

## Seeking Fair and Effective Administration of Immigration Laws

Immigration presents courts and administrative agencies with tremendous challenges. A lack of consensus and resources for total enforcement of laws governing entry to and status in the country creates selective enforcement and debates over how to deploy limited resources. Most of those caught up in enforcement efforts have no access to legal representation to help them protect their rights. Immigration courts are overloaded and produce decisions that are inconsistent from court to court and judge to judge.



This brief examines how the courts, the Justice Department and the Department of Homeland Security administer justice and enforce immigration laws. They attempt to keep as many illegal entrants out of the country as possible, reduce the availability of illegal employment and take action against some who remain here illegally.

Assessing the success of enforcement efforts is difficult because the issues are complex and emotional, and success is hard to define, much less measure. Many worry that the administration of immigration justice is unfair and inequitable, while others complain that border enforcement is weak and that too many illegal immigrants are allowed to remain in the country.

In a politically charged climate, both courts and immigration agencies face difficult tasks. If Congress provides a path to legal status for some illegal residents, as currently proposed, authorities will see new bureaucratic structures and guidelines. Providing a path to legal status will increase demands to identify and remove those not eligible for, or who wish not to pursue, that path. In addition, such undertakings require additional funds at a time when resources are scarce. The new immigration debate highlights the need to craft better policies to direct the institutions most responsible for enforcing the laws fairly.

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## Background

An estimated 11 to 12 million residents in the United States are not authorized to be here. More slip into the country every year, although the number of illegal entrants has been coming down as of late. Last year, the Homeland Security Department's Immigration and Customs Enforcement removed (formerly "deported") about 350,000 illegal residents. Almost every person facing a final removal order, however, is entitled to contest it in the nation's immigration courts.

These courts are not part of the federal court system, whose principal judges are appointed by the president after Senate confirmation; their life tenure and generous resources promote effective and independent decision making. The immigration courts are a unit of the nation's chief law enforcement agency, the Department of Justice, which appoints their judges. They handled almost 300,000 matters last year, making them a key component in the nation's efforts to enforce its immigration laws fairly and effectively. Nevertheless, they have been largely overlooked in the debate over immigration reform, which has chiefly concerned border control and worksite enforcement. By almost all accounts, the immigration courts have too much work for the resources provided them, producing inconsistent decisions and major delays.

*"The immigration courts lack the resources they need to administer the laws fairly and effectively."*

## Immigration Courts

Homeland Security agents issue orders directing the removal of immigrants they conclude are in the country illegally. Most immigrants facing a removal order, however, may contest it in the immigration courts. They might dispute the findings of inadequate documentation, for example, or claim a right of asylum for fear of persecution if returned to the home country. In 2008, over 230 immigration judges serving in some 50 courts nationwide handled approximately 292,000 proceedings—285,000 of which concerned removal orders, up from 250,000 in 2004.

Judges ordered removal in 80 percent of the 229,000 proceedings that produced a decision whether to order removal. In most cases, their decisions are final. Only 9 percent of immigrants appealed their decisions to the Department of Justice's Board of Immigration Appeals, which handled almost 35,000 matters last year. Immigrants may appeal unfavorable Board decisions to the U.S. Courts of Appeals. Last year, those courts heard about 10,000 such appeals. However, circuit judges are bound to give substantial deference to immigration judge determinations.

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cases grew by 19 percent since 2006 alone. Comparing the resources available to immigration courts and to the U.S. District Courts is illustrative, especially since few argue that federal district judges are underworked.

In 2008, each immigration judge completed on average 964 adversary proceedings that produced a decision whether to order removal—about 20 per week. By contrast, on a per judgeship basis, each federal district judge disposed of 480 cases in 2008, saw about 27 trials or trial-like proceedings (e.g., sentencing hearings), about 10 of which produced a verdict or judgment.

District judges have two law clerks each and a court reporter to produce a verbatim record of the proceedings. Attorneys represent both parties in most proceedings. Five hundred magistrate judges handle preliminary matters, misdemeanors and petty offenses, and some civil trials. By contrast, every four immigration judges share one law clerk. They have no judicial adjuncts, and they record their proceedings themselves with tape recorders (unless the immigrant participates by video from a detention center, which has its own problems for judges' credibility assessments).

