2, 2011), www.ice.gov/doclib/foia/prosecutorial-discretion/civil-imm-enforcement-priorities_app-detn-reml-aliens.pdf.

66 Morton, “Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities.”

67 Letter from Homeland Security Secretary Janet Napolitano to Senator Richard Durbin (D-IL), August 18, 2011, <http://shusterman.com/pdf/napolitanoletter81811.pdf>.

68 Memo from Peter S. Vincent, ICE Principal Legal Advisor, to all ICE chief counsel and the Office of the Principal Legal Advisor, “Case-by-Case Review of Incoming and Certain Pending Cases,” (memo, November 17, 2011), www.ice.gov/doclib/foia/prosecutorial-discretion/case-by-case-review-incoming-certain-pending-cases-memorandum.pdf.

69 Ibid.

70 Paloma Esquivel, “Deportation Case Closures Rise, but Backlog Continues,” *Los Angeles Times*, July 25, 2012, <http://latimesblogs.latimes.com/lanow/2012/07/deportation-cases-closed.html>.

71 Ibid. One reason for this disparity is that an individual identified by ICE as a good candidate for discretion may not want to have his or her case closed, mainly because proceeding with the case may result in an immigration judge granting the person relief from removal and formal immigration status. Though ICE’s centralized case-by-case review process has ended, the agency’s trial attorneys continue to identify cases that meet the prosecutorial discretion criteria and that may be eligible for administrative closure; see TRAC, “Once Intended to Reduce Immigration Court Backlog, Prosecutorial Discretion Closures Continue Unabated,” January 15, 2014, <http://trac.syr.edu/immigration/reports/339/>.

72 U.S. Citizenship and Immigration Services (USCIS), “Consideration of Deferred Action for Childhood Arrivals Process,” updated April 9, 2014, www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-process.



U.S. Citizenship and Immigration Services (USCIS) began implementing DACA in August 2012 and issued its first grants of deferred action and work authorization one month later. As of December 31, 2013, a total of 638,054 applications had been submitted, and of the 610,694 cases accepted for adjudication, 521,815 were approved and 15,968 denied.⁷³ MPI estimates that 1.9 million unauthorized youth are potentially eligible for DACA, of whom 57 percent, or 1.09 million, currently meet the program’s age and educational criteria; 22 percent (423,000) could become eligible in the future if they enroll in certain education programs; and 21 percent (392,000) are children under 15 who could become eligible in the future.⁷⁴

E. The Effects of Enforcement Priorities and Prosecutorial Discretion on the Deportation System

The implementation of the current administration’s enforcement priorities and its exercise of prosecutorial discretion differ sharply at U.S. borders and within the United States. At the border, where CBP is the lead enforcement agency, the agency confronts declining apprehensions (i.e. a smaller pool of enforcement targets), and places a *larger* share of those it apprehends in formal removal proceedings and/or brings criminal charges against them.

In the interior, where ICE is the lead enforcement agency, these trends are reversed. With its enhanced capacity to identify those who are subject to removal (i.e. a larger pool of enforcement targets), ICE has set priorities to guide its enforcement practices, resulting in the repatriation of a *smaller* share of the potential enforcement pool. Overall, these policies have reshaped the deportation system in important ways.

The implementation of the current administration’s enforcement priorities and its exercise of prosecutorial discretion differ sharply at U.S. borders and within the United States.

I. Border Enforcement and CBP Operations

Historically the great majority of deportations consisted of informal voluntary departures and voluntary returns. Between FY 1986 and FY 2004, such returns accounted for about 93 percent of total repatriations.⁷⁵ This pattern was particularly pronounced with respect to Border Patrol enforcement at U.S. land borders.

In 2005, CBP began increasing the consequences for those it apprehended in order to strengthen deterrence against repeat crossing attempts, disrupt established smuggling networks, and raise the cost of illegal entry. Since 2005, the Border Patrol has increasingly limited the number of people who are informally returned, and increased the proportion subject to formal removal (primarily nonjudicial removal), criminal prosecution, and/or “remote repatriation,” under which Mexican citizens may be deported laterally along the border from locations other than the port of entry closest to where they were apprehended, or interior repatriation, by which they are returned deep into Mexico’s interior via plane or

73 USCIS, “Number of I-821D Consideration of Deferred Action for Childhood Arrivals by Fiscal Year, Quarter, Intake, Biometrics and Case Status: 2012-2014 First Quarter, February 6, 2014,” www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/DACA/DACA-06-02-14.pdf.

74 Jeanne Batalova, Sarah Hooker, and Randy Capps with James D. Bachmeier and Erin Cox, *Deferred Action for Childhood Arrivals at the One Year Mark: A Profile of Currently Eligible Youth and Applicants* (Washington, DC: Migration Policy Institute, 2013), www.migrationpolicy.org/research/deferred-action-childhood-arrivals-one-year-mark-profile-currently-eligible-youth-and.

75 MPI calculations of data in DHS, *2012 Yearbook of Immigration Statistics*.

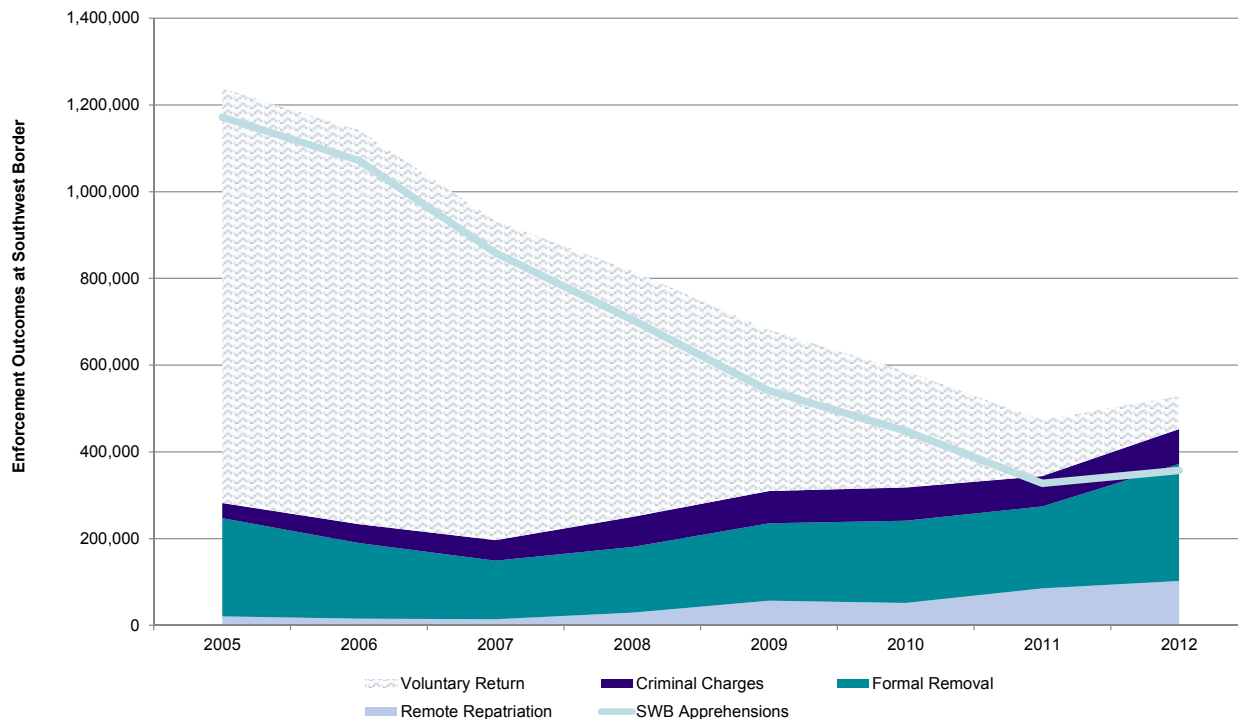


bus. The agency's goal is to discourage recidivism by replacing more lenient consequences with tougher consequences that act as a stronger deterrent against recidivism (i.e., to discourage migrants from re-entering following deportation and to break their bond with smugglers).

As Figure 11 shows, CBP apprehensions at the Southwest border have declined since 2005, while the agency has *expanded* the numbers of people subject to one or more high-consequence enforcement measures. Accordingly, sharp reductions have occurred in the number subject to voluntary return (the lowest consequence on the effectiveness scale). Whereas 82 percent (956,470 of 1,171,428) of those apprehended at the Southwest border were informally returned in FY 2005, only 21 percent (76,664 of 356,873) were granted voluntary return in FY 2012. During the same period, the number subject to formal removal increased from 19 percent (226,226) to 76 percent (270,463). The share subject to criminal charges rose from 3 percent (35,266) to 22 percent (80,209); and the number subject to remote repatriation increased from 2 percent (20,592) to 29 percent (102,057).⁷⁶

Achieving high-consequence enforcement outcomes relies heavily on nonjudicial forms of removal. In FY 2012, 91 percent (246,972) of CBP's 270,463 formal removals at the Southwest border were expedited removals or reinstatements of removal, up from 27 percent (60,004 of 226,226) in FY 2005.⁷⁷

Figure 11. CBP Southwest Border Enforcement Outcomes, FY 2005-12



Source: Marc R. Rosenblum, *Border Security: Immigration Enforcement Between Ports of Entry*, CRS Report R42138 (Washington, DC: Congressional Research Service, 2012), <http://fpc.state.gov/documents/organization/180681.pdf>.

Some have questioned these removal statistics because a majority of recent removals have been apprehended at the Southwest border.⁷⁸ Overall, available data indicate that border removals accounted

⁷⁶ MPI analysis of data in Marc R. Rosenblum, *Border Security: Immigration Enforcement Between Ports of Entry*, CRS Report R42138 (Washington, DC: Congressional Research Service, 2012), <http://fpc.state.gov/documents/organization/180681.pdf>. Numbers do not add to 100 percent because some individuals are subject to more than one consequence.

⁷⁷ Ibid.

⁷⁸ As Jessica Vaughan argues in a Center for Immigration Studies report that questions the Obama administration's enforcement record, "more than half of removals attributed to ICE [in 2012] were the result of Border Patrol arrests that would never have been counted as a removal in prior years. In 2008, under the Bush administration, only one-third of removals were from Border Patrol arrests." Jessica Vaughan, *Deportation Numbers Unwrapped: Raw Statistics Reveal the*



for about 53 percent of removals (834,000 of 1.58 million) in FY 2009-12.⁷⁹ In the prior administration, border removals accounted for 87 percent of all removals in FY 2005, the highest year on record, and CBP's share of removals averaged 67 percent in FY 2004-06, well above the rate in recent years.⁸⁰

A high number of border removals are a direct result of Congress's focus on border enforcement, including through the appropriations process (where approximately two-thirds of immigration enforcement funding has gone to border security)⁸¹ and through IIRIRA's expedited removal process. CBP has embraced its authority to conduct nonjudicial removals and the current administration more generally has placed border removals at the center of its effort to address the political imperative to "secure the border first" before there is contemplation of broader immigration reform.

Border investments and the use of higher-consequence enforcement strategies appear to be having a degree of success in deterring and preventing illegal border crossers.

Moreover, border investments and the use of higher-consequence enforcement strategies appear to be having a degree of success in deterring and preventing illegal border crossers—though not to the point of eliminating new illegal immigration.⁸² Border Patrol data suggest that the use of higher-consequence enforcement measures—formal removals and criminal prosecutions for immigration offenses—likely contributes to reduced apprehensions by discouraging recidivism.⁸³ As Table 2 indicates, CBP reports that recidivism rates among unauthorized immigrants apprehended at the border and placed in formal removal proceedings in FY 2011-13 ranged from 2–7 percent (for people placed in judicial removal proceedings)⁸⁴ and 12-17 percent (for those removed through nonjudicial removal). Border crossers facing immigration-related criminal charges (mainly illegal entry and illegal re-entry) had recidivism rates of 9–12 percent during this period. By comparison, noncitizens permitted voluntary return had recidivism rates of 27-29 percent.⁸⁵

Real Story of ICE Enforcement in Decline (Washington, DC: Center for Immigration Studies, 2013), 2, <http://cis.org/sites/cis.org/files/Deportation-Numbers-Unwrapped.pdf>; see also Senator Jeff Sessions (R-AL), "DHS Enforcement Data Reveals Administrative Amnesty Much Broader Than Previously Understood," (news release, March 26, 2014), www.sessions.senate.gov/public/index.cfm/news-releases?ID=3267d920-f254-463c-b105-ccb1980efe11; Statement of Congressman John Culberson (R-TX), House Appropriations Committee, Subcommittee on Homeland Security, *Budget Hearing - Department of Homeland Security*, 113th Cong., 2d sess., March 11, 2014, www.gpo.gov/fdsys/pkg/CHRG-113hhrg82380/html/CHRG-113hhrg82380.htm.

