

OPERATION STREAMLINE:

THE BORDER PATROL PROSECUTIONS INITIATIVE

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All along the line, the tireless Border Patrol drives, flies, walks. They hit the trails on small ATVs like weekend dune buggy enthusiasts. The heroic BORSTAR rescuers hunt for people in trouble. The secretive BORTAC SWAT troops (called “the hunter-killers” by one Cactus Cop) go on their covert missions. A legendary unit of Customs flits in and out of the night like ghosts, the “Shadow Wolves,” Native American trackers who hunt down drug runners. Added to the mix is the DEA, often belittled by local cops: “DEA means Don’t Expect Anything.” BLM cops. And at each border crossing are the border guards (not, the Border Patrol wants you to know, what they do)—INS agents.

There are also big angry white men in Jeeps, two separate groups of “citizen” border watchers working the western desert outside of Tucson. And the human rights groups are also wandering around, hoping to save dying walkers and placing water jugs on the trails. Then there are the prospectors, drug smugglers, journalists, scientists, FBI, park rangers, Park Service cops, BLM agents, military police, ranchers, Indians, outlaw biker gangs. Scattered here and there are small groups of militias and “patriot militias,” their trailers pulled into secure configurations, upside-down American flags and black MLA/POW flags and the occasional Jolly Roger fluttering in the wind.

With so many hunters trying to catch [him], it’s a wonder he managed to get lost.

*— Luis Alberto Urrea, *The Devil’s Highway**

INTRODUCTION

In the desolation of the desert, the line appears thin. A barbed wire fence. A sign. “Frontera USA.” “Prohibido.” “Peligro - Zona Despobada.” On the border, entry without inspection seems possible. But all roads north are blocked. A vast network of United States Border Patrol installations lie just beyond the horizon—however far that may be.

The central tenant of the United States border security policy is Prevention Through Deterrence: to raise the probability of apprehension to the point its

potential costs outweigh the benefits of unauthorized migration.¹ Each component of the border security apparatus contributes to holding the line. Traditional examples include Operation Gatekeeper (fencing) and Operation Phalanx (drones). The latest components are “enhanced consequence delivery systems,” one of which is the Operation Streamline prosecutions initiative (2005).²

The traditional penalty for unauthorized migration is deportation, a civil sanction. Once deported, a non-citizen is barred from seeking readmission for at least five years.³ Operation Streamline enhances this consequence by piling on a criminal charge, Entry Without Inspection (EWI), on top of the civil sanction.⁴ An EWI conviction serves to classify a non-citizen as a criminal immigrant, which is a blight on any future visa applications. This article focuses on the process and implications of delivering these enhanced consequences.

Operation Streamline has caused an unprecedented increase in the number of immigration cases processed by the federal justice system. The policy is responsible for a 156 percent increase in the number of criminal immigration cases filed in federal criminal courts between 2005 and 2010; EWI referrals account for 96 percent of this increase and represent 68,229 new criminal migrants. [FIGURE 1]⁵

Criminal immigration referrals set the due process system in motion. Defendants are booked and processed by the U.S. Marshals Service (USMS), counseled by the Federal Public Defender’s office, prosecuted by the United States Attorney’s Office (USAO), adjudicated by the federal bench, and imprisoned by the Bureau of Prisons, all before they are deported. This article describes each step in the Streamline process in relation to the Department of Justice (DOJ) agency that carries it out, from apprehension to release. It also describes streamlined hearings.

In an effort to mitigate the impacts of the influx in referrals, Southwest border courts ‘streamline’ illegal entry matters. True Streamliners⁶ see the inside of the courtroom only once. Their hearings are a combination of the arraignment, evidentiary, and sentencing phases of a textbook federal court proceeding involving a guilty plea, and occur en masse. These abbreviated, or fast-tracked, proceedings are referred to as “streamline hearings.”

1 United States Border Patrol. *Border Patrol Strategic Plan: 1994 and Beyond, National Strategy*. Washington, D.C.: U.S. Border Patrol, 1994.

2 National Research Council. *Budgeting for Immigration Enforcement: A Path to Better Performance*. Washington, DC: The National Academies Press, 2011.

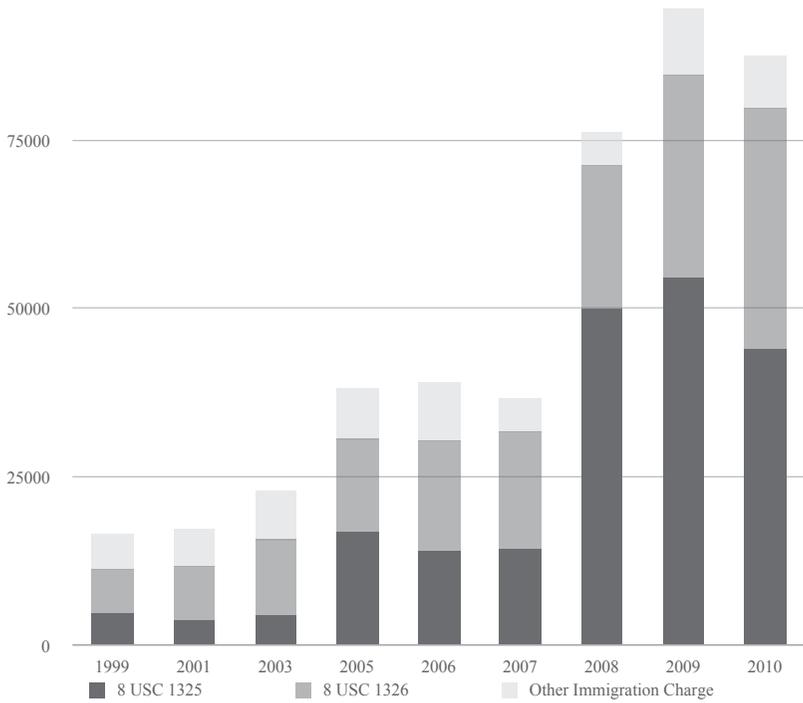
3 See 8 U.S.C. § 1182(a)(9)(A).

4 Entry without inspection: Improper time or place; avoidance of examination or inspection; misrepresentation and concealment of facts,” Title 8 *US Code*, Chapter 12, Subchapter II, Part VIII, §1325 (a) and “Reentry of Removed Aliens,” Title 8 *US Code*, Chapter 12, Subchapter II, Part VIII, §1326.

5 Source: Transactional Records Access Clearinghouse. *Federal Criminal Enforcement: TRAC Express: Lead Charge: Focus: [District]: [Lead Charge]: Referrals Received and Disposed Of: Annual Series: Last 6 Years*. 2011. <http://tracfed.syr.edu>

6 “True Streamliners” is a term coined by William Fry. Interview with William D Fry, Supervisory Assistant Federal Public Defender, Del Rio, Texas (December 15, 2011) [hereinafter Fry Interview].

FIGURE I: NATIONWIDE CRIMINAL IMMIGRATION PROSECUTIONS



| <i>Fiscal Year</i> | <i>Immigration</i> | <i>8USC1325</i> | <i>8USC1326</i> | <i>Other Immigration</i> |
|--------------------|--------------------|-----------------|-----------------|--------------------------|
| 1999 | 16522 | 4457 | 6838 | 5227 |
| 2001 | 17204 | 3359 | 8384 | 5461 |
| 2003 | 22643 | 4095 | 11329 | 7219 |
| 2005 | 37981 | 16504 | 13963 | 7514 |
| 2006 | 38662 | 13643 | 16493 | 8526 |
| 2007 | 36624 | 13960 | 17679 | 4985 |
| 2008 | 75856 | 49663 | 21320 | 4873 |
| 2009 | 94027 | 54175 | 30126 | 9726 |
| 2010 | 87364 | 43688 | 35836 | 7840 |

This article is an anatomy of Operation Streamline. It is structured as a timeline of events, and based on three case studies: Yuma, Arizona; Tucson, Arizona; and Del Rio, Texas. The story begins with apprehension, and follows the migrant's journey through the criminal justice system, exploring implications along the way. The final section outlines the present political status of Operation Streamline, and recommends a comprehensive accounting of the program.

BACKGROUND

Before we begin our discussion of Streamline, it is important that we understand the field and the players.

THE SOUTHWEST BORDER

Of all Border Patrol agents, 85 percent are stationed on the Southwest border. The area is cut into nine patrol zones, spanning eleven federal judicial districts. Of the 1,952 miles of Southwest border, 649 miles are fenced.⁷ In addition to fencing, geographic barriers such as the fast flowing Rio Grande River and the sweltering Sonora Desert complicate crossing.