Homeland Security trial attorneys, known for their aggressiveness, represent the government in all immigration court proceedings, but over half the immigrants facing removal last year did not have lawyers, placing a greater burden on the judge to protect their rights in proceedings beset as well by inadequate translation and cultural differences. It is basic U.S. law that the government will provide lawyers to criminal defendants who cannot afford counsel. Aliens in immigration court proceedings, however, are civil respondents, not criminal defendants. Congress has made clear that any legal representation aliens have shall be "at no cost to the government." Somewhat ironically, then, the government will provide a lawyer (usually an assistant federal public defender) to an indigent alien charged in federal court with illegal entry or identify theft. But immigrants in a removal proceeding—facing an array of arcane procedures—must either go it alone, find and pay for a lawyer, or hope to benefit from a patchwork arrangement of counsel provided through various pro-bono efforts. There are significant barriers to adequate representation. For example, detainees housed in remote, local jails have difficulty finding immigration lawyers, pro-bono or otherwise.

Immigration judges face conflicting objectives. They do not enjoy the Administrative Procedure Act's requirements for competitive selection and secure tenure, designed to promote independent adjudication. Rather, the Justice Department states that immigration judges "act as the Attorney General's delegates in the cases that come before them," even though they should "act independently in deciding" those cases. Immigration judges assert that their selection and supervision by the nation's chief law enforcement officer impairs the appearance and often the reality of effective and impartial adjudication.

These defects in the immigration courts matter because immigration judges decide cases of often great (even life-and-death) moment to a class of litigants scorned by large segments of the population. Chief among them are cases in which immigrants seek asylum in the United States because they fear persecution in their home country due to their race, religion, nationality, political beliefs or membership in a particular social or religious group. The 229,000 immigration court removal proceedings in 2008 included 24,000 asylum claims that reached a substantive termination—100 per judge, on average. By contrast, federal district judges terminated, on average, 48 cases claiming civil rights violations (excluding prisoner petitions). Of those, 38 cases per judgeship saw a preliminary conference or some other judicial involvement.

Immigration judges grant asylum inconsistently. The immigration courts' *aggregate* asylum grant rate of 45 percent in 2008 compares favorably with the 32 percent global rate of asylum grants reported by the United Nations High Commissioner for Refugees. However, the immigration judges' 45 percent grant rate obscures wide disparities between and within immigration courts, even in cases involving aliens from the same country. For example, according to research undertaken by Rajmi-Nogales and his colleagues, in 2000-2005, individual judge grant rates in Chinese asylum cases in the Los Angeles court ranged from 9 percent to 81 percent, with a court-wide average of 32 percent. And having a lawyer made a difference. Immigration judges granted asylum to 16 percent of aliens without counsel, compared to 46 percent of immigrants with lawyers, a gap the authors believe cannot be explained solely by lawyers' looking for winnable cases. U.S. Court of Appeals judges have cited some immigration judges' "systematic failure ... to provide reasoned analysis for the denial of applications for asylum," and news reports appear regularly chronicling judges' cavalier treatment of asylum seekers.

Board of Immigration Appeals cases have strained the courts of appeals in those circuits where most of the removal proceedings begin. Nationally, the courts of appeals saw a modest 6 percent increase in all filings since 2002, but a 131 percent increase in appeals from the Board. The increase has been especially burdensome in the Second Circuit (New York, Connecticut, Vermont) and the Ninth (California and other western states). In the Second, total appeals are up 42 percent since 2002, but Board appeals have increased over 400 percent, comprising of 42 percent of that court's caseload.

A 2006-2007 Justice Department review of immigration courts led to attorney general directives to restore merit-based judicial selection and use of performance

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appraisals, a code of conduct, complaint procedures, immigration law examinations for new judges, enhanced training, and bench reference materials. Unclear is how many of the directives have been implemented or will be, at least in the foreseeable future. The Obama administration's 2010 budget for the immigration courts proposes an 11 percent increase over 2009 levels, mainly for a legal orientation program for detained aliens, for the courts' case processing system, and for 28 more immigration judges. The additional judges (along with 19 more judges now being hired) would reduce proceedings per judge from 964 to slightly over 800—if Homeland Security held its removal efforts steady, which it won't.

