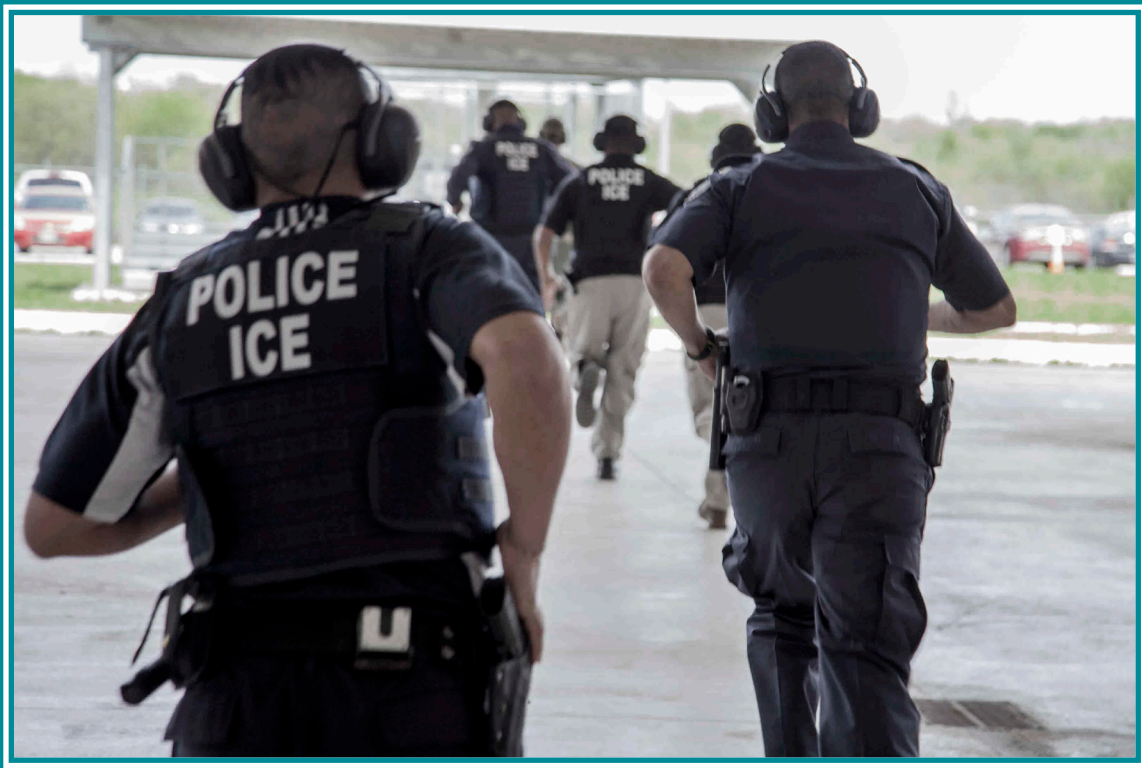


UNDERSTANDING THE POTENTIAL IMPACT OF EXECUTIVE ACTION ON IMMIGRATION ENFORCEMENT



By Marc R. Rosenblum

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Executive Summary

In November 2014, President Obama announced a number of administrative changes to the U.S. immigration enforcement system, as well as to immigrant integration and legal immigration policy. While deferred action programs that are a key part of the executive action announcement have been blocked by a federal judge, two changes that have not faced legal challenge are in the process of being implemented and may substantially affect the U.S. immigration enforcement system. These changes include the adoption by the Department of Homeland Security (DHS) of new policy guidance on which categories of unauthorized immigrants and other potentially removable noncitizens are priorities for enforcement, and the replacement of the controversial Secure Communities information-sharing program with a new, more tailored Priority Enforcement Program (PEP).

The new policy guidance on immigration enforcement priorities and the exercise of prosecutorial discretion builds on previous memoranda published by the Obama administration in 2010 and 2011, but differs from the earlier policies in three ways. First, while earlier guidance was ambiguous in its scope within DHS, the November 2014 memorandum issued by Homeland Security Secretary Jeh Johnson explicitly applies to all three DHS immigration agencies. Second, the new guidance redefines how the department will allocate its detention and deportation resources. Third, it clarifies that DHS supervisors and officers can exercise prosecutorial discretion to not remove certain people even if they fall within one of the enforcement priority categories.

The net effect of the new policy guidance likely will be a reduction in deportations from within the interior of the United States.

The net effect of the new policy guidance likely will be a reduction in deportations from within the interior of the United States as DHS further targets enforcement to noncitizens who have been convicted of serious crimes, are threats to public safety, are recent illegal entrants, or have violated recent deportation orders.

The Migration Policy Institute (MPI) estimates that about 13 percent of unauthorized immigrants currently resident in the United States (about 1.4 million out of an overall population estimated at 11 million) have previous criminal convictions or immigration histories that would make them enforcement priorities under the new policies. By comparison, about 27 percent of unauthorized immigrants (3 million people) would have been considered enforcement priorities under the 2010-11 guidelines. (Both estimates are characterized by a degree of uncertainty and should be interpreted as having a margin of error of about 10 percent.) While much of the attention to the president's executive action announcement has focused on the deferred action programs, which could grant relief from deportation to as many as 5.2 million unauthorized immigrants, implementation of the new enforcement priorities and the PEP program are likely to affect a substantially larger number of unauthorized immigrants, about 9.6 million people.

By comparing the new enforcement priorities to earlier DHS removal data, MPI estimates that the 2014 policy guidance, if strictly adhered to, is likely to reduce deportations from within the United States by about 25,000 cases annually—bringing interior removals below the 100,000 mark (as compared to the all-time high of 188,000 recorded in fiscal year 2011). Removals at the U.S.-Mexico border remain a top priority under the 2014 guidelines, so falling interior removals may be offset to some extent by increases at the border (also depending on the size of illegal inflows).

Much remains unknown, however, about how the new policies will be implemented. The results will turn, to a large degree, on the rollout and implementation of the new PEP program, which replaces a



Secure Communities program that generated substantial backlash and resistance in communities across the United States. Like Secure Communities, PEP uses fingerprint data to identify potentially deportable noncitizens when the Federal Bureau of Investigation (FBI) performs criminal background checks for local police. U.S. Immigration and Customs Enforcement (ICE), which operates the program, may then issue an “immigration detainer” to request that police hold noncitizens for up to 48 hours after their criminal justice proceedings so that ICE can take custody and initiate removal procedures.

Yet while Secure Communities allowed ICE to take custody of *any* potentially deportable noncitizen brought into the criminal justice process, PEP limits the use of ICE detainers to those who have been convicted of a serious crime or are a public-safety risk.

Overall, the new enforcement policies that are the focus of this report have the potential to substantially transform the U.S. deportation system.

A second important change is that while DHS sought to enforce a uniform nationwide version of Secure Communities, the department will negotiate PEP detainer policies with individual jurisdictions on a case-by-case basis. This change is significant because it may convince some of the hundreds of communities that have limited their compliance with ICE under Secure Communities to opt back into PEP. Secure Communities, which quickly became the most powerful tool in the DHS interior enforcement system, also proved its most controversial tool. PEP holds the promise of achieving a better balance in the DHS relationship with state and local jurisdictions.

Overall, the new enforcement policies that are the focus of this report have the potential to substantially transform the U.S. deportation system, particularly within the U.S. interior. By taking the enforcement focus off settled unauthorized immigrants who do not meet the November 2014 enforcement priorities, the new guidelines would, if strictly implemented, offer a degree of protection to the vast majority—87 percent—of unauthorized immigrants now residing in the United States.

I. Introduction

In November 2014, President Obama announced a sweeping series of executive actions that touch on key facets of the immigration system, from legal immigration and immigrant integration to enforcement. Most of the immediate attention from policymakers and the media focused on programs that would provide relief from deportation and work authorization to certain unauthorized immigrants. The executive actions announced on November 20, 2014 included expansion of the existing Deferred Action for Childhood Arrivals (DACA) initiative¹ and a new Deferred Action for Parents of Americans and Lawful Permanent

¹ In August 2012, the Obama administration implemented the Deferred Action for Childhood Arrivals (DACA) program, which provides relief from deportation and work permits for two-year, renewable periods to unauthorized immigrant youth who: (1) are age 15 or older; (2) were under age 31 as of June 15, 2012; (3) came to the United States before age 16; (4) were physically present in the country as of June 15, 2012; (5) have lived in the country for five years continuously since June 15, 2007; (6) have earned a high school diploma or equivalent, are honorably discharged veterans, or are currently enrolled in school—including certain adult education programs; and (7) have not been convicted of a felony, significant misdemeanor, or three or more misdemeanors. More than 664,000 unauthorized immigrants had received DACA status as of March 31, 2015. The DACA expansions announced by the president in November 2014 would lift the maximum age cap, move forward the entry date to 2010, and extend the grant of DACA status for three years. See U.S. Citizenship and Immigration Services (USCIS), “Number of I-821D, Consideration of Deferred Action for Childhood Arrivals by Fiscal Year, Quarter, Intake, Biometrics and Case Status: 2012-2015 (March 31),” www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/Naturalization%20Data/I821d_performancedata_fy2015_qtr2.pdf.



Residents (DAPA) program.² The Migration Policy Institute (MPI) has estimated that slightly more than 5 million unauthorized immigrants would potentially be eligible to apply for one of the two deferred action initiatives—representing 46 percent of the estimated 11 million unauthorized immigrants in the United States.³

The DACA expansions and DAPA program were preliminarily enjoined by a federal judge in February 2015. The judge issued the injunction in *Texas v. United States*, a 2014 lawsuit filed by Texas and 25 other states that challenges the constitutionality and implementation of these elements of the administration's executive action.⁴ In May 2015, the 5th U.S. Circuit Court of Appeals refused to lift the preliminary injunction. Given the pace of litigation and the near certainty that the matter ultimately will end up before the Supreme Court, it appears that DACA and DAPA are likely to remain on hold for most of the remainder of President Obama's time in office, if not beyond.

These prosecutorial discretion changes ... make it unlikely that unauthorized immigrants who would qualify for DACA or DAPA will be deported.

Important changes to Department of Homeland Security (DHS) immigration enforcement practices that were also part of the November 2014 executive action announcement are not under legal challenge and have already begun to be implemented. These prosecutorial discretion changes, which have received significantly less public attention, make it unlikely that unauthorized immigrants who would qualify for DACA or DAPA will be deported; they also affect a substantially larger share of the unauthorized population. This report examines two elements at the heart of the enforcement changes rolled out subsequent to the president's announcement:

1. updated department-wide policy guidance on DHS enforcement priorities and the exercise of prosecutorial discretion; and
2. termination of the Secure Communities program and its replacement with a new initiative called the Priority Enforcement Program (PEP).

This report analyzes how many unauthorized immigrants fall within each of the new priority categories and how changes to DHS enforcement priorities could affect the number of deportations from the United States, as well as what the termination of the Secure Communities program means.

2 The Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) program would grant three years of relief from deportation and work authorization to qualifying unauthorized immigrants who have been in the United States five years or more and are parents of a U.S. citizen or lawful permanent resident (LPR).

3 Migration Policy Institute (MPI), "MPI: As Many as 3.7 Million Unauthorized Immigrants Could Get Relief from Deportation under Anticipated New Deferred Action Program," (press release, November 19, 2014), <http://migrationpolicy.org/news/mpi-many-37-million-unauthorized-immigrants-could-get-relief-deportation-under-anticipated-new>.

