



# Immigration Enforcement Within the United States

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## Summary

An estimated 11 million unauthorized aliens reside in the United States, and this population is estimated to increase by 500,000 annually. Each year, approximately 1 million aliens are apprehended trying to enter the United States illegally. Although most of these aliens enter the United States for economic opportunities and family reunification, or to avoid civil strife and political unrest, some are criminals, and some may be terrorists. All are violating the United States' immigration laws.

Immigration enforcement is the regulation of those who violate provisions of the Immigration and Nationality Act (INA). This includes violations of the INA's civil provisions (e.g., violate the conditions of their admittance), as well as U.S. citizens or aliens who violate the criminal provisions (e.g., marriage fraud or alien smuggling). Many divergent tasks are incorporated under the banner of immigration enforcement. These include removing aliens who should not be in the United States, investigating alien smuggling and trafficking, patrolling between and at ports of entry, combating document and benefit fraud, and enforcing the prohibitions against employers hiring aliens without work authorization.

Historically, more resources (measured in staff hours) have been allotted to enforcement at the border than enforcement within the United States. While the amount of U.S. Border Patrol (USBP) resources almost doubled between FY1997 and FY2003, time spent on other enforcement activities increased only slightly, while the number of inspection hours decreased. Furthermore, focusing on "interior" enforcement, in FY2003, the largest amount of staff time was devoted to locating and arresting criminal aliens (39%), followed by administrative and non-investigative duties (23%) and alien smuggling investigations (15%). Only 4% was devoted to worksite enforcement (i.e., locating and arresting aliens working without authorization, and punishing employers who hire such workers).

Congress has spent much time debating immigration enforcement and the unauthorized alien population. Congress could allocate more resources to immigration enforcement activities, raising the question of what is the most efficient allocation of resources among the different enforcement tasks. For example, some assert that the United States has not truly tried immigration enforcement, arguing that most of the resources have been devoted to border enforcement, instead of fully engaging in other types of immigration enforcement; others contend that only a legalization program can reduce the unauthorized population. In addition, Congress could expand the immigration enforcement role of other federal agencies and state and local law enforcement. Many fear, however, that this option will distract the agencies and local law enforcement from their primary missions. Since many of the unauthorized aliens come to the United States for economic opportunities, some argue that a guest worker program, creating opportunities for a large number of aliens to come to the United States to work, could significantly reduce unauthorized migration. Others argue that an increase in the enforcement of the prohibition against hiring illegal alien workers and the use and manufacturing of fraudulent documents would make it more difficult for unauthorized aliens to find work, resulting in a decrease in the unauthorized population. This report will not be updated.

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## Introduction

It is estimated that there are more than 11 million unauthorized aliens<sup>1</sup> currently living in the United States, and the resident unauthorized alien population is estimated to increase by 500,000 people per year.<sup>2</sup> In addition, each year approximately 1 million aliens are apprehended while trying to illegally enter the United States. Although most of these aliens are entering the United States for economic opportunities or fleeing civil strife and political unrest, some are criminals, and some may be terrorists.<sup>3</sup> All are violating the immigration laws of the United States.

The existence of a large unauthorized population creates an illicit industry devoted to creating fraudulent identities and documents to aid unauthorized aliens in living and working in the United States. Illegal identity documents may be used by terrorists and other criminals who desire to remain hidden from law enforcement.<sup>4</sup> In addition, some argue that it would be harder for unauthorized aliens, including criminals and terrorists, to stay in the United States if finding a job were more difficult.<sup>5</sup> The Center for Immigration Studies found that eight of the 48 *al Qaeda* foreign born terrorists operating in the United States since 1993 worked in the United States illegally.<sup>6</sup>

Some have argued that the U.S. government has been unsuccessful in controlling illegal immigration due to a conflict in political will; the desire to prevent the illegal entry of those who might seek to harm the United States and its populace (e.g., terrorists, criminals), and the need to provide workers for labor-intensive industries (e.g., agriculture, food processing, restaurants). There is evidence of this conflict as far back as the mid-1800s with the arrival of Irish immigrants.<sup>7</sup>

## Policy Issues

The large unauthorized alien population raises concerns since it is very difficult to know if any unauthorized aliens are terrorists or criminals. In addition, the existence of a underground population leads to the propagation of an illegal document industry. Nonetheless, the majority of unauthorized aliens work in the United States, raising concerns that their removal will harm the U.S. economy and illustrating a desire or need of some employers for this pool of labor. What are

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<sup>1</sup> An *alien* is “any person not a citizen or national of the United States” and is synonymous with *noncitizen*.

<sup>2</sup> Jeffrey S. Passel, *Unauthorized Migrants: Numbers and Characteristics*, Pew Hispanic Center, June 14, 2005, at <http://www.pewhispanic.org>.

<sup>3</sup> Department of Homeland Security, Bureau of Customs and Border Protection, “National Border Patrol Strategy,” March 1, 2005, p. 5; and Marc Cooper, “Dead in Their Tracks,” *LA Weekly*, Feb. 24, 2006, p. 32.

