



EXECUTIVE ACTION ON IMMIGRATION: Six Ways to Make the System Work Better

By Donald M. Kerwin
Doris Meissner
Margie McHugh

EXECUTIVE ACTION ON IMMIGRATION

Six Ways to Make the System Work Better

By Donald M. Kerwin, Doris Meissner, and Margie McHugh

March 2011

Acknowledgments

The authors wish to thank the Open Society Foundations, the Ford Foundation, and the 21st Century ILGWU Heritage Fund for supporting this project; Migration Policy Institute (MPI) President Demetrios Papademetriou and MPI Nonresident Fellow Charles Wheeler for their insightful comments on the report; the participants in the MPI roundtable on executive action for their superb ideas and input on how to make the immigration system work more effectively; and Burke Speaker for carefully editing the report.

© 2011 Migration Policy Institute.
All Rights Reserved.

Cover Photo: Wikimedia Commons, public domain use.
Cover Design and Typesetting: April Siruno, MPI

No part of this publication may be reproduced or transmitted in any form by any means, electronic or mechanical, including photocopy, or any information storage and retrieval system, without permission from the Migration Policy Institute. A full-text PDF of this document is available for free download from: www.migrationpolicy.org.

Permission for reproducing excerpts from this report should be directed to: Permissions Department, Migration Policy Institute, 1400 16th Street, NW, Suite 300, Washington, DC 20036, or by contacting communications@migrationpolicy.org.

Suggested citation: Kerwin, Donald M., Doris Meissner, and Margie McHugh. 2011. *Executive Action on Immigration: Six Ways to Make the System Work Better*. Washington, DC: Migration Policy Institute.



Table of Contents

Executive Summary	1
I. Introduction	2
II. Defining What Constitutes Effective Border Control	2
A. Issue	2
B. Recommendations	3
C. Background.....	3
III. Creating a White House Office on Immigrant Integration	6
A. Issue	6
B. Recommendations	7
C. Background.....	7
IV. Facilitating the Legal Admission of Eligible Family Members	9
A. Issue	9
B. Recommendation.....	10
C. Background.....	10
V. Exercising Prosecutorial Discretion across the System	14
A. Issue	14
B. Recommendations	14
C. Background.....	15
VI. Alleviating Burdens on Clogged Courts	19
A. Issue	19
B. Recommendations	19
C. Background.....	20
VII. Testing Legal Representation in Removal Proceedings	22
A. Issue	22
B. Recommendations	23
C. Background.....	23
VIII. Conclusion	25
Works Cited	26
About the Authors	31



Executive Summary

In the absence of new legislation, the locus for immigration policy action resides in the executive branch and the ways in which the nation's existing immigration laws and policies are administered. It is imperative that the administration exercise its authority to field policies, programs, and procedures that are effective and fair in advancing the core goals of the nation's immigration system.

This report suggests six discrete ways that executive action could be used to improve and strengthen the performance of the nation's immigration system. None requires new legislation: all build on policies and operations already established within and among the principal executive branch immigration agencies.

They are:

- The administration and the US Department of Homeland Security (DHS) should define what constitutes effective border control and promote a more informed public debate and broader consensus about the effectiveness of border enforcement, especially along the Southwest land border.
- The administration should create a White House Office on Immigrant Integration led by a new Special Assistant to the President and convene a Cabinet-level interagency task force and working group of state and local officials that would set immigrant integration goals and targets and develop policy and funding mechanisms to meet them. The office would also track integration outcomes in order to inform immigration policymaking and to analyze the needs associated with future immigration policy proposals.
- DHS's US Citizenship and Immigration Services (USCIS) should adjudicate waivers to grounds of inadmissibility based on "unlawful presence" before visa beneficiaries must leave the country to apply for an immigrant visa at a US consulate abroad. Such a procedure would provide certainty for eligible family immigrants, thereby encouraging fuller use of established legal admissions opportunities and processing.
- DHS, in consultation with the Department of Justice (DOJ), should establish uniform enforcement priorities, based on its existing guidance for exercising prosecutorial discretion, and implement them across the immigration system in all of its immigration agencies, programs, and processes.
- US Immigration and Customs Enforcement (ICE) attorneys should screen all Notices to Appear (NTA) for removal proceedings prior to their filing in immigration court to ensure that NTAs adhere to DHS's prosecutorial discretion guidelines and that clogged immigration courts are not further burdened with lower priority cases.
- DHS and DOJ's Executive Office for Immigration Review (EOIR) — which oversees the immigration court system — should issue guidance governing the circumstances in which due process requires the government to appoint counsel in removal proceedings. DOJ should establish a pilot program to test the benefits of appointed counsel in such cases.



I. Introduction

It is now commonplace to describe the nation's immigration system as broken. The presence of 11 million unauthorized residents¹ — almost 30 percent of the nation's foreign-born population — vividly illustrates the problem. Congress has failed in successive efforts over several years to enact reforms. Whether reform initiatives move ahead or stall in this new Congress, a wide body of immigration law is on the books, executive-branch agencies administer and enforce those laws daily, and approximately 1 million people immigrate legally to the United States each year. In short, current laws and actions taken by immigration officials affect millions of lives annually.

In the absence of legislation, the locus for policy action increasingly resides in the executive branch, intensifying the imperative for policies, programs, and procedures that are effective and fair in advancing the core goals of the nation's immigration system: promoting family unity, meeting legitimate labor market needs, offering protection from persecution, and awarding US citizenship as an important step toward full incorporation into US society. Achieving these goals depends on effective immigration enforcement that ensures both border and national security, economic competitiveness, community safety, and a level playing field for American workers.

The ideas proposed in this report are the products of a roundtable that the Migration Policy Institute (MPI) convened in the spring of 2010 with a group of immigrant service providers, policy experts, and practitioners on ways to improve the administration of current immigration laws. MPI analyzed and winnowed the ideas to those that the authors believe carry the greatest promise for significant improvements without the need for new legislation or significant infusions of additional resources.

II. Defining What Constitutes Effective Border Control

A. Issue

In his 2011 State of the Union speech, President Barack Obama reiterated his desire to “work with Republicans and Democrats to protect our borders, enforce our laws and address the millions of undocumented workers who are now living in the shadows.”² However, this renewed call for keeping the immigration issue on the political agenda does not change the core dynamics of the stalemate that has existed in Congress since the failure of immigration reform measures in 2006 and 2007, and more recently in the lame-duck session with the Senate's defeat of the *Development, Relief, and Education for Alien Minors* (DREAM) Act.

Among the reasons for the impasse is a fundamental disagreement about border control. Opponents of comprehensive immigration reform legislation argue that control of the border must be established as a *precondition* for broader reforms. Reform proponents maintain that effective border control can only be achieved *with* broad immigration reform. In both cases, “border control” is undefined.

In addition, lawmakers “keep moving the goalpost,” as Homeland Security Secretary Janet Napolitano

1 Jeffrey S. Passel and D'Vera Cohn, *U.S. Unauthorized Immigration Flows Are Down Sharply Since Mid-Decade* (Washington, DC: Pew Hispanic Center, 2010), <http://pewhispanic.org/reports/report.php?ReportID=126>.

2 White House, “Remarks of President Barack Obama in State of the Union Address,” (news release, January 25, 2011), www.whitehouse.gov/the-press-office/2011/01/25/remarks-president-barack-obama-state-union-address-prepared-delivery.



has observed.³ Secretary Napolitano has also argued that the Department of Homeland Security (DHS) will never be able to “seal the border” in the sense of preventing all illegal migration.⁴ In making that point, she has presented an alternative view of border control from the one set out in the *Secure Fence Act*, which Congress enacted in 2006. That statute calls for “operational control” of the border, defining it as “the prevention of all unlawful entries into the United States, including entries by terrorists, other unlawful aliens, instruments of terrorism, narcotics, and other contraband.”⁵

More recently, in a speech reporting two years into the administration’s Southwest border strategy, she argued that the approach is working:

*[I]t is inaccurate to state, as too many have, that the border is overrun with violence and out of control. This statement — often made only to score political points — is just plain wrong. Not only does it ignore all of the statistical evidence, it also belittles the significant progress that effective law enforcement has made to protect this border and the people who live alongside it.*⁶

Secretary Napolitano’s speech represented an important step in sparking a responsible debate about border control. Still, without greater rigor and broader consensus about what constitutes effective border control, public confidence and immigration reform initiatives will remain vulnerable to assertions of inadequate control. The administration and DHS can play a pivotal role in breaking the stalemate by providing a realistic definition and sound measures of effective border control as the basis for a more informed, honest debate on the issue.

B. Recommendations

The administration and DHS should define what constitutes effective border control and the measures of effectiveness they have established to manage and assess border-control efforts, particularly on the Southwest border.

Senior administration officials should exercise strong leadership in building broader understanding and consensus around the nation’s border-control strategies and results, including a sustained public education initiative to inform and update border and other immigrant-destination communities of its gains in establishing border control.

US Customs and Border Protection (CBP) data, analyses, and measures of effectiveness of border control should be transparent and allow for independent corroboration and substantiation.

C. Background

The need for effective border enforcement and control may be the most widely shared point of agreement in the national immigration debate. For more than 15 years, and particularly since September 11, 2001, both Democratic and Republican administrations and Congresses have allocated unprecedented levels of resources to strengthen border enforcement, particularly at the Southwest land border with Mexico. Today, the Border Patrol employs 20,700 agents, more than double the number from 2004, and CBP’s budget exceeds \$11 billion, an amount that has grown at a comparably rapid rate.

- 3 Ivan Moreno, “Janet Napolitano in Denver: Divided Congress Keeps Obama from Overhauling Immigration,” *The Huffington Post*, June 24, 2010, www.huffingtonpost.com/2010/06/24/janet-napolitano-in-denver_n_624757.html.
- 4 Press conference with Secretary of Homeland Security Janet Napolitano et. al., at US Immigration and Customs Enforcement (ICE) headquarters, October 6, 2010.
- 5 *Secure Fence Act of 2006*, Public Law 109-367, US Statutes at Large 120 (2006): 2638.
- 6 Secretary Napolitano, “Remarks on Border Security at the University of Texas at El Paso,” January 31, 2011, www.dhs.gov/ynews/speeches/sp_1296491064429.shtm.



Yet what constitutes *effective* border control has not been meaningfully defined or debated.

CBP has determined that national security and public safety are its highest priorities. It has adopted a risk-management approach to border security, seeking to secure and maintain control of US borders and to “detect and prevent the entry of dangerous people.”⁷ It has not embraced blanket enforcement — in the sense of preventing all illegal entries — as a goal. Rather, it seeks to establish “effective control” of the border, by which it means being able to detect illegal entries, to identify and classify them based on the threat they present, to respond to them, and to “bring each event to a satisfactory law enforcement resolution.”⁸

What is “effective control?” Historically, apprehension numbers have served as the Border Patrol’s answer to that question. From a high of nearly 1.7 million in fiscal year (FY) 2000, apprehensions have fallen to 463,382 in FY 2010, the lowest level since the early 1970s — when large-scale illegal immigration to the United States began in earnest — and less than half the number as recently as 2006.⁹

This dramatic reduction in apprehensions, particularly at a time of record numbers of Border Patrol agents, represents a valid measure of effectiveness of border control. However, apprehensions are insufficient and misleading as the primary method for assessing enforcement effectiveness for several reasons:

- ***Apprehensions measure activity, not persons.*** The same individual can be apprehended — and thereby counted — multiple times. Thus, apprehensions are a useful metric of workload and level of activity, but an inadequate measure of overall effectiveness.
- ***Illegal immigration is a function of job demand and economic growth.*** It is not possible to disentangle the effects of border enforcement from that of weak job demand. The border buildup has made it increasingly difficult to cross the border illegally and has strengthened deterrence. But the record-low apprehension numbers also coincide with an historic recession in which demand for foreign-born workers — especially low-wage workers in the home construction and, to a lesser extent, hospitality sectors — has diminished dramatically. Over time, apprehensions have mirrored fluctuations in the US economy more closely than they have tracked border enforcement staffing, resources, or strategies.
- ***Apprehension surges, as well as decreases, have both been cited by the Border Patrol as evidence of control.*** When apprehensions were on the rise, the Border Patrol has argued that it was intercepting a greater proportion of potential crossers. Falling numbers have been cited as evidence of deterrence. Both arguments can be legitimate. However, such divergent interpretations throw into question how much to rely on apprehension data as the principal measure of effectiveness.
- ***The reliability of apprehension data as a metric of effectiveness cannot be independently corroborated.*** In interviews with would-be border crossers and returning unauthorized migrants, independent research has found that while most Mexicans in migrant-sending communities see crossing the border as difficult and dangerous, these attitudes have little, if any, statistically significant effect on whether or not they succeed in migrating illegally to the United States.¹⁰ According to this research, enhanced fencing and other border enforcement

7 US Customs and Border Protection (CBP), *Secure Borders, Safe Travel, Legal Trade: US Customs and Border Protection Fiscal Year 2009-2014 Strategic Plan* (Washington, DC: CBP, 2009), 12-16, www.cbp.gov/linkhandler/cgov/about/mission/strategic_plan_09_14.ctt/strategic_plan_09_14.pdf.

