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Fact Sheet: Criminal Prosecutions for Unauthorized Border Crossing

Background

Illegal entry (under 8 U.S.C. § 1325) and illegal re-entry (under 8 U.S.C. § 1326) are the most prosecuted federal crimes in the United States. In FY 2013, almost 100,000 noncitizens were prosecuted for crossing the border without authorization, an increase of 76.2 percent since 2009.¹ 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 federal court convictions.² The Department of Justice (DOJ) attributes the “most significant growth in [U.S. Marshals Service] detention” since 2005 to border prosecutions,³ and increased border convictions have contributed to overcrowding in the federal Bureau of Prisons system, which is now 20 percent over capacity.⁴

This massive increase is the result of government programs that have been aggressively pursued in southwest border districts in every state except California since 2005 and, on a smaller scale, in other districts around the country. 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 DOJ for federal prosecution. In fact, DHS now refers more cases for federal prosecution than all of DOJ’s law enforcement agencies combined.⁵

In the southwest border districts in particular, 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.⁶ They frequently have no counsel until their hearings, allowing little time to consult with an attorney to understand the charges and plea offers, consequences of conviction, and potential avenues for legal relief. Because a single attorney can represent 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.⁷ DOJ and DHS often appoint Border Patrol attorneys or other DHS employees to prosecute these cases.⁸ In Streamline proceedings, judges typically combine the initial appearance, arraignment, plea, and sentencing into a single hearing, sometimes taking as little as 25 seconds per defendant.⁹

The average sentence length for individuals convicted of illegal re-entry is 17 months.¹⁰ After they have served their time, often in privately run prisons known as Criminal Alien Requirement (CAR) prisons (which the ACLU has found to be subject to inadequate oversight¹¹), migrants convicted of illegal entry or re-entry are almost always deported, the same outcome as if they had never been referred for prosecution in the first place.

Illegal entry and re-entry prosecutions almost exclusively target Latinos, leading directly to the disproportionate representation of Latinos in the federal prison system.¹² The DHS Office of Inspector General has found that Border Patrol is referring asylum seekers for criminal prosecution via Streamline, prosecutions that clearly violate U.S. obligations under Article 31(1) of the Refugee Convention.¹³

Effectiveness

The U.S. Border Patrol refers apprehended migrants to DOJ under the assumption that criminal prosecution will deter those individuals from attempting to re-cross the border without authorization in the future. These referrals constitute one of several types of “enforcement actions” available to Border Patrol agents as part of the Consequence Delivery System developed by U.S. Customs and Border Protection (CBP) to “impede and deter further illegal activity along the border.”¹⁴ However, in 2015, a full decade after Streamline was launched, the DHS Office of Inspector General found that Border Patrol “is not fully and accurately measuring Streamline’s effect on deterring aliens from entering and re-entering the country illegally.”¹⁵

Indeed, 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.¹⁶ 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."¹⁷ 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.¹⁸

Meanwhile, blanket prosecutions for illegal entry and re-entry further none of DOJ's own explicit prosecutorial priorities – national security, violent crime, financial fraud, and cases that protect our most vulnerable communities.¹⁹

Costs

Although border prosecutions do not achieve the policy goals of either DHS or DOJ, they are extremely expensive to taxpayers, who foot the 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 facilities, as well as private CAR prisons. Federal incarceration costs alone for illegal entry and re-entry prosecutions have been estimated at \$1 billion per year.²⁰

Mass prosecutions of border crossers also overwhelm federal court districts along the southwest border, draining resources that could be 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 2013.²¹ 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.²²

Opposition

171 immigrants' rights, criminal justice reform, faith-based, and human rights and civil rights organizations have called on the Department of Justice to end prosecutions for illegal entry and re-entry at the southern border.²³ The United Nations Committee on the Elimination of Racial Discrimination has also called for an end to Operation Streamline²⁴, and the Vatican has called for its suspension.²⁵ Even federal judges and prosecutors working along the border have criticized the allocation of resources to illegal entry and re-entry prosecutions.²⁶

Recommendations

The Department of Justice should end or significantly reduce prosecutions for illegal entry and re-entry, and the Departments of Justice and Homeland Security should return immigration enforcement to civil authorities, by taking the following steps.

The Department of Justice 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.
- 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.

- Direct U.S. Attorneys to exercise discretion not to pursue § 1325 and § 1326 charges against asylum seekers and other vulnerable individuals (for example, survivors of domestic abuse and the elderly), or against individuals with significant U.S. ties.
- 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.
- 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.