<sup>4</sup> Testimony of Executive Director of the Center of Immigration Studies, Mark Krikorian, in U.S. Congress House Judiciary Committee, Subcommittee on Immigration, Border Security, and Claims, *Department of Homeland Security Transition: Bureau of Immigration and Customs Enforcement*, hearings, 108<sup>th</sup> Cong., 1<sup>st</sup> sess., Apr. 10, 2003. (Hereafter cited as Krikorian, *Department of Homeland Security Transition: Bureau of Immigration and Customs Enforcement*.)

<sup>5</sup> *Ibid.*

<sup>6</sup> Steven A. Camarota, *The Open Door: How Militant Islamic Terrorists Entered and Remained in the United States*, (Washington: Center for Immigration Studies, May 2002).

<sup>7</sup> Belinda I. Reyes, Hans P. Johnson, and Richard Van Swearingen, *Holding the Line? The Effect of Recent Border Build-up on Unauthorized Immigration*, Public Policy Institute of California, July 2002, p. 80. (Hereafter cited as Reyes, *Holding the Line? The Effect of Recent Border Build-up on Unauthorized Immigration*.)

the best methods to decrease the unauthorized population without disrupting sectors of the economy that depend on foreign labor? Should the United States increase its efforts to reduce the unauthorized alien population, and what are the best methods and use of resources to achieve this goal? Are the current laws adequate? Should other federal agencies or local law enforcement agencies become more involved in immigration enforcement? Is the Department of Homeland Security conducting immigration enforcement in an efficient manner?

## **Report Overview**

This report provides an analysis of immigration enforcement within the United States. The report opens with a definition of immigration enforcement, a discussion of the statutory authority to conduct immigration enforcement, and an overview of immigration enforcement related legislation since 1986. It follows with an exposition on the dichotomy of interior and border enforcement. The report then details different aspects of immigration enforcement in the United States including detention and removal, alien smuggling and trafficking, document and benefit fraud, worksite enforcement, inspections at ports of entry, and patrolling the border between ports of entry.<sup>8</sup> The report continues with a discussion of the role of state and local law enforcement in the enforcement of immigration laws. The report then presents a comparative analysis of the resources devoted to divergent immigration enforcement activities. It concludes with a discussion of crosscutting immigration enforcement issues related to the structure of the Department of Homeland Security. A list of acronyms is provided in the appendix.

## **Data and Analysis**

The report uses different workload measures for the distinct immigration enforcement activities, and these measures are presented for the most current years that the data are available. For example, for the removal of aliens, the workload measure used is the number of removals, while the workload for worksite enforcement is measured in the issuance of Notices of Intent to Fine (NIF's). Nonetheless, none of these measures are comparable with each other. For example, comparing the number of NIF's issued with the number of removals does not provide any insight into the disparate resource allocation for these two tasks. In addition, due to the changes in immigration enforcement priorities after the attacks of September 11, 2001, wherever possible, measures of enforcement activities are presented prior to and after FY2001.

To compare the resources devoted to different enforcement activities, the report analyzes data on agent work hours for each enforcement activity. The data are from the Department of Homeland Security's Performance Analysis System (PAS). The hours are presented as workyears, as 2,080 hours equal one workyear. Due to data limitations, the analysis of the hours is limited to FY1992 through FY2003. During 2004, Immigration and Customs Enforcement (ICE) and Customs and Border Protection (CBP) switched their accounting system from PAS to the U.S. Customs Service's Treasury Enforcement Communications System (TECS), and as a result, data for 2004 onward are not comparable with previous years. TECS contains fewer data fields than PAS, which means that some of the measures in PAS do not exist in TECS. In addition, the data for FY2004 are incomplete in both systems, as the different components in DHS did not switch from PAS to TECS at the same time.

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<sup>8</sup> Importantly, the discussions of certain enforcement activities (e.g., worksite enforcement and alien smuggling) are more detailed than those for other activities since CRS does not have individual reports on these subjects.

## What is Immigration Enforcement?

Immigration enforcement is the regulation of those who violate provisions of the Immigration and Nationality Act (INA). This includes violations of the civil provisions of the INA (e.g., aliens who enter without inspection or violate the conditions of their admittance),<sup>9</sup> as well as U.S. citizens or aliens who violate the criminal provisions of the INA (e.g., marriage fraud or alien smuggling).

Some of the duties under immigration law have aspects of immigration enforcement but also contain adjudicative functions (sometimes referred to as services) and are not universally considered enforcement. Immigration inspectors are the classic example of this “dual” role, as inspectors are responsible for keeping those who seek to harm U.S. interests out while letting bona fide travelers in. An alien who is denied entry to the United States by an inspector has not violated any provision of the INA, unless the alien has committed some type of fraud to gain entry. Indeed, there have been people (both aliens and U.S. citizens) who have been wrongly denied entry by an immigration inspector. It could also be argued that a Department of Homeland Security (DHS) Citizenship and Immigration Services (USCIS) adjudicator is performing an enforcement function by denying an alien’s application for a benefit to which he is not entitled. Others would argue that this is an example of a purely adjudicative function, for unless the alien has committed fraud to receive the benefit, he or she has not committed a violation under the INA.