4 MPI estimates 1.2 million unauthorized immigrants immediately met DACA eligibility requirements at the program's launch in August 2012, and as many as 1.8 million overall could potentially qualify for DACA now or in the future under the program's original rules—rules that have not been successfully challenged in court. See MPI Data Hub, "Unauthorized Immigrant Population Profiles," accessed July 13, 2015, www.migrationpolicy.org/programs/us-immigration-policy-program-data-hub/unauthorized-immigrant-population-profiles.



II. DHS Enforcement Priorities and Prosecutorial Discretion

In furtherance of the president's executive action announcement, Homeland Security Secretary Jeh Johnson on November 20, 2014 issued a new DHS-wide policy memorandum on immigration enforcement priorities and the exercise of discretion during the enforcement process.⁵ The enforcement memo rescinded and supersedes a series of earlier memoranda, most notably a pair issued in 2010 and 2011 by then-U.S. Immigration and Customs Enforcement (ICE) Assistant Secretary John Morton.⁶ The new memo limits the scope of enforcement to a narrower set of priorities than the earlier ICE guidance, and provides clearer direction to DHS enforcement agents, officers, and attorneys.

A. The History of Prosecutorial Discretion in Immigration Enforcement

Like all law enforcement agencies, DHS exercises discretion whether or not to act in certain cases during the enforcement process. Prosecutorial discretion refers to the authority of a law enforcement agency "to decide to what degree to enforce the law against a particular individual."⁷ In the immigration context, the favorable exercises of discretion may include, for example, deciding not to arrest or initiate removal proceedings against a noncitizen,⁸ not detaining someone while removal proceedings are pending, or administratively closing a case to prevent the case from proceeding to a final order of removal. The DACA and DAPA programs are also forms of prosecutorial discretion, in that they administratively defer the possibility of deportation for a defined period. DHS may exercise discretion both for humanitarian reasons (to protect vulnerable migrants) and for law enforcement purposes (to focus enforcement resources on the greatest security and public-safety risks).⁹

Like all law enforcement agencies, DHS exercises discretion whether or not to act in certain cases during the enforcement process.

Between 1976 and 2011, DHS and its predecessor immigration agency, the Immigration and Naturalization Service (INS), published a series of memoranda advising enforcement officers regarding the criteria they should consider when exercising discretion. In general, these guidance memos directed officers to consider factors such as how long potential deportees had lived in the United States, whether they had U.S. family members, health concerns, and other equities.

- 5 Memorandum from Homeland Security Secretary Jeh Johnson to Acting Director of U.S. Immigration and Customs Enforcement (ICE), Commissioner of U.S. Customs and Border Protection (CBP), Director of U.S. Citizenship and Immigration Services (USCIS), and Acting Assistant Secretary for Policy, "Policies for the Apprehension, Detention, and Removal of Undocumented Immigrants," November 20, 2014, www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf.
- 6 Memorandum from ICE Assistant Secretary John Morton to all ICE employees, "Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens," June 30, 2010, www.ice.gov/doclib/news/releases/2010/civil-enforcement-priorities.pdf; Memorandum of 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," June 17, 2011, www.ice.gov/doclib/foia/prosecutorial-discretion/pd_cnstnt_w_civil_imm_enforce_ice_priorities.pdf. The June 2010 memo was reissued with minor revisions in March 2011.
- 7 Morton, "Exercising Prosecutorial Discretion Consistent with Civil Immigration Enforcement Priorities of the Agency."
- 8 This report uses the term noncitizens because removals can encompass both unauthorized immigrants and certain lawfully present noncitizens. Most unauthorized immigrants are deportable, and other noncitizens (LPRs and legal nonimmigrants) also may be deportable if they commit certain crimes or immigration offenses.
- 9 Memorandum from Immigration and Naturalization Service (INS) General Counsel Sam Bernsen to the INS Commissioner, "Legal Opinion Regarding Service Exercise of Prosecutorial Discretion," July 15, 1976, www.ice.gov/doclib/foia/prosecutorial-discretion/service-exercise-pd.pdf.



In 2010, ICE published a memo approaching this question from another direction. While previous memos focused on reasons *not* to arrest, detain, and deport migrants, the 2010 memo identified three sets of priorities for who *should* be arrested, detained, and deported, in the following order:

1. national-security and public-safety threats, including gang members and migrants who had previously been convicted of any type of crime;
2. recent border crossers and other illegal entrants, including anyone apprehended within three years of entering the United States; and
3. noncitizens who obstruct immigration controls, including those who fail to leave the country when subject to an immigration judge's final order and people who re-enter the United States following a removal order.

In focusing on people convicted of a crime, those who cross the border without authorization, and those who violate immigration court orders, the 2010 memo formalized priorities followed by prior administrations, and that had been the focus of earlier congressional attention.¹⁰ Indeed, 93 percent of removals completed by the Bush administration in fiscal years (FY) 2003-08 fell within the Obama administration's 2010 enforcement priorities.¹¹

Still, the 2010 memo was important for two reasons. First, in identifying enforcement priorities, the memo implicitly described a set of *nonpriority* cases—i.e. anyone falling outside the designated categories. A subsequent 2011 memo described additional factors that made potentially deportable migrants candidates for the favorable exercise of prosecutorial discretion.¹² The two memos became a flashpoint in the immigration debate, with some characterizing ICE's exercise of discretion as “administrative amnesty”¹³ and others complaining that the administration's record removals still made President Obama the “deporter-in-chief.”¹⁴

Box I. Border and Interior Removals

Following Department of Homeland Security (DHS) terminology, this report uses the term border removals to refer to all removals initiated by U.S. Customs and Border Protection (CBP). The majority of border removals consist of people apprehended in the act of crossing the border or at ports of entry, but Border Patrol agents may operate up to 100 miles from U.S. land and sea borders, meaning some border removals are initiated at locations at some distance from the actual border.

This report uses the term interior removals to refer to all removals initiated by U.S. Immigration and Customs Enforcement (ICE) or based on a referral to ICE from U.S. Citizenship and Immigration Services (USCIS) or from another federal, state, or local law enforcement agency. Thus, interior removals generally are initiated within the United States, and are more likely to involve unauthorized immigrants who are not recent entrants.

10 Marc R. Rosenblum and Kristen McCabe, *Deportation and Discretion: Reviewing the Record and Options for Change* (Washington, DC: Migration Policy Institute, 2014), 8-10, www.migrationpolicy.org/research/deportation-and-discretion-reviewing-record-and-options-change.

11 *Ibid.*, 26.

12 Morton, “Exercising Prosecutorial Discretion Consistent with Civil Immigration Enforcement Priorities of the Agency.”

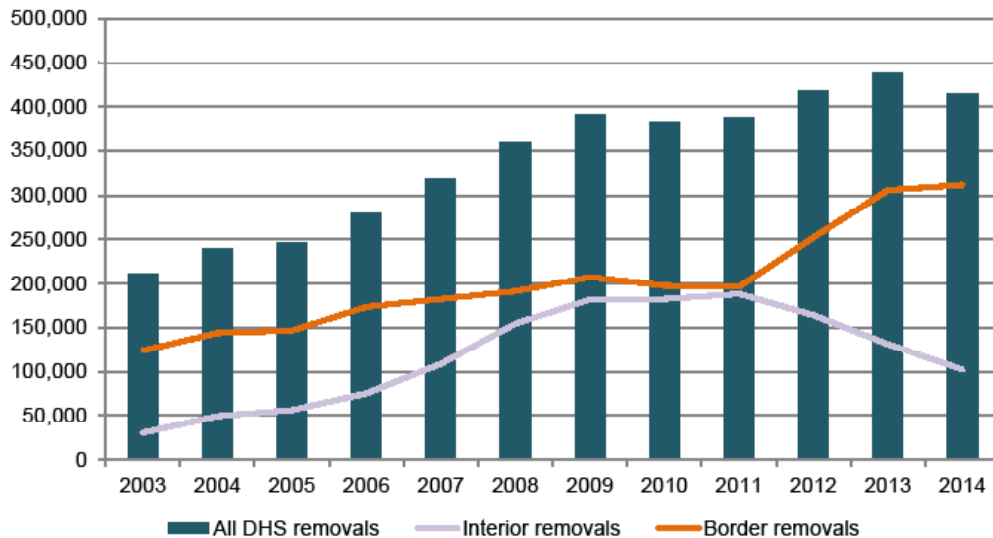
13 See, for example, House Committee on Homeland Security, Subcommittee on Border and Maritime Security, *Does Administrative Amnesty Harm our Efforts to Gain and Maintain Operational Control of the Border?*, 112th Cong., 1st sess., October 4, 2011, <http://homeland.house.gov/hearing/subcommittee-hearing-does-administrative-amnesty-harm-our-efforts-gain-and-main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

14 See, for example, Reid J. Epstein, “National Council of La Raza Leader Calls Barack Obama ‘deporter-in-chief,’” *Politico*, March 14, 2014, www.politico.com/story/2014/03/national-council-of-la-raza-janet-murguia-barack-obama-deporter-in-chief-immigration-104217.html.



Second, the 2010 memo was important because it signaled, and contributed to, a significant change in the administration's enforcement practices. Upon taking office in 2009, the Obama administration mostly kept in place enforcement programs initiated by the Bush administration after the 9/11 attacks to identify and deport unauthorized immigrants from within the United States (i.e., to increase "interior removals").¹⁵ Thus, while the vast majority of immigrant apprehensions and deportations in previous decades occurred at the Southwest border, interior enforcement accounted for almost half of all removals during President Obama's first three years in office—a practice that placed substantial strain on long-settled immigrant communities.¹⁶

Figure 1. DHS Removals, by Apprehension Location, FY 2003-14



Notes: While total Department of Homeland Security (DHS) removals are restricted to formal removals, interior removals data for fiscal year (FY) 2014 are based on U.S. Immigration and Customs Enforcement (ICE) statistics, and include an unknown number of ICE returns. As a result the actual number of interior removals may be somewhat lower in FY 2014 than depicted, and the number of border removals may be somewhat higher. Border removals are defined to include any removals initiated by U.S. Customs and Border Protection (CBP), which operates in a zone that extends up to 100 miles from the border.

Sources: Fiscal year (FY) 2003-13 data are from Marc R. Rosenblum and Kristen McCabe, *Deportation and Discretion: Reviewing the Record and Options for Change* (Washington, DC: Migration Policy Institute, 2014), www.migrationpolicy.org/research/deportation-and-discretion-reviewing-record-and-options-change; FY 2014 data are from DHS, "DHS Releases End of Year Statistics," (press release, December 19, 2014), www.dhs.gov/news/2014/12/19/dhs-releases-end-year-statistics.

With the implementation of the 2010 memo (i.e., beginning in fiscal year [FY] 2011), the administration mostly limited interior removals to noncitizens who had been convicted of a crime or had been previously deported, causing the number of interior removals to fall. Border enforcement remained a priority, however, and the Obama administration continued a Bush administration initiative to rely more heavily on formal removals at the border, rather than voluntary returns.¹⁷ Thus, a second trend since 2010 has been

¹⁵ These programs included the National Fugitive Operations Program, the 287(g) program, and Secure Communities; for a fuller discussion of these programs, see Marc R. Rosenblum and William Kandel, *Interior Immigration Enforcement: Programs Targeting Criminal Aliens*, CRS Report R42057 (Washington, DC: Congressional Research Service, 2012), <http://fas.org/sgp/crs/homesec/R42057.pdf>. Beginning in 2009, the Obama administration discontinued an additional enforcement program initiated by the Bush administration: the detention and deportation of unauthorized immigrants apprehended during work-site raids.

