



Testimony of
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Oversight of the Administration's Criminal Alien Removal Policies

Before

U.S. Senate Committee on the Judiciary

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Chairman Grassley, Ranking Member Leahy, and Members of the Committee:

Good afternoon. My name is Marc Rosenblum, and I am deputy director of the U.S. immigration program at the Migration Policy Institute, an independent, non-partisan think tank in Washington, DC that analyzes U.S. and international migration trends and policies. Thank you for the opportunity to testify today.

The U.S. unauthorized population numbered about 11 million people in 2013, down from 12.2 million in 2007. The large number of unauthorized immigrants results from five decades of substantial unauthorized flows, beginning when the US-Mexico Bracero program ended in 1964 and Congress substantially revised the *Immigration and Nationality Act* in 1965. Since the mid-1980s, the United States has implemented a series of increasingly forceful measures to combat illegal immigration, mostly by tightening border security, but also through a number of programs to identify, detain, and deport unauthorized immigrants from within the United States (i.e., through “interior enforcement”).

The government faces significant challenges in effectuating deportations from within the United States because unauthorized immigrants are hard to identify in the interior, enforcement agents lack some of the broad authority they have at U.S. borders, and many unauthorized immigrants are integrated within U.S. communities. These challenges, along with limited enforcement budgets, mean that Congress and successive presidents have for decades sought to focus enforcement resources on certain groups of noncitizens identified as high priorities for deportation, including national security threats, convicted criminals, and recent border crossers.

Even with clearly articulated enforcement priorities, the Department of Homeland Security (DHS) confronts a number of tradeoffs in designing an overall interior enforcement strategy. Most importantly, there is a fundamental tradeoff between the quality and quantity of deportations. Policymakers must choose between maximizing the volume of deportations and ensuring that deportations focus on the highest-priority cases. Additional tradeoffs involve balancing additional deportations through aggressive interior enforcement against the potential harm to community trust and public safety, the well-being of immigrant communities, and the civil and constitutional rights of immigrants and citizens.

DHS has removed record numbers of unauthorized immigrants since 2009. The department also has published a series of guidance memoranda explicitly enumerating its enforcement priorities, generating some controversy. Yet these guidance memos identify essentially the same priorities that Congress and previous presidents have emphasized for decades.

Thus, the real dispute is not over whether to establish priorities or what they should be. Rather, the most important disagreements relate to the deeper tradeoffs about interior enforcement. Between 2003 and 2011, the interior enforcement system produced an increasing volume of often low-priority removals. Since 2012, DHS has emphasized quality over quantity, while also taking steps to modify how U.S. Immigration and Customs Enforcement (ICE) interacts with local law enforcement agencies; to reduce the spillover effects of enforcement on immigrant communities, employers, and families; and to ensure that immigration enforcement does not violate Americans’ civil and constitutional rights. As a result, while DHS has continued to remove unauthorized immigrants at record numbers (at least through fiscal year (FY) 2014, the latest year for which data are available), a growing share of removals have occurred at the border, and interior removals have focused more narrowly on convicted criminals.

The Challenge of Interior Enforcement

U.S. law generally provides for the apprehension and deportation of unauthorized immigrants from within the United States, along with the deportation of certain lawful immigrants who have committed serious crimes or otherwise violated the terms of their visas. Yet identifying and deporting noncitizens from within the United States presents a number of challenges that make deportations from the interior costlier and more complex than deportations from the border.

For Border Patrol agents conducting enforcement at the U.S. border between ports of entry (POEs), the enforcement mission is generally straightforward because all entries between POEs are illegal, so the Border Patrol seeks to prevent all of these entries. For U.S. Customs and Border Protection (CBP) officers conducting enforcement at POEs, the mission involves preventing illegal inflows while facilitating legal flows, and distinguishing between the two is often complex and may involve difficult tradeoffs. But travelers pass through a controlled space where officers may focus their enforcement efforts, and the government's authority to inspect travelers and their documents is greatest at the border—two factors that greatly facilitate enforcement.

In contrast, ICE officers charged with identifying and deporting unauthorized immigrants within the United States operate in a context in which the targets of enforcement are much harder to identify. Only 13 percent of Americans are foreign born, and of those, only about one-quarter is unauthorized, along with a much smaller number of lawfully present immigrants who are deportable. Unlike at POEs, there is no natural controlled space through which people must pass where enforcement may occur. And the constitutional protections against warrantless searches and detention without probable cause are much stronger in the interior than at the border.¹

While these core constitutional protections are not tied to immigration status, interior enforcement is also complex because many unauthorized immigrants are deeply rooted and highly integrated within U.S. communities, so that efforts to target this population have spillover effects on immigrants' families, employers, and communities. Seventy-nine percent of unauthorized immigrants have lived in the United States five years or longer, including 49 percent who have lived here at least 10 years. Seventy-two percent are in the workforce—a level similar to U.S. citizens. Fourteen percent are married to a U.S. citizen or lawful permanent resident. And 39 percent have children in the United States, including 33 percent who have U.S.-citizen children.²

Finally, ICE's ability to detain and deport unauthorized immigrants and other removable noncitizens is limited by budget constraints. Most interior enforcement cases involve an appearance before an immigration judge, and an overburdened immigration court system means the deportation process can take months or years to complete. The costs of deportation therefore begin with a potentially expensive apprehension process, and may also include prolonged periods of detention, prosecution expenses, and then secure transportation back to immigrants' countries of origin. One study estimates the cost of deporting all 11 million unauthorized immigrants as

¹ *Almeida-Sanchez v. United States*, 413 U.S. 266/No. 71-6278.

² All statistics on the characteristics of the unauthorized population are based on 2008-2013 data published by Migration Policy Institute (MPI), see MPI, "Unauthorized Immigrant Population," accessed November 30, 2015, www.migrationpolicy.org/data/unauthorized-immigrant-population/state/US.

between \$100 and \$300 billion.³

Enforcement Priorities and Prosecutorial Discretion

Given these challenges and finite resources available for immigration enforcement, both Congress and the president have always set enforcement priorities, even though they have not always been public or specific. And because of the unauthorized population's integration within U.S. communities, Congress and the president also have long identified certain otherwise-deportable immigrants who may be eligible for relief from removal or similar immigration benefits.