8 Ibid., 13-14.

9 Transactional Records Access Clearinghouse (TRAC), “Federal Criminal Enforcement and Staffing: How Do the Obama and Bush Administrations Compare?” (Syracuse, NY: TRAC, 2011), <http://trac.syr.edu/tracreports/crim/245/>; TRAC, “Controlling the Borders” (Syracuse, NY: TRAC, 2006), <http://trac.syr.edu/immigration/reports/141/>.

10 Wayne A. Cornelius and Jessa M. Lewis, eds., *Impacts of Border Enforcement on Mexican Migration: The View from Sending Communities* (Boulder, CO: Lynne Rienner and University of California – San Diego Center for Comparative Immigration



measures undertaken since 1994 have had no discernible effect on immigrants' overall ability to cross the border.¹¹

Apprehension data are one piece of the puzzle. But CBP collects many other kinds of data. Especially valuable should be the extensive biometric data — now more than 91 million records of fingerprints — that have been collected in CBP's Automated Biometric Identification System (IDENT) on persons apprehended since the mid-1990s, as well as legitimate travelers and persons seeking immigration benefits.¹² These data can be mined for information about crossing patterns, repeat entries, smuggling activity, and the success of various enforcement strategies.

CBP may be analyzing and relying on these data to inform its operational, resource, and policy decisions. However, such data and analyses have not been released or made available to the public. Thus, there is a lack of transparency with information that could more fully substantiate the effectiveness of border enforcement and that should be available to permit informed review and critique of border-control policies. DHS/CBP have also not invited dialogue, analysis, and insight from nongovernmental actors to assist in developing meaningful assessments and standards for determining the success of its border enforcement efforts.

Examples of measures of effectiveness that are relevant to border control and could be systematically tracked and incorporated into regular assessments would include:

- **Crime rates.** Border communities across the Southwest border have lower crime rates than other comparably sized cities.¹³ El Paso, for example, won a designation of safest city in America with a population over 500,000 in 2010, despite being directly across the border from Ciudad Juárez, one of the most violent cities in Mexico.¹⁴ Rates of violent crime in Southwest border counties have dropped by more than 30 percent and are among the lowest (per capita) in the United States.¹⁵
- **Hot spots.** An indicator of control is even distribution of apprehensions and criminal activity across the border, so that no single corridor — such as Arizona — is vulnerable to a disproportionate share of illegal activity. Similarly, when hot spots arise, CBP should be able to quickly redirect resources in response.
- **Ports of entry.** Effective enforcement *between* ports of entry invariably leads to increased attempts to enter illegally *through* ports of entry. Thus, monitoring, resources, and information exchange between the Border Patrol and port inspections officials must be seamless to deter illegal entries. Enforcement metrics must cover the entire border and all aspects of enforcement.
- **Community confidence and support.** Most areas of the border have experienced shifts in public opinion about federal enforcement over the past decade. Some communities acknowledge improvements in crime rates, safety, and quality of life. Others have raised serious concerns regarding enforcement strategies developed without local input or reference

Studies, 2007); Wayne A. Cornelius and Idean Salehyan, "Does Border Enforcement Deter Unauthorized Immigration? The Case of Mexican Migration to the United States of America," *Regulation and Governance*, no. 1 (2007): 139-153.

- 11 Wayne A. Cornelius, "Reforming the Management of Migration Flows from Latin America to the United States" (working paper 170, Center for Comparative Immigration Studies, San Diego, CA, December 2008), www.ccis-ucsd.org/PUBLICATIONS/WP%20170.pdf
- 12 CBP, "New anti-terror technology produces astounding arrest numbers," *Customs and Border Protection Today* (October/November 2004), www.cbp.gov/xp/CustomsToday/2004/oct_nov/new_anti_terror.xml; US Department of Homeland Security (DHS), "DHS Exhibit 300 Public Release BY 10 / NPPD – US-VISIT – Automated Biometric Identification System (IDENT), (public release, April 17, 2009), www.dhs.gov/xlibrary/assets/mgmt/e300-nppd-usvisit-ident2010.pdf.
- 13 Associated Press, "US-Mexico Border Safety: Area is One of Safest Parts of America," June 3, 2010, www.msnbc.msn.com/id/37493275/.
- 14 Monica Ortiz Uribe, "El Paso, San Diego Among Safest Cities," KPBS, November 22, 2010, www.kpbs.org/news/2010/nov/22/el-paso-san-diego-among-safest-cities/.
- 15 Napolitano, "Remarks on Border Security at the University of Texas at El Paso."



to community needs, and that can cause disruption and deterioration in the lives of border residents. Public attitudes and support of border enforcement activities are important ingredients in ensuring and assessing effective border control.

- **Census and other demographic data.** After two decades of steady increases in the size of the unauthorized population, current estimates show a drop since 2007, from 11.8 million to 10.8 million.¹⁶ In addition, Mexico's 2010 census shows that the numbers leaving Mexico have fallen by more than two-thirds since a peak in the mid-2000s. Mexican analysts are attributing the drop to the US economic downturn and to stepped-up border enforcement.¹⁷

These key indicators of effectiveness point in varying degrees to positive progress in securing the borders. There are additional measures that should be developed to get as complete a picture as possible. The goal should be to systematically track such measures and allow for open assessment of the massive investments that the country has made in border security over the past two decades. Only then can the public debate about border control be honest, informed, and move beyond rhetoric and unexamined assertions that continue to frustrate solutions for fixing a broken system.

III. Creating a White House Office on Immigrant Integration

A. Issue

The large number and fast growth rate of immigrants and their children have fueled vigorous debates about the nature, purpose, and effectiveness of the country's immigration policies and enforcement practices. While immigrant admissions and enforcement policies have garnered a significant amount of attention from lawmakers, interest groups, and the media, issues related to immigrant integration — the impacts and prospects for successful integration of immigrants and their children into local communities and economies — have received far less attention.

Yet issues of immigrant integration are precisely the medium through which most Americans experience the impact of immigration policies in their day-to-day lives. They see the impact in the faces of new and unfamiliar residents in their communities; hear it in the "foreign" languages spoken in stores, workplaces, government offices, and in the media; and feel it often most viscerally in the taxes they pay to support their local schools, health programs, and adult and postsecondary education systems. It is not difficult to argue then, that despite the time, energy, and political capital expended on the immigration debate in recent years, it has been a debate preoccupied with policy reforms that generally overlook a crucial set of concerns about US immigration policies that are rooted in Americans' everyday experiences of immigration impacts in their communities.

Some of these concerns can reasonably be expected to be addressed over time by local actors with little involvement by the federal government and no adjustment to immigration policies. However, other concerns demand the focused attention of federal policymakers — particularly those related to the ability of immigrants and their children to move into the mainstream of the workforce and US society, and the ability of local education, health, and workforce training systems to help them do so.

16 DHS, Office of Immigration Statistics, *Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2010* (Washington, DC: DHS, 2011), www.dhs.gov/xlibrary/assets/statistics/publications/ois_ill_pe_2010.pdf.

17 Associated Press, "Mexico census: Fewer migrating, many returning," March 3, 2011, www.thestate.com/2011/03/03/1721751/mexico-census-fewer-migrating.html.



Immigration policymaking has proceeded for many decades essentially unhinged from meaningful calculations of integration needs or local impacts. This has left the Obama administration facing a backlog of integration policy and funding challenges associated with the millions of naturalized citizens, legal immigrants, refugees, and US-citizen children of the foreign born who have joined US communities in recent decades, as well as those related to the roughly 11 million US unauthorized immigrants.

The administration should take action now to address these challenges as matters of urgent national concern in their own right, and because they represent both a significant barrier to progress on reforms of US immigration policies and a potential path to their resolution. If the administration were to connect — both conceptually and operationally — positive integration effects and outcomes with immigration policies, it would have succeeded in establishing the model for a modern immigration system that benefits national and local interests alike.

B. Recommendations

The president should create a White House Office on Immigrant Integration led by an Assistant to the President. The office should:

- Convene appropriate Cabinet members and a working group of elected state and local officials to establish immigrant integration goals and targets, coordinate existing programs, and develop policy and budget mechanisms for meeting integration goals.
- Resolve disagreements among federal agencies on jurisdiction, policy, and budget matters relating to integration issues and services.
- Task agencies with gathering and analyzing data in order to: establish a federal agency framework of immigrant integration goals and indicators; track the performance of key federal and state integration programs, including measures of program reach, effectiveness, and cost; and identify and recommend future policy and program measures to address integration needs and immigration policy effects.
- Coordinate with the Office of Management and Budget (OMB) and relevant federal agencies processes to analyze integration-related data and policy options of all new immigration proposals or new proposals affecting key integration service areas such as elementary and secondary education, adult basic education and English instruction, workforce training, and health care.
- Engage key stakeholders at different government levels in identifying key integration opportunities and challenges, and in communicating the critical importance of immigrant integration for the success of immigrants and their children, the success of the communities in which they settle, and of the nation as a whole.

C. Background

US immigrants and their children now number 73 million persons, or slightly under one-quarter of the overall US population.¹⁸ Since 1995, the number of US immigrants has grown by over 14.5 million, while the number of children of immigrants has grown by over 6.7 million.¹⁹ This is an increase of more than 21 million persons in 15 years.

18 Migration Policy Institute (MPI) analysis of data from the 2009 March Socio-Economic Supplement to the Current Population Survey (CPS).

19 MPI analysis of CPS March data, 1994-2010.



For nearly a century now, immigration policy has been defined and understood as a matter of the numbers and categories of immigrants who should be legally admitted to the United States and, more recently, of border controls and the conditions and behavior that should result in deportation. This narrow construction of immigration policymaking has ignored the needs of immigrant populations and divorced admission rules from their impact on states and localities and on other federal policy goals.

Recent proposals to reform the immigration system have used this same framework, proposing generally more or fewer numbers of immigrants gaining legal status, without addressing the range of issues associated with integrating large numbers of immigrants and their families at the state and local levels. This framework reinforces the widely held perception that immigration policymaking ignores impacts in local communities, prevents effective consideration and planning of measures that would promote the success of immigrants and the communities where they settle, and drives resistance to new legislation that will result in further immigration.

A visible, proactive effort on the part of the federal government is therefore needed to address the wide range of immigrant integration policy concerns that have been overlooked for too long, and to restore public confidence in the country's current and future immigration policies.

Immigrant integration issues touch on a wide range of federal, state, and local policies and funding in fields such as:

- adult basic education, adult literacy, and English for Speakers of Other Languages (ESOL) instruction;
- community college and postsecondary education;
- workforce development and skills training;
- health care insurance eligibility and financing;
- state and local enforcement of immigration laws;
- early childhood and PreK education; and
- elementary and secondary education.

The administration has many policy tools and programs at its disposal to address integration challenges and opportunities in these areas for legal immigrants and the US-citizen children of the foreign born. In many cases these policy tools must be explicitly applied for integration purposes; in others, means must be found to bring relevant programs and effective practices to scale.

