



Contact: Ruthie Epstein, American Civil Liberties Union, (202) 675-2316, repstein@aclu.org

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.¹ 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.² This is the direct outcome of programs seeking the federal criminal prosecution and imprisonment of unlawful border crossers, aggressively pursued in southwest border districts in every state except California since 2005.

Rather than being processed through the civil immigration enforcement system, apprehended migrants in these districts are referred by the Department of Homeland Security (DHS) to the Department of Justice (DOJ) for federal prosecution. DHS now refers more cases for federal prosecution than all of DOJ's law enforcement agencies combined.³

The criminal proceedings for immigrants charged with illegal entry or re-entry present serious due process concerns, with group hearings and other shortcuts so severe that the government has called its DHS/DOJ border-prosecution cooperation "Operation Streamline." Defendants are typically detained for 1 to 14 days before appearing in court.⁴ These individuals frequently have no counsel until their hearings, allowing little time to consult with an attorney to understand the charges, consequences of conviction, and potential avenues for legal 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.⁵ DOJ and DHS often appoint Border Patrol attorneys or other DHS employees to prosecute these cases.⁶

Judges often combine the initial appearance, arraignment, plea, and sentencing into a single hearing, sometimes taking as little as 25 seconds per defendant.⁷ The average sentence length for individuals convicted of illegal re-entry is 18 months.⁸ After they have served their time, migrants convicted of illegal entry or re-entry are typically deported, the same outcome as if they had never been referred to DOJ for prosecution in the first place.

As part of the Obama administration's initiative 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.⁹ Prosecutions for illegal entry and re-entry achieve none of these stated priorities – and are extremely expensive to taxpayers, who foot the relevant bills to fund district courts, U.S. Attorney's offices, federal public defenders, Criminal Justice Act panel attorneys, court interpreters, and U.S. Marshals Service (USMS) facilities, as well as private federal prisons known as Criminal Alien Requirement (CAR) prisons.

The burden is particularly heavy for the prison system. Private CAR prisons, which are used exclusively to incarcerate non-citizens, including those convicted of illegal re-entry, held 13 percent of the BOP population as of January 6, 2015.¹⁰ Federal incarceration costs for § 1325 and § 1326 prosecutions have been estimated at \$1 billion per year.¹¹ 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.¹² Indeed, DOJ attributes the increase in border prosecutions since 2005 as causing the “most significant growth in [USMS] detention over the last nine years.”¹³ Increased border prosecutions have also contributed to overcrowding in the BOP system, which is now at least 30 percent over capacity.¹⁴

Mass prosecutions of border crossers also overwhelm 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 2013.¹⁵ Nationwide, illegal re-entry prosecutions are up 76.2 percent since 2009.¹⁶ 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.¹⁷

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 Texas¹⁸

“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 Texas¹⁹

“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 Mexico²⁰

“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 Commission²¹

“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 Mexico²²

The Vatican has also called for suspension of Operation Streamline.²³

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.²⁴ It is also unclear whether DHS can even collect the data necessary to assess deterrent effect with any accuracy. The Migration Policy Institute has noted that for border crossers with strong family and economic ties to the United States “even... high-consequence enforcement strategies [i.e., criminal prosecutions] may not deter them from making future attempts.”²⁵ 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.²⁶ From FY 2008 to FY 2012, Border Patrol apprehensions fell by about 82 percent in San Diego, which is not part of the DHS/DOJ prosecution initiative, outpacing declines in any other southwest border sector. While the Yuma and El Paso sectors prosecute a much higher percentage of apprehended migrants, they have rates of repeat entry almost identical to nearby sectors (respectively, Tucson and Del Rio/Laredo) that prosecute only a fraction of apprehended migrants.²⁷

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 U.S. Immigration and Customs Enforcement, DHS’s interior immigration enforcement agency, had illegal entry or re-entry as their most serious criminal conviction.²⁸

DOJ and DHS should return immigration enforcement to civil authorities, and only consider criminal re-entry prosecutions for those individuals who have convictions for serious, violent felonies and whose sentences for those felonies were completed within the previous five years.

ACLU Recommendations to DOJ and DHS

- DOJ should implement the Attorney General’s August 2013 “Smart on Crime” directives by directing 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.
- DOJ should direct U.S. Attorneys 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 U.S. Attorneys 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 due process. DOJ should also direct U.S. Attorneys to exercise discretion not to pursue § 1325 and § 1326 charges against certain categories of vulnerable individuals (for example, survivors of domestic abuse and the elderly), or against individuals with significant U.S. ties.
- DHS should bring its policies, including Customs and Border Protection’s Consequence Delivery System, in line with DOJ’s current prosecutorial interests. Given the paucity of evidence that § 1325 and § 1326 prosecutions deter unauthorized immigration, DHS should instruct its personnel 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 existing pre-solicitations and solicitations for new private beds or prisons 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.