THE UNITED STATES BORDER PATROL

The men in green are no small contingency. Customs and Border Protection (CBP) has more officers authorized to carry a weapon and make an arrest than any other federal law enforcement agency in the United States.^{8,9} In an effort to thicken the border, the Patrol's operational authority extends 100 miles inland from the U.S. border. Agents track movement within their operational zone using manned and unmanned aircraft;¹⁰ video surveillance; and seismic, magnetic and thermal technology.¹¹ They set up both fixed and tactical checkpoints to screen

- 7 Operation Hold-the-Line, initiated in September of 2003, covers the twenty-mile border between the El Paso metro area and Juarez, Mexico. Operation Gatekeeper (1994), runs from the Pacific to the Arizona border. Operation Safeguard (Arizona) and Operation Rio Grande (Texas) are ongoing. Local resistance stifles construction. For example, DHS's failed attempt to erect a segment of the Rio Grande wall, bisecting the University of Texas Brownsville campus. Legal challenges have thus far been thwarted by dismissal. The judiciary denies plenary powers over congressional mandate; IIRIRA grants INS (DHS) the authority to usurp land essential to "control and guard the boundaries and borders of the United States" (IIRIRA, Section 102(d); 8 US Code 1103(b)). See, for example, *Texas Border Coalition v Napolitano et al.*
- 8 Andreas, Peter. *Border Games: Policing the US-Mexico Divide*. 2nd ed. Ithaca, NY: Cornell University Press, 2009. Print. 90.
- 9 United States Customs and Border Patrol is two agencies in one. Customs officers work at ports of entry and Border Patrol roves between ports of entry.
- 10 130 aircraft and three Unmanned Aircraft operate along the Southwest Border (See United States Department of Homeland Security. *FY 2012 Budget in Brief*. 2011. Print. 69). There are two joint USBP-US Military Unmanned Aircraft operations: Operation Jump Start (June 2006 – July 2008) and Operation Phalanx (July 2010 – June 30, 2011). See United States Government Accountability Office. *DoD's Role in Helping to Secure the Southwest Border*. GAO-11-856R. Washington, DC: General Accounting Office, September 12, 2011. 17–18.
- 11 See Secure Border Initiative: SBIInet (SBI Network) or SBI Tactical Infrastructure.

traffic traveling on U.S. roads stretching 100 miles from the border.¹² They also patrol the inland roads, performing stops, much like police officers.¹³

Between 2000 and 2011, the Southwest Border Patrol doubled its manpower, from 8,580 to 17,535 agents.¹⁴ More men in green means more control over the operational zone; thus, the greater the operational control, the fewer migrants attempt to cross.

THE CROSSERS

The numbers of illegal crossing attempts has dropped drastically in the past thirty years, as measured by a drop in apprehensions. Those who do attempt the trek across the Southwest border have been herded into increasingly inhospitable regions.¹⁵ These individuals make the journey to the border from all over the world, the vast majority from Mexico, followed by Guatemala, El Salvador, and Honduras.¹⁶ [FIGURE 2]¹⁷

The Rules of the Game

An illegal border crosser is in violation of both immigration law and criminal law. Once apprehended, the Border Patrol has the discretionary power to release, deport, or criminally charge the suspect. The first course of action is referred to as voluntary return, and is only applicable to citizens of contiguous countries. The border crosser is taken to the Border Patrol station, processed, and then transported back across the border that same day.¹⁸ The second course of action, deportation, is referred to as expedited removal.¹⁹ The Patrol, acting in the stead

12 Border Patrol checkpoints are on U.S. soil, not to be confused with Ports of Entry, staffed by Customs. A fixed checkpoint is a permanent structure; officers, canines, and scanning technology screen all traffic traveling through the checkpoint. A tactical checkpoint is a temporary structure, erected to achieve the element of surprise.

13 See *Terry v Ohio*, 392 US 1 [1968].

14 Note: In 1998, the percentage of agents with less than two years experience stood at 39 percent. United States Government Accountability Office. *Border Patrol Hiring: Despite Recent Initiatives, Fiscal Year 1999 Hiring Goal Was Not Met*. GAO/GGD-00-39. Washington, DC: General Accounting Office, 1999. 2.

15 For more information on the spatial distribution of migrant deaths in relation to border fortification, see Cornelius, Wayne A. "Death at the Border: Efficacy and Unintended Consequences of US Immigration Control Policy." *Population and Development Review*. 27.4 (2001): 661–685.

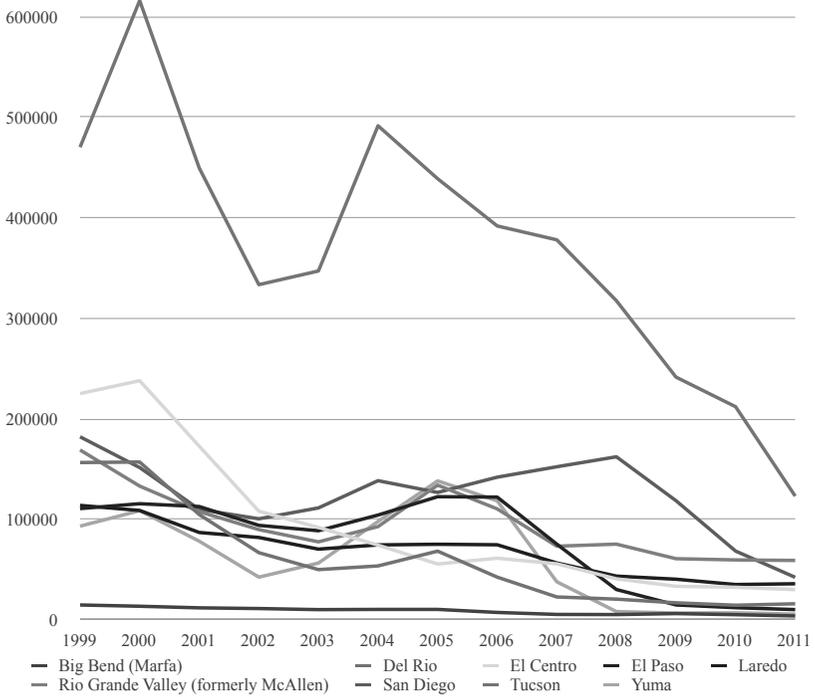
16 For Border Patrol apprehensions by leading country of nationality see: Department of Homeland Security. DHS Office of Immigration Statistics. "FactSheet: U.S. Border Patrol Apprehensions (2005-2010)." July 2011. *Table 1. U.S. Border Patrol Apprehensions by Border, Age, Gender and Leading Country of Nationality: Fiscal Years 2005 to 2010*. See also: <http://www.dhs.gov/immigrationstatistics>.

17 Source: United States Border Patrol. "Southwest Border Sectors: Total Illegal Alien Apprehensions By Fiscal Year (Oct. 1 through Sept. 30th)." http://www.cbp.gov/xp/cgov/border_security/border_patrol/usbp_statistics/

18 A photograph, two flat fingerprints, and biographical information are entered into the Patrol's Automated Biometrics Identification System to identify repeat illegal entrants, then cross-referenced with the FBI's Integrated Automated Fingerprint Identification System to identify criminal entrants.

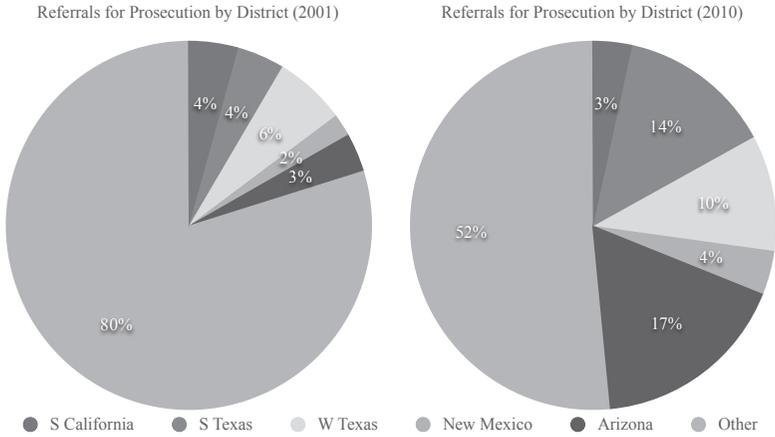
19 Expedited removal applies to individuals apprehended within 100 miles of the border, who cannot establish they have been on U.S. soil for a continuous fourteen-day period, and who are third-country nationals or Mexican or Canadian nationals with prior criminal or immigration

FIGURE 2: UNITED STATES BORDER PATROL ILLEGAL ENTRANT APPREHENSIONS (BY SECTOR)



| <i>Fiscal Year</i> | <i>Big Bend</i> | <i>Del Rio</i> | <i>El Centro</i> | <i>El Paso</i> | <i>Laredo</i> | <i>Rio</i> | <i>San Diego</i> | <i>Tucson</i> | <i>Yuma</i> |
|--------------------|-----------------|----------------|------------------|----------------|---------------|------------|------------------|---------------|-------------|
| 1999 | 14952 | 156653 | 225279 | 110857 | 114004 | 169151 | 182267 | 470449 | 93388 |
| 2000 | 13689 | 157178 | 238126 | 115696 | 108973 | 133243 | 151681 | 616346 | 108747 |
| 2001 | 12087 | 104875 | 172852 | 112857 | 87068 | 107844 | 110075 | 449675 | 78385 |
| 2002 | 11392 | 66985 | 108273 | 94154 | 82095 | 89927 | 100681 | 333648 | 42654 |
| 2003 | 10319 | 50145 | 92099 | 88816 | 70521 | 77749 | 111515 | 347263 | 56638 |
| 2004 | 10530 | 53794 | 74467 | 104399 | 74706 | 92947 | 138608 | 491771 | 98060 |
| 2005 | 10536 | 68506 | 55722 | 122679 | 75346 | 134186 | 126904 | 439079 | 138438 |
| 2006 | 7520 | 42636 | 61465 | 122256 | 74840 | 110528 | 142104 | 392074 | 118549 |
| 2007 | 5536 | 22920 | 55883 | 75464 | 56714 | 73430 | 152460 | 378239 | 37992 |
| 2008 | 5391 | 20761 | 40961 | 30312 | 43658 | 75473 | 162390 | 317696 | 8363 |
| 2009 | 6360 | 17082 | 33521 | 14999 | 40569 | 60989 | 118721 | 241673 | 6951 |
| 2010 | 5288 | 14694 | 32562 | 12251 | 35287 | 59766 | 68565 | 212202 | 7116 |
| 2011 | 4036 | 16144 | 30191 | 10345 | 36053 | 59243 | 42447 | 123285 | 5833 |