¹⁶ For a fuller discussion, see Marc R. Rosenblum and Doris Meissner with Claire Bergeron and Faye Hipsman, *The Deportation Dilemma: Reconciling Tough and Humane Enforcement* (Washington, DC: Migration Policy Institute, 2014), www.migrationpolicy.org/research/deportation-dilemma-reconciling-tough-humane-enforcement.

¹⁷ Formal removals and informal returns both result in a noncitizen being deported, but formal removals are a higher-consequence form of enforcement because they also make the deportee ineligible to return to the United States for a period of time, and potentially subject to criminal penalties following any future apprehension. For a fuller discussion, see Rosenblum and Meissner with Bergeron and Hipsman, *The Deportation Dilemma*.



a sharp increase in border removals.¹⁸ As a result of these policies, the number of interior removals fell from an all-time high of 188,000 in FY 2011 to 102,000 in FY 2014, while border removals increased from 196,000 to 312,000 during the same period. Rising border removals mostly offset falling interior removals, resulting in little change in total DHS removals (see Figure 1).¹⁹

B. The 2014 Changes to Enforcement Priorities

The memo issued by Secretary Johnson in November 2014 modifies DHS immigration enforcement in three main ways.

First, the 2010 and 2011 memos were issued by the ICE Assistant Secretary and addressed to ICE personnel, while the 2014 memo was issued by the department's top leader and explicitly applies to all three DHS immigration agencies: ICE, CBP, and U.S. Citizenship and Immigration Services (USCIS). This change is important because although Secretary Johnson's predecessor, Janet Napolitano, described the 2010 and 2011 memos as department-wide policy, no written policy declared that the enforcement guidelines applied beyond ICE.²⁰

Second, the 2014 memo redefines DHS enforcement priorities and ranks them from highest to lowest as follows:

- **Priority 1:** National-security threats, noncitizens apprehended immediately at the border, gang members, and noncitizens who have been convicted of felonies or aggravated felonies as defined in immigration law.
- **Priority 2:** Noncitizens convicted of three or more misdemeanors or one serious misdemeanor, those who entered or re-entered the United States unlawfully after January 1, 2014, and those who have significantly abused visa or visa waiver programs. Serious misdemeanors are defined as offenses involving domestic violence, sexual abuse or exploitation, burglary, unlawful possession or use of a firearm, drug distribution or trafficking, driving under the influence, and other crimes for which a defendant was sentenced to actual custody of 90 days or more.
- **Priority 3:** Noncitizens subject to a final order of removal issued on or after January 1, 2014.

The new priorities can be read as an effort by the Obama administration to refine the enforcement guidelines announced in 2010-11. For example, the administration has consistently emphasized that border crossers are a top enforcement priority—a goal that matches congressional and widespread public demands. The administration has also taken a number of steps to prioritize border removals, such as the implementation of the Consequence Delivery System²¹ and the adoption of a tough enforcement posture, including the widespread use of family detention, in response to the surge of Central American children

18 Border removals are defined to include any removals initiated by CBP, which operates in a zone that extends up to 100 miles from the border.

19 Data for fiscal year (FY) 2003-13 are MPI calculations based on data in Rosenblum and McCabe, *Deportation and Discretion*, and ICE, *ICE Enforcement and Removal Operations Report, FY 2014* (Washington, DC: ICE, 2014), www.dhs.gov/sites/default/files/images/ICE%20FY14%20Report_20141218_0.pdf. Data for FY 2014 are MPI calculations based on DHS, "DHS Releases End of Year Statistics," December 19, 2014, www.dhs.gov/news/2014/12/19/dhs-releases-end-year-statistics. MPI data for FY 2003-13 are restricted to formal removals, but ICE removal data for FY 2014 also include a small number of informal returns.

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

21 Historically, more unauthorized immigrants apprehended at the border were informally deported under immigration provisions known as "voluntary return," but in recent years CBP has deported an increasing share of border crossers under formal removal provisions, which make deportees ineligible to receive a visa to return to the United States for a period of time and subject to criminal penalties upon a future apprehension. CBP has also worked with the Justice Department to charge an increasing share of border crossers with the federal crime of illegal entry. Since 2011, CBP has used its Consequence Delivery System to analyze the effects of these changes and to fine-tune enforcement practices to increase the effectiveness and efficiency of different deportation policies. See Rosenblum and Meissner with Bergeron and Hipsman, *The Deportation Dilemma*.



and families in 2014. By naming unauthorized immigrants apprehended at the border as a top priority, the 2014 memo appears to reflect a commitment by DHS to match its formal policy guidance to actual practices.

In contrast with the 2010-11 guidelines, which prioritized immigrants who entered or re-entered the United States during the previous three years, the 2014 guidelines tie the second- and third-priority categories to the fixed date of January 1, 2014, targeting for enforcement those who entered on or after that date. In this way, in the words of Secretary Johnson, the guidelines “draw a sharp distinction between past and future.”²² The idea of providing a degree of protection to long-standing, noncriminal unauthorized immigrants while focusing enforcement on new arrivals as of a fixed date is also consistent with legalization frameworks in recent legislative proposals.²³

A third change from 2010 is that the 2014 memo clarifies that DHS supervisors and officers can exercise prosecutorial discretion to not remove certain people even if they fall within one of the enforcement priority categories. The standards for exercising discretion differ across the three priorities. In particular, noncitizens in the first category should be prioritized for removal unless, in the judgment of a top DHS supervisor, “there are *compelling and exceptional factors that clearly indicate* the alien is not a threat to national security, border security, or public safety and should therefore not be an enforcement priority” (emphasis added).²⁴ For people in the second category, a top DHS official can exercise discretion if “there are *factors indicating* the alien is not a threat to national security, border security, or public safety...” (emphasis added).²⁵ And for people in the third category, any DHS officer may exercise prosecutorial discretion if the officer determines that “the alien is not a threat to the integrity of the immigration system or there are *factors suggesting* the alien should not be an enforcement priority” (emphasis added).²⁶ Likewise, the 2014 memo also clarifies that DHS may continue to detain and deport noncitizens who are not identified as enforcement priorities if an ICE field office director determines that their removal “would serve an important federal interest.”²⁷

In support of these policies, the 2014 memo directs DHS personnel to base enforcement decisions “on the totality of the circumstances” in individual cases, considering factors such as extenuating circumstances involving a criminal offense, the length of time since a criminal offense occurred, the length of time a non-citizen has been in the United States, military service, and family or community ties, among other factors.²⁸ In contrast, while ICE identified a similar list of mitigating factors in its 2011 prosecutorial discretion memo, neither that memo nor the 2010 memo provided guidance on how to resolve the potential tension between the DHS enforcement goals and the agency’s grounds for discretion.²⁹ Providing enforcement officials with clear direction on these ambiguous cases is important because tens, or perhaps hundreds, of thousands of unauthorized immigrants may be *both* priorities for enforcement *and* potential candidates

22 Statement as delivered by Homeland Security Secretary Jeh Johnson during a trip to Dilley, Texas, December 15, 2014, www.dhs.gov/news/2014/12/15/statement-secretary-johnson-regarding-today%E2%80%99s-trip-texas.

23 For example, the *Border Security, Economic Opportunity, and Immigration Modernization Act of 2013* (S. 744) would have limited its basic legalization program to unauthorized immigrants who entered the country by December 31, 2011; and the *Comprehensive Immigration Reform Act of 2006* (S. 2611) would have limited its basic legalization program to unauthorized immigrants who entered the country by April 6, 2001.

24 Memorandum from Secretary Johnson, “Policies for the Apprehension, Detention, and Removal of Undocumented Immigrants,” 3. Top DHS supervisors include ICE Field Office Directors, CBP Sector Chiefs, CBP Directors of Field Operations, and USCIS District Directors and Service Center Directors.

25 *Ibid.*, 4.

26 *Ibid.*

27 *Ibid.*, 5.

28 *Ibid.*, 6.

29 For a fuller discussion, see Rosenblum and Meissner with Bergeron and Hipsman, *The Deportation Dilemma*, 42 and 50-51.



for the favorable exercise of discretion.³⁰

Thus, the overall impact of the new memorandum is to describe DHS enforcement priorities more precisely and more narrowly than was the case under the 2010 and 2011 guidance, while broadening the circumstances under which DHS personnel should exercise discretion—including by identifying reasons departmental personnel may choose not to deport people who generally fall within the enforcement priorities.

The overall impact of the new memorandum is to describe DHS enforcement priorities more precisely and more narrowly than was the case under the 2010 and 2011 guidance.

III. Projected Impact of the 2014 Changes to Enforcement

Based on analyses of DHS administrative data, MPI estimates that the new guidelines if strictly adhered to could reduce interior deportations by about 25,000 cases per year.³¹ As a result, the decline in interior removals described in Figure 1 is likely to continue, with removals from within the United States expected to fall in the coming years below the FY 2014 level of 102,000. Border removals should be unchanged, or possibly increase, as a result of the continued priority on recent border crossers.

The projected decline in interior removals results from the fact that the enforcement priorities are defined narrowly, so that about 87 percent of unauthorized immigrants in the United States as of 2015 likely fall outside of all three priority categories, up from 73 percent who would be outside the priority categories under the 2010-11 enforcement guidelines.³² (See Table 1.)

The number of priority cases will grow over time, however, as more unauthorized immigrants enter the

30 For example, hundreds of thousands of removals in recent years involved parents of U.S.-citizen children; see Seth Freed Wessler, “Nearly 205K Deportations of Parents of U.S. Citizens in Just Over Two Years,” Colorlines, December 17, 2012, www.colorlines.com/articles/nearly-205k-deportations-parents-us-citizens-just-over-two-years; ICE, *Deportation of Aliens Claiming U.S.-Born Children: First Semi-Annual, Calendar Year 2013*, Report to Congress (Washington, DC: ICE, 2014), <http://big.assets.huffingtonpost.com/2013report1.pdf>; ICE, *Deportation of Aliens Claiming U.S.-Born Children: Second Half, Calendar Year 2013*, Report to Congress (Washington, DC: ICE, 2014), <http://big.assets.huffingtonpost.com/2013report2.pdf>. In addition, about 5 percent of all removals of convicted criminals in FY 2003-13 (excluding immigration crimes) involved convictions that were at least five years old, based on MPI calculations from Rosenblum and McCabe, *Deportation and Discretion*. Human Rights Watch estimates, based on an analysis of CBP data, that 15 percent of border deportations in 2011-2012 were of unauthorized immigrants who are parents of U.S.-citizen children; see Human Rights Watch, “Border Enforcement Policies Ensnare Parents of US Citizen Children,” January 8, 2015, www.hrw.org/news/2015/01/08/border-enforcement-policies-ensnare-parents-us-citizen-children. For confirmation that a large share of unauthorized border crossers are seeking to re-enter the United States after temporarily departing the country, see Mark Grimes, Elyse Golub, Alexandra Durcikova, and Jay Nunamaker, *Reasons and Resolve to Cross the Line: A Post-Apprehension Survey of Unauthorized Immigrants along the U.S.-Mexico Border* (Tucson, AZ: University of Arizona National Center for Border Security and Immigration, 2013), www.borders.arizona.edu/cms/sites/default/files/Post-Apprehension-Survey-REPORT%20may31-2013_0.pdf.

31 Note that the analysis in this section is based on removal cases, not individuals. Because certain noncitizens are removed more than once, the 25,000 cases refer to somewhat fewer than 25,000 individuals.