Congress's long-standing immigration enforcement priorities include national security threats, noncitizens convicted of a crime, people apprehended at the border, and those apprehended more than once, whether at the border or within the U.S. interior. For example, national security concerns and criminal convictions were among the earliest grounds for exclusion and deportation in U.S. immigration law, dating to 1875.⁴ The 1986 *Immigration Reform and Control Act* (IRCA) required the Attorney General (now Homeland Security Secretary) to begin deportation proceedings "as expeditiously as possible" in the case of noncitizens convicted of removable offenses.⁵ And Congress passed a series of additional laws between 1988 and 1996 further directing DHS to focus enforcement resources on "criminal aliens,"⁶ a requirement reinforced in recent years by congressional appropriators.⁷

Appropriators have also made a high priority of border enforcement,⁸ and since 2006 Congress has defined as a statutory goal "the prevention of all unlawful entries into the United States."⁹ In the context of deportation policies, Congress's focus on border crossers and repeat entrants is reflected in the 1996 *Illegal Immigration Reform and Immigrant Responsibility Act* (IIRIRA), which created and expanded fast-track removal procedures with limited judicial review for certain immigrants apprehended at the border¹⁰ and for repeat entrants or those who have disobeyed prior removal

³ Ben Gitis and Laura Collins, "The Budgetary and Economic Costs of Addressing Unauthorized Immigration: Alternative Strategies," American Action Forum Research, March 2015, <http://americanactionforum.org/research/the-budgetary-and-economic-costs-of-addressing-unauthorized-immigration-alt>.

⁴ The *Page Act* of March 3, 1875 excluded criminals and prostitutes, see *Page Act of 1875, U.S. Statutes at Large* 18 (1875): 477; the *Immigration Act of March 3, 1903* excluded anarchists and those who advocated overthrowing the U.S. government, see *Immigration Act of March 3, 1903, U.S. Statutes at Large* 32 (1903): 1213.

⁵ *Immigration Reform and Control Act of 1986*, Public Law 99-603, *U.S. Statutes at Large* 100 (1986): 3445.

⁶ *Anti-Drug Abuse Act of 1988*, Public Law 100-690, *U.S. Statutes at Large* 102 (1988): 4181; *Immigration Act of 1990*, Public Law 101-649, *U.S. Statutes at Large* 104 (1990): 4978; *Illegal Immigration Reform and Immigration Responsibility Act of 1996* (IIRIRA), Public Law 104-208, *U.S. Statutes at Large* 110 (1996): 3009.

⁷ Congress requires in the Department of Homeland Security (DHS) appropriations act that "the Secretary of Homeland Security shall prioritize the identification and removal of aliens convicted of a crime by the severity of that crime"; See *Department of Homeland Security Appropriations Act*, Public Law 114-4, *U.S. Statutes at Large* 129 (2015): 43.

⁸ For a fuller discussion, see Doris Meissner, Donald M. Kerwin, Muzaffar Chishti, and Claire Bergeron, *Immigration Enforcement in the United States: The Rise of a Formidable Machinery* (Washington, DC: MPI, 2013), www.migrationpolicy.org/research/immigration-enforcement-united-states-rise-formidable-machinery.

⁹ *Secure Fence Act of 2006*, Public Law 109-367, *U.S. Statutes at Large* 120 (2006): 2638-2640.

¹⁰ *Immigration and Nationality Act* (INA) §235. Expedited removal applies to arriving noncitizens who are deemed inadmissible by officers from U.S. Customs and Border Protection (CBP) as individuals seeking immigration benefits through misrepresentation or as noncitizens present without valid entry documents. Any person subject to expedited removal may be removed by CBP without the opportunity to go before an immigration judge. The only exception is for noncitizens who express a credible fear of persecution in their home countries, or an intention to apply for asylum.

orders.¹¹ By design, the creation of these non-judicial procedures has resulted in exponential growth in removals.¹²

Conversely, Congress has also identified criteria that make certain unauthorized immigrants potentially eligible for relief from removal or similar immigration benefits. For example, when Congress in 1996 created new grounds for inadmissibility on the basis of an immigrant's period of unauthorized presence in the United States—the so-called three- and 10-year bars on admission—it also allowed DHS to waive the penalty on the basis of a noncitizen's relationship with U.S. family members.¹³ IIRIRA also allowed judges to grant cancellation of removal (i.e., discretionary relief from deportation) on the basis of a deportable immigrant's long-standing presence in the United States and, in the case of unauthorized immigrants, if his or her deportation would cause extreme hardship to a U.S.-citizen spouse, parent, or child.¹⁴ Congress also gave parents and spouses of U.S. citizens the unique ability to apply for permanent residence within the United States regardless of whether they failed to maintain lawful status or worked without authorization.¹⁵ Long-standing presence in the United States has also been a ground for statutory legalization under the so-called registry program, originally created in 1929 and updated several times since then, the last time under IRCA in 1986.¹⁶ Congress has also favored military service, expediting the application and naturalization process for current and recently discharged members of the U.S. armed forces and their spouses.¹⁷

Presidents have likewise established policies to exercise prosecutorial discretion (i.e., to decide whether and how fully to exercise enforcement powers) in the case of certain potentially deportable noncitizens. Indeed, every president since at least 1956 has unilaterally granted temporary relief from deportation to one or more groups of immigrants, a list that includes at least 39 examples ranging in size from about 1,000 to more than 1 million people.¹⁸ As explained by the Immigration and Naturalization Service (INS) general counsel in 1976, “the reasons for the exercise of prosecutorial discretion are both practical and humanitarian. There simply are not enough resources to enforce all the rules and regulations presently on the books.... [I]t is also obvious that in enacting a statute the legislature cannot possibly contemplate all of the possible circumstances in

¹¹ INA §241(a)(5), 8 U.S.C. §1231(a)(5).

¹² Marc R. Rosenblum and Doris Meissner, *The Deportation Dilemma: Reconciling Tough and Humane Enforcement* (Washington, DC: MPI, 2014), www.migrationpolicy.org/research/deportation-dilemma-reconciling-tough-humane-enforcement.

¹³ Under INA §212(a)(9)(B), 8 U.S.C. §1182(a)(9)(B), noncitizens unlawfully present in the United States for more than 180 days generally are inadmissible (i.e. ineligible to receive a visa) for three years if they depart from the United States, and noncitizens unlawfully present in the United States for more than one year generally are inadmissible for ten years. Immigrants who entered illegally—e.g., by crossing the border with Mexico or Canada—must leave the United States and apply for a visa at a consular post abroad. But by leaving the United States, they are subject to the three- and ten-year bars on return.

¹⁴ INA §240A, 8 U.S.C. §1229b.

¹⁵ INA §245(c)(2), 8 U.S.C. §1255(c)(2).

¹⁶ Donald M. Kerwin, *More than IRCA: U.S. Legalization Programs and the Current Policy Debate* (Washington, DC: MPI, 2010), www.migrationpolicy.org/research/us-legalization-programs-by-the-numbers.

¹⁷ INA §328, 8 U.S.C. §1439; INA §329, 8 U.S.C. §1440.