¹ 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 *At Nearly 100,000, Immigration Prosecutions Reach All-time High in FY 2013*, TRAC IMMIGRATION (Nov. 25, 2013), <http://trac.syr.edu/immigration/reports/336/>.
- ² Michael T. Light, et al., *The Rise of Federal Immigration Crimes*, PEW RESEARCH HISPANIC TRENDS PROJECT (Mar. 18, 2014), <http://www.pewhispanic.org/2014/03/18/the-rise-of-federal-immigration-crimes/>.
- ³ DORIS MEISSNER, ET AL., IMMIGRATION ENFORCEMENT IN THE UNITED STATES: THE RISE OF A FORMIDABLE MACHINERY 10 (Jan. 2013), available at <http://www.migrationpolicy.org/pubs/enforcementpillars.pdf>.
- ⁴ JOANNA LYDGATE, ASSEMBLY LINE JUSTICE: A REVIEW OF OPERATION STREAMLINE 499 (June 2010), available at 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, available at <http://judiciary.house.gov/hearings/pdf/Williams080625.pdf>.
- ⁵ “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*, NY TIMES, (Jan. 11, 2009), <http://www.nytimes.com/2009/01/12/us/12prosecute.html?pagewanted=all&r=0>.
- ⁶ INGRID V. EAGLY, PROSECUTING IMMIGRATION, *Northwestern University Law Review*, Vol. 104, No. 4, Fall 2010 (Nov. 16, 2010); UCLA School of Law Research Paper No. 10-30, p. 1332, available at <http://ssrn.com/abstract=1710182>.
- ⁷ Fernanda Santos, *Detainees Sentenced in Seconds in ‘Streamline’ Justice on Border*, NY TIMES (Feb. 11, 2014), <http://www.nytimes.com/2014/02/12/us/split-second-justice-as-us-cracks-down-on-border-crossers.html>.
- ⁸ *Quick Facts: Illegal Reentry Offenses*, UNITED STATES SENTENCING COMMISSION, available at http://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick_Facts_Illegal_ReentryFY13.pdf.
- ⁹ U.S. DEP’T OF JUSTICE, SMART ON CRIME: REFORMING THE CRIMINAL JUSTICE SYSTEM FOR THE 21ST CENTURY (Aug. 2013), available at <http://www.justice.gov/ag/smart-on-crime.pdf>.
- ¹⁰ *Statistics*, U.S. DEP’T. OF JUSTICE, FEDERAL BUREAU OF PRISONS, http://www.bop.gov/about/statistics/population_statistics.jsp (last visited January 6, 2015).
- ¹¹ ALISTAIR GRAHAM ROBERTSON, ET AL., GRASSROOTS LEADERSHIP, OPERATION STREAMLINE: COSTS AND CONSEQUENCES (Sept. 2012), available at http://grassrootsleadership.org/sites/default/files/uploads/GRL_Sept2012_Report-final.pdf.
- ¹² 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), available at <http://www.bjs.gov/content/pub/pdf/prmfdc0810.pdf>.
- ¹³ U.S. DEP’T OF JUSTICE, FY 2015 CONGRESSIONAL BUDGET JUSTIFICATION 6 (March 2014), available at <http://www.justice.gov/sites/default/files/jmd/legacy/2013/10/22/fpd-justification.pdf>.
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- ¹⁵ TRAC, “Going Deeper” Tool, <http://tracfed.syr.edu/index/index.php?layer=cri>.
- ¹⁶ “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/>.
- ¹⁷ Press Release, U.S. Courts for the Ninth Circuit, Judicial Emergency Declared in District of Arizona (Jan. 25, 2011), available at http://www.politico.com/static/PPM176_110125_judicial_emergency.html.
- ¹⁸ OPERATION STREAMLINE: COSTS AND CONSEQUENCES, *supra* note 11. See also *Federal Judge Questions Immigration Prosecutions*, My Fox Houston (Feb. 7, 2010), <http://www.myfoxxhouston.com/story/18229445/federal-judge-questions-immigration-prosecutions>.
- ¹⁹ Moore, *supra* note 5.
- ²⁰ OPERATION STREAMLINE: COSTS AND CONSEQUENCES, *supra* note 11.
- ²¹ Forrest Wilder, *The Lawsuit West of the Pecos*, TEXAS OBSERVER (Dec. 8, 2010), <http://www.texasobserver.org/forrestforthetrees/the-lawsuit-west-of-the-pecos>.
- ²² Joe Palazzollo and Miriam Jordan, *Border Laws Put Judge on Map*, WALL STREET JOURNAL (May 31, 2013), <http://online.wsj.com/article/SB10001424127887323336104578499480108652610.html>.
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- ²⁸ ACLU analysis of data obtained via FOIA by the NY TIMES, on file with the ACLU.