79 MPI analysis based on data in Vaughan, *Deportation Numbers Unwrapped*, and DHS, *2012 Yearbook of Immigration Statistics*. Calculations are based on CBP's annual removals as reported by Vaughan divided by the total number of formal removals for that year, as reported by OIS.

80 Ibid.

81 Meissner, Kerwin, Chishti, and Bergeron, *Immigration Enforcement in the United States: The Rise of a Formidable Machinery*, 21.

82 In addition to illegal border flows, unauthorized immigrants enter the United States through ports of entry and by overstaying a temporary visa.

83 The term "recidivism rate" refers to the share of apprehensions that represent a second or subsequent apprehension of the same individual in the same fiscal year. Because a major goal of border enforcement is to deter those caught crossing the border illegally from trying to do so again, CBP considers lower recidivism rates an important metric of the effectiveness of border enforcement operations.

84 Recidivism rates are biased downwards for people placed in judicial removal proceedings because noncitizens in such proceedings remain in the United States while their removal charges are pending (either in detention or after being released with removal charges pending) and thus do not re-attempt to cross the border. Some of these individuals fail to depart the United States either because they are granted relief from removal or because they abscond prior to a removal order being executed.

85 The majority of persistent crossers and criminal aliens are subject to tougher consequences (formal removal, criminal charges) while CBP generally reserves voluntary return for lower priority cases, such as some first-time crossers and juveniles. For this reason, the enforcement pipelines selected may not be the only factor contributing to higher or lower recidivism rates. But these selection criteria likely bias the higher-consequence pool toward higher recidivism rates, reinforcing the conclusion that criminal charges and formal removal tend to be more effective at discouraging recidivism than voluntary return.



Table 2. Southwest Border Recidivism Rates by Selected Enforcement Consequence (%), FY 2011-13

Type of Enforcement Consequence	FY 2011	FY 2012	FY 2013
Judicial Removal	6.6	3.8	2.0
Expedited Removal	16.6	16.4	16.7
Reinstatement of Removal	16.9	15.9	16.4
Operation Streamline	12.1	10.3	9.3
Standard Criminal Prosecutions	9.1	9.1	10.1
Voluntary Return	29.4	27.1	28.5
SWB Recidivism Total	19.8	16.7	15.8

Source: Authors' analysis of data provided to MPI by U.S. Customs and Border Protection.

Overall, recidivism rates for the entire Southwest border fell from approximately 20 percent in FY 2011 to about 16 percent in FY 2013, in part because of the systematic implementation of higher consequences across the border sectors during this period.

2. Interior Enforcement

While the current administration has pursued a near zero-tolerance approach to border enforcement—with the great majority of people who are apprehended being placed in nonjudicial removal proceedings—fewer formal removals originate within the United States. In general, border and interior enforcement differ with respect to DHS' enforcement priorities and prosecutorial discretion in two key ways.

First, by definition, almost everyone apprehended at the border is an enforcement priority by virtue of being a recent illegal entrant—although a substantial share may be *re-entering* after previously having lived in the United States. In contrast, many people apprehended within the United States are not recent illegal entrants, and may not fall into any of DHS' priority enforcement categories.

Second, border and interior enforcement differ in how people are apprehended. At the border, virtually everyone who is apprehended is directly in Border Patrol or CBP custody. In contrast, while ICE conducts certain task force operations to apprehend at-large fugitives and certain criminal aliens,⁸⁶ the great majority of ICE apprehensions are *not* originally initiated by ICE officers. Some ICE arrests are the result of referrals from the USCIS Fraud Detection Unit and from federal, state, local, or tribal law enforcement agencies.⁸⁷

⁸⁶ Three different ICE programs target at-large removable aliens. The National Fugitive Operations Program (NFOP) locates and arrests at-large criminal aliens and other high-priority removable aliens throughout the country. The Joint Criminal Alien Removal Taskforces (JCART) program works with other federal agencies and with local law enforcement agencies in New York City and Los Angeles to arrest high-priority at-large criminal aliens in those jurisdictions. And ICE's Homeland Security Investigations (HSI) directorate investigates smuggling offenses, other illegal activities, and immigration crimes, including employer violations of INA §274A, prohibiting the knowing employment of unauthorized workers. As part of this work, HSI also may encounter and arrest removable immigrants.

⁸⁷ The USCIS Fraud Detection Unit refers certain noncitizens with fraudulent benefit applications to ICE. In addition, any federal, state, local, or tribal law enforcement agency may refer suspected removable noncitizens to ICE when they are encountered as part of the agency's normal enforcement activities.



The most common way that ICE identifies and arrests removable individuals is through cooperative partnership programs that screen people for immigration violations as they pass through the criminal justice system. ICE's Enforcement and Removal Operations (ERO) Directorate operates three such programs:

- The Criminal Alien Program (CAP) deploys federal agents to federal prisons, state penitentiaries, and other correctional facilities, where they interview inmates and check their records against federal databases to identify removable noncitizens.⁸⁸
- The 287(g) program trains certain state and local correctional officers to perform similar screening functions as CAP agents as inmates are booked into state and local jails and prisons.⁸⁹
- And the Secure Communities program, which has been deployed in all jails and other detention facilities throughout the United States, uses fingerprints to check immigration records when people are booked into state, local, or federal jails and prisons.⁹⁰ These jail screening programs account for the majority of interior apprehensions.

The two different apprehension systems have important implications for the exercise of prosecutorial discretion. At the border, any exercise of prosecutorial discretion may involve releasing a potentially removable individual directly from CBP custody. In the interior, ICE may choose to exercise discretion earlier in the enforcement process by not ever taking custody of someone who falls outside the scope of DHS' enforcement priorities or who is otherwise considered amenable to discretion.

The different dynamics of interior enforcement are illustrated in Figure 12, which depicts the number of noncitizens identified by Secure Communities in the U.S. criminal justice system and the number deported in FY 2009-13. As Secure Communities expanded from being deployed in 88 jurisdictions in 2009 to all 3,181 law enforcement jurisdictions in the country in 2013, the total number of noncitizens identified through the program, illustrated by the line in Figure 12, increased from 95,664 to 530,019.⁹¹

The two different apprehension systems have important implications for the exercise of prosecutorial discretion.

88 The Criminal Alien Program (CAP) encompasses two former programs aimed at screening criminal noncitizens, the Institutional Removal Program (IRP), and the Alien Criminal Apprehension Program (ACAP).

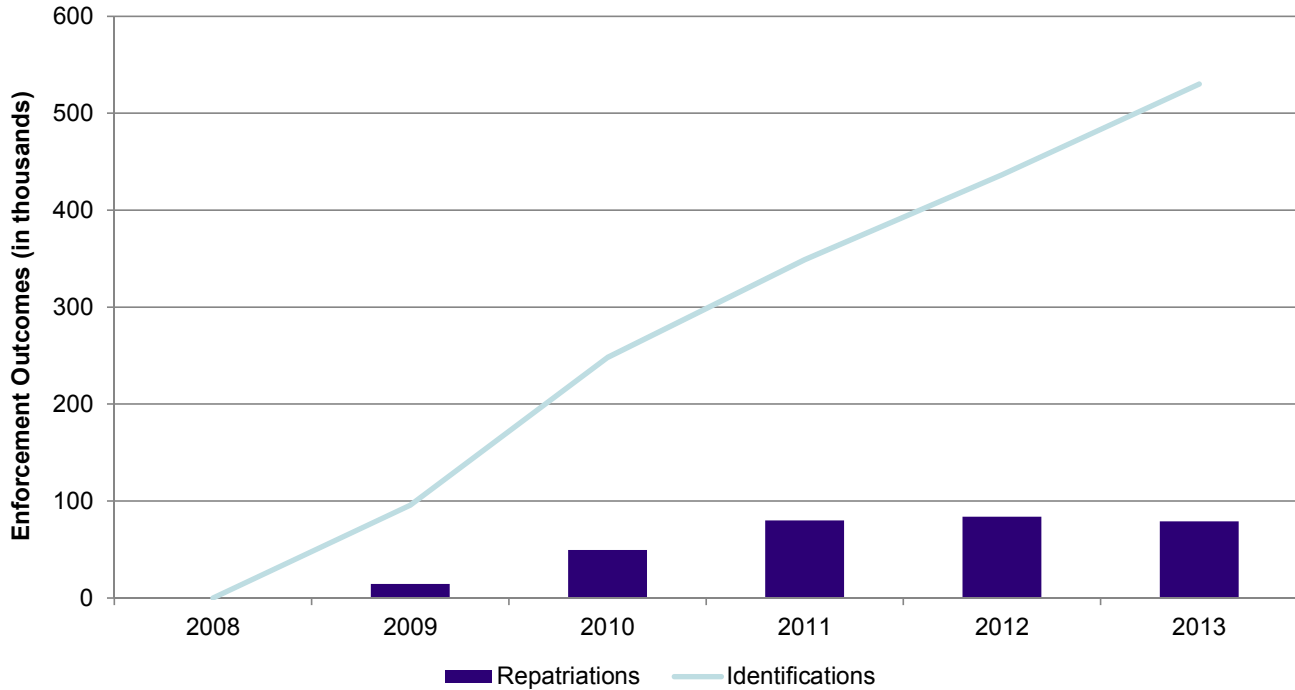
89 The 287(g) program has traditionally been implemented through one of three models: "jailhouse" agreements, which permitted local incarceration officers to be cross-deputized to perform certain immigration functions with respect to individuals detained on criminal charges; "task force" models, which permitted officers to perform immigration enforcement in the community; and "hybrid" models, which blended the "jailhouse" and "task force" approaches. Cristina Rodriguez, Muzaffar Chishti, Randy Capps, and Laura St. John, *A Program in Flux: New Priorities and Implementation Challenges for 287(g)* (Washington, DC: MPI, 2010), 5, www.migrationpolicy.org/research/program-flux-new-priorities-and-implementation-challenges-287g. In recent years, the executive branch has scaled down the size of the 287(g) program considerably, and has eliminated the task force agreements. See ICE, "Fact Sheet: Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act," accessed March 31, 2014, www.ice.gov/news/library/factsheets/287g.htm.

90 Under Secure Communities, when local law enforcement agencies send the fingerprints of people being booked into jails and prisons to the FBI for criminal background checks, the data also are automatically checked against DHS's biometric IDENT database. When fingerprint matches are detected, indicating an arrestee may be a removable alien, records are forwarded to ICE's Law Enforcement Support Center (LESC), where ICE officers review the person's criminal and immigration history to determine whether he or she is an enforcement priority. LESG forwards relevant records to the local ICE field office with responsibility for the arresting jurisdiction, and local ICE officers may contact the arresting agency to issue an immigration detainer, which is a request that ICE be notified prior to the individual's release, and that the agency hold the individual for up to 48 hours, so that ICE can take custody of the person and initiate removal proceedings.

91 MPI analysis of ICE data, "Secure Communities: monthly statistics for IDENT/IAFIS Interoperability," various years.



Figure 12. ICE Secure Communities Program Enforcement Outcomes, FY 2008-13



Note: Not all identifications are of potentially removable migrants; see explanation in text below.

Source: MPI analysis of ICE data, "Secure Communities: monthly statistics for IDENT/IAFIS Interoperability," various years.

Yet only a small share of people identified by Secure Communities are deported (including removals and confirmed returns), as depicted by the bars in Figure 12. Secure Communities deportations averaged about 81,000 people per year in FY 2011-13; this represented 23 percent of total identifications in FY 2011, falling to 15 percent in FY 2013. Thus, 85 percent of the people ICE identified through Secure Communities in FY 2013 were not deported that year.⁹²

In addition, individuals deported through Secure Communities overwhelmingly have been those convicted of a crime and, to a lesser degree, those who meet ICE's other enforcement priorities. Between FY 2009-11, 74 percent of all Secure Communities repatriations were of persons convicted of a crime, though many had been convicted of immigration-related crimes or minor offenses. The criminal removal rate increased to 80 percent in FY 2012 and 88 percent in FY 2013.⁹³

It is important to emphasize that the difference between the line and the bars in Figure 12 is *not* fully explained by ICE's exercise of prosecutorial discretion. First, not all noncitizens identified by Secure Communities are removable; some people counted in these numbers are lawful permanent residents or naturalized U.S. citizens who have records in ICE's database. In addition, the identification data may include repeat identification of the same individuals, both as a function of people who are arrested more than once, and because the same individual's prints may be submitted more than once as the person moves through the criminal justice system. Second, some people ultimately deported as a result of Secure Communities are removed or returned in a year other than the year in which they are identified. Delayed removal is particularly an issue when it comes to serious criminals, who must complete a prison sentence prior to being repatriated.

