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### **Reform U.S. Approach to Border Prosecutions**

Illegal entry (under 8 U.S.C. § 1325) and illegal re-entry (under 8 U.S.C. § 1326) are now the most prosecuted federal crimes in the United States.<sup>1</sup> According to the Pew Research Center, the increase in illegal re-entry convictions over the past two decades accounts for 48 percent of the growth in total convictions in federal courts over the period.<sup>2</sup> This is the direct outcome of zero-tolerance programs that require the federal criminal prosecution and imprisonment of *all* unlawful border crossers, collectively referred to as “Operation Streamline.”

First introduced in 2005, Streamline proceedings have been implemented in jurisdictions in every Southwest border state except California. Under Streamline, in addition to being processed for deportation, apprehended migrants are referred by the Department of Homeland Security (DHS) to the Department of Justice (DOJ) for federal prosecution, and are typically detained for 1 to 14 days before appearing in court.<sup>3</sup> The average sentence length for individuals convicted of illegal re-entry is 19 months.<sup>4</sup> As a result of Streamline, DHS now refers more cases for federal prosecution than all of DOJ’s law enforcement agencies.<sup>5</sup>

As part of his plans to reform the federal criminal justice system, the Attorney General has directed U.S. Attorneys to prioritize cases that deal with national security, violent crime, and financial fraud and cases that protect our most vulnerable communities.<sup>6</sup> Prosecutions for illegal entry and re-entry achieve none of these stated priorities – and increase federal incarceration levels, primarily in private prisons known as Criminal Alien Requirement (CAR) facilities. Meanwhile, DHS’s goal for these prosecutions is to deter illegal migration, but it is virtually impossible to measure the multiple factors that inform a migrant’s decision to cross, and the desire to reunite with family or find a job often outweighs any fear of prosecution.<sup>7</sup> It is also unclear whether DHS can even collect the data necessary to assess deterrent effect with any accuracy.

Furthermore, illegal entry and re-entry prosecutions artificially inflate the numbers of people that DHS deports as “criminal aliens.” In FY 2013, more than 60,000 people removed by ICE had illegal entry or re-entry as their most serious criminal conviction.<sup>8</sup>

**DOJ and DHS should return immigration enforcement to civil authorities. Operation Streamline, as a zero-tolerance program, should be eliminated as wasteful and counter to fundamental notions of prosecutorial discretion and fitting the punishment to the crime.**

### **Border Prosecutions Drain Government Resources**

- Streamline overwhelms federal court districts along the Southwest border, draining resources that would be better used to pursue actual threats to public safety. Illegal entry and re-entry prosecutions constituted more than 80 percent of all prosecutions in the District of Arizona, District of New Mexico, Western District of Texas, and Southern District of Texas in FY 2013.<sup>9</sup> Nationwide, illegal re-entry prosecutions are up 76.2 percent since 2009.<sup>10</sup> Immigration offenses

were the most common federal offense prosecuted in FY 2012 – more than drug, firearms, fraud, larceny, white-collar crimes, or child pornography.<sup>11</sup> As a result, in 2011, the chief federal district judge in Arizona had to declare a judicial emergency and temporarily suspended a “speedy trial” time limit for criminal defendants.<sup>12</sup>

- Streamline is extremely expensive to taxpayers, who foot the bill to fund district courts, U.S. Attorney’s offices, federal public defenders, Criminal Justice Act Panel attorneys, court interpreters, and U.S. Marshals Service facilities, as well as the private federal prisons used primarily to incarcerate non-citizens convicted of illegal re-entry.<sup>13</sup> These private prisons, operating under 13 contracts, held 13 percent of the BOP population as of June 26, 2014.<sup>14</sup> Federal incarceration costs for § 1325 and § 1326 prosecutions have been estimated at \$1 billion per year.<sup>15</sup> The percentage of immigration defendants released on bond before trial is lower than that for any other category of defendants charged with federal crimes, inflating pre-trial detention costs.<sup>16</sup>