According to DHS, immigration enforcement should be viewed as part of a comprehensive homeland security strategy that unifies and coordinates law enforcement operations across formerly separate agencies (e.g., the Immigration and Naturalization Service (INS), the Federal Protective Service, the U.S. Coast Guard, and the U.S. Customs Service).<sup>10</sup> The former Commissioner of INS,<sup>11</sup> James Zigler, was quoted as saying, “We need to set up a regime where we don’t have to spend so much of our time and effort in enforcement activities dealing with people who are not terrorists, who are not threats to our national security, who are economic refugees.”<sup>12</sup>

Some argue that since the terrorists responsible for the 9/11 attacks were aliens, immigration enforcement has recently had an anti-terrorism focus. Moreover, the Center for Immigration Studies found that at least 22 of the 48 al Qaeda foreign-born terrorists found operating in the United States since 1993 had committed significant violations of immigration laws.<sup>13</sup> Thus, it can be argued that more stringent enforcement of the immigration laws may have disrupted some of the terrorists’ plans.

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<sup>9</sup> For example, this includes an alien who overstays his visa or an alien who is working when his visa prohibits employment.

<sup>10</sup> Department of Homeland Security, *Securing our Homeland: The U.S. Department of Homeland Security Strategic Plan, 2004*. At [http://www.dhs.gov/interweb/assetlibrary/DHS\\_StratPlan\\_FINAL\\_spread.pdf](http://www.dhs.gov/interweb/assetlibrary/DHS_StratPlan_FINAL_spread.pdf).

<sup>11</sup> The Homeland Security Act of 2002 (P.L. 107-296) abolished the INS and transferred most of its functions to various bureaus in the new Department of Homeland Security (DHS) effective Mar. 1, 2003.

<sup>12</sup> As quoted by Representative George Gekas in U.S. Congress, House Judiciary Committee, Subcommittee on Immigration and Claims, *INS Interior Enforcement*, hearings, 107<sup>th</sup> Cong., 2<sup>nd</sup> sess., June 19, 2002.

<sup>13</sup> Steven A. Camarota, *The Open Door: How Militant Islamic Terrorists Entered and Remained in the United States* (Washington: Center for Immigration Studies, May 2002).

## **Authority to Conduct Immigration Enforcement<sup>14</sup>**

The Immigration and Nationality Act (INA), as amended, is the primary law by which Congress legislates on immigration.<sup>15</sup> Basic enforcement authority for immigration officials stems from §287 and §235 of the INA.<sup>16</sup> INA §287 gives any officer or employee of the former INS (now employees of the DHS) authorized under regulation prescribed by the Attorney General (now the Secretary of DHS) the general power, without a warrant, to interrogate aliens, make arrests, conduct searches, board vessels, and administer oaths.<sup>17</sup> INA §235 authorizes “immigration officers” to inspect all aliens who are applicants for admission or otherwise seeking admission or readmission to or transit through the United States. As evidenced above, the INA makes no distinction in its law enforcement provisions between the various types of employees or officers of the former INS (e.g., border patrol (USBP), investigators, and deportation officers). Rather, it is through regulation where specific types of DHS personnel, including the USBP, are authorized and designated to conduct certain law enforcement activities.<sup>18</sup>

## **Overview of Select Major Immigration Enforcement Legislation Since 1986**

Since 1986, there have been several bills with major immigration enforcement provisions. The following highlights some of the most important enacted legislation for immigration enforcement activities in the United States, and provides a brief summary of the important changes. The enacted immigration enforcement legislation includes the:

- Immigration Reform and Control Act of 1986 (IRCA; P.L. 99-603), which addressed the control of illegal immigration by creating sanctions for employers who hire or continue to employ aliens who are not authorized to work, and by legalizing most of the unauthorized aliens present in the United States at that time;
- Violent Crime Control and Law Enforcement Act of 1994 (P.L. 103-322), which gave the Attorney General the option to bypass deportation proceedings for certain alien aggravated felons, enhanced penalties for alien smuggling and reentry after deportation, and increased appropriations for the border patrol;
- Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA; P.L. 104-208), which added to the grounds of inadmissibility and deportability, expanded the list of crimes constituting an aggravated felony, created expedited removal procedures, and reduced the judicial review of immigration decisions;

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<sup>14</sup> This section adapted from CRS Report RL32270, *Enforcing Immigration Law: The Role of State and Local Law Enforcement*, by (name redacted), (name redacted), and (name redacted).

<sup>15</sup> Codified as amended at 8 U.S.C. §§1101 *et seq.*

<sup>16</sup> Codified as amended at 8 U.S.C. §§1357 and 1225. The combination or cross-designation of inspectors from Customs, the INS, and the U.S. Department of Agriculture within DHS’s Bureau of Customs and Border Protection, however, may allow the use of other enforcement authorities depending on the circumstance.