Policies and programs related to the integration of unauthorized immigrants must also become more explicitly part of discussions regarding possible future legalization measures. Integration of those who succeed in gaining permanent residency into the mainstream of American life — particularly into the workforce and civic institutions of local communities — should be a primary goal of these efforts, even though the number of those granted permanent residence will surely be a matter of great contention. To prepare for these debates, the administration should take action now to analyze and develop plans to address the integration needs that would be created by such measures.

Efforts to understand integration needs better and promote integration success should be undertaken as part of a new initiative that cuts across relevant federal agencies and includes key state and local entities. The initiative should collect and analyze relevant demographic, budget, program, and other data, and develop policy, funding, and program approaches to the broad range of challenges and opportunities that federal immigration policies present to states and local communities.



Federal leadership on these issues is especially urgent at this time for several reasons:

- Expected federal budget cuts to key programs and services will leave many in need and could prove a critical blow to the programs and structures that had nominally supported immigrant integration services in the past.
- Many states — and most high-immigrant states — are facing unprecedented budget shortfalls and politically charged debates about spending and tax increases; federal budget cuts to key services will likely weaken the resolve, and certainly reduce the flexibility, of state and local officials in supporting key immigrant integration services.
- Cuts to integration services (where they existed) have been underway for several years and will likely accelerate, weakening these struggling service systems at a time when the number of immigrants and their children settling in local communities only continues to rise.

Finally, even if federal and state funding for critical services were to rebound after the current fiscal crisis subsides, high rates of unemployment and underemployment for US workers will likely remain a preoccupation of public policy and the public debate for many years to come. As a result, future immigration proposals will likely need to provide a more sophisticated policy framework that addresses short-term labor market and budget impacts (not just for the federal, but also state and local levels), as well as the longer-term economic incorporation of different types of immigrants. Doing so will require much greater fluency with relevant data, particularly on integration trajectories and costs for immigrants and their children, and the development of coordinated policy and funding approaches to integration both horizontally — across federal agencies — and vertically, within specific program areas that stretch down from the federal government through the state, county, city, and community levels.

For these reasons, we propose the creation of a White House Office on Immigrant Integration — to coordinate the activities previously outlined, and to help shape the transformation of immigration policymaking for the future, so that our country's immigration policies might realize their promise as a means to create better lives for immigrants and for all Americans.

IV. Facilitating the Legal Admission of Eligible Family Members

A. Issue

Since 2007, estimates by the US Department of State (DOS) of the number of persons with approved family-based visa petitions who have not yet received their visas have ranged from 3.4 million to 4.9 million.²⁰ These figures include an unknown number of unauthorized immigrants who have opted to live in the United States with their sponsoring US-citizen or lawful permanent resident (LPR) family members until a visa becomes available for them.

Most unauthorized persons must leave the country to secure their visas. In fact, the number of unauthorized persons who have applied to adjust to LPR status *within* the United States has fallen dramatically in recent years. When unauthorized immigrants leave the United States, they trigger three- and ten-year bars to admissibility (i.e., to readmission) based on unlawful presence. The bars can be

²⁰ Citizenship and Immigration Services (CIS) Ombudsman, *Annual Report 2010* (Washington, DC: CIS Ombudsman, 2010), 32, www.dhs.gov/xlibrary/assets/cisomb_2010_annual_report_to_congress.pdf; Doris Meissner and Donald Kerwin, *DHS and Immigration: Taking Stock and Correcting Course* (Washington, DC: MPI, 2009), 65, www.migrationpolicy.org/pubs/DHS_Feb09.pdf.



waived (I-601 Application for Waiver of Ground of Inadmissibility), yet waiver applications must be submitted abroad and the “extreme hardship” standard that must be met is strict.

The uncertainty of the outcome of a waiver application and the time that must be spent outside the United States dissuade many from traveling to their home countries to claim their visas. Procedures that encourage and build greater certainty into the waiver process could help thousands who have approved or approvable family petitions. It undermines a core goal of US immigration policy when family members of US citizens and LPRs who could secure legal status under the law opt not to do so because of procedural barriers. Procedural reform would allow noncitizens who are *prima facie* eligible for immigrant visas to obtain them, thereby reducing the estimated size of the unauthorized population and promoting family reunification.

B. Recommendation

US Citizenship and Immigration Services (USCIS) should adjudicate waiver applications prior to the time that visa beneficiaries leave the United States for consular processing. The waiver adjudication process should be centralized, building on the best practices — including expert staff, clear communication of waiver processing times, and immediate approval of “clearly approvable waivers” — that have been developed at the USCIS Ciudad Juárez field office, and should also address recurrent delays.

C. Background

Family reunification has been a pillar of US immigration law since 1952 and, particularly, since the Immigration and Nationality Act of 1965. However, many qualifying family members of US citizens and LPRs experience multiyear delays in securing immigrant visas. The delays result when the number of approved visa petitions in a particular year and category exceeds the statutory numbers of visas available.²¹

The Immigration and Nationality Act (INA) limits the overall number of family-based visas awarded each year (480,000), the number of visas awarded in each “preference” category, and the percentage of visas issued to nationals of any one country (no more than 7 percent).²² “Immediate relatives” of US citizens — defined as unmarried children (under age 21), spouses, and parents of US citizens — are not subject to the numerical limitations.²³ The limits apply instead to “preference” categories, which are defined by the relationship to a US citizen or LPR.²⁴ Depending on the preference category and the nationality of the visa beneficiary, backlogs can span years, even decades.

Legislation would be required to change this system. However, USCIS could encourage substantially larger numbers of persons with qualifying relationships to a US citizen or LPR to claim visas for which they are eligible by changing the way it processes these cases.

21 Donald Kerwin, “Family Reunification and the Living Law: Processing Delays, Backlogs, and Legal Barriers” in *In Defense of the Alien*, Vol. XXIII (Staten Island, NY: Center for Migration Studies, 2000).

22 Immigration and Nationality Act (INA) Section 201(c); INA Section 202(a)(2); INA Section 203(a). The worldwide level of family-sponsored immigrants is 480,000, minus immediate relative visas awarded in the previous year and plus unused employment-based visas during the previous year. The number of family-based visas for persons in preference categories cannot fall below 226,000.

23 INA Section 201(b)(2)(A)(i).

24 INA Section 203(a). Preference categories cover: (1) unmarried, adult sons and daughters (21 years of age or older) of US citizens; (2) (a) spouses or children (unmarried and under 21 years of age) of lawful permanent residents (LPRs) and (b) unmarried sons and daughters (21 years of age or older) of LPRs; (3) married sons and daughters of US citizens; and (4) brothers and sisters of US citizens.



I. The Process

The family-based immigration process begins when a US citizen or LPR files an immigrant visa petition (Form I-130) with USCIS for a relative (the visa beneficiary). Approval of Form I-130 establishes the existence of the qualifying family relationship. USCIS assigns a priority date to approved petitions that corresponds to the petition's filing date. Visa beneficiaries cannot apply for an immigrant visa until their priority dates becomes "current," which indicates that a visa is available to them.

Many visa beneficiaries who entered the United States illegally or who overstayed their authorized period of stay opt to remain in the United States with their petitioning family member until their priority date becomes current. Visa beneficiaries must go through one of two processes once their visa is available: adjustment to LPR status within the United States (if eligible) or consular processing outside the United States.

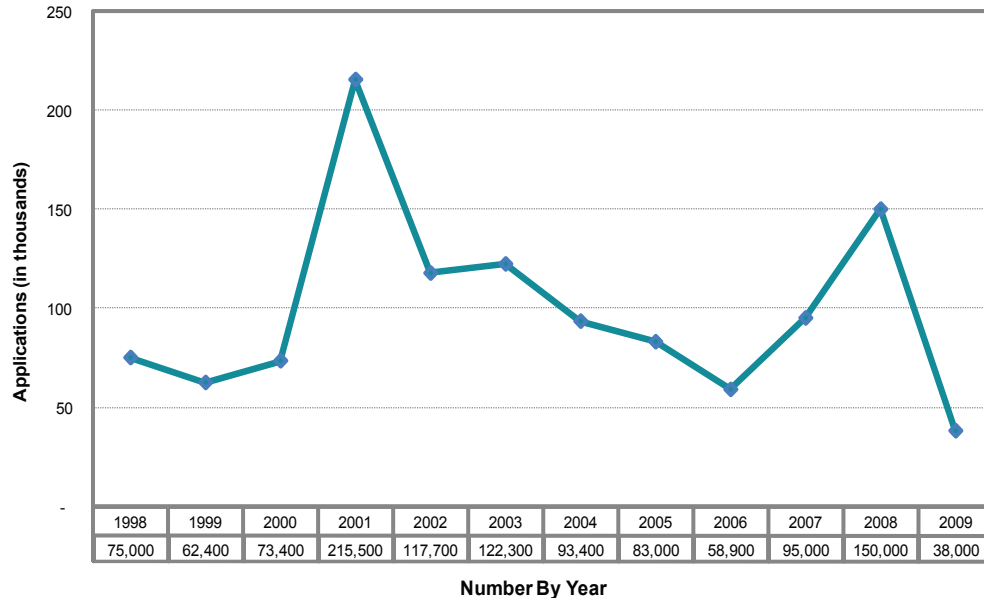
2. Adjustment of Status

Visa beneficiaries who were inspected and admitted to the United States and who remain in legal status, as well as a diminishing number of those who entered illegally or overstayed their visas, can apply to adjust in-country by filing Form I-485 (application for permanent resident status) when their priority date becomes current. In cases involving those classified as "immediate relatives," the I-130 and I-485 can be filed concurrently. In cases in which the petitioner indicates on the I-130 that the beneficiary intends to adjust status, the agency holds onto the approved petition until the visa number becomes current.²⁵ The beneficiary must then take the next step and apply to adjust status. In cases in which the petitioner indicates that the beneficiary will apply for an immigrant visa at a consular office, the agency forwards the approved petition to DOS's National Visa Center (NVC). Once the priority date is current or close to current, NVC notifies the beneficiary that it is time to take the next step.

INA Section 245(i) allows noncitizens who entered without inspection or who overstayed their temporary visas to apply to adjust to LPR status within the United States if their family-based petitions or labor certification applications were filed on or before April 30, 2001. However, the priority date for a number of visa preference categories has already passed April 30, 2001.²⁶ Most of those eligible to adjust under this provision have already done so, and the number of persons who have applied for adjustment under INA Section 245(i) has fallen sharply since FY 2008 (see Figure 1). This major shift indicates that fewer visa beneficiaries who qualify for legal status under the law can "graduate" out of unauthorized status within the United States.

25 USCIS, *USCIS Response to the Citizenship and Immigration Service Ombudsman's 2010 Annual Report* (Washington, DC: USCIS, 2010), 4-5, www.uscis.gov/USCIS/Resources/Ombudsman%20Liaison/Responses%20to%20Annual%20Reports/cisomb-2010-annual-report-response.pdf. USCIS has made significant progress in reducing pending visa petitions and adjustment of status applications over the last two years. Between January 2009 and August 2010, it reduced the number of pending I-130 petitions by 70 percent, from 1.2 million to 350,000. It also worked down its "inventory" of adjustment applications, while meeting four-month application processing targets.

26 US Department of State (DOS), *Visa Bulletin for March 2011* (Washington, DC: DOS, 2011), http://travel.state.gov/visa/bulletin/bulletin_5337.html.

**Figure 1. Applications for Adjustment Under INA Section 245(i), FY 1998-2009**

Note: Figures rounded to the nearest hundred.

Source: Figures provided by the Office of Immigration Statistics, Department of Homeland Security (G-22.3 Performance Analysis System).