⁹² Ibid.

⁹³ These ICE data do not distinguish between immigration- and nonimmigration-related offenses.



Nonetheless, the overall findings from Figure 12 indicate that the implementation of Secure Communities generally has been consistent with DHS's enforcement priorities. Altogether, more than 99 percent of Secure Communities deportations between FY 2009 and FY 2013 either had been convicted of a crime, were unauthorized immigrants with previous removal orders, or had otherwise failed to comply with a formal immigration enforcement proceeding.⁹⁴

F. DHS Enforcement Priorities and Prosecutorial Discretion: How Have They Worked?

Overall, the combination of near zero-tolerance enforcement at the border and more focused enforcement in the interior has meant that the great majority of people deported since 2009 fall into one or more of the enforcement priority categories the administration identified in March 2011. In particular, with the broad implementation of the nonjudicial removal pipelines described above, almost two-thirds of all removals in FY 2009-12 were either expedited removals (i.e., recent illegal entrants) or reinstatements of removal (i.e., people who have violated prior removal orders in some capacity)—two of the categories identified by DHS as enforcement priorities.⁹⁵

The implementation of Secure Communities generally has been consistent with DHS's enforcement priorities.

In addition to recent illegal entrants and people subject to reinstatement or removal, one of the most notable trends that has occurred during this administration has been that a growing proportion of removals is of people who have been convicted of a crime (i.e., people who fall into the first enforcement priority category). Available data do not permit an estimate of the overlap among these three categories (i.e., recent illegal entrants, immigration "obstructionists," and people who have been convicted of a crime), but a forthcoming MPI report will analyze these populations in greater detail).

The overall trends in criminality among people in the removal system are illustrated in Figure 13. People with criminal convictions accounted for two-thirds of formal removals in FY 1993-95, but fell to 38 percent of removals in FY 1998-2001. This occurred as removals of *noncriminals* almost doubled in each of the first two years after IIRIRA's passage, while removals of criminals only grew by about 25 percent per year.⁹⁶ A similar pattern persisted in FY 2003-08 after the creation of DHS in 2003. Noncriminal removals grew at an average rate of 23 percent per year during this period, compared to 7 percent for criminal aliens. By FY 2008, a record-high 71 percent of all formal removals were of people who had never been convicted of a crime.⁹⁷

94 MPI analysis of ICE data, "Secure Communities: monthly statistics for IDENT/IAFIS Interoperability," various years.

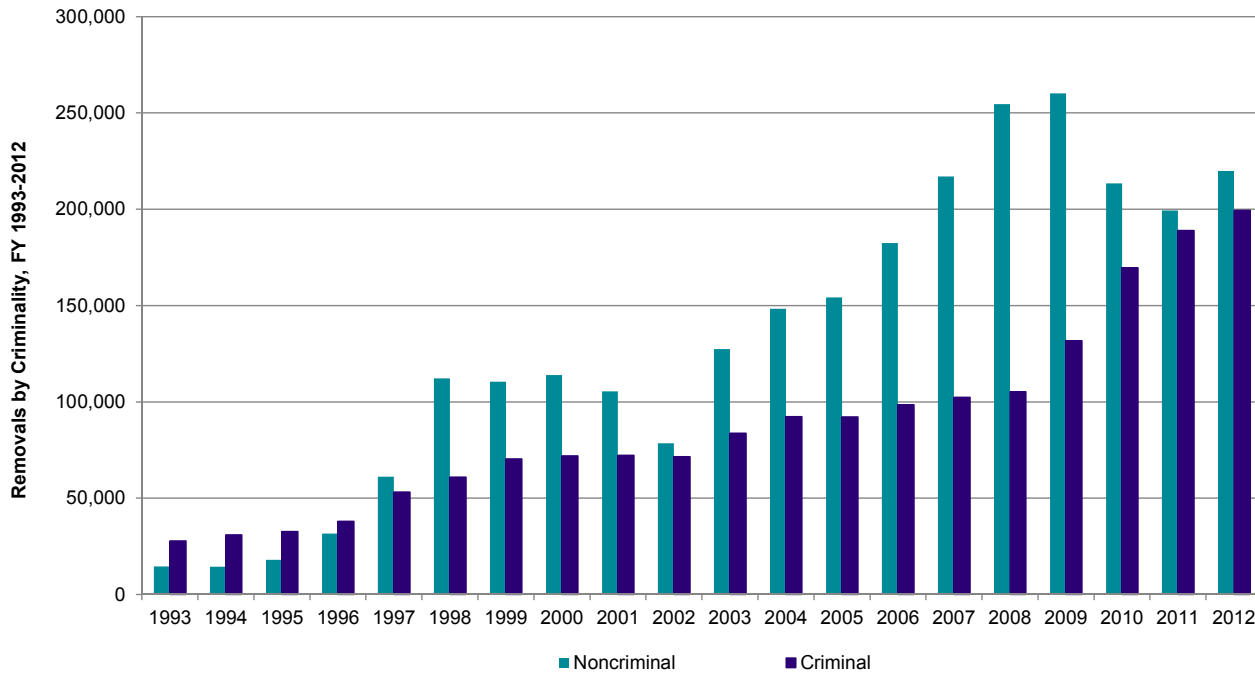
95 Additional removal cases also fall into one or both of these two enforcement categories, but available data do not allow them to be identified because they were not removed through one of these nonjudicial pipelines.

96 MPI calculations from DHS, *Yearbook of Immigration Statistics*, various years.

97 Ibid.



Figure 13. Criminal and Noncriminal Removals, by Type of Criminal Offense, FY 1993-2012



Source: MPI calculations from DHS, *Yearbook of Immigration Statistics*, various years; and United States Courts, “Judicial Business of the U.S. Courts” statistics.

The current administration’s enforcement priorities have reversed this trend. As Figure 13 shows, criminal removals increased at a rate of 18 percent per year in FY 2009-12, while noncriminal removals *decreased* by 3 percent per year. Thus, by FY 2012, about half (48 percent) of all removals were of people who had been convicted of a crime—the highest level since 1996.

At the same time, newly available data for FY 2003-13 indicate that much of the increase in criminal removals has been driven by deportations of people whose only convictions were for immigration-related offenses. This trend has been more pronounced under the current administration than the previous one, and it has been particularly pronounced since 2011, when DHS announced its new enforcement priorities.

Figure 14 depicts MPI’s analysis of ICE data providing information about the most serious lifetime criminal offense for people removed by the agency in FY 2003-13; the data were obtained by *The New York Times* through a Freedom of Information Act (FOIA) request.⁹⁸ Analysis of the ICE data shows that between FY 2003 and FY 2008, while removals of people convicted of nonimmigration crimes grew at an average rate of 7 percent per year (from 75,552 in FY 2003 to 103,264 in FY 2008), removals of people convicted exclusively of immigration crimes grew by an average of 14 percent per year (from 8,805 to 15,969). Thus, people convicted exclusively of immigration-related crimes accounted for 21 percent of the increase in criminal removals by ICE during this period. These data describe ICE removals, and therefore do not include removals executed exclusively by CBP.

The average growth rate for removals of people convicted of nonimmigration crimes remained at 7 percent per year in FY 2008–13 (from 103,264 cases in FY 2008 to 138,545 in FY 2013). But removals of people convicted exclusively of immigration-related crimes grew at an average rate of 31 percent per year in this period (from 15,969 in FY 2008 to 60,300 in FY 2013). Thus, immigration-related crimes accounted for 55 percent of the increase in criminal removals during this period. Moreover, immigration-

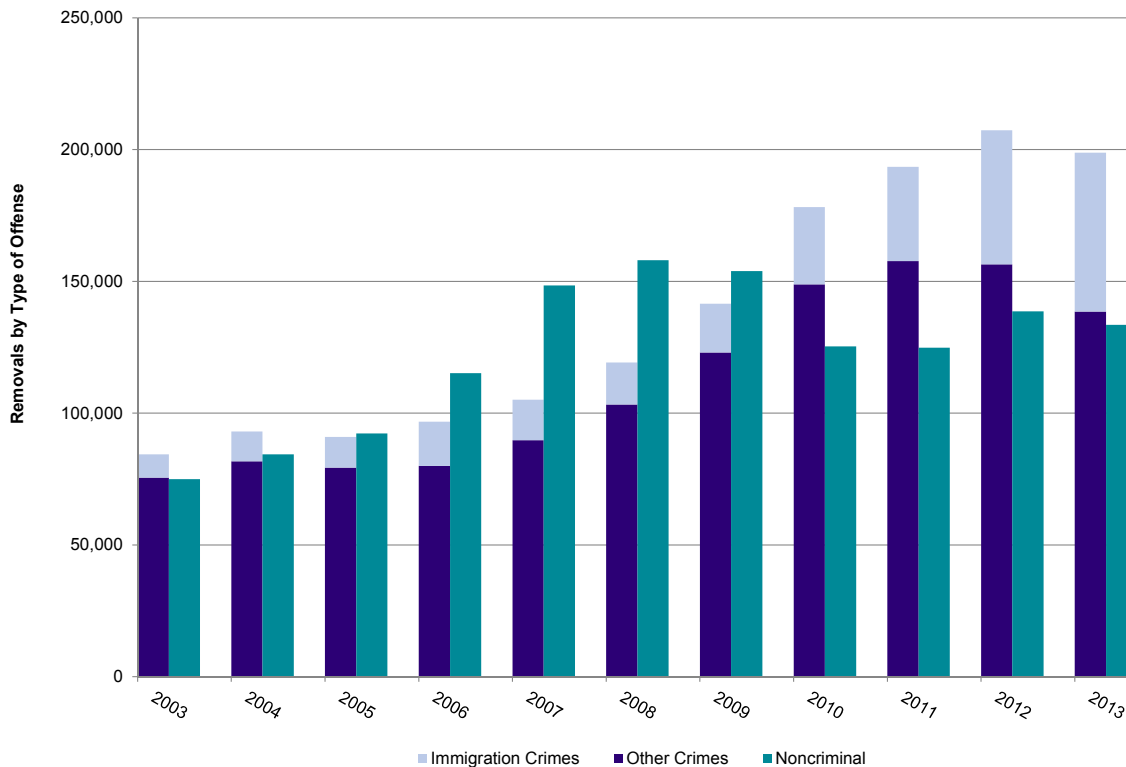
98 See Ginger Thompson and Sarah Cohen, “More Deportations Follow Minor Crimes, Records Show,” *The New York Times*, April 6, 2014, www.nytimes.com/2014/04/07/us/more-deportations-follow-minor-crimes-data-shows.html.



related crimes accounted for *all* of the growth in criminal alien removals in FY 2012-13, as removals of people convicted exclusively of nonimmigration crimes fell from 157,679 in FY 2011 to 138,545 in FY 2013, while removals of people convicted exclusively of immigration crimes grew by two-thirds from 35,758 in FY 2011 to 60,300 in FY 2013.

Altogether, 10 percent of convicted criminals removed by ICE in FY 2003 had been convicted exclusively of immigration offenses (8,805 out of 84,357 cases). By 2013, this proportion had increased to 30 percent (60,300 out of 198,845 total criminal aliens removed). About 87 percent of those with immigration-related convictions removed by ICE in FY 2003-13 had been convicted exclusively of illegal entry or illegal re-entry, including 97 percent in FY 2012-13.

Figure 14. Criminal and Noncriminal ICE Removals by Type of Criminal Offense, FY 2003-13



Notes: The figure depicts formal removals (i.e., not including returns) executed by ICE (i.e. not including removals executed exclusively by CBP). Immigration crimes and nonimmigration crimes refer to a person’s most serious lifetime criminal conviction. Immigration crimes include persons whose most serious crime is described as illegal entry, illegal re-entry, immigration (possession of fraudulent immigration documents), or immigration (trafficking of fraudulent immigration documents).

Source: MPI analysis of ICE data obtained by *The New York Times* through a Freedom of Information Act request.