32 Estimates of the number of resident unauthorized immigrants falling within each enforcement priority category are characterized by a degree of uncertainty and should be interpreted as having a margin of error (plus or minus) of 10 percent; see Appendices for a complete discussion.



United States or are ordered removed after January 1, 2014.³³ With serious criminals, gang members, new border crossers, and other recent entrants defined as priorities, all of the cases falling outside the priority categories involve unauthorized immigrants who are already living in the United States and who have never been convicted of a serious crime.

A. *Estimated Numbers of Priority and Nonpriority Cases*

How many unauthorized immigrants remain enforcement priorities? To answer this question, MPI estimated how many unauthorized immigrants residing in the United States likely fall within each of the priority categories based on information about immigrant criminality, recent patterns of unauthorized inflows, and previous immigration enforcement records.

First, how many of the estimated 11 million unauthorized immigrants have committed crimes that would make them first or second priorities for removal?³⁴ Based on DHS's estimate of the number of noncitizens who have been convicted of a crime, the share of unauthorized immigrants among the noncitizen population, and the criminal histories of noncitizens deported by DHS, MPI estimates that about 690,000 (6.3 percent) of resident unauthorized immigrants have previously been convicted of a felony or serious misdemeanor.³⁵

All of the cases falling outside the priority categories involve unauthorized immigrants who are already living in the United States and who have never been convicted of a serious crime.

Second, with illegal migration flows at near-record lows, MPI's analysis of U.S. Census data suggests that about 640,000 unauthorized immigrants entered the United States after January 1, 2014, and would thus meet the second priority for this reason.³⁶

And based on ICE reports to Congress on the annual number of noncitizens failing to comply with judicial orders of removal, MPI estimates that about 60,000 resident unauthorized immigrants have violated judicial orders of removals issued since January 2014, meeting the third-priority category.³⁷

Thus, as summarized in Table 1 and explained in detail in the Appendices, an estimated 1.4 million unauthorized immigrants, or about 13 percent of the estimated unauthorized population of 11 million, currently fall within one of the three priority categories defined by the 2014 guidelines. This number will increase over time because two of the priority categories are tied to the fixed date of January 1, 2014.

33 In order to describe the number of people from the 2009-13 enforcement data who would be priorities because they entered without authorization or were ordered removed after January 2014, MPI examined the population, in each year, who were ordered removed or entered without authorization during the previous fiscal year.

34 Based on the most recent available data, which is for 2013, this report assumes a current population of 11 million unauthorized immigrants; see Center for Migration Studies of New York, "Estimates of the Unauthorized Population for States," accessed July 6, 2015, <http://data.cmsny.org/>.

35 See Appendices for details. By comparison, about 16 million people in the overall U.S. population (7 percent of those ages 15 and over) had been convicted of a felony as of 2012; see Sarah Shannon and Christopher Uggen, "Incarceration as a Political Institution," in *The Wiley-Blackwell Companion to Political Sociology*, eds. Edwin Amenta, Kate Nash, and Alan Scott (Malden, MA: Blackwell, 2012), 222. Given that the overall figure is for felonies and the data on unauthorized immigrants cover the much broader category of all serious crimes (i.e., including certain misdemeanors), these numbers are consistent with other research finding a low criminality rate among unauthorized immigrants. For an extensive literature review, see Thomas J. Miles and Adam B. Cox, "Does Immigration Enforcement Reduce Crime: Evidence from Secure Communities," *Journal of Law and Economics*, vol. 57, no. 4 (November 2014).

36 This estimate excludes first-priority category noncitizens convicted of serious crimes (to avoid double-counting); see Appendices for further details.

37 This estimate excludes those counted in the first two categories; see Appendices for further details.



Table 1. Estimated Number and Share of Unauthorized Immigrants Meeting 2010-11 and 2014 DHS Enforcement Priorities, 2015

	Number by Enforcement Priority	Share of Overall Unauthorized Population
Meeting 2014 Enforcement Priorities		
Not priorities for enforcement	9,610,000	87%
1 st Priority: Felons	300,000	3%
2 nd Priority:		
Serious Misdemeanants	390,000	4%
Unlawful entry or re-entry after January 1, 2014	640,000	6%
3 rd Priority: Removal order issued after January 1, 2014	60,000	1%
Subtotal all three priorities	1,390,000	13%
Total unauthorized population	11,000,000	100%
Meeting 2010-11 Enforcement Priorities		
Not priorities for enforcement	8,020,000	73%
1 st Priority: All convicted criminals	820,000	7%
2 nd Priority: Entered within past three years	1,370,000	12%
3 rd Priority: Immigration obstructionists	790,000	7%
Subtotal all three priorities	2,980,000	27%
Total unauthorized population	11,000,000	100%

Notes: Unauthorized immigrants falling into more than one priority category are counted only within their highest-ranked category. Percentages do not add to 100 due to rounding errors. The precise number of current unauthorized immigrants within each priority category is uncertain and should be interpreted as having a margin of error of about 10 percent; see Appendices for more detail.

Sources: For overall size of unauthorized population, Center for Migration Studies of New York, “Estimates of the Unauthorized Population for States,” accessed July 6, 2015, <http://data.cmsny.org/>. For all other estimates: U.S. Immigration and Customs Enforcement (ICE), *ICE Congressional Budget Justification*, FY 2015 (Washington, DC: ICE, 2015), www.dhs.gov/dhs-budget; ICE Enforcement Integrated Database (EID); Bryan Baker and Nancy Rytina, *Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2012* (Washington, DC: Department of Homeland Security [DHS], Office of Immigration Statistics [OIS], 2013), www.dhs.gov/sites/default/files/publications/ois_ill_pe_2012_2.pdf; Bryan Baker, *Estimates of the Size and Characteristics of the Resident Nonimmigrant Population in the United States: January 2012* (Washington, DC: DHS, OIS, 2014), www.dhs.gov/sites/default/files/publications/ois_ni_pe_2012.pdf; Nancy Rytina, *Estimates of the Legal Permanent Resident Population in 2012* (Washington, DC: DHS, OIS, 2013), www.dhs.gov/sites/default/files/publications/ois_lpr_pe_2012.pdf; DHS, OIS, *Immigration Enforcement Actions*, years 2010 through 2013 (Washington, DC: DHS, OIS, various years), www.dhs.gov/immigration-statistics-publications; and MPI analysis of data from the 2013 American Community Survey and 2008 Survey of Income and Program Participation by James Bachmeier and Colin Hammar of Temple University and Jennifer Van Hook of The Pennsylvania State University.

By comparison, MPI estimates that about 3 million resident unauthorized immigrants (27 percent) would be enforcement priorities under the 2010-11 guidelines: 820,000 convicted criminals (convicted of any type of crime), nearly 1.4 million recent entrants (defined as anyone entering in the previous three years), and 790,000 who “obstruct immigration controls” (see Table 1 and Appendices). These estimates under the 2010-11 and 2014 priorities should be interpreted with a margin of error of about 10 percent.

B. Projected Effects of Revised Enforcement Priorities on Removals

How would the number of removals that occurred between 2009 and 2013 have been different if the 2014 guidelines had been in place and fully implemented? To answer this question, MPI used ICE data on the characteristics of deportees to determine what priority category they would have fallen into, if any, under



both the 2010-11 guidelines and the 2014 guidelines.³⁸

Table 2 describes the percentage of DHS removals in FY 2009-13 that would be classified as first-, second-, or third-level priorities according to criteria described in the 2010-11 and 2014 policy memoranda.³⁹

Table 2. DHS Removals by Share Meeting 2010-11 and 2014 Enforcement Priorities, (%), FY 2009-13

2010-11 Enforcement Priorities					2014 Enforcement Priorities				
	First	Second	Third	Not a Priority	First	Second	Third	Not a Priority	Unable to Classify
2009	36%	26%	31%	8%	69%	7%	1%	20%	2%
2010	47%	22%	27%	5%	73%	7%	1%	16%	3%
2011	50%	21%	25%	4%	72%	10%	1%	16%	2%
2012	50%	20%	28%	2%	80%	8%	1%	10%	1%
2013	45%	19%	35%	1%	87%	7%	1%	6%	1%
5-Year Total	46%	21%	29%	4%	77%	7%	1%	13%	2%

Notes: Data are based on the following operationalization of the 2010-11 and 2014 enforcement priorities: 2010-11 guidelines: 1st priority – ever convicted of any crime; 2nd priority – apprehended within three years of entry; 3rd priority – any previous removal order or ICE fugitive. 2014 guidelines: 1st priority – ever convicted of a felony or aggravated felony or apprehended at border; 2nd priority – convicted of serious misdemeanor or apprehended within one year of entry; 3rd priority – removal order within previous year. See Appendices for additional information about how deportees were assigned to priority categories.

Source: MPI analysis of ICE Enforcement Integrated Database (EID); DHS, OIS, *Immigration Enforcement Actions*, for 2009 through 2013 (Washington, DC: DHS, OIS, various years), www.dhs.gov/immigration-statistics-publications.

As Table 2 indicates, a larger share of cases that resulted in removals in FY 2009-13 would no longer be considered priorities under the 2014 memo. Four percent of all DHS removals in FY 2009-13 would have fallen outside the 2010-11 guidelines, compared with 13 percent under the 2014 guidelines. (Because border removals remain a priority, all removals falling outside the priorities are interior removals.)

A second observation is that a much larger share of removals during the 2009-13 period would be classified as first-priority cases under the 2014 guidelines than under the earlier guidelines: 77 percent versus 46 percent. This change is primarily driven by the fact that the 2014 guidelines moved migrants apprehended at the border to the first-priority category from the earlier second-priority category, as described above.

Third, the data in Table 2 confirm that the new enforcement priorities build on the 2010-11 guidelines, and that deportation outcomes became increasingly focused on priority cases throughout the 2009-13 period. The proportion of removals outside the priority categories fell from 8 percent in 2009 (before the 2010-11 guidelines were implemented) to just 1 percent in 2013. Likewise, given the overlap between the 2010-11 and 2014 priorities, the share of removals falling outside the 2014 priorities has also dropped over this period, with just 6 percent of all removals in 2013 falling outside the new enforcement priorities, down from 20 percent in 2009. In this sense, the 2014 enforcement priorities do not represent a sharp break from recent enforcement practices.

The “not a priority” removal cases in Table 2 can also be interpreted as describing the number of removals occurring in FY 2009-13 that would not have taken place if the 2010 or 2014 memos had been in place

³⁸ For a full discussion of the methodology, see Rosenblum and McCabe, *Deportation and Discretion*, and ICE, *ICE Enforcement and Removal Operations Report, FY 2014*; and Appendices.

³⁹ MPI analysis of ICE administrative enforcement data obtained by *The New York Times* through a *Freedom of Information Act* request.



and if ICE had not deported anyone falling outside the priority categories. As Table 3 indicates, 268,000 fewer removals would have occurred in FY 2009-13—a 13 percent reduction compared to actual removals during this period—under strict implementation of the 2014 guidelines, and assuming no change in the number of characteristics of immigrants referred to or identified by ICE. That compares to 77,000 fewer removals per year—a 4 percent reduction—that would have occurred during the five-year period under strict implementation of the 2010-11 guidelines. Given that enforcement has already become more focused on priority cases, as described above, strict implementation of the new guidelines would have reduced interior removals by about 25,000 cases in 2013, the most recent year for which detailed data are available, down from a drop of 79,000 cases in 2009.