3. Consular Processing

Visa beneficiaries who are either outside the United States or inside the United States but ineligible to adjust to LPR status must apply for their visas through consular processing. In 2009, DOS counted nearly 3.4 million applicants in its visa waiting list.²⁷ Over the last two years, the demand for family-based immigrant visas has fluctuated, leading DOS to accelerate select visa priority dates (when applicants did not come forward in sufficient numbers), and to retrogress or move back priority dates (when demand has exceeded the number of available visas).²⁸

Between October 2009 and March 2011, the priority date for Mexican spouses and children of LPRs advanced nearly three years, from March 1, 2003 to January 1, 2006.²⁹ Over a longer span of time — October 2006 to March 2011 — the priority date in the same preference categories for China, India, the Philippines, and the worldwide category advanced nearly six years, from April 22, 2001 to January 1, 2007.³⁰ The overall acceleration of visa priority dates during these periods reflects a high level of “attrition” from the family-based immigration system, which typically occurs because of changes in the US economy, immigration law, or the situation of the petitioner or beneficiary.³¹

Once their priority date becomes current, visa beneficiaries who are ineligible for in-country

27 CIS Ombudsman, *Annual Report 2010*, 32.

28 Ibid.; DOS, *Visa Bulletin* for March 2011.

29 DOS, *Visa Bulletin October 2009* (Washington, DC: DOS, 2009); DOS, *Visa Bulletin December 2010* (Washington, DC: DOS, 2010), http://travel.state.gov/visa/bulletin/bulletin_5197.html.

30 DOS, *Visa Bulletin October 2006* (Washington, DC: DOS, 2006), http://travel.state.gov/visa/bulletin/bulletin_3032.html; DOS, *Visa Bulletin* for March 2011.

31 Information provided by Charles Oppenheim, Chief of the Immigrant Visa Control and Reporting Division, Visa Office, DOS. Changes in the situation of the petitioner or beneficiary might include: (1) the beneficiary received immigrant status in another way or aged out of the preference category; (2) the beneficiary or petitioner passed away; (3) USCIS or the National Visa Center could not contact either the petitioner or the beneficiary because of a change in address; or (4) the beneficiary or petitioner chose not to pursue the immigrant visa, whether due to cost or some other reason.



adjustment must leave the country for consular processing. However, in doing so, they trigger bars to readmission to the United States of three years for more than 180 days of unlawful presence or ten years for more than one year of unlawful presence.³² Individuals in this situation can seek an I-601 waiver of inadmissibility if the refusal to admit them would result in “extreme hardship” to a US citizen or LPR spouse or parent.³³ Hardship to the visa beneficiary or their child cannot be considered in granting a waiver.³⁴ At present, waivers can be filed only *after* the beneficiary has left the United States and has been formally denied the immigrant visa.

USCIS adjudicates waivers at the consulate at Ciudad Juárez and at overseas offices throughout the world. At Ciudad Juárez, visa applicants can return to the consulate approximately two months after their immigrant visa interviews to file the waiver. USCIS reviews the waiver application within two to four days and, if approved, the applicant is awarded an immigrant visa. If not approved, the application is referred to specially trained officers who adjudicate it on a slower timetable at USCIS offices in the United States, including at present Anaheim, CA; Miami, FL; El Paso, TX; as well as at the Vermont Service Center.

The Ciudad Juárez office, which processes roughly 80 percent of the I-601s worldwide, has been criticized by the Citizenship and Immigration Services (CIS) Ombudsman for taking ten to 12 months on roughly 50 percent of its cases.³⁵ Thus, visa beneficiaries who are found inadmissible due to unlawful presence must be prepared to spend significant time abroad, away from US family members, if they opt to proceed with consular processing.

In addition, there is no guarantee that they will be able to return. Approval rates for waivers vary by overseas office. In Ciudad Juárez, USCIS approves roughly 50 percent of the waiver applications as part of an “expedited” process.³⁶ USCIS ultimately approves another 25 percent of waivers at its stateside offices, bringing the overall pass rate to approximately 75 percent.³⁷

There is precedent for processing waiver requests prior to the departure of visa beneficiaries from the United States. In cases involving persons ordered removed who are not subject to any additional ground of inadmissibility, Form I-212 (Request for Permission to Reenter after Deportation or Exclusion) waiver requests must be adjudicated by the USCIS district office where the removal hearing took place.³⁸ Immigrant visa applicants who have been ordered removed can file Form I-212 and have it adjudicated *prior to* leaving the country. In most cases, however, the visa applicant will have accrued at least 180 days of unlawful presence and will trigger that ground of inadmissibility upon leaving the United States. In those cases, current USCIS policy requires that the visa applicant file both waiver applications abroad with the overseas USCIS office.

Among other reforms, the CIS Ombudsman has recommended concurrent filing of the I-601 and I-130, centralized processing of all I-601 forms, and automated posting of processing times. It may, in fact, be more appropriate to require that waiver applications in preference category cases be submitted later in the process since the visa beneficiary may not need to seek a waiver at the time the I-130 is filed. Depending on the preference category and nationality, consular processing may still take years. However, the important point is that waiver requests should be adjudicated before the immigrant visa applicant leaves the United States.

In an October 2010 memorandum to the ombudsman, USCIS Director Alejandro Mayorkas indicated

32 INA Section 212(a) (9)(B)(i).

33 INA Section 212(a) (9)(B)(v).

34 USCIS considers the hardship to the petitioner if caused by separation from the child or spouse.

35 CIS Ombudsman, *Annual Report 2010, 90-92*; Catholic Legal Immigration Network, Inc. (CLINIC), *Update on Ciudad Juárez Consulate and USCIS Office* (Washington, DC: CLINIC, 2010).

36 Immigrants must then travel to the United States within six months and present the visa to an immigration inspector, who places a stamp in the beneficiary’s passport, signifying LPR status. DHS subsequently mails them the “green card.”

37 CLINIC, *Update on Ciudad Juárez Consulate*.

38 8 CFR Sections 212.2(g) and 212.2(j).



that the agency had formed a working group to consider implementation of concurrent filing of the I-601 and I-130.³⁹ Director Mayorkas also expressed support for centralizing adjudication of waivers with the aim of promoting consistency, efficiency, and reduced processing times. The memorandum cited the advantages of USCIS’s “triage” process in which it adjudicates “clearly approvable” waiver requests at the time they are filed.⁴⁰ USCIS also reported that it has developed a case management system, the Case and Activity Management for International Operations (CAMINO), that will ultimately allow it to post accurate processing times for cases filed overseas.

If USCIS were to adjudicate the I-601 waiver prior to the visa beneficiaries’ departure from the United States, it would encourage US citizens and LPRs to petition for their qualifying family members and would encourage immigrant visa beneficiaries to complete this process abroad. As it stands, applicants must either undertake “a complex and often time-consuming legalization process outside of the United States that could lead to a denial, or remain in the shadows to stay near family and within the United States.”⁴¹ The process “often discourages those who choose to pursue it and, thereby, deters others from seeking a waiver.”⁴²

It stands to reason that the very cases that most strongly support a waiver — in which the US citizen or LPR spouse or parent would most clearly suffer “extreme hardship” — are those in which the visa beneficiary is most reluctant to leave.

V. Exercising Prosecutorial Discretion across the System

A. Issue

Achieving the goals of US immigration policy depends, in large part, on effective immigration enforcement. Prosecutorial discretion — the authority of law enforcement agencies to decide who within their jurisdictions to investigate, arrest, charge, prosecute, and detain — is a hallmark of effective law enforcement. Every prosecutor’s office, police force, and regulatory agency must decide each day how to enforce the laws they are entrusted with administering.

In immigration enforcement, the foreign born and their families and communities have often been subjected to uneven and unpredictable enforcement practices and philosophies due, in the recent past, to the rapid expansion of enforcement programs, diffusion of responsibilities among different agencies, and devolution of immigration enforcement to states and localities.

B. Recommendations

DHS, in consultation with DOJ, should establish uniform enforcement priorities, build on its established guidance for exercising prosecutorial discretion, and apply these standards to all of its immigration agencies, programs, and processes. DHS and the Executive Office for Immigration Review (EOIR) should develop protocols, working relationships, and internal instructions that reflect these standards and that

39 Memorandum from Alejandro N. Mayorkas, Director, USCIS, to January Contreras, CIS Ombudsman, “Response to Recommendations Regarding the Processing of Waivers of Inadmissibility,” October 12, 2010, www.uscis.gov/USCIS/Resources/Ombudsman%20Liaison/Responses%20to%20Formal%20Recommendations/cisomb-2010-response-45.pdf.

40 Ibid.

41 CIS Ombudsman, “Recommendation Regarding the Processing of Waivers of Inadmissibility,” (Washington, DC: CIS Ombudsman, 2010), 3, www.dhs.gov/xlibrary/assets/cisomb_waivers_of_inadmissibility_recommendation.pdf.

42 Ibid.



are informed by input from immigrant-rights practitioners and the immigration and criminal defense bars.

Prosecutorial discretion should be exercised on a case-by-case basis, and should not be used to immunize entire categories of noncitizens from immigration enforcement. In general, a favorable exercise of discretion should be accompanied by a grant of “deferred action” and employment authorization. The criteria for exercising discretion should reflect DHS’s immigration enforcement priorities, resource limitations, and the government’s ability to effect removal.

C. Background

The need for exercising discretion based on setting enforcement priorities is rooted in three considerations:

- **Limited resources.** Law enforcement agencies must invariably decide how to allocate their resources, consistent with their missions. They cannot ensure absolute compliance with the law. Devoting resources to relatively minor offenses can detract from the ability to pursue more serious and consequential cases that advance broader national security, public safety, and border security goals.⁴³ By exercising prosecutorial discretion, DHS can act upon the differences in culpability and equities among millions of people who have violated US immigration laws.
- **Making cases.** Exercising discretion allows investigators to cultivate sources and secure cooperation by minor offenders in unearthing and prosecuting more serious criminal cases. For example, unauthorized immigrants provide information on human-smuggling networks, employers that routinely violate immigration and labor laws, and other entities that facilitate large-scale illegal migration.⁴⁴ It is not in the government’s interest to remove unauthorized immigrants in such circumstances. Nor is it productive to expend resources in cases in which removal would be impossible or highly unlikely, or where it might jeopardize cooperation with other nations in transnational criminal investigations or in sharing law enforcement and national security intelligence.⁴⁵
- **Proportionate penalties.** Discretion allows for consideration of extenuating circumstances, such as when noncitizens would not be able to fend for themselves if removed, because of extreme youth, old age, mental disability, or lack of ties in the country of birth. Removal can punish certain noncitizens — such as those who depend on life-sustaining medical care — far in excess of what the law provides or anticipates.⁴⁶ Long-term LPRs, members of the armed forces and their families, veterans, and others with “illnesses or special circumstances” also raise humanitarian concerns.⁴⁷

The exercise of discretion in immigration enforcement has a long history. Prior to 1975, the Immigration and Naturalization Service (INS) granted “non-priority” status on humanitarian grounds to elderly, young, mentally disabled, and incompetent persons. In 1975, INS officials began to exercise prosecutorial discretion under formal operating instructions.⁴⁸ “Non-priority” status was a precursor to “deferred action.” Deferred action constitutes a decision not to pursue removal of a noncitizen in the short term. USCIS has traditionally granted employment authorization to deferred action recipients who can show an economic need to work.

43 Declaration of Daniel H. Ragsdale, Executive Director for Management and Administration, ICE, *United States of America v. The State of Arizona*, No. CV 10-1413-PHX-SRB (D. AZ. filed July 6, 2010), 16, 19.

44 *Ibid.*, 33-35.

45 *Ibid.*, 29-32.

46 *Ibid.*, 18-19, 26.

47 *Ibid.*, 25-26.

48 Shoba S. Wadhia, “The Role of Prosecutorial Discretion in Immigration Law,” *Connecticut Public Interest Law Journal* 9, no. 2 (2010): 243-299, <http://ssrn.com/abstract=1476341>.



The *Illegal Immigration Reform and Immigrant Responsibility Act of 1996* (IIRIRA) significantly narrowed the authority of the then-INS and of immigration judges to grant various forms of relief to individuals subject to removal proceedings. The act raised new questions about the scope of relief that would be available as a result of the exercise of prosecutorial discretion.

In 1999, a bipartisan group of members of Congress, many of whom sponsored and championed IIRIRA, criticized DOJ/INS for failing to exercise prosecutorial discretion in removal cases resulting from the new law, deeming the inaction to be “unfair” and to create “unjustifiable hardship.”⁴⁹ In particular, the members protested the removal of long-term LPRs with established family and other significant ties in the United States who had committed relatively minor crimes years in the past. They urged DOJ/INS to issue written guidelines “to legitimate” the exercise of discretion and its consistent exercise.