G. The Impact of Deportation Policies on Immigrant Communities

Enforcement of deportation policies appear to have been generally consistent with DHS’s enforcement priorities. Enforcement is likely also having a substantial impact on established U.S.-citizen and immigrant communities, where large numbers of those removed are deeply integrated into U.S. society.

DHS estimated in 2012 that 86 percent of the unauthorized population as of January 2011 had been in the United States six years or more.⁹⁹ The Pew Hispanic Center estimates from U.S. census data that about

⁹⁹ Michael Hofer, Nancy Rytina, and Bryan Baker, *Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2011* (Washington, DC: DHS Office of Immigration Statistics, 2012), 3, www.dhs.gov/sites/default/files/publications/ois_ill_pe_2011.pdf.



half (46 percent) of adult unauthorized immigrants are parents of minor children (mostly U.S.-citizen children);¹⁰⁰ and a 2013 survey of unauthorized immigrants found that 95 percent had at least one other family member in the United States.¹⁰¹ About 74 percent of adult unauthorized immigrants are in the U.S. labor force.¹⁰²

According to two Pew Research Hispanic Trends Project surveys, one-quarter (24 percent) of all Latinos say they know someone who was deported or detained in the last year,¹⁰³ and 59 percent of Latino immigrants and 46 percent of all Latinos worry “a lot” or “some” that they themselves, a family member, or a close friend could be deported.¹⁰⁴ Between July 1, 2010, and September 31, 2012, 204,810 removals (23 percent) were of parents of U.S.-citizen children, according to ICE data.¹⁰⁵ Additionally, the Applied Research Center estimates that at least 5,100 children currently living in foster care had parents who have been deported or detained in immigration custody.¹⁰⁶

Deportation of unauthorized immigrants has ripple effects throughout U.S.-based immigrant communities and beyond.

These studies suggest that deportation of unauthorized immigrants has ripple effects throughout U.S.-based immigrant communities and beyond. This is particularly true of interior enforcement, which may be especially likely to affect unauthorized migrants who are settled into their communities, and where enforcement also may create an atmosphere of fear and vulnerability extending to the broader community. Secure Communities has been especially controversial within immigrant communities because of the way it seamlessly integrates immigration enforcement into local criminal justice systems, sometimes preconviction or without local charges ultimately being filed—factors that have caused a number of local jurisdictions to limit their cooperation with the program.¹⁰⁷

Yet border enforcement also affects immigrant communities. More than one-quarter of people removed by CBP are reinstatements of removal, and many therefore have previous ties to the United States (i.e., because they were previously in the United States, at least long enough to have been removed). And as border enforcement has toughened and crossing has become riskier and more expensive, casual crossers and first-time entrants are increasingly likely to be deterred from venturing north.

100 Paul Taylor, Mark Hugo Lopez, Jeffrey S. Passel, and Seth Motel, *Unauthorized Immigrants: Length of Residency, Patterns of Parenthood* (Washington, DC: Pew Research Center, 2011), www.pewhispanic.org/2011/12/01/unauthorized-immigrants-length-of-residency-patterns-of-parenthood/.

101 Matt Barreto and Gary Segura, “Poll of Undocumented Immigrants Reveals Strong Family Ties and Social Connections in America,” *Latino Decisions*, April 15, 2013, www.latinodecisions.com/blog/2013/04/15/poll-of-undocumented-immigrants-reveals-strong-family-and-social-connections-in-america.

102 Randy Capps, Michael Fix, Jennifer Van Hook, and James D. Bachmeier, *A Demographic, Socioeconomic, and Health Coverage Profile of Unauthorized Immigrants in the United States* (Washington, DC: MPI, 2013), 5, www.migrationpolicy.org/research/demographic-socioeconomic-and-health-coverage-profile-unauthorized-immigrants-united-states.

103 Mark Hugo Lopez, Ana Gonzales-Barrera, and Seth Motel, *As Deportations Rise to Record Levels, Most Latinos Oppose Obama’s Policy* (Washington, DC: Pew Research Hispanic Trends Project, 2011), www.pewhispanic.org/2011/12/28/as-deportations-rise-to-record-levels-most-latinos-oppose-obamas-policy/.

104 Mark Hugo Lopez, Paul Taylor, Cary Funk, and Ana Gonzalez-Barrera, *On Immigration Policy, Deportation Relief Seen As More Important Than Citizenship* (Washington, DC: Pew Research Hispanic Trends Project, 2013), www.pewhispanic.org/2013/12/19/on-immigration-policy-deportation-relief-seen-as-more-important-than-citizenship/.

105 Seth Freed Wessler, “Nearly 205K Deportations of Parents of U.S. Citizens in Just Over Two Years,” *Colorlines*, December 17 2012, http://colorlines.com/archives/2012/12/us_deports_more_than_200k_parents.html.

106 Seth Freed Wessler, *Shattered Families: the Perilous Intersection of Immigration Enforcement and the Child Welfare System* (Washington, DC: Applied Research Center, 2011), www.raceforward.org/research/reports/shattered-families?arc=1.

107 Catholic Legal Immigration Network, Inc. (CLINIC), “States and Localities That Limit Compliance with ICE Detainer Requests (Jan 2014),” <https://cliniclegal.org/resources/articles-clinic/states-and-localities-limit-compliance-ice-detainer-requests-jan-2014>.



Border enforcement may have a smaller deterrent effect on recidivists, who are a primary target of CBP's enforcement strategy. A 2011-12 survey of people apprehended at the border found that those with long-standing ties to the United States were twice as likely to plan a re-entry attempt, and people with families in the United States were two to three times more likely to do so.¹⁰⁸ Thus, a high proportion of remaining border crossers are likely to be long-time noncitizens who are *returning* to the United States—despite heightened enforcement at the border—because they have homes and families here.

Significantly, while interior and border enforcement efforts each reflect DHS enforcement priorities, it is not clear that the department has been entirely successful at implementing its prosecutorial discretion guidance. That is, while enforcement targets high-priority cases, such targeting does not necessarily mean that those with strong ties to the United States are *taken out* of deportation pipelines, either through an act of discretion by DHS (e.g., because an immigration enforcement officer determines not to take custody of a particular unauthorized immigrant) or because an immigration judge grants relief from removal.

A high proportion of...border crossers are likely to be long-time noncitizens who are returning to the United States

One set of questions surrounds the degree to which the exercise of discretion varies across ICE field offices. For example, research by the Transactional Records Access Clearinghouse (TRAC) at Syracuse University finds that the DHS-DOJ prosecutorial discretion initiative to clear low-priority cases out of immigration court backlogs has had varying results across jurisdictions. Since 2011, five immigration courts (Seattle, Tucson, Los Angeles, Omaha, and Phoenix) dismissed their removal cases at a rate of 20 percent or higher, while the rate in other cities is much lower: 1.7 percent in Houston, 3.7 percent in New York City, 5 percent in Chicago, and 6.3 percent in Miami.¹⁰⁹

A second series of TRAC reports found that DHS priority guidance has also been inconsistent when it comes to ICE detainers or “immigration holds.” In particular, guidelines issued in December 2012 on the use of detainers have yielded uneven results across the country and for certain groups of people. Since the detainer memo was issued, half of holds were placed on individuals with no prior criminal conviction and just 12 percent of individuals subjected to a detainer had been convicted of a serious (Level 1) offense. In some states, the percentage of individuals held with no criminal record was much higher than the national average, including Missouri (74 percent), Alabama (73 percent), and Kansas (71 percent), while in others, it was much lower, including Idaho (29 percent), Virginia (34 percent), and Connecticut (35 percent).¹¹⁰

Overall issuance of detainers has been found to have fallen since the 2012 guidance was issued,¹¹¹ with a

108 Mark Grimes, Elyse Golob, Alexandra Durcikova, and Jay Nuamaker, “Reasons and Resolve to Cross the Line,” University of Arizona National Center for Border Security and Immigration, May 2013, www.borders.arizona.edu/cms/sites/default/files/Post-Aprehension-Survey-REPORT%20may31-2013_0.pdf.

109 This rate refers to the share of total case closures that were closed as an exercise of prosecutorial discretion. TRAC, “Once Intended to Reduce Immigration Court Backlog, Prosecutorial Discretion Closures Continue Unabated,” January 15, 2014, <http://trac.syr.edu/immigration/reports/339/>. According to TRAC, the variation could reflect how effectively ICE attorneys screen out strong prosecutorial discretion candidates before the case ever reaches immigration court, whether a court docket includes detained individuals, and/or inconsistent court standards.

110 TRAC, “Targeting of ICE Detainers Varies Widely by State and by Facility,” February 11, 2014, <http://trac.syr.edu/immigration/reports/343/>.

111 A December 2012 memo from ICE Assistant Secretary John Morton serves as guidance governing the use of ICE detainers in the U.S. criminal justice system. It seeks to align ICE detainer policy with the agency's civil enforcement priorities and instructs ICE agents to place holds only on individuals whom they have reason to believe are removable noncitizens, and who have been convicted of certain crimes (including immigration crimes), have an outstanding order of removal, have committed immigration fraud, or are otherwise a public safety or national security threat. See December 21, 2012 Memorandum from John Morton to all field office directors, all special agents in charge, and all chief counsel, “Civil Immigration Enforcement: Guidance on the Use of Detainers in the Federal, State, Local, and Tribal Criminal Justice Systems,” www.ice.gov/doclib/detention-reform/pdf/detainer-policy.pdf.



pronounced drop for females and Mexican nationals, while detainers have increased for nationals of other select countries.¹¹² Trends also differ by state and by ICE administrative office. While immigration holds have risen since 2012 in New York (up 10 percent) and Pennsylvania (up 8 percent), they have fallen in California (down 31 percent), Florida (down 24 percent), Texas (down 15 percent), and Arizona (down 11 percent). Deviation across ICE offices is also apparent. For example, ICE officers in the Buffalo area have increased monthly immigration holds by 78 percent since the memo was issued, while officers in the Miami area have scaled back by 33 percent.¹¹³

Questions about the exercise of discretion also arise at the border, where CBP appears to lack systematic tools to even identify candidates for relief, and the Consequence Delivery System is not designed to take such factors into account. Moreover, in some cases, CBP agents conduct enforcement up to 100 miles away from the border, potentially subjecting large swaths of the border region—including border cities such as San Diego, Phoenix, and Detroit—to enforcement practices designed for “recent illegal entrants.”

Border crossers with strong family and economic ties to the United States may be particularly harmed by the Consequence Delivery System because repeated illegal entry attempts make them good candidates to be placed in formal removal or to face criminal charges. But even these high-consequence enforcement strategies may not deter them from making additional future attempts. In these cases, the Consequence Delivery System contributes to an escalating criminalization of the unauthorized immigrant population, generating a growing class which may be ineligible for future immigration relief (because of multiple removals or criminal convictions) despite strong connections to the United States.

V. Policy Levers to Influence the Deportation System

The capacity of the current deportation system to formally remove approximately 400,000 or more unauthorized immigrants per year represents a new reality, in which enforcement and the threat of enforcement have fundamentally altered the immigration system, just as they have brought new levels of fear and vulnerability to U.S.-citizen and immigrant families and communities. In calling for a review of deportation policies to make them more “humane,” consistent with the responsibility to enforce the law, President Obama is acknowledging the impact that immigration enforcement is having.¹¹⁴

Immigration has been a contentious issue for decades. Reconciling the tension that exists between robust enforcement that effectively combats illegal immigration and humane enforcement that minimizes the impact on long-standing U.S.-citizen and immigrant communities—the deportation dilemma—may continue to elude policymakers. Nonetheless, stakeholders on all sides of the immigration debate have proposed various reforms, through immigration legislation, appropriations, and executive-branch actions that would modify deportation outcomes. The remainder of this report identifies some of the main proposals being discussed, and describes the trade-offs policymakers confront as they weigh these alternatives.

112 The TRAC report found that detainer issuance increased more than 5 percent for individuals from Haiti, Laos, Trinidad and Tobago, and Iran; see *Ibid.*

113 TRAC, “Surprising Variability in Detainer Trends by Gender, Nationality,” January 22, 2014, <http://trac.syr.edu/immigration/reports/340/>.