¹⁸ American Immigration Council, *Executive Grants of Temporary Immigration Relief, 1956-Present* (Washington, DC: American Immigration Council, 2014), www.immigrationpolicy.org/sites/default/files/docs/executive_grants_of_temporary_immigration_relief_1956-present_final.pdf.

which the statute may be applied. In some situations, applications of the literal letter of the law would simply be unconscionable and would serve no useful purpose.”¹⁹

Since 1976, successive INS and DHS leaders serving under presidents from both parties have published at least 11 memoranda describing criteria that enforcement agents should consider for the favorable exercise of prosecutorial discretion.²⁰ Notably, these factors align closely with those also identified by Congress, such as an immigrant’s length of residence in the United States, family connections, deportation record, and whether convicted of a crime or posing a national security threat. Enforcement agents are also directed to consider additional criteria, including an immigrant’s pursuit of education, military service, and ties to the home country.²¹

Finally, while every president has set de facto enforcement priorities, the current administration is the first to have published formal guidelines describing the administration’s enforcement priorities, first in 2010²² with minor revisions in 2011²³ and major revisions in 2014.²⁴ All three memos focused essentially on the same enforcement priorities as those identified by Congress: threats to national security, noncitizens convicted of crimes and other threats to public safety, those apprehended at the border and other recent arrivals, and those with previous removal orders.

Policy Tools: How ICE Conducts Interior Enforcement

ICE has four main tools for conducting enforcement in the U.S. interior, as follows:²⁵

Screening for immigration status within jails and prisons. The INS initiated a pair of jail screening programs in 1988 to identify convicted criminals eligible for deportation: the Institution Removal Program, which focused on a small number of high-volume prisons, and the Alien Criminal Apprehension Program, which focused on other jails and prisons. The programs were combined and became part of the broader Criminal Alien Program (CAP) under INS’s successor agency, DHS.

¹⁹ Sam Bernsen, “Legal Opinion Regarding Service Exercise of Prosecutorial Discretion,” (letter to Commissioner, July 15, 1976), www.ice.gov/doclib/foia/prosecutorial-discretion/service-exercise-pd.pdf. Also see Shoba S. Wadhia, *The Role of Prosecutorial Discretion in Immigration Law* (University Park: Penn State Law, 2010), http://elibrary.law.psu.edu/cgi/viewcontent.cgi?article=1016&context=fac_works.

²⁰ For a list of these memoranda, see U.S. Immigration and Customs Enforcement (ICE) Assistant Secretary John Morton, memorandum to ICE Field Office Directors, Special Agents in Charge, and Chief Counsel, “Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens,” June 17, 2011, www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf.

²¹ Ibid.

²² ICE Assistant Secretary John Morton, memorandum to ICE employees, “Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens,” June 30, 2010, www.ice.gov/doclib/detention-reform/pdf/civil_enforcement_priorities.pdf.

²³ ICE Assistant Secretary John Morton, memorandum to ICE employees, “Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens,” March 2, 2011, www.ice.gov/doclib/news/releases/2011/110302washingtondc.pdf.

²⁴ Homeland Security Secretary Jeh Charles Johnson, memorandum to ICE Acting Director Thomas S. Winkowski, CBP Commissioner R. Gil Kerlikowske, U.S. Citizenship and Immigration Services (USCIS) Director Leon Rodriguez, and Homeland Security Acting Assistant Secretary for Policy Alan D. Bersin, “Policies for the Apprehension, Detention and Removal of Undocumented Immigrants,” November 20, 2014, www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf.

²⁵ For a fuller discussion of ICE’s interior enforcement programs, see Marc R. Rosenblum and William Kandel, *Interior Immigration Enforcement: Programs Targeting Criminal Aliens*, CRS Report R42057 (Washington, DC: Congressional Research Service, 2013), www.hsdl.org/?abstract&did=744667&advanced=advanced.

CAP agents review inmate rosters to check names and fingerprints against DHS databases, and they interview inmates (on-site and remotely through video teleconference technology) to identify deportable noncitizens not found in DHS databases. The goal of the CAP screening program is to initiate deportation proceedings against certain noncitizens before they complete their criminal sentences, so they may be turned over to immigration officials and deported quickly upon release. The CAP program includes about 1,700 officers who monitor every jail and prison in the United States (over 4,300 facilities).²⁶

Task force operations within U.S. communities. Apart from looking for deportable noncitizens in jails and prisons, ICE also conducts task force operations to apprehend unauthorized immigrants at large within the United States. Traditionally, such task force operations were an element of worksite enforcement, with INS and later ICE investigators targeting locations where unauthorized immigrants are believed to be employed. Since 2003, ICE has also operated the National Fugitive Operations Program (NFOP), which is charged with pursuing at-large noncitizens who have been convicted of crimes, who pose a threat to national security or community safety, who are members of transnational gangs, and who are child sex offenders—priorities defined by Congress.²⁷ ICE operates 129 fugitive operations teams, which were responsible for 37,000 arrests in fiscal year (FY) 2012, the last year for which ICE has made NFOP arrest data available.²⁸

Direct partnerships with state and local law enforcement agencies (LEAs). A third tool at ICE's disposal, put on the books in 1996 but mainly utilized since 2006, is direct partnerships with state and local LEAs pursuant to section 287(g) of the *Immigration and Nationality Act*.²⁹ Under the 287(g) program, specially trained LEA officers working under ICE supervision perform specified immigration enforcement functions, including by assisting ICE with jail screening similar to the work of the CAP program and, until 2012, with task force operations similar to the work of NFOP. Upon identifying a potentially removable noncitizen, a 287(g) officer is authorized to issue an immigration detainer. The detainer is an official document that initiates the removal process by requesting that an LEA hold an immigrant for up to 48 hours (and longer in some cases) after completing criminal proceedings and any associated jail or prison time. This 48-hour period allows ICE to take custody and file formal immigration charging documents.

The 287(g) program peaked at 56,000 arrests in 2009, involving partnerships with 75 LEAs in 2011; but ICE struggled to manage LEA operations and the program encountered a number of problems in certain jurisdictions, particularly in jurisdictions where LEAs conducted task force

²⁶ For a fuller discussion of the Criminal Alien Program, see Guillermo Cantor, Mark Noferi, and Daniel E. Martínez, *Enforcement Overdrive: A Comprehensive Assessment of ICE's Criminal Alien Program* (Washington, DC: American Immigration Council, 2015), http://immigrationpolicy.org/sites/default/files/docs/enforcement_overdrive_a_comprehensive_assessment_of_ices_criminal_alien_program_final.pdf.

²⁷ U.S. Congress, House Committee on Appropriations, Subcommittee on Homeland Security, *Department of Homeland Security Appropriations Bill, 2009, Report to Accompany H.R. 6947*, 110th Cong., 2nd sess., September 18, 2008, H.Rept. 110-862 (Washington: Government Printing Office, 2008), 51-53.