In 2000, INS issued a memorandum directing its officers “to exercise discretion in a judicious manner at all stages of the enforcement process.”⁵⁰ The memorandum argued that INS had finite resources, could not investigate and prosecute every immigration violation, and needed to determine the most effective way to enforce the law. The memorandum instructed INS officers that they could “decline to prosecute a legally sufficient immigration case” if it did not raise a substantial enforcement interest.⁵¹ It set forth factors to be taken into account in exercising discretion in individual cases, including:

- Immigration status, with LPRs warranting greater consideration
- Length of residence in the United States
- Criminal history, with a focus on the nature and severity of the crimes
- Family connections, medical conditions, and extreme youth
- Ties to and conditions in the home country
- Immigration history, including the seriousness and number of immigration violations
- Likelihood of removal
- Eligibility for immigration status in the future
- Cooperation with law enforcement officials
- Military service
- Public opinion on whether the noncitizen should or should not be removed
- Potential alternative uses of the law enforcement resources.

Subsequent field guidance to enforcement officers has elaborated on and updated the 2000 instructions. In 2005, ICE gave guidance to its trial attorneys regarding removal proceedings and appeals.⁵² The memorandum concluded that while “national security violators, human-rights abusers, spies, traffickers both in narcotics and people, sexual predators, and other criminals are removal priorities,” other cases “sometimes require” a weighing of costs and interests.⁵³

The memorandum further stressed the need for discretion, given the workload in the immigration court system and at the Board of Immigration Appeals (BIA). It urged that discretion be exercised in cases that

49 Letter from Rep. Henry J. Hyde, et. al., to the Honorable Janet Reno and the Honorable Doris M. Meissner, November 4, 1999.

50 Memorandum from Doris Meissner, Commissioner, Immigration and Naturalization Service (INS), to Regional Directors, District Directors, Chief Patrol Agents, Regional and District Counsel,” HQOPP 50/4, November 17, 2000.

51 Ibid.

52 Memorandum from William J. Howard, Principal Legal Advisor, Office of the Principal Legal Advisor, ICE, to All Office of the Principal Legal Advisor (OPLA) Chief Counsels, October 24, 2005.

53 Ibid.



could be disposed of through more expedited processes or where a noncitizen enjoyed “clear eligibility for an immigration benefit outside of immigration court.”⁵⁴ It affirmed that ICE trial counsel could move to dismiss a case when continuation was “no longer in the government interest” and it directed that post-hearing actions (mostly appeals and motions to reopen court proceedings) should be guided by the “interests of judicial economy and fairness.”⁵⁵

In 2007, the US Government Accountability Office (GAO) argued that ICE needed to establish enforcement priorities because it could not remove the entire US unauthorized population or every removable person encountered.⁵⁶ GAO identified six phases of the removal process in which ICE officers exercised prosecutorial discretion — the initial encounter with the noncitizen, apprehension, charging, detention, removal proceeding, and actual removal.⁵⁷ ICE officers were to have greater latitude in cases involving aliens who were not criminals, fugitives, or targets of ICE investigations.⁵⁸ GAO recommended that the agency develop comprehensive guidance covering apprehensions and the removal process, including guidance “dealing with humanitarian issues and aliens who are not investigation targets.”⁵⁹

Also in 2007, ICE instructed its field office directors and special agents on the importance of exercising discretion when making arrest and custody decisions involving nursing mothers, caregivers, and in “health-related cases.”⁶⁰ The new instruction stipulated that ICE field agents and officers were “not only authorized to exercise discretion within the authority of the agency,” but were “expected to do so in a judicious manner at all stages of the enforcement process.”⁶¹

The DHS strategic plan for FY 2008 to FY 2010 states that the agency’s overarching immigration enforcement goal is to protect the United States from “dangerous people.” The agency’s immigration objectives include:

- Effective control of U.S. borders
- Interdiction of threats outside the United States
- Apprehensions of employers and workers who violate immigration laws
- Targeting “high-risk” travelers through improved use of data, screening, fraud-resistant identification
- Denying immigration status and entry to national security and public safety threats.⁶²

These goals reflect DHS’s mission as a homeland security agency created in the wake of the 9/11 terrorist attacks. They speak to the need to concentrate DHS enforcement resources on terrorist networks; transnational criminals, such as human traffickers and drug cartels; and employers who violate immigration, labor, and workplace protection laws as part of their business models.

DHS and ICE have used their discretion to redefine ICE enforcement priorities during the last two years. Perhaps the most striking shift has occurred in the approach to employer enforcement. In contrast with the prior administration’s high-visibility worksite “raids” and arrests of unauthorized workers, ICE

54 Ibid.

55 Ibid.

56 US Government Accountability Office (GAO), *Immigration Enforcement: ICE Could Improve Controls to Help Guide Alien Removal Decision Making*, GAO-08-67 (Washington, DC: GAO, 2007), 3, www.gao.gov/new.items/d0867.pdf.

57 Ibid., 5.

58 Ibid., 11.

59 Ibid., 34.

60 Memorandum from Julie L. Myers, Assistant Secretary of U.S. Immigration and Customs Enforcement, to All Field Office Directors and All Special Agents in Charge, “Prosecutorial and Custody Discretion,” November 7, 2007. <http://www.scribd.com/doc/22092973/ICE-Guidance-Memo-Prosecutorial-Discretion-Julie-Myers-11-7-07>.

61 Ibid.

62 DHS, *One Team, One Mission, Security Our Homeland: U.S. Department of Homeland Security Strategic Plan, Fiscal Years 2008-2013* (Washington, DC: DHS, 2008), 6-7, www.dhs.gov/xlibrary/assets/DHS_StratPlan_FINAL_spread.pdf.



now concentrates on employer hiring practices through a strategy of aggressive audits, fines, and debarments of employers.⁶³

ICE is also encouraging companies to sign on to the ICE Mutual Agreement between Government and Employers (IMAGE) program. The program grants special certification if employers use the E-Verify system and otherwise enhance their employee screening.⁶⁴

In June 2010, ICE Assistant Secretary John Morton issued an instruction to ICE employees that outlined the agency's apprehension, detention, and removal priorities.⁶⁵ The memorandum stated that ICE had resources to remove 400,000 aliens per year and needed to prioritize its enforcement activities as a result. It identified national security and public safety risks — terrorists, spies, convicts (particularly felons and violent and repeat offenders), gang members, and persons subject to criminal warrants — as the agency's top enforcement priority.⁶⁶ Its next level of priorities were "recent illegal entrants" or visa violators, fugitive aliens (those ordered removed), and other egregious immigration offenders.

The memorandum directed that attention to lower-priority cases "not displace or disrupt the resources needed to remove" higher-priority cases. It instructed that detention resources — unless required by the law or in extraordinary circumstances — not be used on persons who were seriously ill, disabled, elderly, nursing, or primary caregivers. It advised that "particular care" be given to LPRs and immediate family members of US citizens. The memorandum explicitly affirmed the prior guidance (previously described).

In an August 2010 memorandum, Assistant Secretary Morton outlined a process for exercising discretion in favor of persons in removal proceedings who had applications or petitions pending with USCIS that, if approved, would provide them with an immediate basis for relief from removal.⁶⁷ The memorandum directed ICE Offices of Chief Counsel in these circumstances to request that USCIS adjudicate the application or petition within 30 days for detained immigrants and within 45 days for nondetained immigrants, and that ICE trial attorneys — absent serious adverse factors — move to dismiss removal proceedings.⁶⁸ On February 8, 2011, USCIS posted an interim policy memorandum and proposed modification to its *Adjudicator's Field Manual* that sets forth procedures for adjudicating pending USCIS applications and petitions of persons in removal proceedings.⁶⁹ These procedures largely track those in the Morton memorandum.

In summary, in its formal policy statements and instructions, DHS has established clear priorities, criteria, and instructions for exercising prosecutorial discretion. The task is to implement them uniformly and monitor their use at the operating level. To that end, the following points merit particular attention.

63 Napolitano, "Remarks on Border Security at the University of Texas at El Paso."

64 Miriam Jordan, "Crackdown on Illegal Workers Grows," *The Wall Street Journal*, January 21, 2011, <http://online.wsj.com/article/SB10001424052748703951704576092381196958362.html>.

65 Memorandum from John Morton, Assistant Secretary, ICE, 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/2011/110302washingtondc.pdf.

66 See also, Declaration of Daniel H. Ragsdale, 17-18.

67 Memorandum from John Morton, Assistant Secretary, ICE, for Peter S. Vincent, Principal Legal Advisor for ICE, and James Chaparro, Executive Associate Director for ICE, Enforcement and Removal Operations, "Guidance Regarding the Handling of Removal Proceedings of Aliens with Pending or Approved Applications or Petitions," August 20, 2010. http://graphics8.nytimes.com/packages/pdf/us/27immig_memo.pdf.

68 ICE has also solicited comments on draft guidance for issuing "detainers," the notice provided to federal, state, or local law enforcement agencies that ICE intends to assume custody of an individual. The draft guidance would prioritize cases in which ICE issues detainers, and provides that ICE should generally not issue detainers against persons charged with traffic-related misdemeanors.

69 USCIS, Interim Policy Memorandum for Comment, "Guidance for Coordinating the Adjudication of Applications and Petitions Involving Individuals in Removal Proceedings; Revisions to the Adjudicator's Field Manual (AFM) New Chapter 10.3(i): AFM Update AD 11-16" (Washington, DC: USCIS, PM-602-0029, February 4, 2011), www.uscis.gov/USCIS/Outreach/Interim%20Guidance%20for%20Comment/coordination-adjud-removal-proceedings.pdf.



- The earlier in the process in which discretion can be exercised, the more efficiently the system will operate and the more effectively DHS will meet its enforcement responsibilities. The August 2010 guidance urged that discretion be exercised in only the very limited circumstances of persons immediately eligible for LPR status.⁷⁰ It would be less costly and more efficient if Notices to Appear (NTAs)⁷¹ were not issued in such cases at all.
- The relationship between ICE and CBP requires special coordination because of their close working relationship and distinct, yet complementary responsibilities. The cases that CBP refers for removal (to immigration courts) and detention (to ICE) should coincide with DHS-wide priorities as much as possible.
- ICE has more than 14 federal-state-local enforcement program partnerships.⁷² DHS must exercise strong leadership and oversight of these relationships so that cooperation with partner agencies furthers its mission and goals.

VI. Alleviating Burdens on Clogged Courts

A. Issue

The number of cases pending in immigration courts has reached an all-time high, and the resulting delays in removal proceedings have become an endemic problem. The result has been increased detention costs, delayed removal of dangerous criminals and national security risks, and prolonged proceedings for asylum seekers and others who are eligible for relief from removal. While commendable, DOJ's two-year initiative to hire additional immigration judges and add related resources cannot solve the problem of an overburdened immigration court system without broader systemic changes.

B. Recommendations

Prosecutorial discretion must be applied to cases placed in removal proceedings. ICE trial attorneys should have responsibility for screening NTAs based on DHS's prosecutorial discretion guidelines prior to filing cases in immigration court.⁷³ Select ICE attorneys should be trained and dedicated exclusively to this task.⁷⁴

DHS and DOJ should also collect and share information on factors that might inform decisions on prosecutorial discretion. For example, EOIR and ICE should track the types of cases that immigration judges terminate or that otherwise do not result in removal. DHS should use this information to refine and update its prosecutorial discretion guidelines.

C. Background

The failure to exercise discretion in enforcing US immigration laws has been experienced most acutely

⁷⁰ The 2005 Howard memorandum identifies additional cases in which discretion should be exercised.

⁷¹ The NTA is the form served on noncitizens to initiate removal proceedings.

⁷² ICE, "ICE Access," accessed February 14, 2011, www.ice.gov/access/.

⁷³ 8 CFR Section 239.2 (a). NTAs can be cancelled prior to jurisdiction vesting with the immigration court.