114 The White House, “Readout of the President’s Meeting with Congressional Hispanic Caucus Leadership,” March 13, 2014.



A. Reforms to U.S. Immigration Law

Statutory changes to the INA are the most powerful tool for influencing the immigration enforcement system, as evidenced by the deepening impact of IIRIRA on the deportation system. Legislation proposed in the current Congress would have far-reaching implications for immigration enforcement. For example, the *Strengthen and Fortify Enforcement Act* (SAFE Act), as reported by the House Judiciary Committee, would make unauthorized presence in the United States a criminal offense, rather than a civil violation, as is currently the case. It would also authorize federal, state, and local law enforcement personnel to conduct immigration enforcement operations. In effect, the SAFE Act would extend the practice of criminalizing unauthorized immigration from the border to the entire country, and would increase immigration enforcement personnel significantly.¹¹⁵

Conversely the *Border Security, Economic Opportunity, and Immigration Modernization Act* (S. 744), as passed by the Senate in 2013, would take millions of unauthorized immigrants out of the potential enforcement pool through an earned legalization program. The Senate legislation also would overturn parts of IIRIRA by restoring the discretion of immigration judges to waive removal charges under certain conditions, including for certain individuals facing reinstatement of removal orders.

Both of these bills would fundamentally alter the deportation system and immigration enforcement more broadly, but in substantially different ways. Nonetheless, with Congress generally deadlocked on immigration reform, neither appears imminent.

B. Changes to Immigration Enforcement Appropriations

Congress may continue to influence enforcement through the appropriations process. In particular, changes to enforcement budgeting have been proposed across the enforcement process, from front-line staffing to judicial and detention capacity.

I. Proposals to Increase Front-Line Enforcement Funding

Although substantial new investments in immigration enforcement appear unlikely during the regular FY 2015 appropriations process now underway, both congressional Democrats and Republicans have expressed support in recent years for increased spending on immigration enforcement, including front-line enforcement (personnel and infrastructure) at the Southwest border. The Senate-passed bill, for example, would authorize \$44.5 billion for border enforcement and related spending outside the normal appropriations process. New border spending would double the number of Border Patrol agents and miles of border fencing at the Southwest border, among other things.

Undoubtedly, these or similar investments would augment progress that has been made toward securing the border, by increasing the proportion of unauthorized immigrants apprehended and by supporting CBP's high-consequence enforcement effort. Increased personnel and other resources may be a particular priority in the Rio Grande Valley sector, where a sharp increase in unauthorized inflows—mostly of non-Mexicans, and including a large number of unaccompanied minors—is straining CBP's enforcement capacity.

CBP's budget has increased about fourfold since 9/11, and border enforcement already represents the largest share of immigration enforcement spending.¹¹⁶ Focusing additional investments on the border—particularly at the scale envisioned by the Senate's S. 744—likely would overwhelm other parts of the system, including already strained immigration courts, which have limited capacity to accommodate new

¹¹⁵ There are more than 765,000 sworn state and local law enforcement officers. See Brian A. Reaves, *Census of State and Local Law Enforcement Agencies, 2008* (Washington, DC: DOJ, Office of Justice Programs), 1, www.bjs.gov/content/pub/pdf/csllea08.pdf. In contrast, ICE and CBP had 81,926 total employees combined in FY 2013, including employees who are not deputized to perform law enforcement functions. DHS, *Budget in Brief Fiscal Year 2015* (Washington, DC: DHS, 2015), 41, 63, www.dhs.gov/sites/default/files/publications/FY15BIB.pdf.

¹¹⁶ Meissner, Kerwin, Chishti, and Bergeron, *Immigration Enforcement in the United States: The Rise of a Formidable Machinery*.



removal cases. More generally, outside of the Rio Grande Valley sector, a case can be made that DHS has reached a point of diminishing returns on border investments, and that enforcement spending might have a larger impact elsewhere in the system, including, for example, by strengthening immigration judge capacity to reduce case backlogs and provide hearings in more removal cases.

2. Proposals to Increase Executive Office of Immigration Review Funding

The Executive Office of Immigration Review (EOIR) budget has not kept pace with other elements of the deportation system since 9/11, and immigration court dockets and waiting times have grown accordingly. Appropriators increased EOIR funding by 8 percent in FY 2014 (from \$289 million in post-sequestration funding to \$312 million), and the administration made additional adjustments to increase EOIR's budget to \$326 million.¹¹⁷ For FY 2015, the Obama administration has proposed \$21 million in additional spending, with a goal of adding 35 additional immigration judges plus support staff.¹¹⁸ The Senate legislation would direct DOJ to add 75 immigration judges per year over three years beginning in FY 2014.

In some ways, increasing EOIR capacity would appear to appeal to both sides of the immigration debate. For those who favor tough immigration enforcement, more immigration judges offer shorter waiting periods for immigration hearings, and a more efficient judicial removal process. Shorter waiting periods appeal to immigrant-rights advocates because they limit the time people spend in detention awaiting hearings and allow some a faster path to humanitarian relief. More generally, it is hard to argue against efforts to ensure that the system's capacity to complete removal proceedings keeps pace with the inflow of new removal cases.

Nonetheless, as the slow growth in EOIR funding prior to FY 2014¹¹⁹ indicates, the greater focus on nonjudicial removals since 1996 has allowed total removals to grow far faster than the immigration court system, even when accounting for longer immigration court dockets and backlogs. Thus, from an enforcement standpoint, some may prefer to address backlogs in immigration courts by authorizing additional nonjudicial removals (i.e., taking people out of the immigration court system) rather than by expanding court capacity. Of course, authorizing new classes of nonjudicial removals would result in the removal of certain unauthorized immigrants who may otherwise be eligible for relief.

3. Proposals to Increase or Decrease the Number of Detention Beds

Since 2011, Congress has required that ICE maintain detention space for at least 34,000 people at any given time. Some have proposed making additional classes of unauthorized immigrants subject to mandatory detention during removal proceedings, and extending the period during which people may be detained; both would likely require DHS to have additional detention beds.

Increasing the number of detention beds generally increases deportations because aliens detained during removal proceedings are more likely to be successfully repatriated. Indeed, the enforcement system lacks mechanisms to enforce removal orders issued by immigration judges in cases where immigrants are not detained; and absent a subsequent encounter with CBP or the criminal justice system, many individuals who have been ordered removed fail to depart the country.

During each of the last two budget cycles, DHS has proposed reducing ICE's budget for detention beds because the agency reportedly needs only about 31,500 beds at any given time to ensure adequate space

¹¹⁷ DOJ, *FY 2015 Congressional Budget Submission: Administrative Reviews and Appeals* (Washington, DC: DOJ, Justice Management Division, 2014), 7-11, www.justice.gov/jmd/2015justification/pdf/ara-justification.pdf.

¹¹⁸ Ibid.

¹¹⁹ EOIR appropriations grew about 70 percent between FY 2002-13 (from \$175 million to \$304 million), while enforcement operations rose approximately 300 percent (from \$4.5 billion to \$18.0 billion) over the same period. MPI analysis of data from DHS and DOJ, *Budgets-in-Brief*, various years. Immigration enforcement appropriations are defined to include CBP, ICE, and US-VISIT appropriations (since 2003) and related INS budget lines (prior to 2003).



for the population of mandatory detainees and public safety threats.¹²⁰ Given the high costs of immigrant detention—\$120 per person per day, compared to \$11 per day to monitor a person in one of ICE’s alternatives-to-detention programs¹²¹—limiting the number of beds would free up ICE resources for other enforcement priorities,¹²² and may have a limited impact on the total number of removal orders successfully executed.¹²³

The most likely avenue for near-term changes to deportation policies and outcomes is through executive-branch actions.

ICE generally has interpreted the detention bed mandate as a *target* for the nightly number of immigrants to be detained, rather than as a mandate for total detention *capacity*.¹²⁴ As a result, under the current system, the agency detains certain people who are not considered enforcement priorities, at least partly to satisfy appropriators’ targets.¹²⁵ To immigrant advocates, detention of these low-priority cases is unnecessary and imposes a substantial burden on certain immigrants and their families.

C. Executive Actions

With the immigration debate deadlocked in Congress for nearly a decade, and with enforcement appropriations leveling off during the last five years, the most likely avenue for near-term changes to deportation policies and outcomes is through executive-branch actions. Indeed, previous executive-branch policy choices already have significantly shaped today’s deportation system. Successive administrations have expanded the scope and strength of enforcement through the extension of nonjudicial removal programs and the steady increase in criminal prosecutions for immigration-related offenses, among other changes. The current administration has continued these efforts while also using its prosecutorial discretion authority to bring greater focus to its enforcement actions, especially within the nation’s interior.

120 In recent congressional testimony, ICE Deputy Director Daniel Ragsdale stated that each year his agency detains between 26,000 and 28,000 individuals who are subject to mandatory detention under the INA. Ragsdale explained that ICE’s FY 2015 request for funding for 30,539 beds would enable the agency to detain all mandatory detainees as well as all other Level 1 and Level 2 priority noncitizens. Testimony of Daniel Ragsdale, ICE Deputy Director, before the House Committee on Appropriations, Subcommittee on Homeland Security, *Budget Hearing, United States Immigration and Customs Enforcement*, 113th Cong., 2d Sess., March 13, 2014, <http://appropriations.house.gov/calendararchive/eventsingle.aspx?EventID=371316>.

121 Ibid.

122 Ibid.

123 Eliminating detention beds may not result in substantially fewer removal orders being executed if detention resources are reinvested in ATD programs, some of which have good records with respect to participants’ appearance rates, as noted above. In addition, while eliminating detention beds would move some people from the detained to the nondetained docket, resulting in longer wait times for immigration hearings, immigration courts would respond to this change by shifting more judicial resources to the nondetained docket, so that overall wait times would be roughly unchanged.

124 The issue of whether ICE’s appropriation establishes a nightly detained population mandate or a mandatory minimum detention capacity has been disputed, and was raised during a March 2014 DHS appropriations hearing, when Representatives John Culberson (R-TX) and Lucille Roybal-Allard (D-CA) asked Homeland Security Secretary Jeh Johnson about his interpretation of the statutory language on detention beds. Secretary Johnson replied: “The language says ‘funding made available under this heading shall maintain a level of not less than 34,000 beds . . . reading that I would say it means that we have to maintain 34,000 beds. Some of those beds may be empty from time to time . . .’” See Testimony of Homeland Security Secretary Jeh Johnson before the House Appropriations Committee, Subcommittee on Homeland Security, *Budget Hearing—Department of Homeland Security*, 113th Cong., 2d sess., March 11, 2014.

125 See for example, Lutheran Immigration and Refugee Services (LIRS), *Unlocking Liberty: A Way Forward for U.S. Immigration Detention Policy* (Baltimore, MD: LIRS, 2012), 6, www.lirs.org/wp-content/uploads/2012/05/RPTUNLOCKINGLIBERTY.pdf; Elise Foley, “No Conviction, No Freedom: Immigration Authorities Locked 13,000 In Limbo,” *Huffington Post*, January 27, 2012, www.huffingtonpost.com/2012/01/27/immigration-detention_n_1231618.html.



President Obama most recently called upon DHS to review deportation policies to see how the department might conduct more “humane” enforcement. Advocates for less restrictive immigration policies have proposed at least four types of changes that the administration could pursue. They involve DHS’s enforcement priorities, the exercise of prosecutorial discretion during immigration enforcement, enforcement processes, and the exercise of discretion outside the enforcement process (i.e., as in the DACA program). This section examines proposals that fall within each of these approaches.

There is a wide gap between the actual policy flexibility available to the executive branch and the expectations of those who argue that with the stroke of a pen, the president can stop all deportations. While the executive branch has broad authority to determine how to carry out its statutory mandates, actions that go significantly beyond what the administration has already done may run the risk of weakening the effectiveness of enforcement—which has been an important achievement for the administration—and might run afoul of congressional and public expectations of immigration enforcement agencies.

I. Proposals to Refine DHS Enforcement Priorities

The administration has been largely successful in implementing enforcement priorities that focus attention on noncitizens who have been convicted of a crime, on recent illegal entrants, and on people who obstruct immigration enforcement. Yet these priorities, as currently defined, include many people convicted of minor offenses and people with relatively deep roots in the United States, and thus encourage enforcement agents to target certain people who may be good candidates for humanitarian relief. Defining one or more of these enforcement priorities differently could have a substantial impact.

First, DHS’s current policies define “criminal aliens” broadly to include any noncitizen who has ever been convicted of a crime, making a top-tier enforcement priority not only of convicted murderers and bank robbers, but also of convicted loiterers and unlicensed drivers, as well as people whose only criminal conviction was for illegally entering the United States.