<sup>17</sup> References to the Attorney General or the Commissioner of the former INS are now deemed to refer to the Secretary of DHS or his delegates. See P.L. 107-296, §§102(a), 441, 1512(d), and 1571; 8 C.F.R. §2.1, §103.1.

<sup>18</sup> 8 C.F.R. §287.5.

- USA Patriot Act of 2001 (P.L. 107-56), which broadened the terrorism grounds for excluding aliens from entering the United States, and increased monitoring of foreign students;
- Enhanced Border Control and Visa Reform Act of 2002 (P.L. 107-173), which required the development of an interoperable electronic data system to be used to share information relevant to alien admissibility and removability, and required the implementation of an integrated entry-exit data system;<sup>19</sup>
- Homeland Security Act of 2002 (P.L. 107-296), which transferred the majority of INS' functions to DHS, leaving the Executive Office of Immigration Review in the Department of Justice;<sup>20</sup>
- National Intelligence Reform Act of 2004 (P.L. 108-458), which expanded the grounds of inadmissibility and deportability, accelerated the deployment of the entry/exit system, and increased criminal penalties for alien smuggling;<sup>21</sup> and
- REAL ID Act of 2005 (P.L. 109-13), which established statutory guidelines for removal cases, expanded the terrorism-related grounds for inadmissibility and deportation, included measures to improve border infrastructure, and required states to verify an applicant's legal status before issuing a driver's license or personal identification card that may be accepted for any federal purpose.<sup>22</sup>

## **Interior vs. Border**

Although many make the distinction between interior and border enforcement, questions have been raised about the usefulness of the distinction. Many immigration professionals do not accept the rationale that there is a distinct interior enforcement mission, since interior enforcement can be viewed as a continuum of border enforcement (i.e., violators not caught at the border, must be apprehended and processed in the interior).<sup>23</sup> However, certain aspects of interior enforcement lack a border component. For example, fugitive taskforces, investigations of alien slavery and sweatshops, and employer sanctions do not require close coordination between DHS Customs and Border Protection (CBP) and DHS Immigration and Customs Enforcement (ICE). As an illustration that not all enforcement activities contain a border component, in FY2004, CBP referrals accounted for only 23% of all ICE criminal investigations.<sup>24</sup>

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<sup>19</sup> For more discussion of the USA PATRIOT Act and the Enhanced Border Security and Visa Reform Act, see CRS Report RS21438, *Immigration Legislation Enacted in the 107<sup>th</sup> Congress*, by (name redacted).

<sup>20</sup> See CRS Report RL31560, *Homeland Security Proposals: Issues Regarding Transfer of Immigration Agencies and Functions*, by Lisa M. Seghetti and (name redacted).

<sup>21</sup> For a detailed discussion of National Intelligence Reform Act, see CRS Report RL32616, *9/11 Commission: Legislative Action Concerning U.S. Immigration Law and Policy in the 108<sup>th</sup> Congress*, by (name redacted) and (name redacted).

<sup>22</sup> For more discussion of the REAL ID Act, see CRS Report RL33125, *Immigration Legislation and Issues in the 109<sup>th</sup> Congress*, by (name redacted) et al.

<sup>23</sup> DHS, *An Assessment of the Proposal to Merge Customs and Border Protection with Immigration and Customs Enforcement*, p. 18.

<sup>24</sup> *Ibid.*, p. 41.

## **Interior Enforcement Strategies**

A Government Accountability Study (GAO) report in October 2004 found that although ICE does not have a formal interior enforcement strategy, all the objectives contained in INS interior enforcement strategy have been incorporated within a broader mission to strengthen homeland security.<sup>25</sup> INS interior enforcement strategy, issued in 1999, was designed to address, in order of priority, (1) the detention and removal of criminal aliens, (2) the dismantling and diminishing of alien smuggling and trafficking operations, (3) community complaints about illegal immigration including those of law enforcement, (4) immigrant benefit and document fraud, and (5) employers' use of unauthorized aliens. Overall, the strategy aimed to deter illegal immigration, prevent immigration related crimes, and remove those illegally in the United States.

Two ICE offices, the Office of Investigations (OI) and the Office of Detention and Removal (DRO), bear the primary responsibility for immigration interior enforcement functions.<sup>26</sup> OI is responsible for addressing smuggling and trafficking in aliens, benefit fraud, responding to community complaints of illegal immigrations, and worksite enforcement.<sup>27</sup> DRO is responsible for identifying and removing criminal aliens with some assistance from OI.<sup>28</sup> In addition, the compliance unit within ICE's National Security Investigations Division analyzes data from various databases, such as United States Visitor and Immigrant Status Indicator Technology (US-VISIT) Program and the Student and Exchange Visitor Information System (SEVIS), to identify those who may have violated the terms of their entry or be a risk to national security.