²⁸ For National Fugitive Operations Program (NFOP) arrest data see, ICE, "Fugitive Operations," accessed November 30, 2015, www.ice.gov/fugitive-operations.

²⁹ Section 287(g) of the INA, which permits DHS to delegate certain immigration enforcement functions to state and local law enforcement agencies (LEAs), was passed in 1996 as part of the *Illegal Immigration Reform and Immigrant Responsibility Act* (IIRIRA), but the first 287(g) agreement was not signed until 2002, and the program remained very limited in scope until 2006.

operations.³⁰ Several 287(g) jurisdictions have been the subject of Department of Justice (DOJ) investigations and controversies over racial profiling and other police abuse allegations.³¹ In 2012, the current administration ended 287(g) task force operations and announced plans to phase out the program entirely in favor of indirect partnerships with LEAs under the Secure Communities program, discussed below. ICE currently oversees 32 LEA partnerships in 16 states.³²

Indirect partnerships with LEAs. Finally, since 2008, ICE has relied extensively on indirect, information-based partnerships with LEAs to check the immigration status of arrestees. Under the Secure Communities program between 2008 and 2015 and under the Priority Enforcement Program (PEP) since July 2015, when an LEA submits the fingerprints of an arrestee to the Federal Bureau of Investigation (FBI) for a criminal background check, the FBI automatically shares the fingerprint data with ICE, which checks the prints against its own Automated Biometric Identification System (IDENT) database. IDENT includes more than 160 million fingerprints records of individuals who have previously received an immigration benefit or been the subject of immigration enforcement activities, and ICE uses the information to identify arrestees who may be deportable. As with the 287(g) program, ICE agents could issue immigration detainers to take custody of noncitizens identified as deportable.

The Secure Communities model of sharing fingerprint data proved to be a powerful tool for identifying potentially removable noncitizens. Indeed, my organization, the Migration Policy Institute (MPI), estimates that Secure Communities was responsible for 60 percent of all interior deportations in FY 2013 and 73 percent in FY 2014.³³ Nonetheless, Secure Communities also proved to be highly controversial, because it resulted in a large number of low-priority removals and was seen by many LEAs as damaging to public safety. Thus, in 2015 DHS replaced Secure Communities with PEP, which relies on the same model of information sharing but which imposes new limits on when and how ICE takes custody of noncitizens identified through the program, as discussed below.

³⁰ For a fuller discussion of the 287(g) program, see Randy Capps, Marc R. Rosenblum, Muzaffar Chishti, and Cristina Rodríguez, *Delegation and Divergence: 287(g) State and Local Immigration Enforcement* (Washington, DC: MPI, 2011), www.migrationpolicy.org/research/delegation-and-divergence-287g-state-and-local-immigration-enforcement; and DHS Office of Inspector General, *The Performance of 287(g) Agreements* (Washington, DC: DHS, Office of the Inspector General, 2010), www.oig.dhs.gov/assets/Mgmt/OIG_10-63_Mar10.pdf.

³¹ See for example, Department of Justice (DOJ), "Justice Department Releases Investigative Findings on the Alamance County, N.C., Sheriff's Office," (news release, September 18, 2012), www.justice.gov/opa/pr/justice-department-releases-investigative-findings-alamance-county-nc-sheriff-s-office; and DOJ, "Department of Justice Files Lawsuit in Arizona Against Maricopa County, Maricopa County Sheriff's Office, and Sheriff Joseph Arpaio," (news release, May 10, 2012), www.justice.gov/opa/pr/departments-justice-files-lawsuit-arizona-against-maricopa-county-maricopa-county-sheriff-s. Also see Adhikaar for Human Rights and Social Justice et al., "End the 287(g) Immigration Enforcement Program," (letter to the Honorable Janet Napolitano, December 11, 2012), www.aclu.org/files/assets/dec_2012_terminate_287g_sign-on_final_sent.pdf.

³² ICE, "Fact Sheet: Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act," accessed November 30, 2015, www.ice.gov/factsheets/287g#signedMOA.

³³ MPI calculations based on ICE, "ICE's use of IDENT/IAFIS Interoperability: Monthly Statistics through February 28, 2015," accessed November 30, 2015, www.ice.gov/sites/default/files/documents/FOIA/2015/sc_stats_YTD2015.pdf. Also see Marc R. Rosenblum and Kristen McCabe, *Deportation and Discretion: Reviewing the Record and Options for Change* (Washington, DC: MPI, 2014), www.migrationpolicy.org/research/deportation-and-discretion-reviewing-record-and-options-change; and ICE, "FY 2014 ICE Immigration Removals," accessed November 30, 2015, www.ice.gov/removal-statistics.

Policy Tradeoffs: Designing an Effective Interior Enforcement Strategy

The enforcement strategies described above represent the full range of interior enforcement options that DHS currently deploys. Each has strengths and weaknesses, and policymakers confront four important policy tradeoffs in drawing on these tools to design an overall interior enforcement strategy.

1. *The Tradeoff between the Quality and Quantity of Deportations*

There is an inherent tension between increasing the number of interior deportations and ensuring that deportations focus on the highest-priority cases. The tradeoff between quality and quantity exists regardless of how priorities are defined because identifying and detaining deportable noncitizens in the interior is difficult, and it will always be possible to boost deportation numbers by focusing on the first or easiest individuals who can be located (i.e., by prioritizing volume over top enforcement targets). With finite resources, ICE can target unauthorized immigrants who are easy to locate and deport, but this means that the agency would *not* target others who are more difficult to locate but who are enforcement priorities for national security, public safety, or other reasons. ICE may find it more difficult to locate individuals who are a high priority for enforcement (for instance, because they are criminals accustomed to evading the authorities). It may also be more expensive to apprehend them (for instance, using NFOP teams), and long-term detention, if required, may be costly.