The Department of Homeland Security should:

- Bring its policies, including CBP's Consequence Delivery System, in line with DOJ's current prosecutorial interests by instructing 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 never refer asylum seekers for criminal prosecution.
- Exclude from the "criminal alien" enforcement priority category all individuals whose most serious criminal conviction is for illegal entry or re-entry. 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.²⁷
- 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.

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=crl> see also *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 U.S. DEP'T OF JUSTICE, FY 2015 CONGRESSIONAL BUDGET JUSTIFICATION 6 (March 2014), <http://www.justice.gov/sites/default/files/jmd/legacy/2013/10/22/fpd-justification.pdf>.

⁴ U.S. DEP'T OF JUSTICE, FY 2016 PERFORMANCE BUDGET CONGRESSIONAL SUBMISSION: FEDERAL PRISON SYSTEM, SALARIES AND EXPENSES (2015), http://www.justice.gov/sites/default/files/jmd/pages/attachments/2015/02/02/27_federal_bureau_of_prisons_bop_se.pdf.

⁵ DORIS MEISSNER, ET. AL., IMMIGRATION ENFORCEMENT IN THE UNITED STATES: THE RISE OF A FORMIDABLE MACHINERY 10 (Jan. 2013), <http://www.migrationpolicy.org/pubs/enforcementpillars.pdf>.

⁶ JOANNA LYDGATE, ASSEMBLY LINE JUSTICE: A REVIEW OF OPERATION STREAMLINE 499 (June 2010), http://www.californialawreview.org/assets/pdfs/98-2/Lydgate_FINAL.pdf. *Oversight Hearing on the "Executive Office for United States Attorneys": Hearing Before the Subcomm. of Commercial and Administrative Law of the H. Comm. On the Judiciary*, 110th Cong (2008) (Written Statement of Heather Williams, Appendix 1-1), [hereinafter Williams] <http://judiciary.house.gov/hearings/pdf/Williams080625.pdf>.

⁷ "Dan Rather Reports/Operation Streamline," May 14, 2013, <http://vimeo.com/67640573>. See also Williams *supra* note 6; 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>.

⁸ INGRID V. EAGLY, PROSECUTING IMMIGRATION, *Northwestern University Law Review*, Vol. 104, No. 4, 1332 (Nov. 16, 2010), <http://ssrn.com/abstract=1710182>.

⁹ 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>.

¹⁰ United States Sentencing Comm'n, QUICK FACTS: ILLEGAL REENTRY OFFENSES, , http://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick-Facts_Illegal-Reentry_FY14.pdf. The U.S. Sentencing Commission does not track average sentence length for individuals convicted of illegal entry.