FIGURE 3: SOUTHWEST FEDERAL JUDICIAL DISTRICT SHARE OF NATIONWIDE FEDERAL PROSECUTIONS



| <i>Fiscal Year</i> | <i>Arizona</i> | <i>New Mexico</i> | <i>W Texas</i> | <i>S Texas</i> | <i>S California</i> | <i>Other</i> |
|--------------------|----------------|-------------------|----------------|----------------|---------------------|--------------|
| 1999 | 4812 | 2455 | 8177 | 4978 | 5318 | 102720 |
| 2001 | 4447 | 2575 | 8274 | 5476 | 5604 | 104674 |
| 2003 | 6663 | 4053 | 8474 | 7483 | 4625 | 109410 |
| 2005 | 7256 | 3673 | 8010 | 22290 | 3498 | 109676 |
| 2006 | 13558 | 4093 | 8082 | 16935 | 3583 | 108715 |
| 2007 | 10584 | 3185 | 7292 | 15914 | 5314 | 102824 |
| 2008 | 22002 | 5326 | 24012 | 24902 | 6366 | 100405 |
| 2009 | 27478 | 8712 | 22107 | 35155 | 7058 | 105020 |
| 2010 | 34709 | 7627 | 20203 | 27052 | 6694 | 102432 |

of an immigration judge, performs an accelerated deportation.²⁰ The process takes approximately one month, during which time the crosser is detained in Border Patrol facilities.²¹ The third course of action is to charge the migrant with the crime of EWJ;²² the individual is remanded to a federal detention facility awaiting arraignment. Charging illegal crossers criminally is currently the preferred course of action in every sector along the Southwest border. While this is a relatively new trend in border enforcement, it is an aggressive one.²³ [FIGURE 3]²⁴

OPERATION STREAMLINE

SCREENING

The Operation Streamline procedure begins in the Border Patrol Screening Office. Post apprehension, suspected illegal migrants are transported to the nearest Border Patrol station where they are photographed, fingerprinted, and required to supply certain biographical information.²⁵ These identifiers are entered into the Department of Homeland Security (DHS) Automated Biometric Identification System (IDENT). Here, the information is cross-referenced with the IDENT lookout and recidivist databases.²⁶ Minutes later, photographs of potential matches are returned. The agent is responsible for determining whether the returned photographs match the individuals in custody.²⁷ Following to the identification

violations. Designating Aliens Subject to Expedited Removal Under Section 235(b)(1)(A)(iii) of the Immigration and Nationality Act, 67 Fed. Reg. 68,924 (Nov. 13, 2002); Designating Aliens For Expedited Removal, 69 Fed. Reg. 48,877 (Aug. 11, 2004).

- 20 Expedited removal carries the same weight as a formal deportation, and prevents the individual carrying it from legal admission to the United States for at least five years. See 8 U.S.C. § 1182(a)(9)(A).
- 21 Press Release, U.S. Department of Homeland Security, U.S. Government Seeks to End Litigation Undermining Expedited Removal of Salvadorans (Nov. 17, 2005). http://www.dhs.gov/xnews/releases/press_release_0798.shtm.
- 22 Entry without inspection: "Improper time or place; avoidance of examination or inspection; misrepresentation and concealment of facts," Title 8 *US Code*, Chapter 12, Subchapter II, Part VIII, §1325 (a). "Reentry of Removed Aliens," Title 8 *US Code*, Chapter 12, Subchapter II, Part VIII, §1326.
- 23 In 2011, 8USC§1326 was the most commonly recorded lead charge in all federal prosecutions nationwide, surpassing the 2010 most commonly recorded lead charge: 8USC§1325. Transactional Records Access Clearinghouse. "Illegal Reentry Becomes Top Criminal Charge." June 10, 2011. <http://trac.syr.edu/immigration/reports/251/>
- 24 Source: Transactional Records Access Clearinghouse. Federal Criminal Enforcement: TRAC Express: Programs: Focus: U.S.: [Program Category]: Referrals Received and Disposed Of: Annual Series: Last 6 Years. 2011. <http://tracfed.syr.edu>
- 25 Each Patrol station is furnished with a dedicated processing unit, equipped with a digital camera and an electronic fingerprinting system, connected via virtual network to the IDENT database.
- 26 "Aliens are entered into the lookout database if they are convicted of an aggravated felony, multiple crimes, or crimes of moral turpitude; are known or suspected to be narcotics, weapons, or human smugglers; or are inadmissible due to security concerns (including terrorists) or other related grounds." Congressional Research Service. *Border Security: the Role of the US Border Patrol* by Chad C. Haddal. Washington: The Service, 2010. 11.
- 27 "IDENT (Automated Biometric Identification System)" Encyclopedia of Espionage, Intelligence and Security. 1st ed. 2nd vol. The Gale Group, Inc, 2004. 95-96.

process, the migrant's profile is forwarded to the Border Patrol Screening Office.

The Border Patrol Screening Office assigns one of the three the modes of removal, voluntary return, expedited removal, or criminal prosecution.²⁸ The determinations made in this office are based upon a set of confidential guidelines.²⁹ Factors involved include the migrant's citizenship, age, health, criminal history, and immigration history, as well as the capacity of the area court.

The Screening Office prioritizes migrants from non-contiguous countries (NCCs) due to bed space issues.³⁰ For citizens of countries other than Mexico, voluntary return to Mexico is not an option.³¹ Instead, these individuals are formally deported via Expedited Removal.³² The United States government prefers to detain illegal entrants throughout the expedited removal process, the duration of which averages thirty-two days. Prior to Streamline, illegal entrants apprehended in excess of detention capacity were released,³³ on the Southwest

28 There is a single screening office within each Patrol sector.

29 Interview with Rebecca Bustos, Prosecutions Agent, United States Border Patrol, Yuma, Arizona (December 12, 2011) [hereinafter Bustos Interview]

30 The term used in the literature and in practice is "Other Than Mexicans" or "OTMs." The author has substituted the phrase "Non-Contiguous Citizens" or "NCCs" and will be using it throughout this paper. The term is more specific as it includes Canadians.

31 "OTMs apprehended along the Southwest border by the USBP between official POE [Point of Entry] cannot be returned to Mexico because Mexico will not accept them. Instead, they must be returned to their countries of origin, or third-party countries that will accept them." Congressional Research Service. *Border Security: Apprehensions of "Other Than Mexican" Aliens*, by Blas Nunez-Neto, Alison Siskin, and Stephen Vina. Washington: The Service, 2008. ii. See also: Immigration and Nationality Act §241(b)(2).

32 Prior to 1996, the Executive Office carried out all INS-referred deportations for Immigration Review (EOIR) Immigration Court. Post the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, deportations began to be carried out by INS via Expedited Removal. By 2006, Expedited Removal was normal means for all Southwest CBP deportations. Congressional Research Service. *Immigration Policy of Expedited Removal of Aliens*, by Alison Siskin and Ruth Ellen Wasem. Washington: The Service, 2005. 7-8. Press Release, U.S. Customs and Border Protection, DHS Expands Expedited Removal Authority Along Southwest Border. September 15, 2005. http://www.cbp.gov/xp/cgov/newsroom/news_releases/archives/2005_press_releases/092005/09142005.xml

33 The Office of Detention and Removal handles the detention of all EOIR Immigration Court custodies, for example, ICE referrals. After 2005, referring deportations to the EOIR Immigration Court was no longer an option for CBP. Commensurately, DHS became responsible for the detention of Border Patrol Expedited Removals. "ER was originally used by the INS in official POE. Because people attempting to enter the country at a POE can be denied entry and, in effect, immediately turned around and sent back to the country they came from, ER was seen as a convenient mechanism for expediting the removal process. Between POE, however, the ER process is more complicated. Because OTMs apprehended between POE are already in the United States illegally, they cannot be denied entry... Because the OTMs cannot be returned to the country they crossed into the United States from Mexico they must be returned to their country of origin or some other third country that will accept them. While the ER process is demonstrably quicker than the regular removal process, the mandatory detention feature means that OTMs apprehended by the USBP under ER must be detained for the entirety of the time it takes to return them - on average thirty-two days... As the USBP begins expanding ER to the entire southwest border, a possible issue for Congress could involve whether DHS has the budgetary manpower, and detention resources in place to effectively implement this expansion." Congressional Research Service. *Border Security: Apprehensions of "Other Than Mexican" Aliens*, by Blas Nunez-Neto, Alison Siskin, and Stephen Vina. Washington: The Service, 2008. 24-25.

border, NCCs were released onto U.S. soil, after being served by the Border Patrol with an Order to Appear before an immigration judge. Operation Streamline originated in response to this very situation.^{34, 35} A disproportionate number of NCCs cross into the United States via the Eagle Pass, Texas, corridor.³⁶ DHS lacked geographically appropriate detention space to hold them all. The Eagle Pass Patrol states NCCs would often approach agents asking for *permiso* to enter the United States, or Orders to Appear.³⁷ In 2005, the Border Patrol approached the USAO for the Western District of Texas with a proposal to charge illegal entrants criminally under 8USC§1325 and 8USC§1326, the effect of which would be to transfer detention responsibility to the DOJ.³⁸ Thus began Operation Streamline.