Table 3. Projected Reduction in Interior Removals in FY 2009-13 Based on Strict Adherence to 2010 and 2014 Enforcement Priorities

	Reduction in Interior Removals Based on 2010-11 Enforcement Priorities	Reduction in Interior Removals Based on 2014 Enforcement Priorities	Difference in Interior Removals between 2010 and 2014 Priorities
2009	30,000	79,000	49,000
2010	18,000	61,000	43,000
2011	16,000	61,000	45,000
2012	9,000	42,000	33,000
2013	4,000	25,000	21,000
5-Year Total	77,000	268,000	191,000

Source: MPI analysis of ICE Enforcement Integrated Database (EID); DHS, OIS, *Immigration Enforcement Actions*.

Based on these findings, MPI projects that strict implementation of the 2014 guidelines in the future could result in a reduction of about 25,000 interior removals.⁴⁰ Given the increased focus on border enforcement, the drop in interior removals may be offset to some degree by increased border removals, though border removals also depend on the level of illegal inflows (also see Figure 1).

C. Characteristics of Noncitizens Potentially Benefiting from Prosecutorial Discretion under New Guidelines

What are the characteristics of noncitizens who were deported as enforcement priorities under the 2010-11 guidelines, but who would be outside the priorities—and therefore more likely to benefit from prosecutorial discretion—under the 2014 guidelines? As the third column in Table 3 indicates, about 191,000 interior removal cases that occurred in FY 2009-13 would meet this description. An analysis of these cases suggests that noncitizens no longer considered enforcement priorities fall into the following categories:

- Long-standing removal orders:** About 111,000 removals in FY 2009-13 that would have been viewed as third-priority immigration obstructionist cases under the 2010-11 guidelines (typically for re-entry following a removal order) would not be priorities under the 2014 guidelines. This is because the earlier removal orders were issued more than a year before the individual's most recent

⁴⁰ DHS removal data for 2014 suggests a drop of about this magnitude has already occurred, as interior removals fell by 29,000 from FY 2013 to FY 2014, from 131,000 to 102,000 (see Figure 1). This reduction does not reflect changes resulting from the new guidelines, which were announced in November 2014, after FY 2014 ended. Detailed ICE records are not available to evaluate how many of the 2014 removals fell outside the new guidelines, so the 2014 data cannot be used to generate an updated projection of future removal numbers.



apprehension.⁴¹

- **Minor crimes:** About 74,000 removal cases in FY 2009-13 would have been considered first-priority cases under the 2010-11 guidelines because they involved people who had been convicted of a crime, but would not be priorities under the 2014 guidelines because the crimes were not felonies or serious misdemeanors.
- **Pre-2014 illegal entrants:** About 7,000 cases during the five-year period would have been second-priority “recent entrants” under the 2010-11 guidelines by virtue of being apprehended within three years of entering the United States, but would not be priorities under the 2014 guidelines (as of 2015) because they involved people apprehended more than a year after their illegal entry.⁴²

Whether removals actually fall as projected will depend upon how DHS enforcement agencies implement the new guidelines and on discretion exercised by DHS officers and supervisors.

D. Policy Implementation and Prosecutorial Discretion

Whether removals actually fall as projected will depend upon how DHS enforcement agencies implement the new guidelines and on discretion exercised by DHS officers and supervisors. Discretion in the field matters in at least two important ways. First, while MPI estimates that more than 95 percent of DHS removals since 2010 have been consistent with the 2010-11 priorities,⁴³ and while preliminary data for 2015 suggest a continued decline in interior removals consistent with the projections outlined here,⁴⁴ the 2014 memo clearly gives enforcement supervisors discretion to pursue the removal of noncitizens who fall *outside* DHS enforcement priorities if an ICE field office director determines that doing so “would serve an important federal interest.” This discretion leaves open the possibility that certain ICE offices will regularly deport low-priority cases, though DHS has developed field office-level performance metrics that will allow it to monitor and guard against such outcomes.

Second, DHS supervisors and officers can exercise their discretion when a noncitizen falling into a priority category has strong equities in the United States (e.g., family connections, a long period of continuous residence, etc.). Anecdotal evidence suggests that CBP and ICE feel greater pressure to deport noncitizens who fall within DHS enforcement priorities than to exercise discretion when mitigating circumstances exist.⁴⁵ Media accounts report that some unauthorized immigrants with strong equities in the United States continue to be deported, even after the 2014 memo clarified the authority of enforcement agents

41 This calculation is based on the population ordered removed within the previous year, rather than the population ordered removed after January 2014, and thus should be interpreted as a snapshot of the unauthorized population as of 2015. The number of noncitizens viewed as priorities under the 2014 guidelines will grow as removal orders continue to be issued after January 1, 2014 and unlawful entries or re-entries occur after that date.

42 This calculation is based on the population entering within the previous year, rather than the population entering after January 2014, and thus should be interpreted as a snapshot of the unauthorized population as of 2015. The number of unauthorized immigrants viewed as priorities under the 2014 guidelines will grow as unauthorized immigrants continue to enter the United States after January 2014.

43 Rosenblum and McCabe, *Deportation and Discretion*.

44 Associated Press, “Obama Lives Up to Pledge to Slow Immigrant Deportations,” *The New York Times*, April 29, 2015, www.nytimes.com/aponline/2015/04/29/us/politics/ap-us-immigration-deportations-down.html.

45 See, for example, Rosenblum and Meissner with Bergeron and Hipsman, *The Deportation Dilemma*, 42 and 50-51. CBP has been especially unlikely to exercise discretion in the case of long-time unauthorized immigrants with roots in the United States who depart and are apprehended at the border while attempting to re-enter the country.



and supervisors to exercise discretion in such cases.⁴⁶ And while the new guidelines no longer prioritize those convicted exclusively of immigration crimes or of traffic offenses other than driving under the influence (DUI), the continued prioritization of the broad category of immigration “aggravated felonies” (a term that includes potentially minor theft convictions as well as any crime committed by a previously deported noncitizen) and of certain other misdemeanor offenses means that many individuals with relatively sympathetic histories likely will continue to be enforcement targets.

Ultimately, immigration enforcement agencies face considerable pressure to maintain a high level of deportations. How individual agents and CBP and ICE supervisors balance this pressure against the priorities identified in the 2014 guidelines remains to be determined.

The Priority Enforcement Program appears designed to retain the most important features of Secure Communities ... while addressing key concerns.

IV. Termination and Replacement of the Secure Communities Program

Another key element of the president’s 2014 executive actions that has received limited attention is the replacement of the Secure Communities program, which has drawn significant opposition, with a narrower successor. Secure Communities has been controversial throughout its six-year history, accused of funneling low-priority unauthorized immigrants into the deportation system and undermining community policing—problems that have driven hundreds of communities to limit their cooperation with the program. But the program also has proven to be a highly efficient—if not always highly focused—method for ICE to identify and detain potentially removable noncitizens passing through the criminal justice system. Its successor, the Priority Enforcement Program (PEP), appears designed to retain the most important features of Secure Communities, including information-sharing between ICE and the Federal Bureau of Investigation (FBI), while addressing key concerns by allowing for more local control and imposing limits on the use of immigration detainers. In so doing, PEP could substantially reinforce and support the new DHS enforcement priorities; but here, too, outcomes will depend on how the new program is implemented.⁴⁷

⁴⁶ See, for example, Holly Hines, “Attorney: Pastor Max Villatoro Deported: ‘No Easy Way’ to Get U.S. Visa,” *Iowa City Press-Citizen*, March 20, 2015, www.press-citizen.com/story/news/local/2015/03/20/villatoro-deported/25092073/; Stephen Dinan, “Dysfunctional Immigration Enforcement System Tears Apart Family,” *Washington Times*, May 13, 2015, www.washingtontimes.com/news/2015/may/13/immigration-enforcement-system-dysfunction-tears-a/?page=all.

⁴⁷ As of July 2015 when this report was finalized, the transition from Secure Communities to the Priority Enforcement Program (PEP) was still underway, with most ICE field offices initiating PEP policies as of July 1, 2015.



A. *The History of Secure Communities*

Secure Communities has been an information-sharing program between ICE and the FBI that interacts with state and local law enforcement agencies across the United States. Under Secure Communities, when any law enforcement agency sends fingerprint data to the FBI for criminal background checks, the FBI automatically shares the data with ICE's Law Enforcement Support Center (LESC). The LESL then checks the fingerprints against DHS databases to identify potentially removable noncitizens. In practice, law enforcement agencies routinely conduct fingerprint-based criminal background checks of all arrestees (regardless of origin) as they are being booked into jail. ICE has checked the immigration history of virtually every person arrested and booked in the United States since 2013, when Secure Communities was extended to virtually every jurisdiction nationwide. Altogether, ICE had reviewed more than 47 million sets of fingerprints through Secure Communities as of February 28, 2015.⁴⁸

Under Secure Communities, when fingerprint matches identify arrestees as potentially deportable, the LESL notifies the ICE field office in the arresting jurisdiction. Depending on available ICE resources and the arrestee's criminal and immigration history and ranking on the DHS enforcement priorities, ICE may lodge an immigration detainer—a formal request that the arresting agency hold the individual for 48 hours⁴⁹ after completion of processing in the criminal justice system. Within the 48-hour period, ICE can take custody of potentially deportable noncitizens and initiate removal proceedings against them.

Secure Communities has been an important force multiplier, strengthening DHS's ability to identify, apprehend, and deport unauthorized immigrants from within the United States.

Secure Communities has been an important force multiplier, strengthening DHS's ability to identify, apprehend, and deport unauthorized immigrants from within the United States. The program expanded ICE's reach into every community in the country, allowing 5,000 ICE Enforcement and Removal officers to leverage the enforcement capacity of the nation's 750,000 state and local police officers. Indeed, MPI estimates that Secure Communities was responsible for 60 percent of all interior deportations in FY 2013 and 73 percent in FY 2014.⁵⁰ For these reasons, Secure Communities has many strong supporters, and some advocates for tough immigration enforcement are skeptical of any changes that might weaken the program.⁵¹

Nonetheless, Secure Communities has been controversial—in Homeland Security Secretary Jeh Johnson's words, "its very name has become a symbol for general hostility toward the enforcement of our immigration laws"—⁵² for at least five reasons:

- **Mandatory participation.** ICE and DHS initially described Secure Communities as a voluntary program for state and local law enforcement jurisdictions, and ICE signed a series of agreements with individual states describing the program and the conditions of each partner's participation. In fact, however, ICE and the FBI were statutorily required to share information to identify noncitizens

48 ICE, "Secure Communities: Monthly Statistics through February 28, 2015, IDENT/IAFIS Interoperability," www.ice.gov/sites/default/files/documents/FOIA/2015/sc_stats_YTD2015.pdf.

49 This 48-hour period excludes weekends and holidays.

50 MPI calculations based on ICE, "Secure Communities Monthly Statistics through February 28, 2015, IDENT/IAFIS Interoperability;" Rosenblum and McCabe, *Deportation and Discretion*; ICE, *ICE Enforcement and Removal Operations Report, FY 2014*.

51 See for example, Congressman Bob Goodlatte (R-VA), "Goodlatte: Implementation of Priority Enforcement Program Endangers Our Communities," (press release, June 23, 2015), http://goodlatte.house.gov/press_releases/739.