In fact, about 21 percent of the criminal aliens removed by the Obama administration had been convicted of immigration-related crimes exclusively, and an additional 23 percent had been convicted of minor, nonviolent offenses only.¹²⁶

While all unauthorized immigrants are potentially subject to deportation, regardless of whether they have been convicted of a crime, for the system to *prioritize* certain people based on minor criminal convictions strikes many as arbitrary and unfair. One potential refinement, therefore, would be to revise DHS’s enforcement priorities to focus on *serious* criminals—particularly including crimes of violence and national security threats—rather than anyone ever convicted of a crime.¹²⁷ Similarly, further guidance could identify certain types of crimes that would *not* be included as enforcement priorities, such as traffic offenses other than driving under the influence (DUI) and illegal entry/re-entry.

Such distinctions would fall squarely within the legal tradition of the INA, which permits the Attorney General to waive grounds for inadmissibility based on certain crimes (those involving moral turpitude, for example), and explicitly bars waivers for offenses such as murder and certain aggravated felonies.¹²⁸ Under the Senate’s S.744 legislation, certain specified criminal convictions would make an unauthorized immigrant ineligible for legalization; lesser criminal convictions would potentially not be disqualifying.

A second potential refinement would be to revise the definition of “recent illegal entrants,” which currently is interpreted to include anyone who entered the United States during the previous three

¹²⁶ MPI analysis of ICE data obtained by *The New York Times*.

¹²⁷ The March 2011 enforcement priorities memo distinguishes among different types of criminal aliens—defining Level 1, Level 2, and Level 3 offenses—but all three types of offenses are included in the memo’s definition of aliens who pose a risk to public safety, the top enforcement priority.

¹²⁸ INA §212(h).



years.¹²⁹ The Senate’s S. 744 would permit those who had been in the country for two years or more to apply for provisional legal status—i.e., would not be treated as priorities for enforcement.

Yet revising existing enforcement priorities would carry certain risks.

First, regardless of the severity of the offense, it is difficult to argue that *convicted criminals* should not be priorities for immigration enforcement. A better option when it comes to immigration-related offenses may be for DHS and DOJ to bring fewer such criminal cases in the first place, as discussed below.

Second, with respect to recent illegal entrants, the logic of comprehensive immigration reform—supported by the administration, many in Congress, and majority public opinion—is that long-standing unauthorized immigrants should be candidates for legalization in tandem with an enforcement system that prevents new illegal inflows. Wherever the line between “new” and “long-standing” is drawn, broadly agreed-upon demands to prioritize border security first and foremost also mean that the administration is likely to be cautious about changes that jeopardize recent border gains. Thus, any changes to DHS priorities that would de-emphasize people who have already been formally removed or who fail to appear at a removal hearing may threaten the credibility of the enforcement system and the administration’s argument that adequate enforcement resources and successes are in place to turn to a broader immigration reform agenda.

A...strategy for adjustments to the deportation system would be to strengthen the guidance and procedures for identifying people who are not enforcement priorities.

Finally, the most important question about refining DHS’s enforcement priorities concerns the relationship between enforcement resources and enforcement outcomes. In particular, does the March 2011 prosecutorial discretion memo define a set of enforcement priorities—i.e., who is placed *first in line* for enforcement—or does the memo define the *total scope* of DHS’s enforcement agenda? To the extent the memo does the former, and Congress provides additional enforcement resources, then limiting DHS’s priorities would only result in a larger number of low-priority cases rounding out the department’s enforcement “quota.” As a result, on a practical level, any changes to enforcement priorities would only bring about the “more humane” enforcement that immigrant communities and advocates are demanding if they are accompanied by greater exercise of discretion.

2. Proposals to Expand the Use of Prosecutorial Discretion

A second strategy for adjustments to the deportation system would be to strengthen the guidance and procedures for identifying people who are *not* enforcement priorities on the basis of their ties to the United States (i.e., long U.S. histories, U.S.-citizen or lawful permanent resident families, etc.), and taking them out of the enforcement queue.

Prior to 1996, the enforcement system incorporated this type of humanitarian relief by giving immigration judges substantial discretion to waive deportation, and by providing almost all of those subject to deportation with a judicial hearing. A key goal of IIRIRA was to constrain judicial discretion in most cases, and today’s overburdened immigration court system imposes an additional barrier to relief even for those who may be eligible for hearings.

¹²⁹ Testimony of Thomas Homan, Executive Associate Director of ICE Enforcement and Removal Operations, before the House Committee on Oversight and Government Reform, Subcommittee on National Security, *Border Security Oversight: Identifying and Responding to Current Threats*, 113th Cong. 1st sess., June 27, 2013, www.dhs.gov/news/2013/06/27/written-testimony-ice-house-oversight-and-government-reform-subcommittee-national; American Immigration Lawyers Association (AILA), “AILA’s Recommendations to DHS on Enforcement,” April 3, 2014, www.aila.org/content/default.aspx?bc=6755|37861|25667|47910.



Congress viewed these limits on discretionary relief as important tools for strengthening enforcement two decades ago. At that time the system deported about 50,000 persons per year, two-thirds of whom were convicted criminals. It was a far different enterprise from today, with around 400,000 removals, most of whom are noncriminals.

Arguably, this growth in enforcement capacity calls for greater discretionary relief. But IIRIRA's restrictions remain in place, and their impact has had a cumulative effect as a growing population of people with ties to the United States become ineligible for immigration relief by being removed and/or convicted of a criminal offense. The system has generated more removals, in large part, by giving up consideration of individual equities that may merit relief from removal.

These considerations underlie the administration's approach on prosecutorial discretion. With judicial authority to grant relief from removal sharply constrained, DHS's exercise of discretion is the only way, in many cases, to prevent the removal of people who may be good candidates for humanitarian relief. DHS has substantial leeway to influence outcomes by exercising this type of discretion, including by not taking custody of many cases identified through Secure Communities.¹³⁰

Nonetheless, the relatively broad scope of DHS's enforcement priorities and abundant enforcement resources mean that it continues to remove a significant number of just such people. For example, MPI estimates that in FY 2013 ICE deported about 60,000 people with minor criminal convictions who potentially could have qualified for earned legalization under the Senate's comprehensive immigration reform bill.¹³¹

DHS could strengthen its exercise of prosecutorial discretion in at least three ways.

First, it could address the relationship between its enforcement priorities and its guidelines for discretion. How does the department balance the competing goals identified in its policies? For example, should a minor criminal or a recent border crosser with long-standing ties to the United States and U.S.-citizen children be considered an enforcement priority (as described in the March 2011 ICE prosecutorial discretion memo), or a candidate for discretion (as suggested in the June 2011 discretion memo)? Overarching guidance regarding how to weigh positive and negative considerations would clarify the department's intentions.

Second, implementation of prosecutorial discretion has been uneven across ICE jurisdictions.¹³² Reportedly, ICE officers and field office directors have substantial flexibility in how they interpret the discretion guidelines. DHS and ICE leadership could exercise greater oversight, and could also increase public transparency as an additional tool to hold field offices accountable.

130 Also see, for example, Vaughan, "Deportation Numbers Unwrapped: Raw Statistics Reveal the Real Story of ICE Enforcement in Decline."

131 According to ICE data provided to *The New York Times*, the agency deported 152,685 people from within the United States in FY 2013 (i.e., not counting people apprehended at the border, who would be ineligible for relief under the immigration bill passed by the Senate in 2013). Of these, 23,240 (15 percent) had no criminal convictions, and another 41,430 (27 percent) had been convicted exclusively of a Level 3 offense (two or fewer misdemeanors). Only a small portion of these 64,670 people likely would be unable to meet the Senate bill's requirements with respect to time in the United States. The language of the Senate bill outlining the bars for immigration-related crimes is ambiguous, but this analysis assumes that those convicted of immigration-related crimes would not be automatically barred from receiving registered provisional immigrant (RPI) status conferred under the legislation. Some have interpreted the bill's language as barring from RPI status anyone convicted of a federal felony, as well as those convicted of three or more federal misdemeanors (though a waiver would remain available for those barred solely based on misdemeanor convictions).

132 See, for example, TRAC, *Once Intended to Reduce Immigration Court Backlog, Prosecutorial Discretion Closures Continue Unabated* (Syracuse, NY: TRAC, 2014), <http://trac.syr.edu/immigration/reports/339/>; TRAC, *Targeting of ICE Detainers Varies Widely by State and by Facility* (Syracuse, NY: TRAC, 2014), <http://trac.syr.edu/immigration/reports/343/>. Also see Julia Preston, "Deportations under New U.S. Policy Are Inconsistent," *The New York Times*, November 12, 2011, www.nytimes.com/2011/11/13/us/politics/president-obamas-policy-on-deportation-is-unevenly-applied.html?pagewanted=all; AILA, *Holding DHS Accountable on Prosecutorial Discretion* (Washington, DC: AILA, 2011), www.aila.org/content/default.aspx?docid=37615.



One way to do this would be to formalize a procedure and role played by ICE's attorneys when the prosecutorial discretion guidance was initially introduced. As part of its implementation, all cases scheduled to go before immigration judges were reviewed against the June 2011 prosecutorial discretion guidelines and those cases that met the criteria for discretion were administratively closed. ICE attorney review on an ongoing basis would create a mechanism for assuring greater consistency in the application of prosecutorial discretion across the deportation caseload. U.S. attorneys' offices play that role in their review of cases brought by investigative and regulatory agencies for potential prosecution in federal courts.

Third, the Border Patrol and CBP's Office of Field Operations have not developed their own agency guidance to implement the department's discretion policies. Uneven—or nonexistent—policies to exercise discretion at the border are a particularly important gap, given the high share of removals that originate there.

DHS...has the leeway to restore greater immigration judge discretion in certain cases and reduce the interaction between immigration enforcement and the criminal justice system.

At the same time, adding greater discretion to Border Patrol operations would represent a major challenge to current operations, which rely so extensively on high-consequence enforcement to discourage recidivism. Unlike ICE, which typically exercises discretion by not arresting potentially removable people located in another agency's custody (e.g., by not issuing a detainer to someone identified through Secure Communities), people apprehended at the border already are in CBP custody by the time the agency makes a preliminary status determination. In addition, while many border crossers have equities in the United States, the proportion at the border is likely lower than in the interior.

Any effort to expand the use of discretion at the border would also have to balance the interests of U.S. communities and immigrant families against the risk that changes to the near-zero tolerance approach to border enforcement would undermine the deterrent effect the current system is achieving. A modest modification, therefore, might be to recognize that CBP operations at interior locations up to 100 miles from the border are more akin to ICE interior enforcement operations than to enforcement at or near the border. Although the large share of CBP's work is at or near the border, its nonborder operations could be subject to policies aligned with those of ICE operations at similar interior locations.¹³³

3. Proposals to Modify the Enforcement Process

DHS also has the leeway to restore greater immigration judge discretion in certain cases and reduce the interaction between immigration enforcement and the criminal justice system. In particular, the administration could revisit its procedures concerning expedited removal, reinstatement of removal, referrals for immigration-related criminal charges, and the operation of fast-tracked criminal proceedings such as Operation Streamline.

The expansion of these enforcement provisions over the last two decades has played an important role in the overall growth of the deportation system. Thus, any changes to reduce the flow into these pipelines could make enforcement more humane. Yet such changes also would be costly to implement—both in terms of their direct costs, as well as their possible impact on the performance of the enforcement system.

First, DHS could re-examine its policies for placing people in nonjudicial removal proceedings (i.e. expedited removal and reinstatement of removal). As originally implemented, expedited removal

¹³³ In certain border regions, geography and other considerations cause the Border Patrol to focus enforcement efforts at some distance from the border ("enforcement in depth"); the 100-mile enforcement zone may be more appropriate in these cases.



applied only to people apprehended at ports of entry, and it was not until 2004 that executive-branch regulations were issued to expand expedited removal to the 100-mile zone where it is currently applied. Reinstatements of removal also have expanded substantially in recent years, and many reinstated orders are for people whose initial order may have been through expedited removal, meaning they have never appeared before an immigration judge.

Thus, DHS could develop screening tools to identify people with strong U.S. equities—long periods of U.S. residence, U.S.-based families—who are apprehended near the border or who have previously been removed. These cases could be shifted into judicial removal proceedings. This approach would reintroduce a greater degree of case-by-case review to the deportation system. Yet immigration courts already are overburdened and expanding their role would require substantial additional investments.