Certain categories of migrants are exempt from Streamline. Individuals previously legally admitted to the United States are referred by CBP to Immigration and Customs Enforcement (ICE).³⁹ Once in ICE custody, detainment becomes the responsibility of the Office of Detention and Removal (DOR) and prosecution that of the Executive Office of Immigration Review (EOIR) Immigration Court. In addition, mothers traveling with children under the age of fourteen, migrants ages zero to fourteen, the elderly, the ill, and the incapacitated are all exempt from Streamline.⁴⁰ The remaining illegal entrants make up the pool of Streamline candidates.

In the case of eligible candidates, Screening Office determinations are based upon the capacity of the area court. In sectors with high apprehension rates but comparatively low area-court capacities, Screening Offices are more selective of which migrants they refer for criminal prosecution, and vice versa. In the Yuma sector, for example, the Screening Office refers nearly 100 percent of those apprehended for prosecution; the Border Patrol makes an average of sixteen arrests

34 Lydgate, Joanna. "Assembly Line Justice: A Review of Operation Streamline." *California Law Review*. 98.481 (2010).

35 "The issue of OTM apprehensions has received publicity recently for many [...] reasons, which were highlighted during congressional testimony by DHS [former] Deputy Secretary Admiral James Loy when he stated that Al-Qaeda is considering infiltrating the Southwest border..." Congressional Research Service. *Border Security: Apprehensions of "Other Than Mexican" Aliens*, by Blas Nunez-Neto, Alison Siskin, and Stephen Vina. Washington: The Service, 2008. ii.

36 Mexico HWY 57, originating in Mexico City, runs directly North to Eagle Pass, Texas. Migrants traveling from Central and South America to the United States often begin the final leg of their journey in Mexico City. This results in large numbers of NCCs crossing via the Eagle Pass corridor. In addition, Lydgate reports: "The road from Monterey, Mexico, to the United States runs directly through Piedras Negras, making Eagle Pass an attractive point of entry." Lydgate, Joanna. "Assembly Line Justice: A Review of Operation Streamline." *California Law Review*. 98.481 (2010): 491.

37 Lydgate, Joanna. "Assembly Line Justice: A Review of Operation Streamline." *California Law Review*. 98.481 (2010): 492.

38 "The USAO for the Western District of Texas, however, 'took one look' at the plan and declined to participate, informing the Border Patrol that prosecuting people on the basis of national origin would be a potential equal protection violation... The Border Patrol ultimately came up with a plan to prosecute all migrants—Mexicans and non-Mexicans alike—apprehended in this particular area of Eagle Pass." Lydgate, Joanna. "Assembly Line Justice: A Review of Operation Streamline." *California Law Review*. 98.481 (2010): 493.

39 This category includes, but is not limited to, those with expired visas. The rationale being that overstay is the purview of US immigration courts.

40 These ineligible individuals are voluntarily returned if they are citizens of Mexico.

daily, while the capacity of the court is sixty.⁴¹ In Tucson, the Border Patrol makes an average of 531 arrests daily, but the area court's Streamline cap is set at seventy. The Tucson Screening Office thus prioritizes, in descending order, migrants in the lookout database,⁴² citizens of NCCs, re-entrants, and migrants with prior voluntary return(s).

When the Screening Office makes the determination to charge an illegal entrant with a violation of 8USC§1325 or 8USC§1326, a Streamline matter is opened. The Screening Office refers the matter to the appropriate Federal District Court for prosecution, an arraignment is scheduled, and the Border Patrol transports the now-defendant into the custody of the USMS.

HOLDING

The USMS is responsible for the detention and transportation of Streamliners until their sentencing.⁴³ Once in USMS custody, migrants are housed in courthouse holding cells or at a local detention facility. For example, Streamline defendants arraigned in Tucson are held in USMS courthouse holding cells because the distance between the Tucson courthouse and a suitable detention facility is 70 miles. Those arraigned in Del Rio are held at the Val Verde Correctional Facility, located just five miles north of the courthouse.⁴⁴ The USMS securely transports defendants to and from these facilities, as needed. Migrants are escorted in constraints, a standard element of courthouse security. Convicts sentenced in excess of time served are remanded to a federal detention facility, under the purview of the federal Bureau of Prisons. Migrants granted time served are returned to the custody of the Patrol, transported to the border, and released.

Border Patrol agents assist the USMS in performing Streamline-related duties. This reinforcement occurs at every step of the process. In Del Rio, Border Patrol agents guide their referrals through the court's financial questionnaire to establish indigency. In Tucson, when the USMS expressed concern over the extraordinarily low ratio of marshals to detainees, CBP responded by detailing two agents to augment courtroom security.⁴⁵ This practice is not unique to Tucson.

41 The Yuma magistrate court also handles cases referred by the El Centro and San Diego Border Patrol offices (Southern District of California). Interview with Matthew Johnson, Assistant Federal Public Defender, Yuma, Arizona (December 20, 2011) [hereinafter Johnson Interview].

42 Only in cases where punitive action has been carried out to completion are migrants referred for prosecution under Streamline. Otherwise wanted illegal entrants are referred to and transferred into custody of the appropriate agency.

43 An individual detained pursuant to a violation of federal law undergoes three inter-agency transfers. First, the arresting agency CBP is accountable for costs incurred prior to transfer into United States Marshal Service custody within 48 hours of arrest. Next, the USMS is accountable for costs up to the transfer into Bureau of Prisons custody post-sentencing. Detainees are guaranteed probable cause determination (arraignment) within 48 hours of a warrantless arrest. *County of Riverside v. McLaughlin*. 500 U.S. 44. Supreme Court of the United States. 1991. *Cornell University Law School Legal Information Institute (LII)*. Web. 15 April 2012.

44 For the locations of detention facilities housing non-citizens, see <http://www.detentionwatch-network.org/dwnmap>.

45 Oversight Hearing on the "Executive Office for United States Attorneys" Before the United States

Border Patrol agents are detailed to Streamline proceedings in Yuma, as well—two marshals and two Border Patrol agents to thirty defendants. While this cooperation preserves the feasibility of Streamline, it does not eliminate its burden on the USMS budget.

Holding Implications

The USMS reports that “Nowhere has the impact of changing law enforcement priorities on detention expenditures been more observable than with the implementation of zero tolerance immigration enforcement policies by the DHS along the Southwest Border.”⁴⁶ In fact, the number of USMS criminal immigration bookings has more than doubled since Streamline’s 2005 implementation.⁴⁷ To prevent this influx from over-stretching DOJ component budgets, including that of the USMS, these cases are streamlined.

From a budgetary perspective, Operation Streamline is made possible by fast-tracking. Detention fund outlays are a function of average daily prisoner population, or, the total number of bookings, multiplied by average length of stay. By minimizing length of stay, DHS limits Streamline’s dependence on the USMS.⁴⁸ [FIGURE 4]⁴⁹

“The impact of the added immigration bookings has been mitigated to a substantial extent by policies adopted by the U.S. Attorneys, DHS, and the federal judiciary to fast-track these cases through the criminal justice process [...] The reduction in detention time has offset the impact of the unanticipated increase in bookings.”⁵⁰ While fast-tracking may make Streamline possible, it also gives rise to due process concerns.

House of Representatives Subcommittee of Commercial and Administrative Law, 100th Congress (2008) (amended written statement of Heather E. Williams, First Assistant Federal Public Defender, District of Arizona, Tucson). 8. <http://judiciary.house.gov/hearings/pdf/Williams080625.pdf>

46 U.S. Department of Justice, Office of the Federal Detention Trustee, *FY 2012 Performance Budget, President’s Budget*. 2011. 7. www.justice.gov/jmd/2012justification/pdf/fy12-ofdt-justification.pdf.