One illustration of the tradeoff between the quality and quantity of removals comes from comparing approximate costs per deportation across different ICE enforcement programs. Of ICE's four main enforcement programs and tools—CAP, 287(g), Secure Communities/PEP, and NFOP—NFOP is designed to be the most targeted, as it pursues specific high-priority cases, rather than capitalizing on the flow of noncitizens through the criminal justice system. Not surprisingly, NFOP is also, by far, the most expensive of these four programs in terms of the ratio between program appropriations and resulting arrests. In 2012, the last year for which program-specific arrest data are available, NFOP had a budget of \$155 million and arrested 37,371 noncitizens: an average cost of \$4,137 per arrest. By comparison, the cost per arrest of the less focused CAP, Secure Communities, and 287(g) programs were \$982, \$1,927, and \$2,116 per person respectively.³⁴

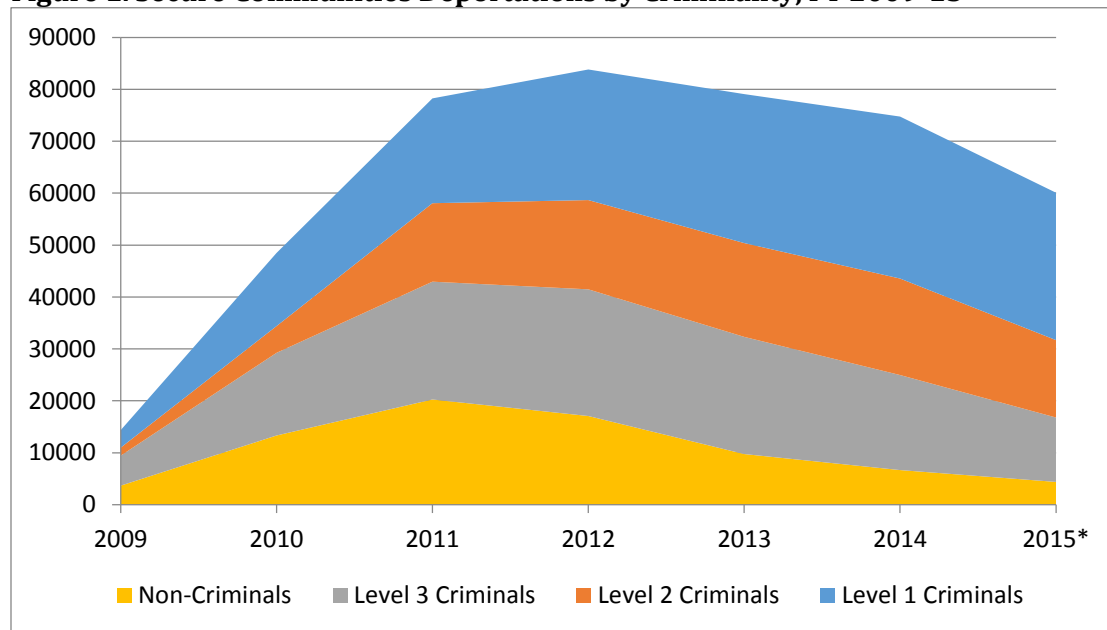
The tradeoff between quality and quantity of deportations is also evident in available enforcement data within and across ICE's interior enforcement programs. For example, the Bush administration embraced the 287(g) program as a significant force multiplier for ICE, as there are fewer than 6,000 ICE detention and removal agents, compared to about 750,000 police officers across the United States. Thus, delegating enforcement powers even to a small share of these officers leverages ICE's interior enforcement resources substantially. But a careful analysis of the 287(g) program at the height of its operation found that the program was not primarily targeted to top enforcement priorities, defined as unauthorized immigrants who had committed felonies or multiple misdemeanors. The study also found that 287(g) jurisdictions that sought to maximize their volume of removals placed immigration detainees on a much larger share of noncitizens who had never been convicted of a crime.³⁵

³⁴ Rosenblum and Kandel, *Interior Immigration Enforcement: Programs Targeting Criminal Aliens*, 22.

³⁵ Rosenblum and McCabe, *Deportation and Discretion*.

Similarly, the rapid growth of Secure Communities between 2009 and 2012 produced a five-fold increase in deportations resulting from the program, from 14,000 in 2009 to 84,000 in 2012 (see Figure 1). But 25 percent of Secure Communities deportations during this period were of people who had never been convicted of a crime, and another 30 percent were considered Level 3 criminals (i.e., they had been convicted of two or fewer misdemeanor offenses). Conversely, Secure Communities deportations were essentially flat between 2011 and 2013, and are projected to fall to about 60,000 in 2015. During this period of lower volume, the share of Secure Communities deportations that were Level 1 criminals increased from 26 to 47 percent, while non-criminals fell from 26 to 7 percent.³⁶

Figure 1. Secure Communities Deportations by Criminality, FY 2009-15



Note: 2015 data are a projection based on the first five months of the fiscal year.

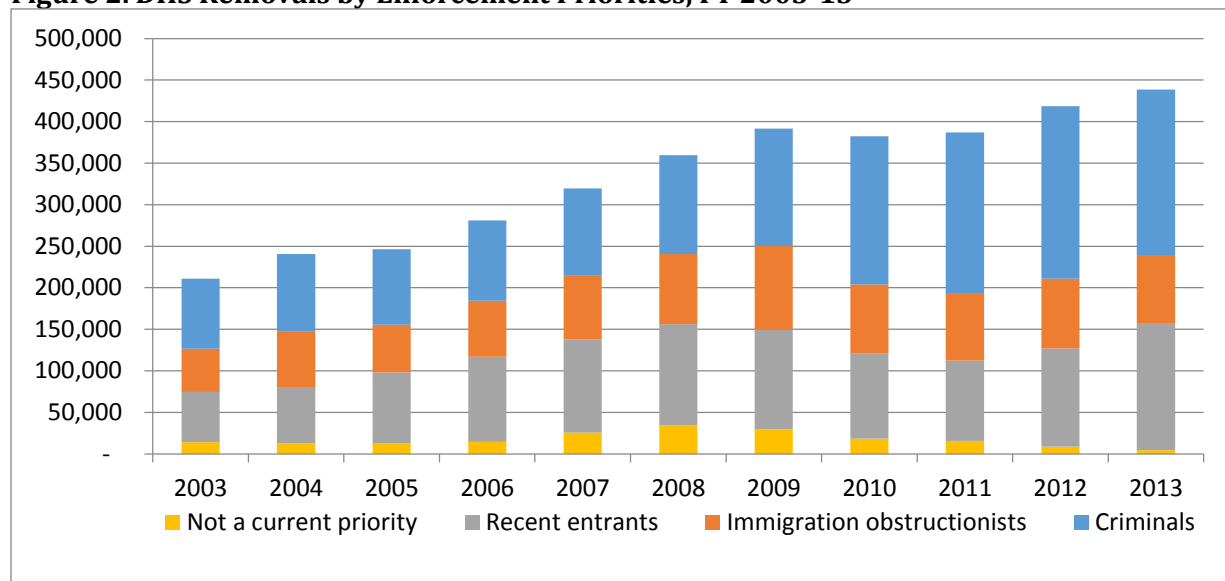
Source: Migration Policy Institute (MPI) analysis of U.S. Immigration and Customs Enforcement (ICE) data, “ICE’s use of IDENT/IAFIS Interoperability: Monthly Statistics through February 28, 2015,” accessed November 30, 2015, www.ice.gov/sites/default/files/documents/FOIA/2015/sc_stats_YTD2015.pdf.