## **Border Enforcement**

Border enforcement includes inspections at ports of entry (POEs) and the patrolling of areas between POEs.<sup>29</sup> In 1994, the USBP strategy to deter illegal entry was "prevention through deterrence," i.e., to raise the risk of being apprehended to the point where aliens would find it futile to try to enter. The strategy called for placing USBP resources and manpower directly at the areas of greatest illegal immigration in order to detect, deter, and apprehend aliens attempting to cross the border between official points of entry.<sup>30</sup>

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<sup>25</sup> Government Accountability Office, *Immigration Enforcement: DHS Has Incorporated Immigration Enforcement Objectives and Is Addressing Future Planning Requirements*, Oct. 2004 (GAO-05-66), p. 2. (Hereafter cited as GAO, *Immigration Enforcement: DHS Has Incorporated Immigration Enforcement Objectives and Is Addressing Future Planning Requirements*.)

<sup>26</sup> *Ibid.*, p. 2.

<sup>27</sup> Alien smuggling and trafficking is addressed by the human trafficking unit within OI's Smuggling and Public Safety Investigations Division. Community complaints about illegal immigration are addressed by the human trafficking unit and the human rights unit within the Smuggling and Public Safety Investigations Division. Benefit and document fraud is addressed by the identity and benefit fraud unit in the Smuggling and Public Safety Investigations Division, and the visa security unit in the International Affairs Division. USCIS also has its own benefit fraud unit. Worksite enforcement particularly as it pertains to critical infrastructure (e.g., airports, power plants) is conducted by the critical infrastructure protection unit in the National Security Investigations Division.

<sup>28</sup> GAO, *Immigration Enforcement: DHS Has Incorporated Immigration Enforcement Objectives and Is Addressing Future Planning Requirements*, p. 2.

<sup>29</sup> See CRS Report RL32562, *Border Security: The Role of the U.S. Border Patrol*, by (name redacted); and CRS Report RL32399, *Border Security: Inspections Practices, Policies, and Issues*, by (name redacted) et al.

<sup>30</sup> Recently, DHS has begun the Secure Border Initiative (SBI), a multi-year plan which includes increasing USBP agents, expanding detention and removal capabilities, upgrading the technology used at the border, improving the border infrastructure, and increasing interior enforcement. For more information on the SBI see [http://www.cbp.gov/xp/cgov/newsroom/fact\\_sheets/border/secure\\_border\\_initiative/secure\\_border.xml](http://www.cbp.gov/xp/cgov/newsroom/fact_sheets/border/secure_border_initiative/secure_border.xml), last visited on March 31, 2006.

After September 11, 2001, the USBP refocused its strategy on preventing the entry of terrorists and weapons of mass destruction. In order to prevent and deter terrorist entry, intelligence and surveillance operations have been focused on known smuggling operations that have previously trafficked aliens from significant interest countries. The USBP also coordinates and shares intelligence with Canadian and Mexican authorities. It is important to note, however, that the increased emphasis on preventing terrorist entry into the United States did not change the scope of the USBP's mission—preventing unauthorized aliens from entering the country. There is evidence that although border enforcement has increased, forcing aliens to take more dangerous routes to enter the United States, and increasing the risks and costs of those attempting to illegally enter the United States, the number of unauthorized aliens in the United States has continued to increase.<sup>31</sup>

## Types of Immigration Enforcement

The INA includes both criminal and civil components, providing both for criminal charges (e.g., alien smuggling, which is prosecuted in the federal courts) and for civil violations (e.g., lack of legal status, which may lead to removal through a separate administrative system in the Department of Justice).<sup>32</sup> Being illegally present in the U.S. has always been a civil, not criminal, violation of the INA, and subsequent deportation and associated administrative processes are civil proceedings.<sup>33</sup> For instance, a lawfully admitted nonimmigrant alien may become deportable if his visitor's visa expires or if his student status changes. Criminal violations of the INA, on the other hand, include felonies and misdemeanors and are prosecuted in federal district courts. These types of violations include the bringing in and harboring of certain undocumented aliens (INA §274), the illegal entry of aliens (INA §275), and the reentry of aliens previously excluded or deported (INA §276).<sup>34</sup>

### Removal (Deportation)

An alien is “removable” if (1) the alien has not been admitted to the United States and is inadmissible under INA §212,<sup>35</sup> or (2) the alien has been admitted to the United States and is deportable under INA §237. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) combined “exclusion” and “deportation” proceedings into a single removal proceeding. INA §237 specifies six broad classes of deportable aliens including aliens who:

- are inadmissible at time of entry or violate their immigration status;<sup>36</sup>

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<sup>31</sup> For example, see Wayne A. Cornelius, “Death at the Border: Efficacy and Unintended Consequences of US Immigration Control Policy,” *Population and Development Review*, vol. 27, no. 4 (Dec. 2001), p. 666.

<sup>32</sup> The following paragraph is adapted from CRS Report RL32270, *Enforcing Immigration Law: The Role of State and Local Law Enforcement*, by (name redacted), (name redacted), and (name redacted).