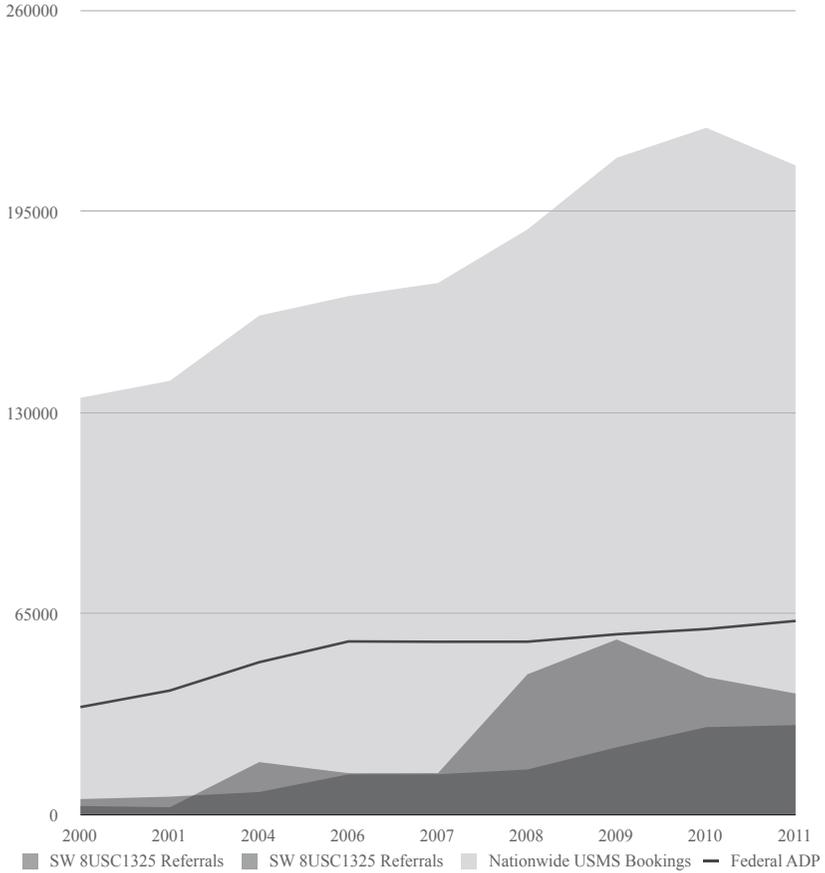
47 U.S. Department of Justice, U.S. Marshals Service, *FY 2013 Performance Budget, President’s Budget, Federal Prisoner Detention Appropriation*, February 2012, p. 7.

48 Fast-tracking also limits the rigor of processing. For example, those who arrive at the detention facility within twenty-four hours of their scheduled arraignment generally appear before the court in their street clothes; those held for durations exceeding twenty-four hours generally appear in jumpsuits.

49 United States Department of Justice. Justice.gov. Office of the Federal Detention Trustee: Statistics: Prisoner Bookings. <http://www.justice.gov/ofdt/prisoner.htm>
Source: Transactional Records Access Clearinghouse. Federal Criminal Enforcement: TRAC Express: Lead Charge: Compare: [AZ, NM, TXW, TXS, CAS]: [Factor to Compare]: Rank: Order: Annual Series: [Time Period]. 2011. <http://tracfed.syr.edu> United States Department of Justice. Justice.gov. Office of the Federal Detention Trustee: Statistics: Average Daily Detention Population. <http://www.justice.gov/ofdt/population.htm>

50 U.S. Department of Justice, Office of the Federal Detention Trustee, *FY 2012 Performance Budget, President’s Budget*. 2011. 7. www.justice.gov/jmd/2012justification/pdf/fy12-ofdt-justification.pdf

FIGURE 4: SOUTHWEST ENTRY & RE-ENTRY WITHOUT INSPECTION REFERRALS
vs.
NATIONWIDE USMS BOOKINGS & FEDERAL ADP



| | 2000 | 2002 | 2004 | 2006 | 2007 | 2008 | 2009 | 2010 | 2011 |
|---------------------------------|--------|--------|--------|--------|--------|--------|--------|--------|--------|
| Southwest 8USC1326 Referrals | 4725 | 5493 | 6999 | 12712 | 12744 | 14275 | 21455 | 27968 | 28627 |
| Southwest 8USC1235(a) Referrals | 2488 | 2075 | 16677 | 13087 | 13121 | 45040 | 56306 | 44156 | 38834 |
| USMS Nationwide Bookings | 134417 | 139898 | 160983 | 167292 | 171531 | 188806 | 211986 | 221681 | 209526 |

DEFENSE

Yuma, Arizona

The Federal Public Defenders Office handles the representation of Yuma Streamline defendants.⁵¹ Five attorneys are assigned to this office, and they rotate a single attorney onto Streamline duty each day.⁵² On average, defendants number between twenty and thirty each Tuesday through Friday, and as many as sixty on Mondays.⁵³ Depending on the caseload, the Federal Public Defender (FPD) arrives two to three hours before the start of the first session to advise his clients.

Attorney-client meetings are conducted in groups. The USMS selects defendants and delivers them to an interview room, in which their awaiting counsel receives them. The interview room is a secured space: a holding cell, furnished with a table and chairs, with a capacity of eight persons. Generally, the USMS delivers defendants five at a time, but as their selection is loosely based on charge, numbers range from one to seven.

The assigned FPD spends, on average, twenty minutes advising each group of clients. On December 12, 2011, the Yuma court disposed thirty-two misdemeanor illegal entry cases and three felony re-entry cases. Matthew Johnson, Assistant Federal Public Defender, represented the defendants in each of these cases. He reported that he arrived at the courthouse at 9:30 a.m. and received clients in the usual groups of five. As the Streamline proceedings began at 11:45 a.m., Mr. Johnson spent roughly twenty minutes advising each group of clients.

Tucson, Arizona

The attorney-to-client ratio in Tucson is five to one.⁵⁴ The Tucson FPD office rotates one of its thirty-five staff attorneys onto Streamline duty each day.⁵⁵ The remaining defendants are represented by panel attorneys; those who are willing

51 Under certain, limited circumstances, Yuma Streamline defendants are represented by CJA Panel Attorneys: 1) a conflict of interest arises or 2) the defendant was apprehended within the boundaries of the Southern District of California; Yuma sector Patrol is responsible for California's Imperial County; illegals apprehended within this slice of the zone are tried in Arizona. Johnson Interview.

52 In 2008, Heather E. Williams, First Assistant Federal Public Defender, District of Arizona, Tucson, reported that, "Two to three assistant FPDs handle Streamline each day, interviewing clients in the morning, with court in the afternoon." Oversight Hearing on the Executive Office for United States Attorneys Before the United States House of Representatives Subcommittee of Commercial and Administrative Law, 100th Congress (2008) (amended written statement of Heather E. Williams, First Assistant Federal Public Defender, District of Arizona, Tucson). 6. This is no longer the case, as reported by Matthew Johnson, AFPPD, on December 20, 2011, and as witnessed by this author on December 12, 2011.

53 Johnson Interview.

54 Interview with Wanda Day, Criminal Justice Act (CJA) Panel Attorney, Tucson, Arizona (December 13, 2011) [hereinafter Day Interview].

55 Interview with Elizabeth Lee, Assistant Federal Public Defender, Tucson, Arizona (December 13, 2011) [hereinafter Lee Interview].

to participate commit to regular days each week.⁵⁶ This reliance on Criminal Justice Act (CJA) attorneys is the greatest of any Streamline court. On average, Tucson prosecutes seventy Streamline cases per day, which requires thirteen panel attorneys to supplement the single on-duty FPD.⁵⁷

Tucson attorney-client meetings are on an individual basis. They take place in the Special Proceedings Courtroom, beginning at 9:00 a.m. For the purpose of these meetings, tables are situated directly in front of the bench, spaced approximately six feet apart. Each counselor stations themselves at a separate table and receives his or her clients one at a time, as USMS delivers the defendants.

The duration of each attorney-client meeting varies, based on the needs of each client. Elizabeth Lee, Tucson Assistant Federal Public Defender (AFPD) provided a few examples. For defendants who have been through the process previously, the conferences move quickly. In contrast, for those clients from what she describes as “a different world,” the process unfolds slowly; the attorney is tasked with explaining fundamental aspects of the process. Lee describes herself in these circumstances as explaining, “what a court is, what a trial is, what time is.” This is not an exaggeration. The now-defendants at this point in the process journey from corners of southern Mexico and Central America that are so vastly different in atmosphere from that of downtown Tucson that another world is certainly an apt description. Wanda Day, Tucson CJA panel attorney, describes Streamline interviews as “emotionally draining.” Streamline defendants “all want to tell their stories,” to divulge their reasons for crossing, to humanize their cases. Day said she listens, but finds it hard to explain that in the eyes of the judge, their story is irrelevant (or who the judge is, and that she is not that person).

The interview session ends at noon, and at 1:30 p.m., the Streamline proceedings begin. The furniture is not rearranged. The excess counsel tables are convenient for the thirteen defense attorneys, who are up and down throughout the procedure, and would otherwise be forced to move in and out of the gallery.

Del Rio, Texas

Defense depends on the day of the week in Del Rio. The Federal Public Defenders Office receives Streamline appointments solely on Mondays. The four remaining Streamline dockets are each appointed to a single, separate CJA panel attorney. As a result, the FPD defends entrants apprehended over the weekend, whereas CJAs handle weekday crossers. Attorneys receive their appointments the day of filing, one day prior to arraignment. This allows the attorneys a nearly full day to interview clients.

⁵⁶ Day Interview.

⁵⁷ A Tucson Streamline CJA Panel attorney is paid \$100 per hour. The duration of an average Tucson Streamline duty is six hours. Six hundred dollars, times thirteen panel attorneys, equals \$7,800 per day. There are 251 working days in 2012, excluding weekends and ten holiday-days. Therefore, a rough estimate of the 2012 total cost of CJA Panel representation for Tucson Streamline is \$1,957,800.