52 Memorandum from Homeland Security Secretary Jeh Johnson to ICE Acting Director, Office of Civil Liberties, and Assistant Secretary for Intergovernmental Affairs, "Secure Communities," November 20, 2014, www.dhs.gov/sites/default/files/publications/14_1120_memo_secure_communities.pdf.



who have committed crimes that make them deportable.⁵³ In 2010, as several jurisdictions adopted local laws to opt out of Secure Communities, ICE began to describe the program as mandatory and stopped negotiating terms of participation with local jurisdictions.⁵⁴

- **Low-priority removals.** As its name suggests, Secure Communities has been described foremost as a public-safety tool designed to identify and deport the most serious noncitizen criminal offenders. But during the program's first four years (FY 2009-12)—consistent with DHS priorities at the time—noncitizens never convicted of a crime and those convicted only of one or two misdemeanors comprised a majority (54 percent) of those deported through Secure Communities. This share declined to 36 percent in FY 2013-15.⁵⁵
- **Use of detainers.** Under Secure Communities, ICE regularly issued detainers to delay the release of people who had already completed their criminal justice processing—including some who had never been convicted of a crime. This practice has been particularly controversial, partly because states and localities have been required to cover the costs of the extensions and because of concerns that the detentions violated the Fourth Amendment's protection against wrongful detention.⁵⁶ Three states (California, Connecticut, and Rhode Island), the District of Columbia, and approximately 350 cities and counties—often referred to as “sanctuary cities”—have passed laws and ordinances to limit compliance with ICE detainer requests.⁵⁷ Drawing upon its profiles of the unauthorized population, MPI estimates that these jurisdictions are home to at least 5.9 million unauthorized immigrants, representing 53 percent of the U.S. unauthorized population.⁵⁸
- **Racial profiling.** Because Secure Communities automatically screened all arrestees, it may have created incentives for certain law enforcement officers to arrest people they suspected of being unauthorized immigrants, sometimes by engaging in racial profiling. Some research has found evidence that Secure Communities encouraged racial profiling in some jurisdictions.⁵⁹ ICE announced plans in 2012 to conduct new statistical monitoring to guard against such profiling, but the DHS Office of Civil Rights and Civil Liberties was never able to design an appropriate system for monitoring Secure Communities.⁶⁰
- **Impact on immigrant community-police relations.** Critics argue that Secure Communities has undermined trust between law enforcement agencies and immigrant communities, discouraging

53 *Enhanced Border Security and Visa Entry Reform Act of 2002*, section 202; 8 U.S.C. 1722(a)(2).

54 Paloma Esquivel, “Federal immigration enforcement is mandatory, memo says,” *Los Angeles Times*, January 8, 2012, <http://articles.latimes.com/2012/jan/08/local/la-me-ice-foia-20120109>.

55 Through FY 2012, 24 percent of Secure Communities deportations were of noncriminals and 30 percent were of noncitizens classified as Level 3 offenders, meaning they had been convicted of one or two misdemeanors; these numbers fell to 10 percent and 26 percent, respectively, in FY 2013-15. MPI calculations from ICE, “Secure Communities: Monthly Statistics through February 28, 2015, IDENT/IAFIS Interoperability.” Data for 2015 are through the first four months of the fiscal year. Noncriminals deported through Secure Communities were noncitizens who had failed to comply with an order of removal, previously removed unauthorized immigrants, and others who met one of the 2010-11 enforcement priorities.

56 At least eight federal lawsuits have brought Fourth Amendment wrongful detention claims, and at least two federal courts have ruled that states and localities are not required to comply with detainer requests (a position ICE no longer contests). In *Ernesto Galarza v. Mark Szalczyk, City of Allenton, Lehigh County, Greg Marino, and Christie Correa*, the Third U.S. Circuit Court of Appeals held that detainers are merely requests, are not mandatory, and cannot compel a state or local law enforcement agency to detain suspected unauthorized immigrants subject to removal. See 745 F.3d 634 (3d Cir. 2014). In *Maria Miranda-Olivares v. Clackamas County*, a federal magistrate judge, relying in part on *Galarza*, found that detainers are requests and the mere existence of the detainer was not sufficient basis for a jail to reasonably conclude that it had probable cause to detain the plaintiff. See 2014 U.S. Dist. LEXIS 50340 (D. Ore. Apr. 11, 2014). The judge ruled that county officials violated the plaintiff's Fourth Amendment rights when they kept her in custody solely on the basis of an immigration detainer.

57 Immigrant Legal Resource Center (ILRC), “Immigration Enforcement,” accessed July 13, 2015, www.ilrc.org/enforcement.

58 MPI calculations from MPI Data Hub, “Unauthorized Immigrant Population Profiles.”

59 See for example, Aarti Kohli, Peter Markowitz, and Lisa Chavez, *Secure Communities by the Numbers: An Analysis of Demographics and Due Process* (Berkeley, CA: Chief Justice Earl Warren Institute on Law and Social Policy, University of California, Berkeley Law School, 2011), www.law.berkeley.edu/files/Secure_Communities_by_the_Numbers.pdf.

60 ICE, “ICE Response to the Task Force on Secure Communities Findings and Recommendations,” April 27, 2012, www.dhs.gov/xlibrary/assets/hsac/ice-response-to-task-force-on-secure-communities.pdf. As part of the memo announcing the termination of Secure Communities and creation of the PEP program, Homeland Security Secretary Jeh Johnson directed DHS to collect and analyze data “to detect inappropriate use [of PEP] to support or engage in biased policing.” See Johnson memorandum, “Secure Communities,” 2.



immigrants from reporting crimes and creating a barrier to community policing.⁶¹ A number of law enforcement agencies have raised this concern, though others support the program. A DHS task force on Secure Communities also raised concerns about impacts on policing practices.⁶²

B. The Priority Enforcement Program

PEP will continue to take advantage of data sharing between the FBI and ICE to automatically check against DHS database the fingerprints of all people arrested by state and local law enforcement agencies; and the LESC will continue to notify local ICE field offices when potentially deportable noncitizens are identified.

However, PEP will impose new constraints on how local ICE field offices follow up with state and local law enforcement agencies. The policies will be implemented through a pair of new forms that were deployed at ICE field offices as of July 1, 2015: one form will be used to request notification when a subject potentially eligible for removal is expected to be released from law enforcement custody, and a second form will be used to request that law enforcement agencies hold detainees for up to 48 hours beyond their criminal justice processing (i.e., an immigration detainer). This two-stage process is intended to give ICE offices more chances to exercise discretion during the enforcement process. The PEP forms differ from the previous Secure Communities detainer form in three main ways:⁶³

1. The request for notification form may only be issued if ICE determines that an arrestee has engaged in or is suspected of terrorism or espionage or otherwise poses a danger to national security, has been convicted of an offense involving active participation in a criminal gang, or has been convicted of crimes identified as enforcement priorities under the 2014 memo. By contrast, the Secure Communities detainer form established a much lower threshold for issuing detainers, including a finding that a noncitizen had been *charged* with any crime (i.e., not convicted); and the Secure Communities form also included a catch-all “other” category.
2. ICE will only issue immigration detainers when one of these conditions has been met and when the agency further determines that probable cause exists that the subject is removable. Probable cause may be based on the existence of a final order of removal, a pending removal proceeding, biometric confirmation that the noncitizen is removable, or based on information gathered by ICE during an interview with the subject. The Secure Communities detainer form included check boxes to indicate a finding of probable cause, but did not require a finding of probable cause in order for detainer requests to proceed.
3. The PEP detainer request form *requires* local law enforcement agencies to notify potentially removable immigrants of the detainer request, rather than requesting that such notification occur, as was the case under Secure Communities. The detainer form includes instructions and phone numbers for noncitizens to ask questions, register complaints, or make a claim to U.S. citizenship or to being a crime victim.

Finally, DHS no longer is seeking to apply a uniform information-sharing and detainer model across the

61 See for example, Nik Theodore, *Insecure Communities: Latino Perceptions of Police Involvement in Immigration Enforcement* (Chicago: University of Illinois at Chicago, 2013), https://greatcities.uic.edu/wp-content/uploads/2014/05/Insecure_Communities_Report_FINAL.pdf.

62 Homeland Security Advisory Council, “Task Force on Secure Communities Findings and Recommendations,” September 2011, 24, www.dhs.gov/xlibrary/assets/hsac-task-force-on-secure-communities.pdf.

63 MPI analysis based on DHS, “Immigration Detainer – Notice of Action,” DHS Form I-247 (12/12), www.ice.gov/doclib/secure-communities/pdf/immigration-detainer-form.pdf; Johnson memorandum, “Secure Communities;” DHS, “Request for Voluntary Notification of Release of Suspected Priority Alien,” DHS Form I-247N, www.aclu.org/files/field_document/I-247N%20Request%20for%20Notification%20SAMPLE.pdf; DHS, “Immigration Detainer – Request for Voluntary Action,” DHS Form I-247D, www.aclu.org/files/field_document/I-247D%20Immigration%20Detainer%20SAMPLE.pdf; ICE, Office of Enforcement and Removal Operations, “Priority Enforcement Program (PEP),” accessed July 13, 2015, www.ice.gov/sites/default/files/documents/Fact%20sheet/2015/pep_brochure.pdf.



United States, as it sought to do with Secure Communities. In an effort to convince states and localities that limited their cooperation with Secure Communities to opt into PEP, DHS will work with individual communities to develop protocols that stipulate agreed-upon enforcement practices. For example, a jurisdiction may agree to honor PEP requests only in cases involving convicted felons or may require that ICE establish a community review board as a condition of its cooperation. The precise terms of these arrangements are likely to be negotiated on a case-by-case basis, with DHS paying particular attention to large jurisdictions such as New York City, Los Angeles, and Cook County, IL, whose cooperation ICE depends on for effective interior immigration enforcement.

V. Projected Impact of the Change to the Priority Enforcement Program

While it is too early to evaluate PEP implementation, the new program has the potential to substantially reshape ICE interior enforcement practices. Any substantive changes to Secure Communities are important because the program has become the primary way ICE identifies potentially deportable immigrants in the U.S. interior, as noted above. If implemented as described in the November 2014 executive action announcement and a brochure released in July 2015,⁶⁴ the PEP program will ensure that interior removals reflect enforcement priorities in the 2014 memo, and will increase the proportion of serious criminals among the removal population.

The changes announced in 2014 appear designed to retain the operational benefits of Secure Communities while addressing many of the concerns raised by critics. Because PEP will continue to use FBI-ICE information-sharing to screen arrestees at booking, ICE will still be able to identify high-priority deportable noncitizens early in the criminal justice process. PEP thus preserves a powerful tool for immigration enforcement. The enforcement benefits will be especially significant if large jurisdictions that have limited their cooperation with Secure Communities detainer requests agree to honor a larger share of PEP requests.

At the same time, PEP will only allow ICE to request that local law enforcement agencies notify ICE about release dates in the case of gang members, national-security threats, and noncitizens already *convicted* of specific serious crimes (as opposed to those *booked* for any crime). PEP will further restrict the use of detainers to cases in which, following a notification, ICE finds probable cause that the noncitizen is removable. In this way, PEP further refines the 2014 enforcement priorities because it should ensure that the most common form of interior enforcement—i.e., resulting from DHS cooperation with local law enforcement agencies—is restricted to a subset of the most important priorities described in the 2014 memo. If implemented successfully, these refinements may also discourage racial profiling and mitigate the adverse impact of immigration enforcement on police-community relations.