### **There Is No Evidence that Border Prosecutions Deter Illegal Entry**

- Migration Policy Institute has noted that for border crossers with strong family and economic ties to the United States “even... high-consequence enforcement strategies [criminal prosecutions] may not deter them from making future attempts.”<sup>17</sup>
- A University of Arizona study tracking 1,200 people deported via Streamline found that when it comes to re-entry there is no statistically significant difference between those who went through Streamline and those who did not.<sup>18</sup>
- From FY 2008 to FY 2012, Border Patrol apprehensions fell by about 82 percent in San Diego, which is not part of Streamline, outpacing declines in any Streamline sector. While the Yuma and El Paso sectors prosecute every apprehended migrant through Streamline, they have rates of recidivism almost identical to nearby sectors (respectively, Tucson and Del Rio/Laredo) that prosecute only a fraction of apprehended migrants through Streamline.<sup>19</sup>

### **Streamline Prosecutions Do Not Meet Basic Due Process Standards**

- Immigrants charged with illegal entry or re-entry frequently do not receive counsel until they appear in court, allowing little time to consult with their attorney to understand the charges, consequences of conviction, and potential avenues for relief. Because a single attorney often represents dozens of defendants at a time, he or she might not be able to speak confidentially with each client or might have a conflict of interest among clients.<sup>20</sup>
- Judges combine the initial appearance, arraignment, plea, and sentencing into a single hearing, sometimes taking as little as 25 seconds per defendant.<sup>21</sup>

### **Federal Judges and Prosecutors Oppose Streamline**

- “The expenses of prosecuting illegal entry and re-entry cases (rather than deportation) on aliens without any significant criminal record is simply mind boggling. The U.S. Attorney’s policy of prosecuting all aliens presents a cost to the American taxpayer that is neither meritorious nor reasonable.” –Judge Sam Sparks, U.S. District Court for the Western District of Texas<sup>22</sup>

- “The U.S. attorney isn’t bringing me those [priority] cases. They’re just catching foot soldiers coming across the border. . . . But they will tell you that they don’t have the resources to . . . develop a conspiracy case.” –Judge George P. Kazen, U.S. District Court for the Southern District of Texas<sup>23</sup>
- “Because of the [immigration] caseload, we can’t always be as proactive as we’d like to be because we’re so busy being reactive. [Drug and human trafficking] cases do exist. [...] Would I like to spend a lot more time trying to work up the ladder to [drug and human trafficking] organizations? Most definitely.” –Clint Johnson, Assistant U.S. Attorney in Las Cruces, New Mexico<sup>24</sup>
- “There is a use of criminal justice resources that doesn’t make sense.” –Judge Ruben Castillo, U.S. District Court for the Northern District of Illinois and former Commissioner, U.S. Sentencing Commission<sup>25</sup>
- “Every day I see people who would never have been considered as criminal defendants two years ago.” –Judge Robert C. Brack, U.S. District Court for the District of New Mexico<sup>26</sup>

The Vatican has also called for an end to Operation Streamline.<sup>27</sup>

### **ACLU Recommendations to DOJ and DHS**

- To implement the Attorney General’s August 2013 “Smart on Crime” announcement, DOJ should direct U.S. Attorneys to de-prioritize § 1325 and § 1326 prosecutions except in specific cases where such charges advance one of the Department’s current prosecutorial interests: national security, violent crime, financial fraud, and protection of the most vulnerable members of society.
- In the case of violent crime, DOJ should direct prosecutors to pursue § 1325 and § 1326 charges only against individuals who have convictions for serious, violent felonies and whose sentences for those felonies were completed within the previous five years.
- DOJ should direct prosecutors to exercise discretion not to pursue a § 1326 charge when the prior removal order, prior entry conviction, or prior re-entry conviction was obtained without full due process. DOJ should also direct prosecutors to exercise discretion not to pursue § 1325 and § 1326 charges against certain categories of vulnerable individuals (for example, victims of domestic abuse and the elderly), or against individuals with significant U.S. ties.
- To bring DHS policy in line with DOJ’s current prosecutorial interests, and given the absence of evidence that § 1325 and § 1326 prosecutions deter unauthorized immigration, DHS should instruct CBP and ICE agents to refer for § 1325 and § 1326 prosecutions only those individuals who have convictions for serious, violent felonies, and whose sentences for those felonies were completed within the previous five years.
- DHS should exclude from the “criminal alien” enforcement priority category all individuals whose most serious criminal conviction is for illegal entry or re-entry.