Attorney-client interviews take place at Val Verde Correctional Facility, in a classroom-type area. The Federal Public Defenders Office conducts one-on-one interviews with their Streamline defendants.⁵⁸ Eleven attorneys and four investigators are on staff in the Del Rio FPDO. CJA panel attorneys often conduct attorney-client meetings in a seminar style.⁵⁹ Clients are encouraged to approach counsel separately if desired. On high-volume days, Del Rio CJA panel attorney Robert Garza said he finds it helpful to assemble the audience into three sections, based on criminal and immigration history, and then address each separately. Garza often assigns his aids two of the three sections. As an example, a typical, fifty-defendant conference ranges three to four hours.⁶⁰

Until 2007, Del Rio appointed solely panel attorneys to Streamline defendants.⁶¹ Instead of an hourly wage, as is normal means in the Western District, these attorneys were paid fifty dollars per client represented. A race to the bottom soon ensued. Participating counsel suggested a single attorney or pair of attorneys, on a rotating basis, cover each day's Streamline docket. The court approved it, and this system is still in place today.⁶² In practice, when Streamline dockets number greater than sixty, the excess defendants are appointed to the FPDO. Dockets exceeding sixty are not an anomaly. On the April morning this sentence was composed, eighty-three misdemeanor illegal entry defendants were arraigned in Del Rio, sixty represented by a single Panel attorney and the remaining twenty-two by the FPDO.⁶³

This thinly stretched ratio is compounded by two additional factors. First, seasonal illegal migration patterns impact the Streamline docket in Del Rio more so than in other districts. Throughout the Southwest, border crossing rates lull in the winter months and peak between April and July.⁶⁴ Because Del Rio operates a fully functioning zero tolerance policy, the Streamline docket size ebbs and flows

58 Fry Interview.

59 Telephone Interview with Robert Garza, Criminal Justice Act (CJA) Panel Attorney, Del Rio Texas (April 19, 2012) [hereinafter Garza Interview].

60 Garza Interview.

61 It is unclear why the FPDO did not participate in Streamline until 2007. Lydgate reports two sides of the story: Fry claiming his office initially “refused to play the game,” and former Del Rio District Judge Alia Ludlum claiming the FPDO did not have the capacity to handle the additional caseload at the time. Lydgate... 504.

62 Today, CJA Panel attorneys are compensated per Streamline client as follows: [Garza Interview]

| | | |
|-------|---------|---------|
| 0-12 | 13-50 | +51 |
| \$100 | \$75.00 | \$50.00 |

63 April 19, 2012. To access Del Rio Judges' Docket Calendars use: <http://www.txwd.uscourts.gov/calendar/default.asp#delrio>

64 Illegal migration patterns correspond with harvest seasons and other similar temporary employment opportunities. “[...] harvest season—May through July—is known as ‘death season.’ It is then that lettuce, tomatoes, cucumbers, oranges, strawberries are all ready to be picked. Arkansas chickens are ready to be plucked. Cows are waiting in Iowa and Nebraska to be ground into hamburger [...] and the western desert is waiting, too —its temperatures soaring [...]” Urrea, Luis Alberto. *The Devil's Highway*. 1st ed. New York, NY: Little, Brown and Company, Time Warner Book Group, 2004. Print. 34.

in tandem, resulting in panel attorneys receiving as many as sixty appointments on high-season days. Yuma observes a similar effect, although to a lesser extent, as apprehension rates are three times lower.⁶⁵ Additionally, the Yuma FPD, handling sixty defendants cannot be exactly compared to a CJA panel attorney doing the same. The FPD office is collaborative; it employs multiple attorneys, investigators, and office aids. This atmosphere cannot be matched by a panel attorney plus hired help.

Defense Implications

Illegal entry is a highly defensible crime. It is the burden of the government to prove the defendant knowingly crossed into the United States without passing through a designated point of entry. This can be done one of two ways: government witness to the act or defendant confession. Both of these are problematic; the majority of illegal entrants are not caught in the act of crossing but are apprehended on U.S. soil miles after the fact. Further, Border Patrol agents rarely work in pairs, so, lacking corroboration, confessions made in the field are rendered inadmissible. Level of defensibility, however, is not a variable often affecting the outcome of Streamline cases.

The vast majority of Streamline defendants plead guilty. Alleged illegal entrants facing fewer than thirty days tend to have no interest in pleading not guilty, once notified by counsel they will remain incarcerated throughout the trial preparation period, the duration of which is thirty days.⁶⁶ For those facing stays of incarceration exceeding thirty days, the prospect of a reduced sentence is enticing enough to solicit a similar guilty plea; in exchange for a guilty plea, Streamline defendants are offered a possible reduction in sentence. It is the familiar idea that if one confesses, the judge may go easy on him. In other words, Streamline plea agreements do not carry sentencing stipulations.

Instead of sentencing stipulations, Streamline defense attorneys rely on empirics. Each case outcome adds to what, over time, becomes a relative understanding of the sentencing habits of each judge. The following table provides similar estimates in days served.⁶⁷

65 In 2011, the Del Rio Patrol apprehended 16,144 illegal entrants whereas the Yuma Patrol apprehended 5,833 illegal entrants.

66 The maximum time allowed under United States Code for the government to prepare its case.

67 In Del Rio, an illegal entrant, carrying two 8USC§1325(a) convictions will be sentenced under 8USC§1326 if apprehended a third time. In Arizona, illegal entrants with a single prior illegal entry conviction or a single prior deportation will be sentenced under 8USC§1326. This has reportedly resulted in a 'judicial emergency' in Arizona, as these cases cannot be disposed at the Magistrate level. Johnson Interview.

TABLE I

| | <i>Yuma</i> | <i>Tucson</i> | <i>Del Rio</i> |
|---|------------------------|------------------------|----------------|
| No History | Time Served | 10 | 10 |
| Past Voluntary Returns | Time Served | 10 | 10 |
| Past Deportation | [Charged as 8USC§1326] | [Charged as 8USC§1326] | 30 |
| Minor Criminal History in the United States | 15 to 30 | 30 | 30 |
| Major Criminal History in the United States | 60 | 60 | 60 |
| Past Conviction of 8USC1325(a) | [Charged as 8USC§1326] | [Charged as 8USC§1326] | 180 |

These estimates can be affected by several outlying factors, including but not limited to: recency of charge; level of offense, for example, an adult male assaulting an adult male would be considered a lesser offense than an adult male assaulting an adult female; number of offenses within each category; intelligence provided, for example, identification of a human smuggler; and level of cooperation with Border Patrol. Because these factors can be arranged in an infinite number of combinations, defense attorneys are never certain as to the punitive measures their Streamline clients face.

The Streamline process strips defense attorneys of many indispensable weapons in their arsenal. Unable to accurately stipulate punitive measures faced, and prevented from proceeding to trial by so-called Hail Mary guilty pleas, their service is rendered ineffective. With tied hands, these attorneys' titles are transformed from counselor and defender to "speaker of Spanish," "explainer of process," and listener.

PROSECUTION

The Border Patrol Agent

The United States is represented by a Border Patrol agent in Yuma 8USC§1325(a) prosecutions, not by a licensed attorney. This agent arrives at the courthouse each morning in an unmarked government vehicle, out of uniform. She remains seated at the prosecution's desk throughout the misdemeanor Streamline session, fielding questions when directed, but otherwise refraining from addressing the court.

The Customs and Border Patrol Special Prosecutor

The Border Patrol also details what are referred to as special prosecutors to carry out streamline prosecutions. In Yuma, these licensed, CBP-employed attorneys appear on behalf of felony Streamline defendants, following appointments to Phoenix. As the Tucson sector has no participating magistrate court, both misdemeanor and felony defendants are appointed to CBP prosecutors; each represents a day's Streamline docket, on a rotating basis. Because the Tucson Streamline docket is disposed in a single session, and encompasses both misdemeanors and felony flips, the Border Patrol presumably viewed detailing an additional agent to represent those misdemeanors as an inefficient use of resources.⁶⁸ Although the opportunity exists, the magistrate court in Del Rio utilizes the services of CBP special prosecutors in misdemeanor Streamline cases, as opposed to unlicensed agents. Here, three CBP special prosecutors handle the misdemeanor dockets on a rotating basis, reserving felony matters for the USAO.⁶⁹

The United States Attorneys' Office

The USAO handles all Del Rio felony matters.⁷⁰ Once felony Streamline defendants are arraigned, they are held at Val Verde to await a periodic docket call that is presided over by a visiting district judge. Repeat illegal entrants are more likely to be charged as misdemeanors in Del Rio than in Arizona; this practice is intended to avoid the overtaxing of district judges.⁷¹ This determination—how and if to charge an individual—is made at the level of the prosecution or the surrogate agency, the United States Border Patrol.

Prosecution Implications

Deferring the prosecution of Streamline matters to Border Patrol agents and CBP special prosecutors usurps the prosecutorial discretion of the USAO. Via normal means, federal enforcement agencies file their charges with the USAO and the USAO determines whether or not to refer the matters for prosecution, and if so, under which charges. This calculation is intended to be representative of the values and standards of 'the People.'⁷² In Streamline, the agenda of the DOJ, and, one could argue, the People, is replaced with that of the referring enforcement agency. Because CBP special prosecutors lack the level of prosecutorial discretion enjoyed by the USAO—both declination authority and the authority to

68 A flip or a flip-flop refers to a defendant's felony 8USC§1326 charge being dropped and substituted with a 8USC§1325(a) conviction, in return for a signed plea agreement.