⁷⁴ Of course, DHS/ICE and DOJ/Executive Office for Immigration Review (EOIR) should also establish streamlining mechanisms to narrow the issues and to resolve cases that would otherwise need to be adjudicated by an immigration judge.



at the final stages of the enforcement process, by the immigration court system and, to a lesser extent, by federal Courts of Appeal.⁷⁵ In a comprehensive report on the removal adjudication system, the American Bar Association's (ABA) Commission on Immigration concluded:

*If DHS officers and attorneys increase their use of prosecutorial discretion to weed out unnecessary cases or issues, the burden on the removal adjudication system could be lessened significantly. DHS would issue fewer NTAs, resulting in fewer cases in the system and fewer detainees. The number of issues adjudicated in immigration court likely would decline as well.*⁷⁶

In FY 2010, the immigration court system received 392,888 removal cases and related legal matters, and completed 353,247.⁷⁷ Between FY 2007 and FY 2010, immigration courts received 96,559 more matters than they completed.⁷⁸ By the end of December 2010, the number of pending removal cases had reached a record 267,752, a 44 percent increase since FY 2008 (see Figure 2).⁷⁹ These cases had been pending an average of 467 days.⁸⁰

It takes many high-volume courts an average of between one and two years to complete cases; in Los Angeles, the wait equals two years.⁸¹ Delays of this magnitude increase detention costs, postpone the removal of dangerous criminals and national security risks, and unduly prolong the ordeals of asylum seekers, noncitizens who can adjust to LPR status, and others who are eligible for relief from removal. The lengthy delays result from insufficient numbers of immigration judges and court resources in the face of heavy and growing workloads.⁸²

75 Administrative Office of the United States Courts, *Judicial Business of the United States Courts: 2009 Annual Report of the Directors* (Washington, DC: US Government Printing Office, 2010), 94-99, www.uscourts.gov/Statistics/JudicialBusiness/JudicialBusiness.aspx?doc=/uscourts/Statistics/JudicialBusiness/2009/JudicialBusinesspdfversion.pdf; Administrative Office of United States Courts, "Caseload Statistics 2010: US Courts of Appeals – Appeals Commenced, Terminated, and Pending, by Circuit, During the 12-Month Period Ending March 31, 2010," www.uscourts.gov/Viewer.aspx?doc=/uscourts/Statistics/FederalJudicialCaseloadStatistics/2010/tables/B01Mar10.pdf. In FY 2009, US Courts of Appeal received 7,518 appeals from the Board of Immigration Appeals (BIA), a significant drop from FY 2005 (12,349), but still 13 percent of their total appeals. In certain Courts of Appeal, the percentage of appeals from BIA was far higher. The number of appeals of BIA decisions appears to have continued to decline in FY 2010.

76 The American Bar Association (ABA), Commission on Immigration, *Reforming the Immigration System: Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudications of Removal Cases* (Washington, DC: ABA, 2010), I-60, http://new.abanet.org/Immigration/PublicDocuments/aba_complete_full_report.pdf.

77 EOIR, *FY 2010 Statistical Yearbook* (Falls Church, VA: EOIR, 2011), B1 to B7, www.justice.gov/eoir/statspub/fy10syb.pdf. Of the court matters received, 325,326 were legal proceedings, 52,660 were bond redeterminations, and 14,902 were motions to reopen or reconsider.

78 *Ibid.*, B2.

79 TRAC, *Immigration Case Backlog Still Growing in FY 2011* (Syracuse, NY: TRAC, 2011), <http://trac.syr.edu/immigration/reports/246/>.

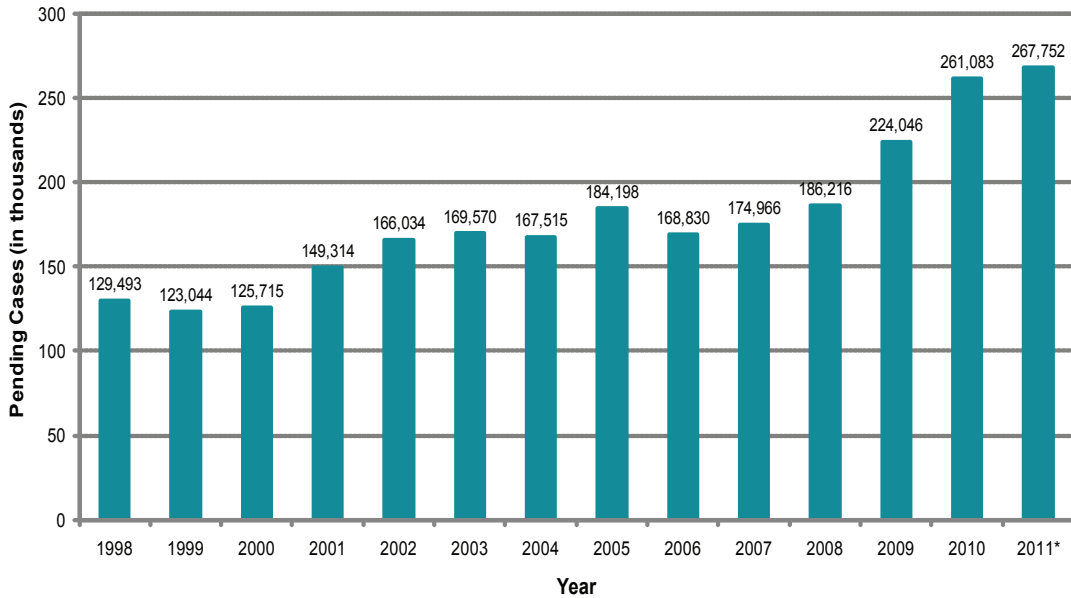
80 *Ibid.*

81 *Ibid.*

82 ABA, Commission on Immigration, *Reforming the Immigration System: Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudications of Removal Cases*, 2-16. "Numerous stakeholders and commentators have recognized what IJs [immigration judges] also know: that EOIR is underfunded and that this resource deficiency has resulted in too few judges and insufficient support staff to competently handle the workload of the immigration courts (citation omitted)."



Figure 2. Cases Pending Before Immigration Courts, FY 1998-2011*



Note: *FY 2011 cases as of December 30, 2010.

Source: Executive Office for Immigration Review data obtained by Transactional Records Access Clearinghouse (TRAC) at Syracuse University. MPI presentation of data obtained through the TRAC Immigration Court Backlog Tool, http://trac.syr.edu/phptools/immigration/court_backlog/.

The ABA report found that on average immigration judges completed 1,243 proceedings in FY 2008 and issued 1,014 decisions.⁸³ A DOJ hiring freeze, beginning in January 2011, combined with the expansion of the postarrest screening program Secure Communities and other enforcement programs, will lead to a further increase in immigration judge workloads.

The delays also stem from a lack of uniformity and rigor in referring cases to the immigration court system. Immigration judges have increasingly terminated cases based on finding noncitizens not removable as charged. In the first three quarters of FY 2010, the number and percentage of terminated cases has hovered between 10 percent and 12 percent, with far higher rates in immigration courts in Los Angeles (27 percent) and Miami (24 percent).⁸⁴

The NTA advises the noncitizen, *inter alia*, on the nature of the proceedings and the charges against him or her. While ICE issues most NTAs, CBP and USCIS each issue tens of thousands of NTAs per year.⁸⁵ Under current regulations, 40 separate occupational groups of ICE, CBP, and USCIS officials can issue NTAs, as can other “delegated” DHS officials.⁸⁶ Because of the absence of policy discipline in the issuance of NTAs, immigration judges and ICE trial attorneys have had to devote their limited resources to cases such as:

- Noncitizens who are eligible or will soon be eligible for LPR status based on a qualifying family relationship to a US citizen or LPR, or an employment opportunity⁸⁷

83 Ibid.

84 TRAC, *ICE Seeks to Deport the Wrong People* (Syracuse, NY: TRAC, 2010), http://trac.syr.edu/immigration/reports/243/include/requests_pct.html.

85 Ibid., 1-10 to 1-25. Overall, noncitizens can come to the attention of immigration officials by seeking immigration benefits, inspection at a port of entry, arrest within the country, or screening following arrest for a criminal offense.

86 8 CFR Section 239.1(a).

87 The August 2010 Morton memorandum and February 2011 USCIS interim memorandum attempt to relieve the burden created on the court system by this limited category of cases.



- Noncitizens who are unlikely to be removed, such as those who have been raised in the United States and whose nations of birth will not accept their return
- Minors, the very ill, the elderly, primary caregivers, and others who raise humanitarian issues⁸⁸
- Asylum seekers who have been apprehended at a US border, and have been found to have a “credible fear” of persecution by a USCIS asylum officer⁸⁹
- Other cases that could be more efficiently handled in other ways.

ICE trial attorneys do not decide which removal cases to pursue, a practice at stark odds with the way that criminal prosecutions are initiated in most other court systems. To vest the authority to screen NTAs in a specially trained, dedicated corps of ICE attorneys would ensure the consistent application of prosecutorial guidelines and would relieve an already overburdened court system from the necessity of adjudicating cases that could be better handled outside the removal process. Prosecutorial guidelines should particularly reflect the types of cases that immigration judges terminate at high rates and that otherwise do not result in removal.

VII. Testing Legal Representation in Removal Proceedings

A. Issue

While immigration courts need to operate more efficiently, they also have the responsibility to ensure that removal proceedings conform to due process and satisfy basic standards of fairness. In this regard, they suffer from a fundamental deficiency. Most noncitizens in removal proceedings cannot afford legal counsel. Under federal law, persons facing removal enjoy a right to representation “at no expense to the Government.”⁹⁰

The “no expense to the Government” restriction does not preclude voluntary, government-funded legal representation, but simply affirms it is not required.⁹¹ Since 2003, EOIR has administered a successful legal orientation program for immigrant detainees and others facing removal.⁹² The program has led to increased legal representation, better prepared cases, more efficient courts, and diminished detention costs.⁹³ Appointed counsel might well bring similar benefits.⁹⁴

88 Immigration courts must also accommodate the removal proceedings of the spouses and children of Temporary Protected Status (TPS) recipients who arrived after the TPS designation date. It would take legislation to make this class of noncitizens eligible for TPS or for some other status.

89 ABA, Commission on Immigration, *Reforming the Immigration System, 1-61 to 1-63*; US Commission on International Religious Freedom, *Report on Asylum Seekers in Expedited Removal, Volume 1: Findings and Recommendations* (Washington, DC: International Commission on International Religious Freedom, 2005), 54-55, www.uscirf.gov/images/stories/pdf/asylum_seekers/Volume_1.pdf. The ABA’s Commission on Immigration and the US Commission on International Religious Freedom have proposed that asylum officers be allowed to adjudicate the asylum claims of persons in expedited removal, but this change would require legislation.

90 INA Section 292.

91 ABA, Commission on Immigration, *Report to the House of Delegates on Resolution 107A* (Chicago, IL: ABA, 2006).

92 EOIR, *EOIR Legal Orientation and Pro Bono Program* (Falls Church, VA: EOIR, 2010), www.justice.gov/eoir/probono/probono.htm.

93 Anna Hinken, *Evaluation of the Rights Presentation*, (Falls Church, VA: EOIR, 2000); www.justice.gov/eoir/reports/rt-spresrpt.pdf; Nina Siulc, Zhifen Cheng, Arnold Son, and Olga Byrne, *Legal Orientation Program: Evaluation and Performance and Outcome, Measurement Report, Phase II* (New York, NY: Vera Institute for Justice, 2008), www.justice.gov/eoir/reports/LOPEvaluation-final.pdf.

94 Jaya Ramji-Nogales, Andrew I. Schoenholtz, and Phillip G. Schrag, “Refugee Roulette: Disparities in Asylum Adjudication,” *Stanford Law Rev.* 60, no. 2 (2007): 295-412.



B. Recommendations

DHS and DOJ should identify the removal cases in which due process *requires* legal counsel (e.g. mentally ill and disabled persons and unaccompanied minors) and those criteria that would support appointed counsel in other cases. They should also jointly clarify that the “no expense to the Government” restriction does not prohibit government-funded legal counsel: rather, it seeks to affirm that there is no affirmative right to counsel at the government’s expense.