The Justice Department's Executive Office of Immigration Review has taken steps to help detained aliens understand immigration court procedures, and it works with several nonprofit immigrant assistance groups to match aliens with pro-bono counsel. According to its website, the Office has helped 450 aliens secure pro-bono counsel since 2001.

The American Bar Association and other organizations have also tried to assist. Judge Robert A. Katzmann of the U.S. Court of Appeals for the Second Circuit, for example, has launched a project to encourage law firms, nonprofits, specialized and other bar associations, corporate counsel, and law school clinics to increase the amount of pro-bono representation in immigration proceedings. "Justice," he told a colloquium of private lawyers and others he assembled in New York in March 2009 "should not depend on the income level of immigrants."

More far reaching organizational proposals, first raised at least ten years ago and unlikely of enactment, are to transform the immigration courts from an arm of the Justice Department to a more independent "Article I" court, somewhat akin to the Tax Court. That change would end the situation whereby an executive branch official with an interest in the outcome of judges' decisions has the authority to promote or discipline those judges. Yet, Article I status might not help the courts' resource problems. They may be better off in the Justice Department—if the Department is willing to fight for resources in Congress—than cast free to swim on their own in hostile, anti-immigrant legislative waters.

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## Enforcement

Immigration courts sit at the end of the immigration enforcement pipeline, which begins at the border and proceeds to efforts to identify unauthorized residents who evade border detection or lose their eligibility to remain in the country. These other elements of the pipeline have received most of the attention in the immigration

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reform debate. For many, the more than 11 million unauthorized residents in the country bespeak wholly inadequate enforcement. To many others, the benefits of total enforcement are not worth the costs in tax dollars, in family dislocation and to the economy.

The Obama administration has sought a slight budget increase for Department of Homeland Security immigration (and customs) enforcement activities—1 percent over the 2009 budget to just above \$20 billion, and a 4 percent increase in personnel to almost 90,000. Yet any politically feasible increase in enforcement resources is unlikely to allow the government to remove many more than the 350,000 people removed last year.

## **Policing Entry into the Country**

Homeland Security's Customs and Border Protection (CBP) tries to stop unauthorized persons and objects from entering the country. Its Secure Border Initiative has made it much harder for nonresidents to cross the border illegally. In 2008, CBP apprehended almost 724,000 illegal entrants on the border, down from 1,189,000 in 2005. Due to a lack of resources, the government puts only a fraction of those apprehended into formal proceedings. Homeland Security's Immigration Statistics Office reports that the department let approximately 740,000 illegal entrants, apprehended at the Mexican and Canadian borders in 2007, return home voluntarily.

Not all illegal entrants escape formal proceedings. In 2006, the "catch-and-release" policy for *non*-Mexican illegal entrants ended. The department now places nearly all those aliens in detention facilities until removal hearings, rather than give them a hearing date and trust them to appear.

Immigration officers may also order an "expedited removal" if they find an effort to enter the country by fraud or misrepresentation. In 2007, there were 106,000 expedited removals, 50 percent more than in 2001. Unlike regular removal proceedings, in an expedited removal an alien cannot seek review before an immigration judge unless s/he asserts a fear of persecution in the home country. The government extols expedited removal as a tool to fight smuggling and human trafficking. Critics warn that it gives immigration officers too much discretion to order removal without judicial review.

The "Operation Streamline" program on the Southwest border seeks, not Homeland Security administrative procedures, but rather prosecution in federal court on a "zero tolerance" basis. Most entrants apprehended in the five judicial districts along the border are charged with petty offenses, carrying sentences of six months or less. Supporters claim that these sentences' deterrent effect explains the reduction in

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border apprehensions, and call for more resources. Others argue that illegal entrants simply shift entry points to avoid sites that have temporarily ramped up prosecutions. In 2008, the 70,000 immigration defendants in the five courts along the border were 75 percent of those courts' total defendants. Yet, the number of migrants apprehended at the border is in the high six figures.