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- ¹¹ ACLU & ACLU OF TEXAS, WAREHOUSED AND FORGOTTEN (June 2014), <https://www.aclu.org/warehoused-and-forgotten-immigrants-trapped-our-shadow-private-prison-system>
- ¹² Latinos represent 34 percent of all BOP prisoners but just 17 percent of the total U.S. population. *Statistics: Inmate Ethnicity*, Federal Bureau of Prisons, http://www.bop.gov/about/statistics/statistics_inmate_ethnicity.jsp (last visited Dec. 14, 2015); Statistical Portrait of Hispanics in the United States, 1980-2013, Pew Research Center, <http://www.pewhispanic.org/2015/05/12/statistical-portrait-of-hispanics-in-the-united-states-2013-key-charts/> (Dec. 14, 2015).
- ¹³ OFFICE OF INSPECTOR GEN., STREAMLINE: MEASURING ITS EFFECT ON ILLEGAL BORDER CROSSING 2 (May 15, 2015) [hereinafter *OIG*], https://www.oig.dhs.gov/assets/Mgmt/2015/OIG_15-95_May15.pdf.
- ¹⁴ *Does Administrative Amnesty Harm our Efforts to Gain and Maintain Operational Control of the Border? Hearing before the Subcommittee on Border and Maritime Security of the H. Comm on Homeland Security*, 112th Cong 16-20. (2011) (Testimony of Michael J. Fisher, Chief, U.S. Border Patrol, U.S. Customs and Border Protection), <https://www.gpo.gov/fdsys/pkg/CHRG-112hhrg73358/pdf/CHRG-112hhrg73358.pdf>.
- ¹⁵ *OIG*, *supra* note 13 at 16. The United States is bound through its accession to the 1967 Protocol Relating to the Status of Refugees to Article 31(1) of the Refugee Convention, which prohibits states from penalizing refugees for illegal entry. Because refugee status is a matter of discovery and a refugee is, in fact, deserving of the protections of the Refugee Convention and Protocol prior to recognition of refugee status, the referral of asylum seekers for criminal prosecution in the manner described by the *OIG* report is incompatible with U.S. commitments under Article 31(1). Convention Relating to the Status of Refugees art. 31(1), July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 137, <http://www.refworld.org/docid/3be01b964.html>.
- ¹⁶ HUMAN RIGHTS WATCH, TURNING MIGRANTS INTO CRIMINALS: THE HARMFUL IMPACT OF U.S. BORDER PROSECUTIONS 24 n.40 (May 2013), http://www.hrw.org/sites/default/files/reports/us0513_ForUpload_2.pdf.
- ¹⁷ MARC R. ROSENBLUM AND DORIS MEISSNER, THE DEPORTATION DILEMMA: RECONCILING TOUGH AND HUMANE ENFORCEMENT 43 (April 2014), <http://www.migrationpolicy.org/research/deportation-dilemma-reconciling-tough-humane-enforcement>.
- ¹⁸ Ted Robbins, *Is Operation Streamline Worth Its Budget Being Tripled?*, NATIONAL PUBLIC RADIO (Sept. 5, 2013), <http://www.npr.org/2013/09/05/219177459/is-operation-streamline-worth-its-budget-being-tripled>.
- ¹⁹ DEP'T OF JUSTICE, SMART ON CRIME 2 (Aug. 2013), <http://www.justice.gov/ag/smart-on-crime.pdf>.
- ²⁰ ALISTAIR GRAHAM ROBERTSON, ET AL., GRASSROOTS LEADERSHIP, OPERATION STREAMLINE: COSTS AND CONSEQUENCES (Sept. 2012)[hereinafter OPERATION STREAMLINE: COSTS AND CONSEQUENCES], http://grassrootsleadership.org/sites/default/files/uploads/GRL_Sept2012_Report-final.pdf.
- ²¹ TRAC, Federal Criminal Enforcement Going Deeper Tool, TRAC, <http://tracfed.syr.edu/index/index.php?layer=crl> (last visited Dec. 14, 2015).
- ²² 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.
- ²³ Letter from 171 Civil Rights, Human Rights, and Faith-Based Organizations to Loretta Lynch, Attorney General (July 28, 2015), <https://www.aclu.org/letter/coalition-letter-attorney-general-171-organizations-end-streamline-prosecutions>.
- ²⁴ United Nations, International Convention on the Elimination of All Forms of Racial Discrimination, Concluding observations on the combined seventh to ninth periodic reports of the United States of America (Sept. 25, 2014), <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhszOI9YwTXeABruAM8pBAK1Q%2fDZ6XAqlyobgts1zwlHPkOhsSqMrVxuS6brQbHYpDYGXBUcX1bgRtTg3HaweAr5PBs9soaesD5KdByekI9OS>.
- ²⁵ 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.
- ²⁶ For example, Judge Sam Sparks, U.S. District Court for the Western District of Texas, noted, “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.” OPERATION STREAMLINE: COSTS AND CONSEQUENCES, *supra* note 20. See also Steven Kreytak, *Federal Judge Questions Immigration Prosecutions*, AUSTIN AMERICAN-STATESMAN (Feb. 7, 2010), <http://www.statesman.com/news/news/local/federal-judge-questions-immigration-prosecutions-1/nRkNB/> Judge George P. Kazen, U.S. District Court for the Southern District of Texas, said, “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.” Moore, *supra* note 7. Clint Johnson, Assistant U.S. Attorney in Las Cruces, New Mexico, said, “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.” OPERATION STREAMLINE: COSTS AND CONSEQUENCES, *supra* note 20. Judge Ruben Castillo, U.S. District Court for the Northern District of Illinois and former Commissioner, U.S. Sentencing Commission, said, “There is a use of criminal justice resources that doesn’t make sense.” Forrest Wilder, *The Lawsuit West of the Pecos*, TEXAS OBSERVER (Dec. 8, 2010), <http://www.texasobserver.org/forrestforthetrees/the-lawsuit-west-of-the-pecos>. Judge Robert C. Brack, U.S. District Court for the District of New Mexico, said, “Every day I see people who would never have been considered as criminal defendants two years ago.” Joe Palazzollo and Miriam Jordan, *Border Laws Put Judge on Map*, WALL STREET JOURNAL (May 31, 2013), <http://online.wsj.com/article/SB10001424127887323336104578499480108652610.html>.
- ²⁷ ACLU analysis of data obtained via FOIA by the NY TIMES, on file with the ACLU.