Looking at overall deportation numbers (at the border and in the interior), an analysis of detailed enforcement data for 2003-13 clearly reveals two distinct phases: a period of sharply increasing overall removal numbers but less-focused enforcement from 2003 to 2008, and a period of much slower growth in overall removals but increasing focus on high-priority cases—criminals, recent border crossers, and people with repeated immigration violations or who disobeyed immigration court orders—from 2009-13 (see Figure 2). In particular, during the period of sharply increasing removals, the proportion of all removals who had been convicted of crimes fell from 40 percent in 2003 to 33 percent in 2008, while the share falling completely outside these three priority categories increased from 7 to 9 percent. During the later period of slower, but still positive, growth in removals, the share of criminals grew to a high of 50 percent in 2011-12 before falling back to 45 percent in 2013; and the share of removals falling completely outside these three priority

³⁶ MPI calculations based on ICE, “ICE’s use of IDENT/IAFIS Interoperability: Monthly Statistics through February 28, 2015.”

categories fell to 1 percent in 2013—just 4,348 non-priority removals out of an all-time record of 438,421 total removals in one year.³⁷

Figure 2. DHS Removals by Enforcement Priorities, FY 2003-13



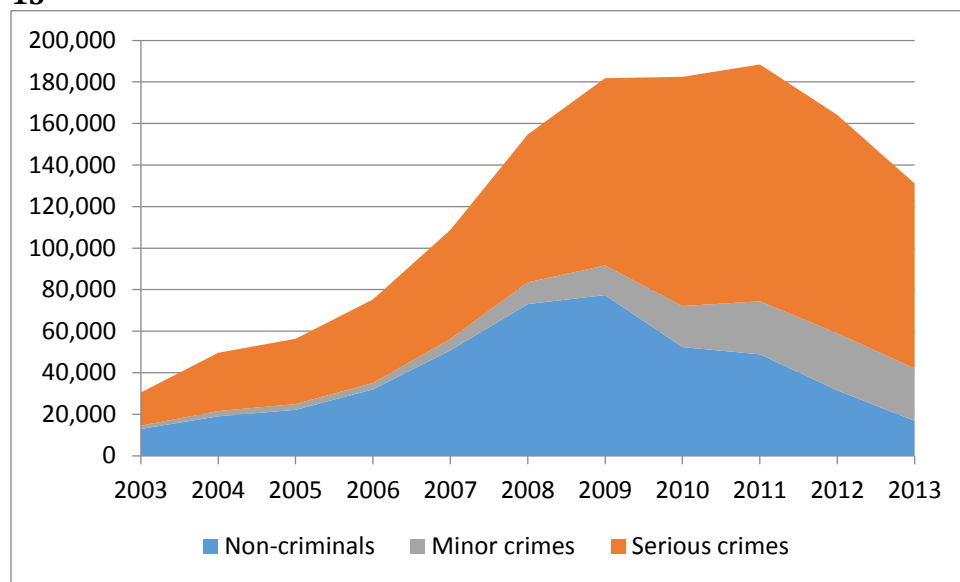
Source: Marc R. Rosenblum and Kristen McCabe, *Deportation and Discretion: Reviewing the Record and Options for Change* (Washington, DC: Migration Policy Institute, 2014), www.migrationpolicy.org/research/deportation-and-discretion-reviewing-record-and-options-change.

The tradeoff between quality and quantity is even clearer when focusing exclusively on interior enforcement. Figure 3 depicts interior removals, distinguishing among non-criminals, people convicted only of minor offenses (defined to include immigration crimes, traffic crimes other than DUI, and nuisance crimes, such as loitering), and those convicted of more serious criminal offenses. As the figure illustrates, the share of interior removals consisting of noncitizens who had ever been convicted of serious crimes fell from 52 percent in 2003 to 46 percent in 2008, while the share of non-criminals grew from 42 to 47 percent. Interior removals fell by about 50,000 people between 2009 and 2013, but the drop was fully accounted for by a decline in non-criminal removals, which fell by 60,000 during this period. By 2013, non-criminals accounted for just 13 percent of interior removals, with serious criminals at 68 percent and minor crimes accounting for 19 percent of removals (up from 7 percent in 2008).³⁸

³⁷ Rosenblum and McCabe, *Deportation and Discretion*.

³⁸ MPI analysis based on data presented in *Ibid.*, Appendix B.

Figure 3. Interior Removals by Type of Most Serious Lifetime Criminal Conviction, FY 2003-13



Note: Minor crimes include immigration crimes, traffic offenses other than DUI, and nuisance crimes; serious crimes include all other offenses.

Source: Adapted from Rosenblum and McCabe, *Deportation and Discretion*.

2. The Effects on Public Safety of Cooperation between DHS and Local Law Enforcement

How do DHS partnerships with state and local law enforcement, whether direct or indirect, affect public safety in U.S. communities? Bringing local LEAs into the immigration enforcement process expands ICE's reach into U.S. communities, as discussed above, generally producing increased removals. Moreover, while the vast majority of unauthorized immigrants have never been convicted of a crime, much less a serious criminal offense,³⁹ conducting screening in jails and prisons is a promising strategy for identifying those immigrants who have done so. Some LEAs see even minor criminals as deportation priorities, and some favor deporting all unauthorized immigrants, in part to ensure that they know who is living in their communities. For these reasons, dozens of LEAs requested cooperative agreements with ICE under the 287(g) program, and certain national law enforcement agencies like the National Sheriffs' Association and the Major County Sheriffs' Association support programs like Secure Communities.⁴⁰

But other national law enforcement organizations such as the Major Cities Chiefs Police Association,⁴¹ the Police Executives Research Forum,⁴² and the Law Enforcement Immigration Task

³⁹ By a conservative estimate, about 6 percent of unauthorized immigrants have ever been convicted of a felony or serious misdemeanor. See Marc R. Rosenblum, *Understanding the Potential Impact of Executive Action on Immigration Enforcement* (Washington, DC: MPI, 2015), www.migrationpolicy.org/research/understanding-potential-impact-executive-action-immigration-enforcement. Other research suggests the criminality rate among unauthorized immigrants is somewhat lower than 6 percent; see Thomas J. Miles and Adam B. Cox, "Does Immigration Enforcement Reduce Crime: Evidence from Secure Communities," *Journal of Law and Economics*, vol. 57, no. 4 (November 2014); Mary C. Waters and Marisa Gerstein Pineau, *The Integration of Immigrants into American Society* (Washington, DC: The National Academies Press, 2015), www.nap.edu/catalog/21746/the-integration-of-immigrants-into-american-society.

⁴⁰ ICE, "Secure Communities," accessed November 30, 2015, www.ice.gov/secure-communities#tab1.

⁴¹ Major Cities Chiefs Association, "Major Cities Chiefs: Immigration Policy," accessed November 30, 2015, www.majorcitieschiefs.com/pdf/news/2013_immigration_policy.pdf.