Opponents also argue that the resources that Operation Streamline uses could be directed at more serious offenses, such as drug cartel operations. That may change with increased government resources to curb border drug violence and weapons shipments.

Construction is nearly complete on a \$2.5 billion border fence, which includes sophisticated technologies and physical barriers to deter, detect and help apprehend illegal entrants. Critics want to suspend the fence's construction until DHS can address allegedly under-evaluated technologies, environmental dangers, mismanagement, and significant cost overruns. The Obama administration, though, plans to continue construction, because, said the president, securing the borders is a prerequisite to policy changes that will "get people [already here] out of the shadows and on a pathway to citizenship."

## **Non-Border Removal**

Homeland Security's Immigration and Customs Enforcement (ICE) tries to identify and remove those who evade detection at the border or who enter the country legally but remain despite status changes that render them illegal—say, a visa expiration.

ICE at times describes its mission broadly as "to develop the capacity to identify and remove all removable aliens," a modest goal compared to a 2003 ICE plan that envisioned "the removal of all removable aliens" by 2012. On other occasions, ICE describes its mission more specifically: "to fight crime and terrorist activity . . . track the money trails that support smuggling and document fraud. . . build cases against criminals [and] sexual predators." This language effectively concedes that, given current resources, millions of aliens living here illegally but peacefully are unlikely to face removal actions. ICE reportedly removed 349,041 aliens in 2008, triple the amount in 2001. Yet, even if ICE tripled its 2008 removals, that would amount to only one-tenth of today's illegal alien population.

In May 2009, Homeland Security Secretary Janet Napolitano emphasized "public safety" when describing "a renewed department-wide focus on two different emphases for our immigration enforcement efforts": criminal aliens and employers who knowingly hiring illegal workers.

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For several years, ICE has linked federal, state and some local fingerprint databases in order to identify and remove illegal aliens as they enter the criminal justice system, as well as to identify incarcerated aliens and secure final removal orders before their release. (Noncitizens here legally are nevertheless subject to removal if convicted in state or federal court of crimes of “aggravated felonies,” “controlled substances,” or “moral turpitude.” There is confusion over which offenses, including misdemeanors, these terms embrace.) In 2008, ICE removed 117,000 of the 300,000-450,000 criminal aliens it estimates are in the country. In May 2009, DHS announced plans to expand these checks from federal and state prisons to all local jails with the goal of identifying and removing more criminal aliens.

Advocates for more vigorous enforcement efforts see the emphasis on removing violent criminals as what Texas legislator Lamar Smith called, “defacto amnesty” for millions of other illegal aliens. Immigrant advocacy groups, though, see widespread fingerprint checks as steps toward broader checks, threatening illegal residents who are otherwise law-abiding. Others fear that integrating federal, state and local databases to check biometric data could produce errors and scoop up immigrants, legal and otherwise, convicted of minor offenses.

### **Worksite Enforcement**

One of the thorniest enforcement problems is unauthorized residents’ using—and employers’ failure or inability to recognize—fraudulent documents to gain employment. DHS urges businesses to use its voluntary “E-Verify” program, which promises quick, online verification of such documents. Several states have made E-Verify mandatory for state agencies and contractors. Nationally, only one percent of businesses uses the program, but the Obama administration plans to mandate its use for federal contractors.

E-Verify’s proponents point to a relatively small rate of errors (e.g., reporting eligible workers as ineligible and vice versa). Opponents argue that if the current program were expanded to all businesses the number of workers affected by errors would increase to the millions. That is one basis for a Chamber of Commerce lawsuit to prevent the federal contractor mandate. Most agree that for E-Verify to be effective, especially if expanded to all employers, the program must be complemented with tamper-proof, machine-readable social security cards using biometric data.