69 Interview with William J Flynn, Senior Attorney, United States Customs and Border Patrol, Del Rio, Texas (December 15, 2011). [Hereinafter Flynn Interview].

70 Flynn Interview.

71 It is unclear to this author why the Del Rio USAO does not divert felony Streamline matters to CBP prosecutors, as is the procedure in Arizona.

72 The United States Attorneys Office is charged with representing the people of the United States in Federal prosecutions.

manipulate charges—CBP prosecutors are no more than the mouthpieces of the Screening Office, and effectually those of the DHS. As a result, the DHS, an enforcement agency, represents the people of the United States of America in Streamline prosecutions.

HEARING AND SENTENCING

Below is the transcript of a typical en masse Streamline hearing. Note the arraignment, plea entry, and sentencing phases are combined into a single session.

* * *

TUCSON, ARIZONA⁷³

DECEMBER 13, 2011

BEGIN: 1:30 P.M. MST

END: 3:40 P.M. MST

PRESIDING: HONORABLE CHARLES R. PYLE⁷⁴

DEFENDANTS: SIXTY (FEMALE: EIGHT, MALE: FIFTY-TWO)⁷⁵

TRANSLATION: VIA HEADPHONES⁷⁶

COURTROOM SECURITY: BORDER PATROL AGENTS (3) & U.S. MARSHALS (1)⁷⁷

The prosecution moves to dismiss five defendants on “the grounds of language,” as the court declines to provide translation.⁷⁸ The clerk reads each defendant’s name; each defendant stands and responds ‘presente.’ Each defense attorney approaches and states which defendants they represent (average seven). The judge then calls seven defendants to approach the bench at a time.⁷⁹ The judge asks each of the following questions once per group. After the question has been posed, the seven defendants answer in turn or en masse, as indicated.

I first need to confirm your true name. [Defendant’s name], is that your true name?

EACH: Yes / No

All of you are charged with [insert charge]. I understand before court your

73 Streamline proceedings are held every day of the week in the Special Proceedings courtroom, on the second floor of the Tucson district court.

74 Tucson district court justices preside over Streamline proceedings on rotation, once every seven days.

75 All defendants appear in street clothes. Men and women are segregated.

76 Two translators: one speaking Spanish, conveyed through the headphones (not audible in the gallery), the other speaking English, translating defendants responses to the interested parties including the judge, counsel, and clerk.

77 Defendants’ hands are cuffed in front, attached to a chain wrapped around their waists. Their feet are shackled.

78 Many undocumented entrants belong to the indigenous populations of Mexico, residing mainly in the southernmost provinces of Yucatan, Oaxaca, Quintana Roo, Chiapas, Campeche, Hidalgo, Puebla, Guerrero, San Luis Potosi and Veracruz. Their native languages bear no resemblance to Spanish. For these defendants, counsel orders an evaluation by the court interpreter. If Spanish language comprehension is deemed inadequate, the case is dismissed; to commission a translator of even the more common dialect groups such as Nahuatl, Yucatec Maya, Zapotec, and Mixtec is expensive and time consuming.

79 Defendants are separated first by gender and second by charge.

attorney explained the charge to you in Spanish. Do all of you understand the charge against you?

EACH: Yes

You have the right to remain silent, say nothing about the charges against you. Do all of you understand this right?

EACH: Yes

You have the right to be represented by an attorney in all court proceedings. Do all of you understand your right to an attorney?

EACH: Yes

I understand all of you have agreed to plead guilty to the [petty offense, illegal entry]. A maximum sentence of [up to 180 days in prison, a fine of up to \$500, a \$10 court assessment fee]. Do you all understand this maximum punishment?

EACH: Yes

You have the right to a trial, at trial you are presumed innocent, the government must prove your guilt beyond a reasonable doubt. Do you understand this?

EACH: Yes

You have the right to force the government to present its witnesses in court. Your lawyer can question government witnesses under oath. You have the right to our own defense. You have the right to call your own witnesses and to subpoena witnesses. You have the right to remain silent, no one can force you to answer questions at trial and I cannot consider your silence a presumption of guilt. If you plead guilty, you give up your right to a trial. Is that what you want to do? Do you want to give up those rights and plead guilty?

EACH: Yes

Has anyone forced you or threatened you to come to court and plead guilty?

EACH: No⁸⁰

Are you pleading guilty voluntarily?

EACH: Yes

Are you pleading guilty because you are guilty?

EACH: Yes⁸¹

I understand that each of you has entered into a written plea agreement with the government. Under the agreement you give up the right to pre-trial sentencing. You are going to be sentenced today. Under the agreement you give up the right to appeal. Do you understand?

EN MASSE: Yes

By pleading guilty you agree to the charges against you: That you are a citizen of a country other than the United States, that you entered the United States through Mexico by crossing away from a point of entry so you would not be inspected by immigration officials. Do you understand the charges against you?

80 In a few instances, the first defendant addressed answers yes. This is presumably because the flow shifts from yes to no answers. In these instances, the defendants are corrected.

81 This question poses the greatest difficulty for the largest number of defendants. In most cases, the first in line takes his or her time and ponders the question before answering. The answers of yes to this question carries the most personality: often very emphatic, attached to "Sir," or repeated.

EN MASSE: Yes

Then all of you are charged with [misdemeanor illegal entry].

[Insert defendant name] guilty or not guilty?

EACH: Guilty

[Repeat name] are you a citizen of [insert nationality]?

EACH: Yes

Do you have any papers allowing you to be in the US lawfully?

EACH: No

On [date] did you illegally enter the US near [geographic area]?

EACH: Yes

[Insert name(s)] you and the government agreed to __ days in prison, is that correct?

EACH: Yes⁸²

Do you want the court to accept this agreement?

EACH: Yes

It is the judgment of this court the defendants have willingly entered into the plea agreement provided by the government.

The judge asks each defendant if they have any questions. The judge asks the defense attorneys en masse if they have any questions. The judge asks the prosecution if she has any questions.

Then, it is the judgment of the court that [insert name(s)] be sentenced to __ days in prison; the special assessment fee waived.

* * *

Once an individual group of defendants is sentenced, the marshals and agents escort the group from the courtroom. Defendants sentenced to time served are returned to the custody of the Border Patrol and transported back to the border. Those sentenced in excess of time served are remanded into the custody of the Bureau of Prisons.

DETAINMENT AND RELEASE

Streamline convicts incarcerated post hearing face a set of challenges upon release. Customs and Border Patrol holds defendant property for thirty days post sentence expiration.⁸³ The USMS limits the items it will accept to accompany each defendant to “fifty dollars U.S. currency, a plain watch and a plain wedding ring.”⁸⁴ Following release, defendants are reunited with those belongings held

82 In cases of identical sentence stipulations, Judge Pyle will address those defendants en masse. For example, “Mr. Garcia, Mr. Lopez, Mr. Hernandez [...] sixty days in prison, is that correct?” Each: “Yes.” The question is not re-iterated.

83 Day Interview.

84 Oversight Hearing on the “Executive Office for United States Attorneys” Before the United States House of Representatives Subcommittee of Commercial and Administrative Law, 100th Congress (2008) (amended written statement of Heather E. Williams, First Assistant Federal Public Defender, District of Arizona, Tucson). <http://judiciary.house.gov/hearings/pdf/Wil->

by the USMS, but are responsible for the retrieval of those held by the CBP. Mexican citizens sentenced in excess of time served, and therefore transferred into the custody of the Federal Bureau of Prisons, are transported directly to the border after release, and as a result are not given the opportunity to retrieve belongings in the care of CBP.⁸⁵ As a consequence, “they are entering into Mexico without their identifications and money. This has led to an unsettling situation, where these people face problems identifying themselves as Mexicans when re-entering Mexico. With no picture identifications or birth certificates, Mexican Immigration Authorities have struggled to identify these people as Mexicans and not as Central Americans.”⁸⁶ In response, defense attorneys have taken steps to mitigate the situation.