Force⁴³ have opposed involving local police in immigration enforcement. As outlined by the Major Cities Chiefs Police Association, local police oppose playing such a role because immigration enforcement undermines trust and cooperation between police and immigrant communities and so interferes with community policing; it diverts resources from police departments' primary crime-fighting responsibility; police do not have appropriate training to conduct immigration enforcement, which is a complex area of federal law; the federal government is poorly equipped to handle the existing volume of immigration violations; and police are concerned about being held liable for violations of immigrants' civil rights, especially following a series of recent court rulings casting doubt on ICE's use of detainers, as discussed below.⁴⁴

Generally for these reasons, by the summer of 2015 at least 360 cities, counties, states, and law enforcement agencies had passed laws, ordinances, or other formal policies to limit how law enforcement in their jurisdictions interact with ICE, including by prohibiting or restricting the ability of police to comply with ICE detainer requests that were at the heart of the Secure Communities program.⁴⁵ MPI estimates that these jurisdictions were home to more than 5.9 million unauthorized immigrants—53 percent of the U.S. unauthorized population.⁴⁶ While ICE could still conduct immigration enforcement in these jurisdictions, limits on LEA-DHS cooperation hinder certain ICE operations and increase the costs of interior enforcement.

As part of the executive actions on immigration announced in 2014, DHS sought to address these community concerns and reestablish productive relationships with LEAs by replacing Secure Communities with PEP. According to publicly available information, PEP will continue to use fingerprint data shared between the FBI and ICE, but PEP imposes limits on how ICE may use the information. ICE will only seek to take custody of noncitizens who pose a danger to national security or who have been convicted of serious crimes. Under Secure Communities, ICE could seek custody of any deportable noncitizens, regardless of whether they had been charged with or convicted of a crime. Another key difference is that ICE usually relied on immigration detainers to take custody of individuals under Secure Communities. Under PEP, ICE is to take custody of deportable noncitizens immediately at the conclusion of their criminal justice proceedings in most cases, without requesting an additional 48-hour hold. When ICE does issue detainers, the PEP detainer forms are required to ensure that probable cause exists for ICE to arrest the immigrant, and the period of extended LEA custody is strictly limited to 48 hours, rather than 48 hours plus weekends and holidays, as was previously the case.⁴⁷

A final significant difference between Secure Communities and PEP is that DHS has announced plans to address LEAs' concerns about their interaction with DHS and to comply with any relevant state or local laws or executive actions limiting LEA-DHS cooperation. While ICE sought to require

⁴² Police Executive Research Forum, *Local Police Perspectives on State Immigration Policies* (Washington, DC: Police Executive Research Forum, 2014), www.policeforum.org/assets/docs/Free_Online_Documents/Immigration/local%20police%20perspectives%20on%20state%20immigration%20policies.pdf.

⁴³ Laurence Benenson, "Law Enforcement Immigration Task Force Principles," National Immigration Forum, January 2015, <http://immigrationforum.org/blog/leitf-principles/>.

⁴⁴ Major Cities Chiefs Association, "Major Cities Chiefs: Immigration Policy."

⁴⁵ Immigrant Legal Resource Center, "Immigration Enforcement: Advocacy Tools to Better Understand and Combat Immigration Enforcement," accessed November 30, 2015, www.ilrc.org/enforcement.

⁴⁶ Marc R. Rosenblum, *Federal-Local Cooperation on Immigration Enforcement Frayed; Chance for Improvement Exists* (Washington, DC: MPI, 2015), www.migrationpolicy.org/news/federal-local-cooperation-immigration-enforcement-frayed-chance-improvement-exists.

⁴⁷ ICE, "Priority Enforcement Program," accessed November 30, 2015, www.ice.gov/pep.

that localities comply with any and all immigration detainer requests under Secure Communities, under PEP the department will reach individual agreements with local jurisdictions with respect to the terms and conditions under which immigrants are transferred from police to ICE custody.⁴⁸ As a result, certain jurisdictions may further restrict which noncitizens they will transfer to DHS custody beyond the limits implied by DHS's national priorities.

As I have argued elsewhere, PEP appears well designed to retain the operational benefits of Secure Communities by continuing to identify potentially removable immigrants through FBI-DHS information sharing while limiting the removal of low-priority cases and restricting the use of immigration detainers.⁴⁹ In that sense, PEP is designed to favor higher quality over a higher quantity of removals. Perhaps the most important indicator of PEP's promise is that dozens of jurisdictions that had limited their cooperation with ICE under Secure Communities have agreed to honor certain ICE requests under PEP.⁵⁰ Nonetheless, no data have been made available to date on how PEP is working in practice, and it is too early to evaluate its impact on public safety or its effects on immigrant communities.

3. Impact of Interior Enforcement on Immigrant Communities

Interior enforcement can have far-reaching and long-term effects on deportees' families, employers, and the broader communities in which immigrants live. An estimated 20 to 25 percent of deportees are parents of U.S.-citizen children; children and U.S. spouses and partners who are left behind following a parent's deportation suffer a wide range of negative behavioral and emotional outcomes, financial hardship, and housing instability, as well as declines in school performance, among other adverse effects.⁵¹ On one level, these adverse impacts are an inevitable byproduct of interior enforcement (as well as border enforcement targeting returning immigrants) given the deeply integrated U.S. unauthorized population. As Doris Meissner and I have argued elsewhere, "The deportation dilemma is that more humane enforcement is fundamentally in tension with stricter immigration control. A robust enforcement system inevitably inflicts damage on established families and communities."⁵²

The social and psychological costs of enforcement also depend on where and how enforcement occurs. Numerous studies have found that large-scale raids at worksites and other public locations push whole immigrant communities underground.⁵³ Raids at immigrants' houses (for instance by NFOP teams) can have a particularly damaging impact on spouses and children, particularly when

⁴⁸ For a fuller discussion of the differences between Secure Communities and the Priority Enforcement Program, see Rosenblum, *Understanding the Potential Impact of Executive Action on Immigration Enforcement*; ICE, "Priority Enforcement Program."

⁴⁹ Rosenblum, *Understanding the Potential Impact of Executive Action on Immigration Enforcement*.

⁵⁰ DHS, "Remarks By Secretary Of Homeland Security Jeh C. Johnson At Congressional Hispanic Caucus Institute 2015 Public Policy Conference – As Delivered," October 7, 2015, www.dhs.gov/news/2015/10/07/remarks-secretary-homeland-security-jeh-c-johnson-congressional-hispanic-caucus.

⁵¹ Heather Koball, Randy Capps, Sarah Hooker, Krista Perreira, Andrea Campetella, Juan Manuel Pedroza, William Monson, and Sandra Huerta, *Health and Social Service Needs of U.S.-Citizen Children with Detained or Deported Immigrant Parents* (Washington, DC: The Urban Institute and MPI, 2015), www.migrationpolicy.org/research/health-and-social-service-needs-us-citizen-children-detained-or-deported-immigrant-parents.