The administration should urge Congress to appropriate funds for a pilot project, building on the federal legal orientation project that provides government-funded representation to indigent persons who cannot effectively represent themselves. The pilot should evaluate the benefits of government-funded legal representation and determine whether government-appointed counsel in select cases strengthens due process, improves court efficiency, and reduces detention costs.

C. Background

Between FY 2006 and FY 2010, the rates of legal representation in immigration proceedings ranged from 35 percent to 43 percent.⁹⁵ Yet most immigrants cannot effectively represent themselves without counsel in these complex and adversarial proceedings. Immigration judges may opt to examine and draw out claims for relief from removal more rigorously in unrepresented cases. However, they cannot prepare a case or present evidence, and they struggle to accommodate large caseloads.

At least one federal court has recognized that due process might require government-funded counsel in the right set of circumstances.⁹⁶ The ABA has called for government-funded legal counsel for unaccompanied minors and mentally ill and disabled persons.⁹⁷ In addition, a pending class action lawsuit in federal district court in Los Angeles maintains that the government must provide counsel to indigent, mentally disabled detainees in removal proceedings.⁹⁸ A federal judge in that case ordered the government to appoint a “qualified representative” to represent two men who suffer from severe mental illness in immigration proceedings. However, courts have proven reluctant to require the government to pay for legal counsel in such cases.⁹⁹

Legal representation can mean the difference between securing relief from removal and being removed from the United States, which may result in permanent separation from family, loss of means of support, and, in extreme cases, even torture or death. A comprehensive report on the US immigration court system published in 2008 concluded that “whether an asylum seeker is represented in court is the single most important factor affecting the outcome of her case.”¹⁰⁰ Studies have shown that represented asylum seekers prevail in their claims at rates:

- Four to six times higher than those without representation¹⁰¹
- Six times higher than detainees without representation¹⁰²
- Twelve times higher for those caught at US ports of entry and determined to have a “credible

95 EOIR, *FY 2010 Statistical Yearbook*, G1.

96 *Aguilera-Enriquez v. INS*, 516 F. 2d 565, 568 (5th Cir. 1975), *cert denied* 423 U.S. 1050 (1976).

97 ABA, *Policy and Procedures Manual* (Chicago, IL: American Bar Association, 2010), 269, www.abanet.org/policy/Green-BookChp13.pdf; ABA, *Ensuring Fairness and Due Process in Immigration Proceedings* (Chicago, IL: American Bar Association, 2010), 2-3, www.abanet.org/poladv/transition/2008dec_immigration.pdf.

98 *Franco-Gonzalez v. Holder*, no. 10—C-02211 DMG (DTB) (C.D. Cal. filed August 2, 2010).

99 ABA, Commission on Immigration, *Reforming the Immigration System*, 5-4.

100 Jaya Ramji-Nogales, Andrew I. Schoenholtz, and Phillip G. Schrag, “Refugee Roulette.”

101 Andrew Schoenholtz and Jonathan Jacobs, “The State of Asylum Representation: Ideas for Change,” *Georgetown Immigration Law Journal* 16, no. 4 (2002): 739- 772.

102 Donald Kerwin, *Revisiting the Need for Appointed Counsel*, Insight No. 4 (Washington, DC: MPI, 2005), 6, www.migrationpolicy.org/insight/Insight_Kerwin.pdf.



fear” of persecution¹⁰³

- Three times higher overall and two times higher controlling for factors such as the immigration court hearing the case, the applicant’s nationality, and detention.¹⁰⁴

Detention makes it more difficult for noncitizens to obtain counsel and represent themselves without counsel.¹⁰⁵ It also makes it more difficult for counsel to represent their clients competently, and for clients to assist counsel in preparing their cases. As a result, detainees secure representation and obtain relief at far lower rates than nondetained immigrants, and they abandon their claims at higher rates.¹⁰⁶

A recent report by the National Immigrant Justice Center (NIJC) pointed to the chronic shortage in affordable legal counsel for immigrant detainees.¹⁰⁷ The report found that more than 25 percent of detainees were housed in “grossly underserved” facilities (with only one nonprofit attorney per 500 detainees), and 10 percent were held in facilities without access to any nonprofit attorneys.¹⁰⁸ Seventy-eight percent of the detainees surveyed were housed in facilities that prohibited attorneys from even scheduling private calls with their clients.¹⁰⁹

Many persons in removal proceedings cannot obtain legal counsel and cannot effectively represent themselves. In such cases, government-funded counsel may be needed to meet due process standards. A pilot program could also assess whether government-funded representation allows immigration judges to make better informed decisions, increases court efficiency, and reduces detention costs.

103 US Commission on International Religious Freedom, *Report on Asylum Seekers in Expedited Removal, Volume II*, 239, 251.

104 GAO, *U.S. Asylum System*, 30.

105 Nina Bernstein, “In City of Lawyers, Many Immigrants Fighting Deportation Go It Alone,” *New York Times*, March 12, 2009, www.nytimes.com/2009/03/13/nyregion/13immigration.html.

106 US Commission on International Religious Freedom, *Report on Asylum Seekers in Expedited Removal, Volume II*, 197-198, 412-413.

107 National Immigrant Justice Center (NIJC) surveyed: (1) 150 immigrant detention centers, housing 31,355 of the 32,000 immigrants in detention per night; (2) charitable legal service providers for detainees; and (3) 25,489 detainees in 67 facilities regarding phone access.

108 NIJC, *Isolated in Detention: Limited Access to Legal Counsel in Immigration Detention Facilities Jeopardizes a Fair Day in Court* (Chicago, IL: NIJC, 2010), 4-5, www.immigrantjustice.org/policy-resources/isolatedindetention/intro.html.

109 Ibid.



VIII. Conclusion

The recommendations made throughout this report call for actions that are fully within the scope of executive-branch authority to administer US immigration law and policy. Taken together, they would create more effective and accountable immigration enforcement policies, make it possible for persons eligible for family-based visas to come forward and to secure them, and pave the way for coordinated, long-term efforts to promote the successful integration of the historically high US foreign-born population. At present, federal integration programs are scattered throughout the government and beg for coordination and visibility. In addition, state, local, and community programs will face budget pressure and cuts into the near future, increasing the need for better coordination.

The recommendations would increase the effectiveness of enforcement programs by consistently directing them at the most significant threats and the greatest enforcement priorities and needs. They would improve the efficiency of removal proceedings and insert a level of fairness into proceedings that in too many cases is lacking due to shortages in legal representation. They would serve the government's interest in reduced detention costs and in the best, most informed decisions being made under the law. Finally, they would establish clear criteria for assessing the effectiveness of border enforcement, so that unexamined assertions that US borders are out of control would be less likely to undermine legislative reform proposals and public confidence in the government's ability to enforce the nation's immigration laws and manage its immigration system.



Works Cited

- Administrative Office of United States Courts. 2010. Caseload Statistics 2010: US Courts of Appeals – Appeals Commenced, Terminated, and Pending, by Circuit, During the 12-Month Period Ending March 31, 2010. www.uscourts.gov/Viewer.aspx?doc=/uscourts/Statistics/FederalJudicialCaseloadStatistics/2010/tables/B01Mar10.pdf.
- _____. 2010. *Judicial Business of the United States Courts: 2009 Annual Report of the Directors*. Washington, DC: US Government Printing Office. www.uscourts.gov/Statistics/JudicialBusiness/JudicialBusiness.aspx?doc=/uscourts/Statistics/JudicialBusiness/2009/JudicialBusinesspdfversion.pdf.
- Aguilera-Enriquez v. INS, 516 F.2d 565, 568 (5th Cir. 1975), cert denied, 423 U.S. 1050 (1976).
- American Bar Association. 2008. *Ensuring Fairness and Due Process in Immigration Proceedings*. Chicago, IL: ABA. www.americanbar.org/content/dam/aba/migrated/poladv/priorities/immigration/2008dec_immigration_authcheckdam.pdf.
- _____. 2010. *Policy and Procedures Manual*. Chicago, IL: ABA. www.americanbar.org/content/dam/aba/migrated/policy/GreenBookChp13.authcheckdam.pdf.
- ABA, Commission on Immigration. 2006. *Report to the House of Delegates on Resolution 107A*. Chicago, IL: ABA.
- _____. 2010. *Reforming the Immigration System: Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudications of Removal Cases*. Washington, DC: ABA. http://new.abanet.org/Immigration/PublicDocuments/aba_complete_full_report.pdf.
- Associated Press. 2010. US-Mexico Border Safety: Area is One of Safest Parts of America. June 4, 2010. www.msnbc.msn.com/id/37493275/.
- _____. 2011. Mexico census: Fewer migrating, many returning. March 3, 2011. www.thestate.com/2011/03/03/1721751/mexico-census-fewer-migrating.html.
- Bernstein, Nina. 2009. In City of Lawyers, Many Immigrants Fighting Deportation Go It Alone. *The New York Times*, March 12, 2009. www.nytimes.com/2009/03/13/nyregion/13immigration.html.
- Catholic Legal Immigration Network, Inc. (CLINIC). 2010. *Update on Ciudad Juárez Consulate and USCIS Office*. www.aila.org/content/default.aspx?docid=34219.
- Citizenship and Immigration Services (CIS) Ombudsman. 2010. *Annual Report 2010*. Washington, DC: CIS Ombudsman. www.dhs.gov/xlibrary/assets/cisomb_2010_annual_report_to_congress.pdf.
- _____. 2010. *Recommendation Regarding the Processing of Waivers of Inadmissibility*. Washington, DC: CIS Ombudsman. www.dhs.gov/xlibrary/assets/cisomb_waivers_of_inadmissibility_recommendation.pdf.
- Cornelius, Wayne A. 2008. *Reforming the Management of Migration Flows from Latin America to the United States*. San Diego, CA: Center for Comparative Immigration Studies at the University of California San Diego. www.ccis-ucsd.org/PUBLICATIONS/WP%20170.pdf.
- Cornelius, Wayne A. and Idean Salehyan. 2007. Does Border Enforcement Deter Unauthorized Immigration? The Case of Mexican Migration to the United States of America. *Regulation and Governance* (1): 139-153.
- Cornelius, Wayne A. and Jessa M. Lewis, eds. 2007. *Impacts of Border Enforcement on Mexican Migration: The View from Sending Communities*. San Diego, CA: Center for Comparative Immigration Studies at the University of California, San Diego.
- Hinken, Anna. 2000. *Evaluation of the Rights Presentation*. Falls Church, VA: US Department of Justice, Executive Office for Immigration Review. www.justice.gov/eoir/reports/rtspresrpt.pdf.