- DOJ and DHS should end the practice of appointing Border Patrol attorneys or other DHS employees to act as Special Assistant U.S. Attorneys, or in any prosecutorial capacity, in § 1325 and § 1326 cases.
- DOJ should withdraw the existing solicitations for new private prisons, stop soliciting new contract beds or facilities, and develop a long-term plan for phasing out the use of private prisons in concert with a reduction in the total federal prison population.

<sup>1</sup> In FY 2013, U.S. Attorneys' offices filed criminal charges against almost 100,000 immigrants for illegal entry or illegal re-entry – 53 percent of all federal prosecutions nationwide. See Syracuse University, Transactional Records Access Clearinghouse (TRAC), "Going Deeper" Tool, <http://tracfed.syr.edu/index/index.php?layer=cri> and TRAC, AT NEARLY 100,000, IMMIGRATION PROSECUTIONS REACH ALL-TIME HIGH IN FY 2013 (Nov. 25, 2013) <http://trac.syr.edu/immigration/reports/336/>.

<sup>2</sup> Michael T. Light, et al., Pew Research Hispanic Trends Project, *The Rise of Federal Immigration Crimes* (Mar. 18, 2014), available at <http://www.pewhispanic.org/2014/03/18/the-rise-of-federal-immigration-crimes/>.

<sup>3</sup> Joanna Lydgate, "Assembly Line Justice: A Review of Operation Streamline", June 2010, p. 499, [http://www.californialawreview.org/assets/pdfs/98-2/Lydgate\\_FINAL.pdf](http://www.californialawreview.org/assets/pdfs/98-2/Lydgate_FINAL.pdf). Written Statement of Heather Williams, House Judiciary Subcommittee on Commercial and Administrative Law, Oversight Hearing on the Executive Office of U.S. Attorneys, June 2008, Appendix 1-1, <http://judiciary.house.gov/hearings/pdf/Williams080625.pdf>

<sup>4</sup> United States Sentencing Commission, "Quick Facts: Illegal Reentry Offenses," [http://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick\\_Facts\\_Illegal\\_Reentry.pdf](http://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick_Facts_Illegal_Reentry.pdf).

<sup>5</sup> Doris Meissner, et. al., Immigration Enforcement in the United States: the Rise of a Formidable Machinery, Migration Policy Institute, Jan. 2013, <http://www.migrationpolicy.org/pubs/enforcementpillars.pdf> at 10.

<sup>6</sup> U.S. Dep't of Justice, "Smart on Crime: Reforming the Criminal Justice System for the 21<sup>st</sup> Century," August 2013, available at <http://www.justice.gov/ag/smart-on-crime.pdf>.

<sup>7</sup> HUMAN RIGHTS WATCH, TURNING MIGRANTS INTO CRIMINALS: THE HARMFUL IMPACT OF U.S. BORDER PROSECUTIONS 24 n.40 (May 2013), available at [http://www.hrw.org/sites/default/files/reports/us0513\\_ForUpload\\_2.pdf](http://www.hrw.org/sites/default/files/reports/us0513_ForUpload_2.pdf).

<sup>8</sup> ACLU analysis of data obtained via FOIA by the New York Times, on file with the ACLU.

<sup>9</sup> TRAC, "Going Deeper" Tool, <http://tracfed.syr.edu/index/index.php?layer=cri>.

<sup>10</sup> "At Nearly 100,000, Immigration Prosecutions Reach All-Time High in FY 2013: Illegal Reentry Prosecutions Jump 76% During Obama Administration," TRAC Reports (Nov. 25, 2013), available at <http://trac.syr.edu/immigration/reports/336/>.

<sup>11</sup> Glenn R. Schmitt and Jennifer Dukes, Overview of Federal Criminal Cases: Fiscal Year 2012, U.S. Sentencing Commission, 2012, [http://www.ussc.gov/Research\\_and\\_Statistics/Research\\_Publications/2013/FY12\\_Overview\\_Federal\\_Criminal\\_Cases.pdf](http://www.ussc.gov/Research_and_Statistics/Research_Publications/2013/FY12_Overview_Federal_Criminal_Cases.pdf).

<sup>12</sup> Press Release, U.S. Courts for the Ninth Circuit, Judicial Emergency Declared in District of Arizona (Jan. 25, 2011), [http://www.politico.com/static/PPM176\\_110125\\_judicial\\_emergency.html](http://www.politico.com/static/PPM176_110125_judicial_emergency.html).