⁵² Rosenblum and Meissner, *The Deportation Dilemma*, 53.

⁵³ Randy Capps, Rosa Maria Castañeda, Ajay Chaudry, and Robert Santos, *Paying the Price: The Impact of Immigration Raids on America's Children* (Washington, DC: The Urban Institute, 2007), www.urban.org/research/publication/paying-price-impact-immigration-raids-americas-children; Ajay Chaudry, "Children in the Aftermath of Immigration Enforcement," *The Journal of the History of Childhood and Youth* 4, no. 1 (2011): 137-54.

the children witness the arrest of a parent.⁵⁴ And cooperation between ICE and local LEAs through traffic stops has been widely found to discourage immigrants from driving, threatening livelihoods.⁵⁵ Significant enforcement efforts can spread fear throughout immigrant communities, even among families and children that are not directly affected by detention or deportation.⁵⁶ In addition, two-thirds of unauthorized immigrants are employed. Deportations disrupt U.S. labor markets and reduce job creation by U.S. firms.⁵⁷ By one estimate, deporting all 11 million unauthorized immigrants would cut the U.S. workforce by 6.4 percent and reduce U.S. real GDP by \$1.6 trillion (5.7 percent).⁵⁸

4. Civil Liberties and Racial Profiling

Interior immigration enforcement raises special civil liberties concerns because immigration violations are generally civil (i.e., non-criminal) offenses, but immigration enforcement relies on extensive police-like powers. Noncitizens may be forcibly detained in jail-like settings, cut off from their livelihoods, and permanently separated from their homes and families—all without the benefit of legal representation. Guarding against civil-rights violations also merits special attention because 96 percent of people removed from the United States between 2004 and 2013 were Latin American or Caribbean—a number that far exceeds these regions' share of the unauthorized population (79 percent),⁵⁹ and which is consistent with a broader history of racial profiling and law enforcement discrimination against Americans of Hispanic or Black descent.⁶⁰

Concerns about civil rights are especially acute with respect to immigration enforcement programs that rely on direct and indirect partnerships with state or local LEAs. Various studies have found evidence of racial profiling and pretextual arrests associated with deployment of the 287(g) program and Secure Communities in certain communities.⁶¹ Several federal courts in 2014 found that it is unconstitutional for LEAs to hold people beyond their criminal justice proceedings exclusively on the basis of an ICE detainer.⁶² In addition, a 2013 report found that more than 800 U.S. citizens were the subject of ICE detainers between FY 2008 and FY 2012, even though ICE does

⁵⁴ Koball et al., *Health and Social Service Needs of U.S.-Citizen Children with Detained or Deported Immigrant Parents*.

⁵⁵ Ibid; and Capps, Rosenblum, Chisti, and Rodríguez, *Delegation and Divergence: 287(g) State and Local Immigration Enforcement*.

⁵⁶ Joanna Dreby, "The Burden of Deportation on Children in Mexican Immigrant Families," *Journal of Marriage and Family* 74 (2012): 829–45.

⁵⁷ Andri Chassamboulli and Giovanni Peri, *The Labor Market Effects of Reducing the Number of Illegal Immigrants* (Cambridge, MA: The National Bureau of Economic Research, 2014), www.nber.org/papers/w19932.

⁵⁸ Gitis and Collins, "The Budgetary and Economic Costs of Addressing Unauthorized Immigration: Alternative Strategies."

⁵⁹ MPI calculations based on removal data from DHS, *Yearbook of Immigration Statistics: 2013 Enforcement Actions* (Washington, DC: DHS, 2013), www.dhs.gov/publication/yearbook-immigration-statistics-2013-enforcement-actions; Marc R. Rosenblum and Ariel G. Ruiz Soto, *An Analysis of Unauthorized Immigrants in the United States by Country and Region of Birth* (Washington, DC: MPI, 2015), www.migrationpolicy.org/research/analysis-unauthorized-immigrants-united-states-country-and-region-birth.

⁶⁰ Tanya Golash-Boza, *Deported: Policing Immigrants, Disposable Labor and Global Capitalism* (New York: New York University Press, 2015).

⁶¹ American Civil Liberties Union of Georgia, *The Persistence of Racial Profiling in Gwinnett: Time for Accountability, Transparency, and an End to 287(g)* (Atlanta: American Civil Liberties Union of Georgia, 2010), www.acluga.org/download_file/view_inline/1504/392/; also see DHS, Office of Inspector General, *The Performance of 287(g) Agreements*.

⁶² *Miranda-Olivares v. Clackamas Cty.*, No. 3:12-cv-02317-ST, 2014, at *1; *Galarza v. Szalczyk*, 745 F.3d 634; *Morales v. Chadbourne*, 996 F. Supp. 2d 19, 29. Also see Michael Kagan, *Immigration Law's Looming Fourth Amendment Problem* (Las Vegas: University of Nevada, Las Vegas, William S. Boyd School of Law, 2015), <http://scholars.law.unlv.edu/cgi/viewcontent.cgi?article=1936&context=facpub>.

not have the authority to issue detainers in these cases.⁶³ DHS should ensure greater transparency about enforcement programs and outcomes to allow communities to hold DHS and its partners accountable for civil-rights violations.

Conclusion

Congress has devoted considerable attention in recent years to questions surrounding DHS's enforcement priorities and its exercise of prosecutorial discretion. The controversy is not whether DHS should set enforcement priorities and exercise discretion in certain cases; every administration (and indeed every law enforcement agency) does so, and the failure to set priorities would be irresponsible at best. Nor would it appear that the controversy is over the substantive content of the current administration's policies, as its enforcement priorities and criteria for exercising discretion align closely with decades of statutory and executive precedents.

It seems clear, instead, that questions about the administration's enforcement programs primarily concern how to weigh competing priorities. How important is it to maximize the number of removals, and the number of interior removals in particular, versus focusing attention on high-priority cases and exercising discretion—for both practical and humanitarian reasons—in certain other cases? How much weight should be placed on protecting public safety when police departments see their involvement in immigration enforcement as competing with their core responsibilities? Is increasing the number of deportations more important than protecting the well-being of communities, employers, and immigrant families? What can be done to ensure that immigration enforcement does not violate Americans' civil and constitutional rights? These questions have only become more difficult in the last decade as ICE has developed more powerful tools to deport noncitizens from the U.S. interior.

⁶³ Transactional Records Access Clearinghouse (TRAC), *ICE Detainers Placed on U.S. Citizens and Legal Permanent Residents* (Syracuse, NY: TRAC, Syracuse University, 2013), <http://trac.syr.edu/immigration/reports/311/>.