Second, DHS and DOJ—together—could re-examine their policies for bringing immigration-related criminal charges against people whose only offense has been to enter the United States illegally. The federal courts have processed about 1 million such cases since 1997 (including an unknown number of repeat prosecutions).¹³⁴ Actions by three successive administrations to prosecute these immigration cases has effectively criminalized illegal immigration and created a large population of “criminal aliens” who, under previous prosecutorial priorities, would have been treated as civil offenders.

These prosecutions place a heavy burden on the federal criminal justice system, including U.S. attorneys, district courts, U.S. Marshals, Bureau of Prisons, and federal public defenders. The costs not only include the direct budgetary impact on these systems, but the opportunity costs of not prosecuting other, perhaps more serious, crimes.

At the same time, illegal entry and re-entry have been criminal offenses since 1952. There is some evidence that the criminalization of illegal immigration contributes to the effectiveness of the deportation system, as people charged with criminal offenses at the border have lower recidivism rates than those subject to other forms of removal.

One approach to balancing these considerations would be to limit the scope of Operation Streamline, and handle criminal charges through standard prosecutions that provide greater due-process protections and the opportunity to weigh individual equities. Yet the trade-off between standard prosecutions and Operation Streamline resembles the trade-off between judicial and nonjudicial removals. Eliminating fast-tracked judicial processing would raise enforcement costs, requiring either much larger investments in the federal criminal justice system or many fewer prosecutions.

4. Proposals to Expand DACA-Style Relief

A fourth potential strategy would be for the administration to expand the criteria allowing people to apply for deferred enforcement outside of the removal process—i.e., to create a larger version of the Deferred Action for Childhood Arrivals (DACA) program.¹³⁵ Many immigrant advocates and community leaders are calling for such an expansion.

The DACA program differs from the other forms of prosecutorial discretion in that it permits certain people to *apply* for relief, rather than to be considered for relief after becoming targets of immigration enforcement. In addition, DACA beneficiaries receive temporary legal authority to live and work in the United States, whereas beneficiaries of other prosecutorial discretion do not receive work authorization and remain more vulnerable to enforcement at a later date.

DACA applies to unauthorized immigrant youth who entered the United States as children and have completed the program’s educational requirements—criteria similar to those Congress has considered

¹³⁴ MPI calculations from United States Courts, “Judicial Business of the United States Courts,” detailed statistical appendices, FY 1997-2013.

¹³⁵ For an overview of the criteria for relief under DACA and implementation of the DACA program, see Batalova, Hooker, and Capps with Bachmeier and Cox, *Deferred Action for Childhood Arrivals at the One-Year Mark: A Profile of Currently Eligible Youth and Applicants*.



under so-called DREAM legislation.¹³⁶ Proponents of less-restrictive immigration policies have demanded that the administration expand these criteria to include, for example, unauthorized immigrants who are parents of DACA beneficiaries, the parents and spouses of U.S. citizens or lawful permanent residents, or people with other types of U.S. connections, including, for example, those with jobs in the United States.

Expanding DACA would offer the most reliable form of protection from deportation that is within the authority of the executive branch to provide. However, expansion raises concerns.

The current DACA beneficiaries are a highly sympathetic population, in that these are young people who have grown up in the United States and gone through its schools, disadvantaged by being in the country illegally through the actions of their parents. Even under these best-case circumstances, DACA has been the target of bitter political attacks as “administrative amnesty” and the administration has been accused of disregarding enforcement of immigration laws. Extending DACA to parents of DACA beneficiaries, for example, dilutes one rationale that it extends protections to “innocents” who did not voluntarily migrate to the United States. And it would be difficult to differentiate why these parents would have greater claims for relief than other unauthorized immigrants who did not bring young children with them when they migrated.

The U.S. Immigration and Naturalization Service (INS) and its successor, DHS, have embraced and aggressively used the expanded deportation authorities and resources gained since the mid-1990s.

Furthermore, many members of Congress and others would be deeply opposed and even more critical of the president’s handling of immigration policy as a usurpation of congressional authority. To the extent that there is any remaining chance of progress toward immigration reform legislation in the months ahead, such a decision could bring momentum to a halt.

The House already recently enacted the *Enforce the Law Act of 2014*, authorizing either chamber of Congress, under certain conditions, to bring a civil action against the president or other executive-branch officials for failure to administer a federal statute. Although Senate leaders have stated they will not act on the measure, it serves as a clear signal to the administration of congressional dissatisfaction with its prosecutorial discretion policies. This bill or similar measures to significantly curtail long-standing executive-branch authorities could be introduced again and possibly enacted by a future Congress.

VI. Conclusion

Congress passed sweeping legislation in 1996 to toughen America’s deportation system. Almost 20 years later, with immigration enforcement appropriations the highest they have ever been, the Department of Homeland Security (DHS) has increasingly put in place the tools to apprehend and remove unprecedented numbers of unauthorized immigrants.

The U.S. Immigration and Naturalization Service (INS) and its successor, DHS, have embraced and aggressively used the expanded deportation authorities and resources gained since the mid-1990s. Particularly in the last decade, successive executive-branch policies and practices have made expedited removal and reinstatements of removal the primary ways DHS carries out its removal responsibilities and mandates, especially in border enforcement. Further, immigration cases now represent almost half of the docket of federal district and magistrate courts, as courts in the four Southwest border states have

¹³⁶ *Development, Relief, and Education for Alien Minors Act of 2010* (DREAM Act), 111th Cong., 1st sess., *Congressional Record* 156, no. 154 (November 30, 2010): S. 3992.



charged people with immigration-related crimes almost 1 million times since 1997.

Over time, the cumulative effects of a tough legal framework, generous appropriations, and aggressive implementation have resulted in the deployment of a fully mature deportation system that represents a new historical reality. At the same time, a primary effect of the more than 4.5 million formal removals that have occurred since 1997—including many of noncitizens with deep roots in the United States—has been to criminalize a large and growing portion of the unauthorized population, and to raise ever-higher barriers for people who might otherwise be candidates for an eventual legalization program.

Enforcement at the border and within the United States show sharply different pictures. At the border, there is a near zero-tolerance system, where unauthorized immigrants are increasingly subject to formal removal and criminal charges. Within the country, there is greater flexibility, with priorities and resources focused on a smaller share of the sizeable unauthorized population. Such differences are consistent with the different goals and circumstances confronting border and interior enforcement. But the impacts of these differing systems have begun to converge, raising increasingly complex questions and choices for policymakers and the public.

The Obama administration has taken significant steps to make adjustments to this system. Without rolling back major initiatives introduced by prior administrations—including the universal deployment of Secure Communities—DHS has largely restricted deportation to three priorities: people previously convicted of a crime (“criminal aliens,” broadly defined), people apprehended near the border, and people who re-enter following a removal order or who fail to comply with immigration enforcement proceedings.

The resulting system is deeply unsatisfying to both sides in the immigration debate. Those who favor tougher enforcement object to the low priority placed on deporting unauthorized immigrants who fall outside DHS’s priority categories and to the administration’s use of prosecutorial discretion, which critics deem “administrative amnesty.” Those who are concerned about the harsh effects of deportation object to the continued removal of record numbers of people with strong ties to American families and communities, and demand greater use of executive authorities to halt deportations.

*Enforcement at the border and within the United States
show sharply different pictures.*

With Congress apparently deadlocked on immigration reform legislation, the debate has turned to executive-branch actions to bring discretion to an ever-more efficient deportation system. Indeed, the executive branch has substantial authority to shape the enforcement system within an established legal and resources framework.

While adjustments to DHS enforcement priorities can be made, actions by the executive branch alone cannot reconcile the fundamentally competing policy demands the immigration enforcement system now confronts. The deportation dilemma is that more humane enforcement is fundamentally in tension with stricter immigration control. A robust enforcement system inevitably inflicts damage on established families and communities.

The question at the heart of the administration’s review of its deportation policies is: How does the government carry out its enforcement responsibilities and mandates while also shielding U.S.-citizen and immigrant families and communities from undue harm? How can an enforcement system that is predicated on deporting people to deter illegal immigration and uphold the integrity of the nation’s immigration laws also minimize the harmful impacts of enforcement?

Whatever answer the administration gives is not likely to diminish controversy and disagreements over issues of deportation until the real solution—a rationalized, updated immigration law—is one day politically possible.



Appendices

Appendix I. Glossary of Terms

287(g) program: A program authorized by section 287(g) of the *Immigration and Nationality Act* (INA) that allows law enforcement officers in designated state and local agencies to perform certain immigration enforcement functions. To participate in the 287(g) program, state and local law enforcement agencies must enter into written agreements with the Department of Homeland Security (DHS). Congress created the program in 1996 through the *Illegal Immigration Reform and Immigrant Responsibility Act* (IIRIRA).

Administrative arrest: In the immigration context, the arrest of a noncitizen for an immigration law violation.

Administrative removal: A type of nonjudicial removal that may be issued to a noncitizen who has not been admitted for lawful permanent residence, and who has a prior conviction for an aggravated felony. The authority for administrative removal comes from INA § 238(b).

Alien Smuggling: The criminal offense of bringing into the United States (or attempting to bring into the United States) a noncitizen in any manner or at any place other than those designated by immigration officials. Alien smuggling is a felony under 8 USC §1324.

Civil detention: The form of detention authorized for individuals believed to be removable from the United States under the immigration law. Unlike criminal incarceration, civil detention does not serve a punitive purpose; in the immigration context, its purposes are to ensure that noncitizens appear at their removal hearings and that those ordered removed do not abscond.

Consequence Delivery System (CDS): A tool developed by U.S. Customs and Border Protection (CBP) to assist agents in determining how to handle the case of each inadmissible immigrant who is apprehended while attempting to cross the border. Possible “consequences” under CDS include voluntary return, expedited removal, reinstatement of removal, and/or referral for criminal prosecution.

Criminal Alien: A noncitizen who has previously been charged with and convicted of a felony or misdemeanor offense in the criminal court system.

Criminal Alien Program (CAP): An Immigration and Customs Enforcement (ICE) program through which immigration officers screen individuals incarcerated in federal, state, and local prisons and jails for their immigration history. Based on these screens, ICE officers decide whether to initiate removal proceedings against particular individuals.

Deportation: The expulsion of an inadmissible or deportable noncitizen from the United States, through either the issuance of a formal removal order, or through the completion of the more informal return process. This report uses the terms “deportation” and “repatriation.”

Deportable Alien: A noncitizen who has been admitted to the United States, either as a temporary nonimmigrant or as a lawful permanent resident (LPR), and who is subject to removal from the country based on one of the violations set forth in INA § 237. Among other offenses, grounds of deportability include the commission of certain criminal offenses, unlawful voting, and violations of conditions of entry.

Document Fraud: The criminal offense of knowingly forging or altering an immigration document, knowingly using a false or fraudulent immigration document, or attempting to evade immigration law restrictions by not disclosing one’s true identity. Document fraud is a federal crime under 18 USC §1546.

Expedited Removal: A type of nonjudicial removal that may be issued to unauthorized noncitizens who



are apprehended within 100 miles of the border and who have not been physically present in the United States for at least two years prior to their apprehension. Expedited removal is authorized under INA §238.

IDENT: The automated biometric identity system is a centralized DHS database that contains biometric data, such as fingerprints and digital photographs, as well as some biographic information and encounter data for individuals who previously had contact with DHS.

Illegal Entry: Entry into the United States at a time and place not designated by immigration authorities, or entry based on willful misrepresentation or concealment of a material fact. Illegal entry is a federal misdemeanor offense under 8 USC §1325.

Immigration Crime: A federal felony or misdemeanor offense that relates to illegally entering the country or assisting others in doing so. Examples of immigration crimes include illegal entry, illegal re-entry, alien smuggling, and visa/document fraud.

Immigration Judges (IJs): Department of Justice (DOJ) officers who are appointed by the Attorney General and who have the authority to issue formal orders of removal and to grant discretionary relief to noncitizens through adjudicative proceedings.

Inadmissible Alien: A noncitizen seeking admission to the United States who is ineligible under the immigration code based on certain characteristics, such as prior criminal history, certain health conditions, and prior immigration violations.

Joint Criminal and Alien Removal Taskforces (JCART): Multiagency taskforces created to locate and apprehend criminal aliens. Task forces are made up of officers from ICE, CBP, the U.S. Marshals Service, and state and local law enforcement agencies.

Judicial Removals: Formal removals that are issued by immigration judges, generally following hearings in which a noncitizen defendant has the ability to contest removability, present evidence, and seek discretionary relief from removal.

Nonjudicial Removals: Formal removals that are issued without oversight by an immigration judge and without a formal hearing. Nonjudicial removals are handled entirely by DHS officers.