Key questions remain unanswered about how ICE field offices will implement these changes. One question concerns the likely impact on noncriminals of PEP's continuation of the Secure Communities policy of universal fingerprint screening—a policy that rejected calls by immigrant-rights advocates to restrict fingerprint screening to individuals convicted of a crime.⁶⁵ PEP could continue to conduct preconviction screening, but the LESC could be directed to notify field offices only when an arrestee is a public-safety threat or has been convicted of a serious crime. Either of these changes would more definitively limit the ability of ICE field offices to use PEP's fingerprint-screening results to deport noncitizens who fall outside the scope of the new program. Yet if PEP were to rely on postconviction screening, ICE would be unable to identify noncitizens previously convicted of a serious crime as well as gang members and other public-safety threats who have not been convicted of a crime, both categories that remain top enforce-

⁶⁴ ICE, Office of Enforcement and Removal Operations, "Priority Enforcement Program (PEP)."

⁶⁵ See for example, Asian Americans Advancing Justice, "PEP-Comm & The Trust Act: What You Need to Know," accessed July 13, 2015, www.iceoutofca.org/uploads/2/5/4/6/25464410/aaaj-alc_-_pep_and_trust_act_fact_sheet_-_dec_2014.pdf.



ment priorities. And ICE has resisted calls to narrow the flow of information to local field offices because customizing the LESC response based on an individual's detailed criminal history would require the ICE support center to make complex determinations based on the jurisdiction in which the criminal conviction occurred.⁶⁶

A second set of questions surrounds the flexibility built into the PEP program. For example, the PEP memo explicitly permits ICE to take custody of noncitizens who have not been convicted of a serious crime but who meet other enforcement priorities as long as the arresting agency agrees to cooperate with the transfer.⁶⁷ Immigrant-rights advocates remain concerned that these provisions may allow PEP, like Secure Communities, to generate low-priority deportations in some jurisdictions.

In general, DHS plans to address these concerns through the more narrowly focused PEP notification and detainer forms and through new training for ICE field offices. In addition—and in contrast with Secure Communities—PEP enforcement practices have been designed from inception to incorporate the collection of detailed district-level performance metrics that should allow DHS to monitor how the program is implemented in different jurisdictions. Preliminary reports suggest that the “quality” of PEP removals (i.e., the share of removals falling into the highest priority categories) has already begun to improve relative to Secure Communities. Even so, based on the initial reactions from immigrant-rights organizations,⁶⁸ ICE and DHS have considerable work to do to rebuild trust with immigrant communities.

Widespread opposition to Secure Communities has left more than half of the U.S. unauthorized population living in jurisdictions that refuse to honor some or all immigration detainers.

The most important question remains whether the shift to PEP will convince jurisdictions that refused to fully cooperate under Secure Communities to opt back into a more cooperative relationship with DHS. This question is critical from the DHS perspective because the department depends on constructive partnerships with state and local law enforcement agencies to apprehend and deport high-priority noncitizens from within the United States. It is also critical to DHS because widespread opposition to Secure Communities has left more than half of the U.S. unauthorized population living in jurisdictions that refuse to honor some or all immigration detainers—a level of noncompliance with federal policy that offers a stark indicator that local-federal cooperation has fractured.

VI. Conclusion

The president's executive actions announced in November 2014 created a watershed moment in the recent history of U.S. immigration policy, putting in place major changes to the immigration enforcement system at a time when legislative action has been absent. The most widely publicized policy changes were in the deferred action realm, with proposals to expand or create new programs that could provide a three-year reprieve from deportation and work authorization for slightly more than 5 million unauthorized immigrants if they pass court muster. However, as this report documents, changes to DHS enforce-

⁶⁶ For example, states classify crimes as felonies and misdemeanors differently, and they apply different sentences to the same crimes. See ICE, “ICE Response to the Task Force on Secure Communities Findings and Recommendations,” 16.

⁶⁷ Johnson memorandum, “Secure Communities,” 3. The PEP notification and detainer forms do not appear to allow ICE offices to request information on detainers in these cases, however.

⁶⁸ See for example, letter from Advancing Justice — AAJC, et al. to the Honorable Jeh Johnson, June 17, 2015, www.scribd.com/doc/268945332/2015-06-17-PEP-Letter-to-DHS.



ment practices may be equally significant—and clearly more so while the DAPA program and DACA expansion are on hold. MPI estimates that the new enforcement priorities could provide a degree of protection from deportation for an estimated 87 percent of the unauthorized population (about 9.6 million people), up from about 73 percent (about 8 million) under the 2010 enforcement priorities.

MPI further estimates that DHS will complete about 25,000 fewer removals annually from the interior of the United States if the new priorities are fully implemented—bringing total interior removals below the 100,000-mark for the first time since 2006. The 2014 executive actions build on recent DHS efforts to further shift its focus to the border, and increased removals at the border may partly offset a drop in interior removals, though border removals are also highly dependent on illegal inflows.

Important questions remain about how the new enforcement guidelines and PEP program will be implemented ... leaving the actual impact of the new policies uncertain.

Unauthorized immigrants most likely to benefit from the new enforcement priorities include noncriminals who entered the United States before 2014 and who have not been ordered removed since that time. And with the replacement of Secure Communities with the Priority Enforcement Program, only noncitizens who have been convicted of serious crimes or who are gang members or threats to national security are likely to be deported as a result of DHS cooperation with state and local law enforcement agencies.

Important questions remain about how the new enforcement guidelines and PEP program will be implemented by DHS enforcement personnel, leaving the actual impact of the new policies uncertain. Preliminary evidence suggests that interior enforcement numbers have indeed continued to decline in 2015. On the other hand, there are reports that ICE continues to deport certain noncitizens who technically fall within DHS enforcement priorities, but who would appear to be strong candidates for the favorable exercise of discretion. As for the PEP program, it remains an open question whether DHS succeeds in convincing the large number of jurisdictions that limited their compliance with Secure Communities to opt back into PEP—in essence a test whether narrowing the focus of enforcement broadens its reach. The answer to this question, and the ultimate impact of the 2014 reforms, will be years in the telling.



Appendices: Explanation of Estimates

Appendix I. Estimates of the Priority Status of Resident Unauthorized Population

MPI's estimates of the resident unauthorized population (i.e. unauthorized immigrants currently residing in the United States) that falls within the 2010-11 and 2014 DHS enforcement priorities are calculated by estimating the size of three main groups: convicted criminals, recent entrants, and noncitizens who have violated immigration court orders. While the 2010-11 and 2014 enforcement memos define these groups somewhat differently, the three categories make up the great majority of noncitizens who are viewed as priorities under both sets of guidelines. Both guidelines also prioritize unauthorized immigrants apprehended at the border, but border crossers are not counted as part of the resident unauthorized population. In addition, MPI does not estimate the number of noncitizens who are considered national-security threats or gang members but have never been convicted of a serious crime because no systematic data exist on these groups and relatively few unauthorized immigrants are likely to fall into these categories.

The sections below describe MPI's methodology for estimating the number of resident unauthorized immigrants who fall within each category, as defined by the 2010-11 and 2014 guidelines. In order to avoid counting the same individuals more than once, we also estimate how many people fall within more than one category, and count individuals only within the highest-priority category in which they fall. (For example, a convicted criminal who is also a recent entrant is counted as a convicted criminal.)

As a baseline for all of these estimates, MPI uses the most recent estimate of the total unauthorized population by Robert Warren: 11.0 million people in 2013.⁶⁹

A. Convicted Criminals

The 2010-11 enforcement guidelines prioritized noncitizens ever convicted of any crime, while the 2014 enforcement guidelines prioritize those who have ever been convicted of a felony or a serious misdemeanor. MPI's estimate of the number of unauthorized immigrants falling into these categories is based on a 2012 DHS estimate of the number of convicted criminals in the total foreign-born population, DHS data on the proportion of the foreign-born population that is unauthorized (also as of 2012—the most recent DHS estimate available, used here for internal consistency), and information on the severity of crimes committed by noncitizens deported by DHS in FY 2003-13:

- **Estimates under the 2010-11 enforcement guidelines.** DHS estimated in 2012 that there were 1.9 million convicted criminals among the entire noncitizen population, including unauthorized immigrants, legal permanent residents (LPRs), and legal temporary nonimmigrants.⁷⁰ DHS also estimated in 2012 that there were 11.4 million unauthorized immigrants, 13.3 million LPRs, and 1.9 million legal temporary nonimmigrants.⁷¹ Thus, DHS data suggest that 43 percent of noncitizens were unauthorized. Assuming unauthorized immigrants and lawful noncitizens commit crimes at similar rates, MPI estimates that 43 percent of 1.9 million noncitizens, or about 820,000 unauthorized immigrants were convicted criminals in 2012. All of these unauthorized immigrants would be enforcement priorities under the 2010-11 guidelines, and they represent 7.5

69 Center for Migration Studies of New York, "Estimates of the Unauthorized Population for States," accessed July 6, 2015, <http://data.cmsny.org/>.

70 DHS, *U.S. Immigration and Customs Enforcement Salaries and Expenses*, Fiscal Year 2013 Congressional Submission, 2013, 61, www.dhs.gov/dhs-budget.

71 Bryan Baker and Nancy Rytina, *Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2012* (Washington, DC: DHS, OIS, 2013), www.dhs.gov/sites/default/files/publications/ois_ill_pe_2012_2.pdf; Bryan Baker, *Estimates of the Size and Characteristics of the Resident Nonimmigrant Population in the United States: January 2012* (Washington, DC: DHS, OIS, 2014), www.dhs.gov/sites/default/files/publications/ois_ni_pe_2012.pdf; Nancy Rytina, *Estimates of the Legal Permanent Resident Population in 2012* (Washington, DC: DHS, OIS, 2013), www.dhs.gov/sites/default/files/publications/ois_lpr_pe_2012.pdf.



percent of the estimated total unauthorized population of 11 million.

- Estimates under the 2014 enforcement guidelines.** Based on MPI's analysis of the criminal convictions of ICE removals completed in FY 2003-13, 16 percent of criminal removals had been convicted exclusively of traffic crimes other than DUI, nuisance crimes, or misdemeanor illegal entry offenses; about 37 percent had been convicted of felonies; and about 47 percent had been convicted of serious misdemeanors.⁷² Thus, 37 percent of 820,000, or about 300,000 unauthorized immigrants, had been convicted of a felony and 47 percent (about 390,000) had been convicted of a serious misdemeanor. These unauthorized immigrants—a total of 690,000, or 6.3 percent of the total unauthorized population—are considered first- and second-priority enforcement categories respectively under the 2014 guidelines.

The precise number of unauthorized immigrants convicted of crimes (under the 2010-11 priorities) or felonies or serious misdemeanors (under the 2014 guidelines) may be somewhat higher or lower than these estimates, which therefore should be interpreted as having a margin of error in the low tens of thousands, or about 10 percent. The overall number would be slightly higher than 820,000 if unauthorized immigrants committed serious crimes at a higher rate than LPRs or nonimmigrants, since MPI's calculation assumes similar rates of criminality. On the other hand, previous research suggests *lower-than-average* criminality rates among unauthorized immigrants, which means the actual number of convicted unauthorized immigrants may be slightly lower than MPI's estimate of 820,000.⁷³ In addition, ICE has historically prioritized serious criminals for removal, so the proportion of minor criminals among all unauthorized immigrants may be somewhat higher than 16 percent, and the actual number of those convicted of serious crimes may be somewhat lower than the 2014 estimate suggests.