- Franco-Gonzalez v. Holder, No-10—C-02211 DMG (DTB) (C.D. Cal. filed August 2, 2010).
- Howard, William J. 2005. Principal Legal Advisor, Office of the Principal Legal Advisor, US Immigration and Customs Enforcement (ICE). 2005. Memorandum to All Office of the Principal Legal Advisor (OPLA) Chief Counsels, October 24, 2005.
- Jordan, Miriam. 2011. Crackdown on Illegal Workers Grows. *The Wall Street Journal*, January 21, 2011. <http://online.wsj.com/article/SB10001424052748703951704576092381196958362.html>.
- Kerwin, Donald. 2001. Family Reunification and the Living Law: Processing Delays, Backlogs, and Legal Barriers. *In Defense of the Alien*, ed., Lydio Tomasi, vol. 23. Staten Island, NY: Center for Migration Studies.
- _____. 2005. *Revisiting the Need for Appointed Counsel*. Washington, DC: Migration Policy Institute. www.migrationpolicy.org/insight/Insight_Kerwin.pdf.
- Meissner, Doris and Donald Kerwin. 2009. *DHS and Immigration: Taking Stock and Correcting Course*. Washington, DC: Migration Policy Institute. www.migrationpolicy.org/pubs/DHS_Feb09.pdf.
- Moreno, Ivan. 2010. Janet Napolitano in Denver: Divided Congress Keeps Obama from Overhauling Immigration. *The Huffington Post*, June 24, 2010. www.huffingtonpost.com/2010/06/24/janet-napolitano-in-denve_n_624757.html.
- Napolitano, Janet. 2011. Remarks on Border Security at the University of Texas at El Paso. Remarks released as prepared, January 31, 2011. www.dhs.gov/ynews/speeches/sp_1296491064429.shtm.
- Ortiz Uribe, Monica. 2010. El Paso, San Diego Among Safest Cities. KPBS San Diego, November 22, 2010. www.kpbs.org/news/2010/nov/22/el-paso-san-diego-among-safest-cities/.
- Passel, Jeffrey S. and D'Vera Cohn. 2010. *U.S. Unauthorized Immigration Flows Are Down Sharply Since Mid-Decade*. Washington, DC: Pew Hispanic Center. <http://pewhispanic.org/reports/report.php?ReportID=126>.
- Ragsdale, Daniel. 2010. *United States v. Arizona*, 703 F. Supp. 2d 980 (D. Ariz. 2010) (No. CV 10-1413-PHX-SRB).
- Ramji-Nogales, Jaya, Andrew I. Schoenholtz, and Phillip G. Schrag. 2007. Refugee Roulette: Disparities in Asylum Adjudication. *Stanford Law Review* 60(2): 295-412.
- Schoenholtz, Andrew and Jonathan Jacobs. 2002. The State of Asylum Representation: Ideas for Change. *Georgetown Immigration Law Journal* 16(4): 739- 772.
- Secure Fence Act*. 2006. Public Law 109-367, US Statutes at Large 120.
- Siulc, Nina, Zhifen Cheng, Arnold Son, and Olga Byrne. 2008. *Legal Orientation Program: Evaluation and Performance and Outcome, Measurement Report, Phase II*. New York, NY: era Institute for Justice. www.justice.gov/eoir/reports/LOPEvaluation-final.pdf.
- Transactional Records Access Clearinghouse (TRAC). 2006. Controlling the Borders. Syracuse, NY: TRAC. <http://trac.syr.edu/immigration/reports/141/>.
- _____. 2010. ICE Seeks to Deport the Wrong People. Syracuse, NY: TRAC. http://trac.syr.edu/immigration/reports/243/include/requests_pct.html.
- _____. 2011. Federal Criminal Enforcement and Staffing: How Do the Obama and Bush Administrations Compare? Syracuse, NY: TRAC. <http://trac.syr.edu/tracreports/crim/245/>.
- _____. 2011. Immigration Case Backlog Still Growing in FY 2011. Syracuse, NY: TRAC. <http://trac.syr.edu/immigration/reports/246/>.
- US Census Bureau Current Population Survey (CPS). MPI analysis of the March Socio-economic Supplements of the 1994 to 2010 CPS.



- US Citizenship and Immigration Services (USCIS). 2010. Response to Recommendations Regarding the Processing of Waivers of Inadmissibility. Memorandum from USCIS Director Alejandro N. Mayorkas, Director USCIS, to January Contreras, Citizenship and Immigration Services Ombudsman. October 12, 2010. www.uscis.gov/USCIS/Resources/Ombudsman%20Liaison/Responses%20to%20Formal%20Recommendations/cisomb-2010-response-45.pdf.
- _____. 2010. USCIS Response to the Citizenship and Immigration Service Ombudsman's 2010 Annual Report. Washington, DC: USCIS. www.uscis.gov/USCIS/Resources/Ombudsman%20Liaison/Responses%20to%20Annual%20Reports/cisomb-2010-annual-report-response.pdf.
- _____. 2011. Guidance for Coordinating the Adjudication of Applications and Petitions Involving Individuals in Removal Proceedings; Revisions to the Adjudicator's Field Manual (AFM) New Chapter 10.3(i): AFM Update AD. Interim Policy Memorandum for Comment, February 4, 2011. www.uscis.gov/USCIS/Outreach/Interim%20Guidance%20for%20Comment/coordination-adjud-removal-proceedings.pdf.
- US Commission on International Religious Freedom. 2005. *Report on Asylum Seekers in Expedited Removal, Volume 1: Findings and Recommendations*. Washington, DC: International Commission on International Religious Freedom. www.uscirf.gov/images/stories/pdf/asylum_seekers/Volume_I.pdf.
- US Customs and Border Protection (CBP). 2004. New anti-terror technology produces astounding arrest numbers. *Customs and Border Protection Today*, October/November 2004. www.cbp.gov/xp/CustomsToday/2004/oct_nov/new_anti_terror.xml.
- _____. 2009. *Secure Borders, Safe Travel, Legal Trade: US Customs and Border Protection Fiscal Year 2009-2014 Strategic Plan*. Washington, DC: CBP. www.cbp.gov/linkhandler/cgov/about/mission/strategic_plan_09_14.ctt/strategic_plan_09_14.pdf.
- US Department of Homeland Security (DHS). 2008. *One Team, One Mission, Security Our Homeland: US Department of Homeland Security Strategic Plan, Fiscal Years 2008-2013*. Washington, DC: DHS. www.dhs.gov/xlibrary/assets/DHS_StratPlan_FINAL_spread.pdf.
- _____. 2009. DHS Exhibit 300 Public Release BY 10 / NPPD – US-VISIT – Automated Biometric Identification System (IDENT). Public release, April 17, 2009. www.dhs.gov/xlibrary/assets/mgmt/e300-nppd-usvisit-ident2010.pdf.
- _____. 2010. Press conference with Secretary of Homeland Security Janet Napolitano, et. al., at ICE headquarters, October 6, 2010. www.ice.gov/news/releases/1010/101006washingtondc2.htm.
- _____. 2011. Office of Immigration Statistics. *Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2010*. Washington, DC. www.dhs.gov/xlibrary/assets/statistics/publications/ois_illpe_2010.pdf.
- US Code of Federal Regulations Title 8, part 212.2(g) (2010).
- _____. Title 8, part 212.2(j) (2010).
- _____. Title 8 part 239.2 (a) (2010).
- _____. Title 9 part 239.1(a) (2010).
- US Department of Justice, Executive Office for Immigration Review (EOIR). 2010. *EOIR Legal Orientation and Pro Bono Program*. Falls Church, VA: EOIR. www.justice.gov/eoir/probono/probono.htm.
- _____. 2011. *FY 2010 Statistical Yearbook*. Falls Church, VA: EOIR. www.justice.gov/eoir/statspub/fy10syb.pdf.
- US Department of State (DOS). 2006. *Visa Bulletin October 2006*. Washington, DC: DOS. http://travel.state.gov/visa/bulletin/bulletin_3032.html.



- _____. 2009. *Visa Bulletin October 2009*. Washington, DC: DOS.
- _____. 2010. *Visa Bulletin December 2010*. Washington, DC: DOS. http://travel.state.gov/visa/bulletin/bulletin_5197.html.
- _____. 2011. *Visa Bulletin for March 2011*. Washington, DC: DOS. http://travel.state.gov/visa/bulletin/bulletin_5337.html.
- US Government Accountability Office (GAO). 2007. *Immigration Enforcement: ICE Could Improve Controls to Help Guide Alien Removal Decision Making*. Washington, DC: GAO. www.gao.gov/new.items/d0867.pdf.
- US Immigration and Customs Enforcement (ICE). 2007. Prosecutorial and Custody Discretion. Memorandum from ICE Assistant Secretary Julie L. Myers to All Field Office Directors and All Special Agents in Charge, November 7, 2007.
- _____. 2010. Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens. Memorandum from ICE Assistant Secretary John Morton to All ICE Employees, June 30, 2010.
- _____. 2010. Guidance Regarding the Handling of Removal Proceedings of Aliens with Pending or Approved Applications or Petitions. Memorandum from ICE Assistant Secretary John Morton for Peter S. Vincent, Principal Legal Advisor for ICE, and James Chaparro, Executive Associate Director for ICE, Enforcement and Removal Operations, August 20, 2010.
- _____. 2011. ICE Access. www.ice.gov/access/.
- US Immigration and Nationality Act Section 201(b)(2)(A)(i) (2010).
- _____. Section 201(c) (2010).
- _____. Section 202(a)(2) (2010).
- _____. Section 203(a) (2010).
- _____. Section 212(a) (9)(B)(i) (2010).
- _____. Section 212(a) (9)(B)(v) (2010).
- _____. Section 292 (2010).
- US Immigration and Naturalization Service (INS). 2000. Memorandum from Doris Meissner, INS Commissioner, to Regional Directors, District Directors, Chief Patrol Agents, Regional and District Counsel, November 17, 2000.
- US Representative Henry J. Hyde, et. al. 1999. Letter to The Honorable Janet Reno and The Honorable Doris M. Meissner, November 4, 1999.
- Wadhia, Shoba S. 2010. The Role of Prosecutorial Discretion in Immigration Law. *Connecticut Public Interest Law Journal* 9 (2): 243-299. <http://ssrn.com/abstract=1476341>.
- White House. 2010. Remarks of President Barack Obama in State of the Union Address. News release, January 25, 2011. www.whitehouse.gov/the-press-office/2011/01/25/remarks-president-barack-obama-state-union-address-prepared-delivery.



About the Authors



Donald M. Kerwin is Vice President for Programs at the Migration Policy Institute (MPI). Mr. Kerwin has written broadly on US immigration policy, national security, and other issues. Prior to joining MPI, he worked for more than 16 years at the Catholic Legal Immigration Network, Inc. (CLINIC), serving as Executive Director for nearly 15 years. CLINIC is a public interest legal corporation that supports a national network of charitable legal programs for immigrants. Mr. Kerwin is a member of the American Bar Association's Commission on Immigration, a past member of the Council on Foreign Relations' Immigration Task Force, a board member of

Jesuit Refugee Services-USA and the Border Network for Human Rights, and an associate fellow at the Woodstock Theological Center. Mr. Kerwin is a 1984 graduate of Georgetown University and a 1989 graduate of the University of Michigan Law School.



Doris Meissner, former Commissioner of the US Immigration and Naturalization Service (INS), is a Senior Fellow at MPI, where she directs MPI's work on US immigration policy. She is also one of the Co-Directors of MPI's Regional Migration Study Group. She contributes to the Institute's work on immigration and national security, the politics of immigration, administering immigration systems and government agencies, and cooperation with other countries. Ms. Meissner has authored and coauthored numerous reports, articles, and op-eds and is frequently quoted in the media.

From 1993 to 2000, she served in the Clinton administration as Commissioner of the INS, then part of the US Department of Justice. She first joined the Department of Justice in 1973 as a White House Fellow and Special Assistant to the Attorney General and then served in various senior policy posts at Justice, including Acting Commissioner and Executive Associate Commissioner of INS. In 1986, she joined the Carnegie Endowment for International Peace as a Senior Associate. Ms. Meissner created the Endowment's Immigration Policy Project, which became MPI in 2001. She earned BA and MA degrees at University of Wisconsin-Madison, where she began her professional career as Assistant Director of student financial aid. She was also the first Executive Director of the National Women's Political Caucus.



Margie McHugh is the Co-Director of the National Center on Immigrant Integration Policy at MPI, a national hub for leaders in government, community affairs, business, and academia to obtain the knowledge and skills they need to respond to the challenges and opportunities that today's high rates of immigration pose for local communities across the United States.

Prior to joining MPI, Ms. McHugh served for 15 years as Executive Director of The New York Immigration Coalition, an umbrella organization for over 150 groups in New York that uses research, policy development, and community mobilization efforts to achieve landmark integration policy and program initiatives. Ms. McHugh is the recipient of dozens of awards recognizing her successful efforts to bring diverse constituencies together and tackle tough problems, including the prestigious *Leadership for a Changing World* award. She has served as a member and officer on the boards of directors for both the National Immigration Forum and Working Today; on the editorial board of *Migration World Magazine*; and has held appointive positions in a variety of New York City and State commissions, most notably the Commission on the Future of the City University of New York and the New York Workers' Rights Board. Ms. McHugh is a graduate of Harvard and Radcliffe Colleges.



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

www.migrationpolicy.org

1400 16th Street NW
Suite 300
Washington, DC 20036

Tel: 001 202-266-1940
Fax: 001 202-266-1900