<sup>33</sup> INA §237(a)(1)(B). Other examples of civil violations include §243(c) (penalties relating to vessels and aircraft) and §274D (penalties for failure to depart).

<sup>34</sup> Other criminal provisions include §243(a) disobeying a removal order, §1306 offenses relating to registration of aliens, and §274A(f) engaging in a pattern or practice of hiring illegal aliens.

<sup>35</sup> An alien may be present in the United States but not admitted. For example, if an alien entered the United States without being inspected by an immigration officer, the alien would be physically present in the United States, but would not have been admitted under the law.

<sup>36</sup> All aliens must satisfy to DHS inspectors upon entry to the United States that they are not ineligible for admission (continued...)

- commit certain criminal offenses (e.g., crimes of moral turpitude,<sup>37</sup> aggravated felonies,<sup>38</sup> alien smuggling, high speed flight);
- fail to register (if required under law) or commit document fraud;
- are security risks (such as aliens who violate any law relating to espionage, engage in criminal activity which endangers public safety, partake in terrorist activities, or assisted in Nazi persecution or genocide);
- become a public charge within five years of entry;<sup>39</sup> or
- vote unlawfully.

In removal proceedings an immigration judge (IJ) from the Department of Justice's Executive Office for Immigration Review (EOIR) determines whether an alien is removable. The proceeding commences when the alien is issued a notice to appear (NTA) which can be issued by a variety of DHS personnel including border patrol officers in CBP, asylum and examination officers in USCIS, and detention officers in ICE.<sup>40</sup>

With certain exceptions, a removal proceeding under INA §240 is the "exclusive procedure" for determining whether an alien should be removed from the United States. These exceptions include expedited removal (INA §235, and removal proceedings under the Institutional Removal Program (IRP). Those who are removed are subject to bars to reenter the country.<sup>41</sup>

The courts have ruled that removal proceedings are civil not criminal, and that deportation is not punishment. Thus, there is no right to counsel, no right to a jury trial, and the due process protections are less than in a criminal trial. Furthermore, a decision on removability does not have to be proven beyond a reasonable doubt. In addition, because deportation is not punishment, Congress may impose new immigration consequences for actions that previously occurred (i.e., actions that would not have made the alien deportable when they occurred may make the alien deportable at a later date if Congress changes the law).<sup>42</sup>

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(...continued)

under the so-called "grounds for inadmissibility" of INA §212. These include health-related grounds, criminal history, national security and terrorist concerns, becoming a public charge, seeking to work without proper labor certification, illegal entry and immigration law violations, lack of proper documents, ineligibility for citizenship, and aliens previously removed.

<sup>37</sup> Moral turpitude is not easily defined under immigration law. Some argue that the flexibility in the term allows for changing social norms.

<sup>38</sup> The definition of aggravated felony (defined in INA §101(a)(43)) includes over 50 types of crimes. In addition, an alien convicted of an aggravated felony is conclusively presumed to be deportable (INA §238(c)). Misdemeanors at the state level may be aggravated felonies under the INA.

<sup>39</sup> So few aliens have been deported under these grounds since 1980, that DHS does not report the number.

<sup>40</sup> 8 C.F.R. §239.1(a)

<sup>41</sup> There is a five-year bar to admissibility for aliens who have been subjected to expedited removal or those ordered removed when trying to enter the United States. There is a 10-year bar for admission for those who were ordered deported. There is a 20-year bar for those who have been previously removed, and those convicted of an aggravated felony are permanently inadmissible. INA §212(a)(9)(A).

<sup>42</sup> Charles Gordon, Stanley Mailman, Stephen Yale-Loehr, *Immigration Law and Procedure*. Newark: LexisNexis, vol 6.

## **Expedited Removal<sup>43</sup>**

Under expedited removal, an alien who lacks proper documentation or has committed fraud or willful misrepresentation of facts to gain admission into the United States is inadmissible and may be removed from the United States without any further hearings or review,<sup>44</sup> unless the alien indicates either an intention to apply for asylum or a fear of persecution.<sup>45</sup>

Aliens subject to expedited removal must be detained until they are removed and may only be released due to medical emergency or if necessary for law enforcement purposes. Although under law the Attorney General<sup>46</sup> may apply expedited removal to any alien who has not been admitted or paroled<sup>47</sup> into the United States and cannot show that they have been continuously present for two years, expedited removal has only been applied to aliens

- arriving at ports of entry;
- arriving by sea who are not admitted or paroled; and, recently,
- who are present without being admitted or paroled, are encountered by an immigration officer within 100 air miles of the U.S. international land border, and have not established to the satisfaction of an immigration officer that they have been physically present in the United States continuously for the 14-day period immediately preceding the date of encounter.