Counselors assist their soon-to-be-incarcerated Streamline clients by personally retrieving their confiscated belongings, or by establishing communication with their families. Heather Williams, First Assistant Federal Public Defender for the District of Arizona, Tucson, provides the following testimony:

Our office retrieves client property from CBP, though we are not supposed to do so by our own Policies and Procedures. From backpacks, we take IDs, birth certificates, phone cards, addresses, phone numbers, and photographs and make copies of them and send them to our clients. The prison will not let them have the originals because that is ‘property.’ Any money we find, no matter the currency, office volunteers will take to a bank or ‘cases de cambio,’ exchange and receive back in a money order or cashier’s check and deposit it in the client’s prison account. If there is family to whom we can send other personal property, we do so. The lawyers send it using their own money because we cannot use Office postage to send personal property. Any remaining property we throw out.⁸⁷

liams080625.pdf

- 85 Oversight Hearing on the “Executive Office for United States Attorneys” Before the United States House of Representatives Subcommittee of Commercial and Administrative Law, 100th Congress (2008) (amended written statement of Heather E. Williams, First Assistant Federal Public Defender, District of Arizona, Tucson). <http://judiciary.house.gov/hearings/pdf/Williams080625.pdf>
- 86 Juan Manuel Calderon-Jaimes (Consul of Mexico, Tucson, Arizona). Letter to: Honorable Charles R. Pyle, United States District Court, Tucson, Arizona). February 15, 2008. 1 leaf. Reproduced in: Oversight Hearing on the “Executive Office for United States Attorneys” Before the United States House of Representatives Subcommittee of Commercial and Administrative Law, 100th Congress (2008) (amended written statement of Heather E. Williams, First Assistant Federal Public Defender, District of Arizona, Tucson). <http://judiciary.house.gov/hearings/pdf/Williams080625.pdf>
- 87 Oversight Hearing on the “Executive Office for United States Attorneys” Before the United States House of Representatives Subcommittee of Commercial and Administrative Law, 100th Congress (2008) (amended written statement of Heather E. Williams, First Assistant Federal Public Defender, District of Arizona, Tucson). <http://judiciary.house.gov/hearings/pdf/Williams080625.pdf>

The chief concern of many Streamline defendants facing incarceration is establishing communication with their families. Wanda Day, Tucson CJA Panel attorney, contacts the families of her clients via telephone, Skype and email, as per the client's direction. Day states she knows of several other defense attorneys who participate in this practice. Defense attorneys, some of Streamline's most outspoken critics, are in the unique position to turn the tide on the operation via the federal appeals process.

THE STATUS OF OPERATION STREAMLINE

Judicial Status

The United States Court of Appeals has yet to overturn a Streamline conviction. The lack of available test cases is a factor. Streamline convicts possess little incentive to pursue review. Rulings in past test cases have served to restrict Streamline's abbreviation of due process somewhat; they have not found demonstrable harm to the substantial due process rights of defendants.⁸⁸

The Ninth Circuit Court of Appeals ruling in *U.S. V. Roblero-Solis* constrains Streamline's abbreviation of due process.⁸⁹ The opinion holds the taking of pleas en masse to be in violation of Federal Rule of Criminal Procedure 11, which requires defendants be addressed personally.⁹⁰ The letter-of-the-law level adherence to this ruling is conveyed in the above Tucson transcript.⁹¹ Awaiting the next available test case, the question of whether or not these hearings violate the spirit of Rule 11, or harm the substantial rights of defendants, will remain unanswered.

88 Upon addressing the harm to the substantial rights of the defendants in *U.S. v. Roblero-Solis*, the court found, based on the standard set in *United States v. Dominguez Benitez*, 542 U.S. 74 (2004), no harm demonstrated. *Dominguez-Benitez* requires each defendant "show a reasonable probability that, but for the error, he would not have entered the plea." *U.S. v. Roblero-Solis et. al.* United States Ninth Circuit Court of Appeals. December 2, 2009. The defendants in *U.S. v. Diaz-Ramirez* challenged their convictions, arguing that the en masse hearing violated their Fifth Amendment right to due process. Specifically, Diaz and Figueroa contended that pleas entered as part of an en masse hearing are akin to silence, and cite *Boykin v. Alabama*, 395 U.S. 239 (1969), a case involving a silent record. The court ruled against Diaz and Figueroa on the grounds the record does in fact show a guilty plea, and that it was entered voluntarily and intelligently. *U.S. v. Diaz-Ramirez et. al.* United States Ninth Circuit Court of Appeals. 23 May 2011.

89 *U.S. v. Roblero-Solis et. al.* United States Ninth Circuit Court of Appeals. December 2, 2009.

90 "Rule 11 (b)(1) provides that before accepting a guilty plea 'the court must address the defendant personally in open court.' During this address, 'the court must determine' that the defendant understood certain specified rights, risks, and consequences. Under section (b)(2) before accepting the guilty plea, 'the court must address the defendant personally... and determine that the plea is voluntary.' The *Roblero-Solis* court addresses the question: "Can these mandatory requirements be met when the court addresses a multitude of defendants?" *U.S. v. Roblero-Solis et. al.* United States Ninth Circuit Court of Appeals. December 2, 2009.

91 The transcript is an example of the post-Roberlo-Solis procedure: [Insert defendant name] guilty or not guilty? Each: Guilty. The procedure described in the appeal does not include the inserting of the defendants name.

Legislative Status

Congress has not authorized or allocated a budget for Operation Streamline. Funding for Streamline is pulled from existing line items across multiple agency budgets. The program name does not appear in any enrolled appropriations bill.⁹² The Comprehensive Immigration Reform (CIR) addresses this lack of reporting.

In its current form, the CIR bill requires the suspension of Operation Streamline, pending the submission of a detailed cost report.⁹³ If this reporting requirement were met, then a cost-benefit analysis of Streamline could be conducted. Unfortunately, the CIR bill was tabled by the 111th Congress. And “in the absence of any action from Congress, the Administration will continue to focus its immigration enforcement resources on securing the border, keeping our communities safe, and prosecuting criminals.”⁹⁴

Executive Status

A fundamental component of the president’s immigration reform plan is prioritizing immigration enforcement. “Individuals who are a threat to our public safety and national security, such as convicted criminals, are the highest enforcement priority.”⁹⁵ The White House boasts that in 2012, “55 percent or 225,390 of the people removed were convicted of felonies or misdemeanors—almost double the removal of criminals since 2008.”⁹⁶ Thirty-six percent of these

92 The program name appeared for the first time in a DHS appropriations bill in 2010; it was not included in the enrolled bill. The stricken text includes a reporting requirement: “(1) additional Border Patrol sectors that should be utilizing Operation Streamline programs; and (2) resources needed from the Department of Homeland Security, the Department of Justice, and the Judiciary, to increase the effectiveness of Operation Streamline programs at some Border Patrol sectors and to utilize such programs at additional sectors.” United States. Cong. Senate. *Department of Homeland Security Appropriations Act 2010. 111th Cong.*, 1st sess. H.R.2892.IH. Washington: GPO, 174. Print. See Section 563. The program name also appears in 2011 United States House and Senate Appropriations Committee versions, but does not appear in subsequent enrolled bill. “The Committee supports Operation Streamline...The Committee encourages the Department to work with the appropriate Department of Justice agencies and the Judiciary to expand Operation Streamline to additional Border Patrol Sectors.” U.S. Senate. Committee on Appropriations. *Department of Homeland Security Appropriations Bill, 2012*, (to Accompany H.R. 2017). (112 S. Rpt. 74). Available from: <http://www.gpo.gov/fdsys/pkg/CRPT-112srpt74/pdf/CRPT-112srpt74.pdf>. U.S. House. Committee on Appropriations. *Department of Homeland Security Appropriations Bill, 2012*, (to Accompany H.R. 2017) *Together with Dissenting and Separate Views*. (112 H. Rpt. 91). Available from: <http://www.gpo.gov/fdsys/pkg/CRPT-112hrpt91/pdf/CRPT-112hrpt91.pdf>

93 United States. Cong. Senate. *Comprehensive Immigration Reform ASAP Act of 2009. 111th Cong.*, 1st sess. H.R.4321.IH. Washington: GPO, 20. Print. See Section 125, “Operation Streamline Prosecution Initiative.”

94 The White House. *Issues: Immigration*. “Strengthening Enforcement: Progress Lifting the Shadow of Deportation from Hardworking Young People.” <http://www.whitehouse.gov/issues/immigration> (accessed March 10, 2013).

95 The White House. *Issues: Immigration*. “Strengthening Enforcement: Applying Smarter Enforcement Measures.” <http://www.whitehouse.gov/issues/immigration> (accessed March 10, 2013).

96 The White House. *Issues: Immigration*. “Strengthening Enforcement: Applying Smarter Enforcement Measures.” <http://www.whitehouse.gov/issues/immigration> (accessed March 10, 2013).

criminals are Streamline convicts.⁹⁷ It is arguably misleading to include Streamline convicts in this category, as illegal entry (or illegal overstay) is implicit in a non-citizens' categorization as removable. The cost of this overlap, and those previously discussed, cannot be quantified using presently available data.

RECOMMENDATION

To achieve a relatively comprehensive understanding of the effects of Operation Streamline, the following investigation should be conducted. Begin by gathering all matters referred to southwest federal district courts for prosecution. Record the arresting agency and the referring agency, along with the offense at booking. Then chart the charges brought and the judicial outcome. Next, cross reference all Streamline defendant names with Border Patrol and USMS logs to determine the time in holding and transport miles. Finally, for each participating court, develop an average number of hours logged each month on Streamline cases, both in and out of session, by the following groups: judges, public defenders, CJA panel attorneys, CBP prosecutors, USAO prosecutors, translators, and court clerks. This compiled data would serve as an adequate baseline for investigations into the effects of Streamline.

97 Transactional Records Access Clearinghouse. Federal Criminal Enforcement: TRAC Data Interpreter Tool: Convictions: Fiscal Year [2012]: Lead Charge [8USC1325; 8USC1326]. 2013. <http://tracfed.syr.edu/index/index.php?layer=cri>. FY2012 8USC1325 Convictions: 47,061. FY2012 8USC1326 Convictions: 83,009.