B. Recent Entrants

Both the 2010-11 and 2014 enforcement guidelines prioritize recent illegal entrants, defined under the earlier guidelines as unauthorized immigrants who had been in the United States for less than three years, and under the 2014 guidelines as those who entered or re-entered the United States after January 1, 2014. MPI estimates the number of unauthorized immigrants falling into these categories by using its existing methodology for describing the unauthorized population, based on information from the U.S. Census Bureau's 2013 American Community Survey:⁷⁴

- Estimates under the 2010-11 enforcement guidelines.** Based on U.S. Census data for 2013, MPI estimates that 1.48 million unauthorized immigrants (13.5 percent of the total estimated population of 11 million) entered the United States in the three years prior to 2013. Assuming the rate of unauthorized inflows remains unchanged since 2013, there are currently 1.48 million unauthorized immigrants who entered the United States in the last three years. We further assume that these unauthorized immigrants have been convicted of crimes at a similar rate (7.5 percent) as the unauthorized population as a whole. Subtracting convicted criminals yields 1.37 million unauthorized immigrants who have been in the country for three years or less and have never been convicted of a crime.
- Estimates under the 2014 enforcement guidelines.** MPI estimates that 680,000 unauthorized immigrants entered the United States between 2012 and 2013. Assuming the rate of unauthorized

72 For a fuller discussion of criminal convictions of migrants removed in FY 2003-13, see Rosenblum and McCabe, *Deportation and Discretion*.

73 For an extensive literature review, see Thomas J. Miles and Adam B. Cox, "Does Immigration Enforcement Reduce Crime: Evidence from Secure Communities," *Journal of Law and Economics*, vol. 57, no. 4 (2014). Also see Walter A. Ewing, Daniel E. Martinez, and Rubén G. Rumbaut, *The Criminalization of Immigration in the United States* (Washington, DC: Immigration Policy Center, 2015), <http://immigrationpolicy.org/special-reports/criminalization-immigration-united-states>.

74 For a discussion of MPI's methodology for describing characteristics of the unauthorized population, see MPI Data Hub, "Unauthorized Immigrant Population Profiles," accessed July 13, 2015, www.migrationpolicy.org/programs/us-immigration-policy-program-data-hub/unauthorized-immigrant-population-profiles; Jennifer Van Hook, Frank D. Bean, James Bachmeier, and Catherine Tucker, "Recent Trends in Coverage of the Mexican Born Population of the United States: Results from Applying Multiple Methods Across Time," *Demography*, vol. 51, no. 2 (2014).



inflows remains unchanged since 2013, there are currently 680,000 unauthorized immigrants who have been in the United States since January 2014. We further assume a similar rate (6.3 percent) of serious criminal convictions within this population as in the overall unauthorized population, meaning there are about 640,000 unauthorized immigrants who entered the country since January 2014 and have never been convicted of a serious crime.

The precise numbers of unauthorized immigrants who have been in the United States for less than three years/since January 2014 may be slightly higher than these estimates since unauthorized inflows have increased slightly in the last year. Most of this change was due to increased arrivals of Central American children and families, however, some of whom may be eligible for humanitarian relief from removal. Therefore, the estimate for immigrants in this priority category also should be interpreted as having a margin of error in the low tens of thousands, or about 10 percent. The number of unauthorized immigrants arriving since January 2014 will increase over time because this priority category is tied to a fixed date.

C. Noncitizens Who Have Violated Immigration Court Orders or Obstructed Immigration Controls

The 2010-11 enforcement guidelines prioritize noncitizens who obstruct immigration controls, defined to include those who fail to leave the country when subject to an immigration judge's final order or who re-enter the United States following a deportation order. The 2014 guidelines prioritize noncitizens who have been ordered removed by an immigration judge since January 1, 2014, including those who re-enter following an order of removal issued since that date. MPI's estimates in these categories are based on the ICE estimate of the number of noncitizens who fail to appear at an immigration hearing or fail to depart the United States following an order of removal ("ICE fugitives"), DHS reinstatements of removal, and estimates of CBP's apprehension rate.

Estimates under the 2010-11 enforcement guidelines:

- In 2014, ICE estimated that there were 470,000 ICE fugitives in the United States as of October 31, 2013.⁷⁵ Everyone in this group falls within the third-priority category under the 2010-11 guidelines. MPI assumes 7.5 percent of ICE fugitives have previously been convicted of a crime and 13.5 percent of ICE fugitives have entered within the last three years; subtracting these groups yields an estimate of 380,000 ICE fugitives not falling into one of the previously counted categories.
- DHS has deported 1.3 million unauthorized immigrants since 1997 under reinstatements of orders of removal.⁷⁶ Based on surveys conducted by the University of California, San Diego and Princeton University, MPI assumes that about half of all would-be unauthorized immigrants attempting to enter the United States since 1997 have been apprehended.⁷⁷ If half of all intending crossers are apprehended, this suggests that an equal number have re-entered the United States after an order of removal and *not* been re-apprehended, meaning about 1.3 million previously removed unauthorized immigrants have successfully re-entered the United States. Everyone in this group falls within the third-priority category under the 2010-11 guidelines. According to MPI's analysis of DHS data and ICE administrative records for FY 2003-13, 60 percent of those deported under reinstatements of removal had previously been convicted of a crime; and MPI assumes 13.5 percent of reinstatement cases entered or re-entered in the last three years. Subtracting these cases to avoid double-counting yields an estimate of 450,000 people who have re-entered the

75 ICE, *ICE Congressional Budget Justification, FY 2015* (Washington, DC: ICE, 2014), 53, www.dhs.gov/sites/default/files/publications/DHS-Congressional-Budget-Justification-FY2015.pdf.

76 DHS, *2013 Yearbook of Immigration Statistics* (Washington, DC: DHS, OIS, 2014), www.dhs.gov/yearbook-immigration-statistics. This figure includes unpublished CBP data on reinstatements of removal issued in FY 2014.

77 University of California, San Diego, Mexican Migration Field Research Project and Princeton University, Mexico Migration Project. For a fuller discussion of these surveys and their estimates of apprehensions rates see Lisa Seghetti, *Border Security: Immigration Enforcement Between Ports of Entry*, CRS Report R42138 (Washington, DC: Congressional Research Service, 2012), 25, www.fas.org/sgp/crs/homesecc/R42138.pdf.



United States following a removal order that are not counted in one of the other priority categories. MPI further assumes that 10 percent (45,000) of those who have re-entered the United States following an order of removal are also counted among ICE fugitives; subtracting these cases yields 410,000 re-entries to be added to the 380,000 ICE fugitives and a total estimate of 790,000 cases in the third-priority category under the 2010-11 guidelines.

Estimates under the 2014 enforcement guidelines:

- In 2013, ICE estimated that about 70,000 people become ICE fugitives in any given year, not accounting for ICE enforcement efforts, so MPI assumes about 70,000 unauthorized immigrants have become ICE fugitives since January 2014.⁷⁸ The total population of ICE fugitives has remained roughly constant in recent years suggesting that DHS also deports about 70,000 ICE fugitives annually, or about 15 percent of the total ICE fugitive population of 470,000 in 2013. MPI assumes that these deportations are randomly drawn from the full population of ICE fugitives. Thus, MPI assumes that about 15 percent (10,000) of the 70,000 post-January 2014 ICE fugitives have already been deported, and about 60,000 ICE fugitives remain in the United States after failing to comply with a post-January 2014 order of removal. These cases fall within the third-priority category under the 2014 guidelines.
- About 6.3 percent of these cases (3,800) likely have committed serious crimes (the same percentage as in the general unauthorized population), a population that falls within the margin of error in this analysis. As a result, MPI estimates that about 60,000 third-priority cases under the 2014 guidelines did not fall into the other priority categories. (Some additional unauthorized immigrants may have re-entered the United States following an order of removal issued since January 2014, but all of these post-2014 re-entries already would already be counted as second-priority cases.)

The numbers falling within the 2010-11 third-priority category are the most difficult to estimate, and should be interpreted to have a wide margin of error—possibly somewhat more than 10 percent. The precise number of people re-entering after an order of removal may be somewhat higher than 1.3 million (450,000, accounting for overlap with the first- and second-category cases) because the actual apprehension rate may have been less than 50 percent during some of this period; but the number also may be lower than 1.3 million (450,000) because our estimate does not account for individuals who have been subject to multiple reinstatement orders. The MPI estimate of the degree of overlap between ICE fugitives and re-entry cases is also highly uncertain. With respect to the 2014 third-priority category, ICE's estimate that 70,000 people become ICE fugitives in any given year is based on ICE records from 2003-06 (i.e., before ICE began targeting this population), so the actual number of unauthorized immigrants becoming ICE fugitives in 2014 and remaining in the United States may be lower than 60,000.

D. Summary

In sum, MPI estimates that:

- about 820,000 resident unauthorized immigrants have been convicted of a crime (first-priority cases) under the 2010-11 guidelines, and 690,000 have been convicted of a felony or serious misdemeanor (first- and second-priority cases) under the 2014 guidelines.
- approximately 1.48 million resident unauthorized immigrants entered the United States in the last three years, including 1.37 million who have never been convicted of a crime (second-priority cases under the 2010-11 guidelines); and 680,000 entered since January 1, 2014, including 640,000 who have never been convicted of a serious crime (second-priority cases under the 2014 guidelines).

⁷⁸ ICE, *Congressional Budget Justification FY 2013* (Washington, DC: ICE, 2013), 46, www.dhs.gov/xlibrary/assets/mgmt/dhs-congressional-budget-justification-fy2013.pdf.



- about 470,000 unauthorized immigrants have violated a judicial order of removal or failed to appear at an immigration hearing, and about 1.3 million have re-entered the United States following an order of removal. Accounting for overlap with those previously convicted of a crime and recent entries and for overlap between ICE fugitives and re-entry cases, MPI estimates that about 790,000 cases fall exclusively within the third-priority category under the 2010-11 guidelines. About 60,000 people violated a judicial order or failed to appear at an immigration hearing since January 2014 and are counted as third-priority cases under the 2014 guidelines.

Appendix 2. Assignment of Priority Status to Previous Deportees

MPI used information from the ICE Enforcement Integrated Database to determine what priority category, if any, people removed between FY 2009-13 would have fallen into under the 2010-11 and the 2014 enforcement guidelines. The general methodology for assigning priority status to removal cases is described in detail elsewhere;⁷⁹ this Appendix describes additional methodological issues raised in making priority assignments under the 2014 guidelines.

MPI was unable to identify noncitizens considered national-security threats or gang members who had not been convicted of a crime; these cases are therefore omitted from the first-priority category for both sets of guidelines. MPI was unable to identify noncitizens convicted of three or more misdemeanors; these cases are omitted from the second-priority category for the 2014 guidelines. As proxy measures for the number of cases entering without authorization after January 2014 or ordered removed after January 2014 (second- and third-priority categories under the 2014 guidelines), MPI estimated cases entering without authorization or ordered removed in the previous year, relative to each row in Table 2. MPI was unable to classify certain removal cases under the 2014 guidelines because migrants' criminal histories could not be definitively coded as felonies, serious misdemeanors, or lesser misdemeanors. Three percent of cases involved noncitizens whose crimes could have been either felonies or serious misdemeanors (e.g., depending on state sentencing guidelines); these cases were divided evenly between the first- and second-priority categories. Two percent of cases involved migrants whose crimes could either have been serious misdemeanors (i.e., second-priority cases) or lesser misdemeanors (i.e., are not priorities for enforcement); these cases are left unclassified (and listed in the right-most column of Table 2).

⁷⁹ Rosenblum and McCabe, *Deportation and Discretion*, and ICE, *ICE Enforcement and Removal Operations Report, FY 2014*.



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