## **Institutional Removal Program**

INA §238(a) allows for removal proceedings to be conducted at federal, state, and local prisons for aliens convicted of crimes. This program as instituted is known as the Institutional Removal Program (IRP). Under the IRP, the proceedings are held while the alien is incarcerated. Nonetheless, under the INA aliens must complete their criminal sentences before they can be removed from the United States.<sup>48</sup> INS developed a nationwide automated tracking system for the federal Bureau of Prisons (BOP) and deployed them to IRP sites. The system covers foreign born inmates incarcerated under the federal system and tracks the hearing status of each inmate.<sup>49</sup>

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<sup>43</sup> INA §235(b)(1)(A)(i). For a detailed discussion of expedited removal, see CRS Report RL33109, *Immigration Policy on Expedited Removal of Aliens*, by (name redacted) and (name redacted).

<sup>44</sup> Under expedited removal, both administrative and judicial review are limited generally to cases in which the alien claims to be a U.S. citizen or to have been previously admitted as a legal permanent resident, a refugee, or an asylee.

<sup>45</sup> The INA provides immigration protections to aliens who have a well-founded fear of persecution, most notably in the form of asylum status. Aliens who are in expedited removal and claim asylum are given a “credible fear” hearing to determine if there is support for their asylum claim. Those who pass the credible fear hearing are placed into formal removal proceedings under INA §240. For a discussion of removal under §240 see Appendix A of CRS Report RL33109, *Immigration Policy on Expedited Removal of Aliens*, by (name redacted) and (name redacted). For more on credible fear, see CRS Report RL32621, *U.S. Immigration Policy on Asylum Seekers*, by (name redacted).

<sup>46</sup> Due to the Homeland Security Act of 2002 (P.L. 107-296), expedited removal policy is being administered by the Secretary of Homeland Security.

<sup>47</sup> “Parole” is a term in immigration law which means that the alien has been granted temporary permission to enter and be present in the United States. Parole does not constitute formal admission to the United States and parolees are required to leave when the parole expires, or if eligible, to be admitted in a lawful status.

<sup>48</sup> INA §241(a)(4)(A).

<sup>49</sup> Government Accountability Office, *Immigration Enforcement: Challenges to Implementing the INS Interior Enforcement Strategy*, (GAO-02-861T) June 19, 2002.

## Removal Proceedings

As discussed above, when DHS encounters an alien that it thinks should be removed from the United States, the alien is presented a notice to appear (NTA), which commences the removal proceeding. The NTA outlines the charges against the alien and identifies the part of the INA that the alien is being charged with violating. If the alien is not subject to mandatory detention (discussed below), the alien may be detained, or released on bond or his own recognizance (OR).<sup>50</sup>

In a court removal proceeding an ICE attorney (i.e., the government's attorney) must prove the charges in the NTA, witnesses are presented, and the immigration judge rules on whether the alien is removable from the United States or is eligible for relief from removal.<sup>51</sup> An alien who fails to appear for a removal hearing (absent exceptional circumstances) can be removed in absentia and becomes inadmissible for five years,<sup>52</sup> and ineligible for relief from removal for 10 years.<sup>53</sup> Within 30 days after the hearing, the government's attorney or the alien may appeal the decision to the Board of Immigration Appeals (BIA) in EOIR. After the BIA decision the alien may appeal to a federal court.

## Voluntary Departure

The majority of aliens who are removed do not undergo formal removal proceedings in front of an IJ. Most aliens are given the opportunity to depart voluntarily from the United States, and most of them agree to voluntary departure.<sup>54</sup> At the border, voluntary departure is only available for aliens from contiguous territories (i.e., Canada and Mexico), and aliens are escorted to the point of departure.<sup>55</sup> CBP inspectors also can permit an alien traveling through a POE to withdraw their application for admission and return to their point of origin. Aliens who do not take one of these options (and are not under expedited removal), when offered, are subject to formal removal proceedings in front of a DOJ immigration judge and ICE's Office of Detention and Removal (DRO) assumes responsibility for the alien's custody management (detention or release, and possible reappréhension of released aliens) and removal of the alien (which may include escorting the alien to their home country).<sup>56</sup>

In addition, certain aliens who have been issued NTA's may request voluntary departure before (in lieu of), during or after formal removal proceedings. Criminal aliens are ineligible for

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<sup>50</sup> If the alien is not a mandatory detainee and is not released on bond, the alien may request a bond redetermination hearing before an immigration judge to be given bond (if ICE denied release on bond) or to have the bond lowered. During the bond hearing, the alien must prove that he is not a flight risk or a danger to society.

<sup>51</sup> Examples of relief from deportation are voluntary departure, cancellation of removal, and asylum. While deportation may entail hardships to the alien and their family, these hardships alone do not exempt the alien from deportation, although they may have some influence on the granting of discretionary relief.

<sup>52</sup> An alien is inadmissible to the United States under §212(a)(6)(B) if he/she failed to attend his/her removal proceeding without "reasonable cause."

<sup>53</sup> INA §240(b)(7). Relief includes being able to adjust status, change nonimmigrant classification, or take advantage of the registry.

<sup>54</sup> INA §240(b).

<sup>55</sup> Aliens under voluntary departure must admit that their entry was illegal and waive their right to an immigration hearing. Aliens under voluntary departure may apply for legal entry in the future.