<sup>13</sup> Lydgate *supra* note 3, p. 527.

<sup>14</sup> US Dep't. of Justice, Federal Bureau of Prisons, Statistics, [http://www.bop.gov/about/statistics/population\\_statistics.jsp](http://www.bop.gov/about/statistics/population_statistics.jsp) (last visited June 28, 2014).

<sup>15</sup> Alistair Graham Robertson, et al., Grassroots Leadership, Operation Streamline: Costs and Consequences, Sept. 2012, [http://grassrootsleadership.org/sites/default/files/uploads/GRL\\_Sept2012\\_Report-final.pdf](http://grassrootsleadership.org/sites/default/files/uploads/GRL_Sept2012_Report-final.pdf).

<sup>16</sup> Thomas H. Cohen, U.S. Dept. of Justice, Office of Justice Programs, Bureau of Justice Statistics, Pretrial Release and Misconduct in Federal District Courts, 2008- 2010, Nov. 2012, <http://www.bjs.gov/content/pub/pdf/prmfdc0810.pdf>.

<sup>17</sup> Marc R. Rosenblum and Doris Meissner, Migration Policy Institute, "The Deportation Dilemma: Reconciling Tough and Humane Enforcement," April 2014, p. 43, <http://www.migrationpolicy.org/research/deportation-dilemma-reconciling-tough-humane-enforcement>.

<sup>18</sup> National Public Radio, "Is Operation Streamline Worth Its Budget Being Tripled?," Sept. 5, 2013, <http://www.npr.org/2013/09/05/219177459/is-operation-streamline-worth-its-budget-being-tripled>

<sup>19</sup> Government Accountability Office, "Key Elements of New Strategic Plan Not Yet in Place to Inform Border Security Status and Resource Needs," December 2012, <https://media.aazpm.org/master/document/2013/1/9/pdf/gaoborderreport.pdf>.

<sup>20</sup> "Dan Rather Reports/Operation Streamline," May 14, 2013, <http://vimeo.com/67640573>. See also Williams *supra* note 3; and Solomon Moore, "Push on Immigration Crimes Is Said to Shift Focus," *New York Times*, (Jan. 11, 2009).

<sup>21</sup> Fernanda Santos, "Detainees Sentenced in Seconds in 'Streamline' Justice on Border," *New York Times*, Feb. 11, 2014, <http://www.nytimes.com/2014/02/12/us/split-second-justice-as-us-cracks-down-on-border-crossers.html>.

<sup>22</sup> Operation Streamline: Costs and Consequences, *supra* note 15, ; see also *Federal Judge Questions Immigration Prosecutions*, My Fox Houston, Feb. 7, 2010, <http://www.myfoxboston.com/story/18229445/federal-judge-questions-immigration-prosecutions>.

<sup>23</sup> Moore, *supra* note 20.

<sup>24</sup> Operation Streamline: Costs and Consequences, *supra* note 15, [http://grassrootsleadership.org/sites/default/files/uploads/GRL\\_Sept2012\\_Report-final.pdf](http://grassrootsleadership.org/sites/default/files/uploads/GRL_Sept2012_Report-final.pdf).

<sup>25</sup> Forrest Wilder, "The Lawsuit West of the Pecos." *Texas Observer* (Dec. 8, 2010), available at <http://www.texasobserver.org/forrestforthetrees/the-lawsuit-west-of-the-pecos>

<sup>26</sup> Joe Palazzolo and Miriam Jordan, Border Laws Put Judge on Map, *Wall Street Journal*, May 31, 2013, <http://online.wsj.com/article/SB10001424127887323336104578499480108652610.html>.

<sup>27</sup> United Nations General Assembly, "Draft Report of the Working Group on the Universal Periodic Review: United States of America," A/HRC/WG.6/9/L.9, paragraph 68, p. 10, Nov. 10, 2010, [http://lib.ohchr.org/HRBodies/UPR/Documents/session9/US/A\\_HRC\\_WG.6\\_9\\_L.9\\_USA.pdf](http://lib.ohchr.org/HRBodies/UPR/Documents/session9/US/A_HRC_WG.6_9_L.9_USA.pdf).