In 2008, ICE expanded its “worksite enforcement” program of “targeting employers suspected of hiring large numbers of illegal workers,” chiefly restaurants, processing plants and construction sites. The raids caused raves and rebukes that belie the tiny number of aliens arrested: about 1,000 criminal arrests and 5,200 administrative arrests (removal actions) in 2008. The raids prompted charges of assembly-line procedures for workers charged in federal court with social security fraud or identity



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theft, as well as humanitarian objections over children separated from their incarcerated or removed parents (to which the Bush administration responded with guidelines to protect such children, pregnant women and minors). Defenders say the raids are a powerful cause of “attrition through enforcement,” encouraging many illegal workers to leave, and therefore should be ramped up.

Of 2008’s 1,103 criminal arrests, only 135 were owners or managers. In July 2009, ICE announced a new strategy: widespread auditing of employers suspected of routinely hiring illegal workers and seeking civil and criminal penalties for offenders. On one July day alone, ICE reportedly sent notices to 652 businesses, compared to 503 in all of 2008. The new policy seems to signal the end of worksite raids and attendant alien arrests, yet businesses will have to fire unauthorized workers, who may be deported.

### **Detention**

Homeland Security has statutory authority to detain aliens whom it places in removal proceedings. ICE uses over 300 facilities. Local and county jails house about two thirds of these detainees under intergovernmental agreements. Some detention is mandatory—e.g., national security risks and criminal aliens. In 2007, ICE detained over 300,000 aliens, up from 232,000 in 2003; average daily detention is approximately 31,000.

Increasing detention capacity will likely facilitate the removal of more of the 560,000 “fugitive aliens” who ICE says remain in the country despite final removal orders. Last year, ICE removed 37,000 of these aliens, up from previous years. There is disagreement over whether ICE targets the most dangerous fugitive aliens. Advocates for more detention argue that less than 20 percent of non-detained aliens with final removal orders actually leave the country. Others argue that the \$2.4 billion that ICE spends on detention could be used for more effective enforcement elsewhere. For example, they say pilot-tested monitoring programs have produced high appearance rates for certain types of non-detained aliens.

*“Actions by state and local governments have a sizable impact on immigrants.”*

In 2007, ICE reported an average detention stay of 37 days, but pro-immigrant groups have pointed to instances of much longer stays. Critics have also documented inadequate physical and mental medical care, even deaths; detention of aliens in remote locations that frustrate efforts of family and lawyers to assist them; and punishment of detainees for protesting their conditions of confinement. Critics have welcomed ICE’s 2008 Operational Manual based on “National Detention Standards,” but claim that it lacks an effective enforcement mechanism.

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## **State and Local Enforcement**

Actions by state and local governments have a sizable impact on immigrants. Some state and local policies, like federal laws, target employment eligibility, use of fraudulent documents and smuggling. Some jurisdictions have restricted illegal residents' access to public services. And generic police powers—zoning and nuisance abatement ordinances, for example—are often aimed particularly at unauthorized residents.

Homeland Security has augmented its own resources with memoranda of understanding with 60 local law enforcement agencies—training and deputizing over 400 officers under its “287(g)” program. Police organizations have looked warily on this effort and called for limiting local enforcement activities to the investigation of serious offenders and determining the immigration status of local jail populations. Police officials argue that pervasive local police involvement in immigration enforcement discourages cooperation by immigrants in routine inspections, diverts resources from other police activity, and increases the departments' exposure to liability and litigation, particularly for racial profiling.

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## References

Data on Department of Homeland Security operations come mainly from fact sheets and other documents posted on the department's website <http://www.dhs.gov/index.shtm> and those of its component units. Data on immigration court performance come mainly from the Executive Office of Immigration Review's Fiscal 2008 Statistical Year Book, available at <http://www.usdoj.gov/eoir/statspub/fy08syb.pdf>. Data on federal court performance come from the B, C, D, and M Tables for appropriate years of Administrative Office of the United States Courts, ANNUAL REPORT OF THE DIRECTOR: JUDICIAL BUSINESS OF THE UNITED STATES COURTS <http://www.uscourts.gov/judbus2008/contents.cfm>.

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*Reforming immigration policy has been a subject of intense debate and promises to be so again in this new political climate. This series presents the work of experts from a variety of fields at Brookings and is designed to inform the public debate over immigration policy. Our goal is to stimulate new thinking on this important area and to present new information that sheds light on major immigration concerns and trends.*

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