Notice to Appear (NTA): The charging document completed by ICE in order to initiate formal removal proceedings against a noncitizen.

Operation Streamline: A joint DHS/Department of Justice (DOJ) program launched in 2005 that charges large numbers of recent border crossers with criminal immigration charges (namely, illegal entry and illegal re-entry) through a fast-track judicial process.

Prosecutorial Discretion: The authority of a law enforcement agency to make decisions about who to apprehend, detain, and charge. In the immigration context, prosecutorial discretion includes decisions about whether and when to initiate removal proceedings, as well as decisions about whether to apprehend, detain, and deport a noncitizen.

Reinstatement of Removal: A type of nonjudicial removal that may be issued to a noncitizen who previously received a formal order of removal, departed the United States, and returned without authorization. Reinstatements of removal are authorized under INA § 241(a)(5).

Relief from Removal: A discretionary determination by an immigration judge that a noncitizen, although technically removable, should not be required to leave the United States. The INA contains a small number of forms of relief from removal, including cancellation of removal for individuals who have resided in the United States for extended periods of time, and humanitarian protection (such as asylum) for individuals who fear persecution in their home countries.



Remote Repatriation: The removal or return of a Mexican national apprehended at the border to either the interior of the country, or via a port of entry that is far from the area where the individual initially crossed the border. Remote repatriations are intended to deter repeated illegal crossings by separating migrants from the smuggling networks that they initially used to attempt entry into the United States.

Removal: The compulsory and confirmed movement of an inadmissible or deportable noncitizen out of the United States based on an order of removal. A noncitizen who is formally removed is subject to administrative and criminal consequences if he or she reenters the country without authorization.

Return: The confirmed movement of an inadmissible or deportable noncitizen out of the United States not based on a formal order of removal.

Secure Communities Program: An ICE program now operating nationwide that screens the fingerprints of all arrested individuals against federal immigration databases, as well as criminal databases. When a fingerprint screen reveals that an arrested individual is a removable noncitizen, ICE officers determine whether to seek custody of the person and whether to initiate removal proceedings.

Stipulated Order of Removal: A type of judicial removal in which a noncitizen agrees not to contest his or her removability and to accept immediate removal. While immigration judges must sign stipulated orders of removal, in most cases, a noncitizen who signs a stipulated order does not have the opportunity to go before a judge in a formal hearing. Stipulated orders of removal are authorized under INA § 240(d).

Voluntary Departure: A type of return that is ordered by an immigration judge, either at the beginning of a removal case, when charges have just been filed against a noncitizen, or at the end of the case, if the judge determines that a noncitizen is not eligible for immigration relief. DHS officers may also grant voluntary departure prior to the conclusion of a removal case.

Withdrawal of Application for Admission: The process through which a CBP officer permits a noncitizen seeking entry to the United States to take back his or her application for admission and voluntarily leave the country. CBP officers have discretion to determine whether and when to allow a noncitizen to withdraw his or her application for admission.

Appendix 2. ICE and DHS Prosecutorial Discretion Memoranda and Policy Guidance, 2010-13

- **August 20, 2010: *Guidance Regarding the Handling of Removal Proceedings of Aliens with Pending or Approved Applications or Petitions.*** This memo established a framework for ICE to request expedited adjudication and dismissal of removal proceedings for individuals in proceedings with pending applications or petitions with USCIS that would provide an immediate basis for relief.¹³⁷
- **June 17, 2011: *Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens.*** This memo establishes that due to resource limitations, ICE must regularly exercise prosecutorial discretion with respect to a range of enforcement decisions. It authorizes ICE personnel to exercise prosecutorial discretion based on a set of factors including the agency's civil immigration priorities, an individual's ties to the United States, length of U.S. residence, criminal and immigration history, and health conditions.¹³⁸

¹³⁷ John Morton, Assistant Secretary, ICE, "Memorandum for Peter S. Vincent, Principal Legal Advisor and James Chaparro, Executive Associate Director, ERO: Guidance Regarding the Handling of Removal Proceedings of Aliens with Pending or Approved Applications or Petitions" (memo, August 20, 2010), www.ice.gov/doclib/foia/prosecutorial-discretion/handling-removal-proceedings.pdf.

¹³⁸ As stated in the document, the memo builds on several existing memoranda related to prosecutorial discretion, issued by INS and DHS officials, including: Sam Bernson (1976); Bo Cooper (2000); Doris Meissner (2000); Bo Cooper (2001); William J. Howard (2005); Julie L. Meyers (2007); and John Morton (2011). John Morton, Assistant Secretary, ICE, "Memorandum for



- **June 17, 2011: Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs.** This memo instructed ICE officers, special agents, and attorneys to exercise prosecutorial discretion on a case-by-case basis when making detention and enforcement decisions with respect to victims of crime, witnesses to crime, and individuals pursuing legitimate civil-rights complaints.¹³⁹
- **November 7, 2011: Revised Guidance for the Referral of Cases and Issuance of Notices to Appear (NTAs) in Cases Involving Inadmissible and Removable Aliens.** This memo sets forth new USCIS guidelines establishing the circumstances under which USCIS should issue a notice to appear (NTA) or refer a case to ICE, with a focus on cases that involve national security and public safety threats, criminals, aliens engaged in fraud, and cases where NTA issuance is required by statute or regulation.¹⁴⁰
- **November 17, 2011: Case-by-Case Review of Incoming and Certain Pending Cases.** Through this memo, ICE initiated a case-by-case review of pending and incoming cases in immigration court, instructing ICE attorneys to determine whether each case should continue or warrants prosecutorial discretion in the form of administrative closure, based on factors outlined in the June 2011 prosecutorial discretion and other previous memoranda.¹⁴¹ ICE issued a follow-on document soon after titled *Guidance to ICE Attorneys Reviewing the CBP, USCIS, and ICE Cases Before the Executive Office for Immigration Review*.¹⁴²
- **Undated: Next Steps in the Implementation of the Prosecutorial Discretion Memorandum and the August 18th Announcement on Immigration Enforcement Priorities.** This document laid out a three-part implementation plan for the prosecutorial discretion and case-by-case review memos, consisting of a prosecutorial discretion training program, a review of incoming cases, effective immediately, and a review of cases pending in immigration court.¹⁴³
- **June 15, 2012: Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children.** This memo, issued by Homeland Security Secretary Janet Napolitano, instructs CBP, USICS, and ICE to exercise prosecutorial discretion for certain young unauthorized immigrants who came to the United States before age 16, are pursuing an education, and pass a background check. It establishes that such individuals who also meet all requirements should be granted deferred action for a period of two years, in order to prevent low priority individuals from being removed from the United States.¹⁴⁴

All Field Office Directors, All Special Agents in Charge, All Chief Counsel: Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens” (memo, June 17, 2011), www.ice.gov/doclib/foia/prosecutorial-discretion/pd_cnstnt_w_civil_imm_enforce_ice_priorities.pdf.

139 John Morton, Assistant Secretary, ICE, “Memorandum for All Field Office Directors, All Special Agents in Charge, All Chief Counsel: Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs” (memo, June 17, 2011), www.ice.gov/doclib/foia/prosecutorial-discretion/certain-victims-witnesses-plaintiffs.pdf.

140 USCIS, “Revised Guidance for the Referral of Cases and Issuance of Notices to Appear (NTAs) in Cases Involving Inadmissible and Removable Aliens” (memo, November 7, 2011), www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static/Files/Memoranda/NTA%20PM%20%28Approved%20as%20final%2011-7-11%29.pdf.

141 Peter S. Vincent, Principal Legal Advisor, “Memorandum for All Chief Counsel, Office of the Principal Legal Advisor: Case-by-Case Review of Incoming and Certain Pending Cases” (memo, November 17, 2011), www.ice.gov/doclib/foia/prosecutorial-discretion/case-by-case-review-incoming-certain-pending-cases-memorandum.pdf.

142 ICE, “Guidance to ICE Attorneys Reviewing the CBP, USCIS, and ICE Cases Before the Executive Office for Immigration Review,” (unsigned ICE memo, undated), www.ice.gov/doclib/foia/prosecutorial-discretion/guidance-to-ice-attorneys-reviewing-cbp-uscis-ice-cases-before-eoir.pdf.

143 ICE, “Next Steps in the Implementation of the Prosecutorial Discretion Memorandum and the August 18th Announcement on Immigration Enforcement Priorities,” (unsigned memo, undated), www.ice.gov/doclib/about/offices/ero/pdf/pros-discretion-next-steps.pdf.

144 Janet Napolitano, Secretary of Homeland Security “Memorandum for David V. Aguilar, Acting Commissioner, U.S. Customs and Border Protection, Alejandro Mayorkas, Director, U.S. Citizenship and Immigration Services, and John Morton Director, U.S. Immigration and Customs Enforcement: Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children,” (memo, June 15, 2012), www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf.



- **October 5, 2012: *Applicability of Prosecutorial Discretion Memoranda to Certain Family Relationships*.** This memo clarifies that one of the factors used in prosecutorial discretion assessments, a “person’s ties and contributions to the community, including family relationships,” encompasses committed, long-term, same-sex relationships.¹⁴⁵
- **December 21, 2012: *Civil Immigration Enforcement: Guidance on the Use of Detainers in the Federal, State, Local, and Tribal Criminal Justice Systems*.** This memo serves as guidance with respect to the use of ICE detainers in the U.S. criminal justice system. It seeks to align ICE detainer policy with the agency’s civil enforcement priorities and instructs ICE officers to place holds only on individuals whom they have reason to believe are removable noncitizens, and who have been convicted of a range of certain crimes (including immigration crimes), have an outstanding order of removal, have committed immigration fraud, or who is otherwise a public safety or national security threat.¹⁴⁶
- **August 23, 2013: *Facilitating Parental Interest in the Course of Civil Immigration Enforcement Activities*.** Meant to supplement existing ICE immigration enforcement priorities and prosecutorial discretion memoranda, this memo seeks to preserve the parental rights of noncitizen parents and legal guardians of minor children during immigration enforcement actions, and instructs ICE officials to continue to consider whether a noncitizen is a parent or legal guardian of young children in their decision to exercise prosecutorial discretion.¹⁴⁷
- **November 15, 2013: *Parole of Spouses, Children and Parents of Active Duty Members of the U.S. Armed Forces, the Selected Reserve of the Ready Reserve, and Former Members of the U.S. Armed Forces or Selected Reserve of the Ready Reserve and the Effect of Parole on Inadmissibility under Immigration and Nationality Act § 212(a)(6)(A)(i)*.** This memo formalizes a policy that allows unauthorized immigrant spouses, children, and parents of armed forces personnel and veterans to “parole in place” and remain in the United States to apply for permanent residency, rather than apply from abroad and potentially not be readmitted to the United States for a period of as long as ten years.

145 Gary Mead, Executive Associate Director, Peter S. Vincent, Principal Legal Advisor, and James Dinkins, Executive Associate Director, “Memorandum for: All Field Office Directors, All Chief Counsel, All Special Agents in Charge: Applicability of Prosecutorial Discretion Memoranda to Certain Family Relationships,” (memo, October 5, 2012), www.immigrationequality.org/wp-content/uploads/2012/11/PD-memo-10-5-2012-2.pdf.

146 John Morton, Director, ICE, “Memorandum for All Field Office Directors, All Special Agents in Charge, All Chief Counsel: Civil Immigration Enforcement: Guidance on the Use of Detainers in the Federal, State, Local, and Tribal Criminal Justice Systems,” (memo, December 21, 2012), www.ice.gov/doclib/detention-reform/pdf/detainer-policy.pdf.

147 John Sandweg, Acting Director, ICE, “Facilitating Parental Interest in the Course of Civil Immigration Enforcement Activities,” (memo, August 23, 2013), www.ice.gov/doclib/detention-reform/pdf/parental_interest_directive_signed.pdf.



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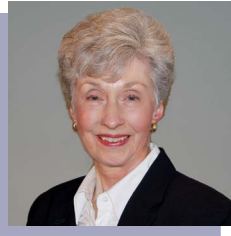


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The Migration Policy Institute is a nonprofit, nonpartisan think tank dedicated to the study of the movement of people worldwide. MPI provides analysis, development, and evaluation of migration and refugee policies at the local, national, and international levels. It aims to meet the rising demand for pragmatic and thoughtful responses to the challenges and opportunities that large-scale migration, whether voluntary or forced, presents to communities and institutions in an increasingly integrated world.

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