<sup>56</sup> DHS, *An Assessment of the Proposal to Merge Customs and Border Protection with Immigration and Customs Enforcement*, p. 27.

voluntary departure. The DHS officer or the IJ must specify the period of time allowed for departure<sup>57</sup> and may impose conditions, such as bond or detention, deemed necessary to assure the alien's departure.<sup>58</sup> Voluntary departure is not available to any alien who was previously allowed to depart voluntarily. Furthermore, aliens who fail to depart within the time period specified for voluntary departure are subject to monetary penalties and ineligible for voluntary departure or other relief from removal for 10 years.

Voluntary departure costs less than formal removal since, in most cases, the government does not have to pay for the alien's repatriation. In addition, the resources that would be needed if all aliens apprehended along the borders were subject to formal removal proceedings would be prohibitive. Nonetheless, in the interior, many aliens subject to voluntary departure fail to leave the country. It is estimated that each year, 40,000 non-detained aliens fail to leave the United States as ordered (either under voluntary departure or as ordered by an IJ).<sup>59</sup>

### **Absconder Initiative**

Designed by the Office of Detention and Removal (DRO) in January 2002, and run by both DRO and OI, the National Fugitive Operations Program (NFOP) seeks to apprehend, process, and remove aliens who have failed to comply with removal orders. As part of the Alien Absconder Initiative, NFOP teams work exclusively on fugitive cases, giving priority to aliens convicted of crimes.<sup>60</sup> The absconder initiative was the first systematic attempt to enforce every final removal order issued.<sup>61</sup> Nonetheless, as **Figure 1** shows, although there has been a concerted effort since FY2002 to remove absconders, the number of absconders went from 376,003 in FY2002 to 536,644 in FY2005, an increase of 43% in three years. However, this increase could be due to the increase in aliens who are given final orders of removal. In FY2001, 282,396 aliens received final orders of removal, while in FY2005, 368,848 final orders were issued.<sup>62</sup>

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<sup>57</sup> Total time must be less than 120 days. 8 C.F.R. 240.25(c).

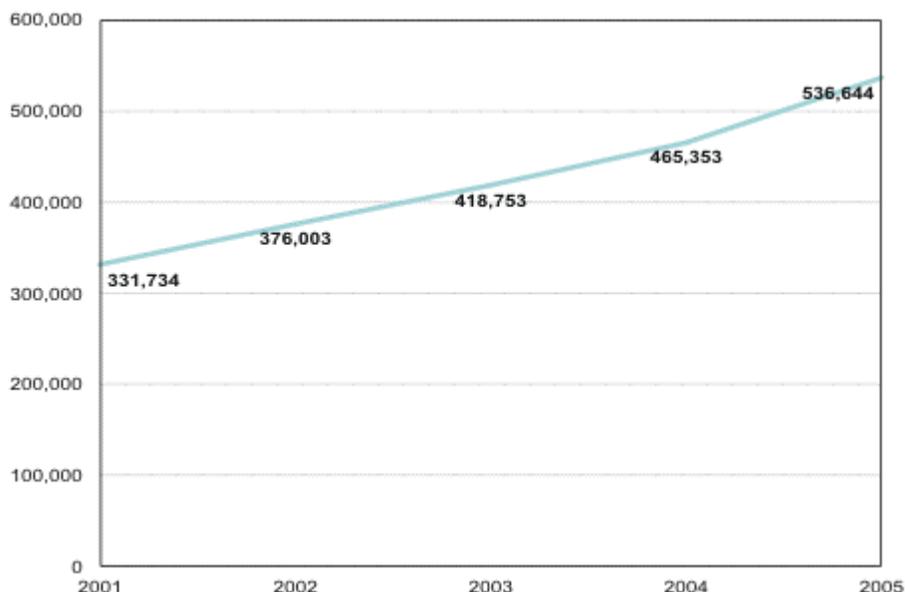
<sup>58</sup> DHS may revoke a grant of voluntary departure at any time. 8 C.F.R. 240.25(b).

<sup>59</sup> Press Office, Department of Homeland Security, U.S. Immigration and Customs Enforcement, *Ice Expands Pilot Project to Detain Deportable Aliens*, Mar. 26, 2004.

<sup>60</sup> See [http://www.ice.gov/graphics/about/organization/or\\_dro.htm](http://www.ice.gov/graphics/about/organization/or_dro.htm) for more information on the Absconder Initiative. Testimony of Joseph R. Green, Assistant Commissioner for Investigations, Immigration and Naturalization Service, at House Judiciary Committee, Subcommittee on Immigration and Claims Hearing on INS Interior Enforcement (June 19, 2002).

<sup>61</sup> Failure to depart after the issuance of a final removal order is a felony under the INA.

<sup>62</sup> U.S. Department of Justice, Executive Office for Immigration Review, *FY2001-FY2005 Statistical Yearbook*.

**Figure 1. Number of Alien Absconders, FY2000-FY2005**

**Source:** CRS presentation of unpublished data from the Department of Homeland Security

## Criminal Aliens

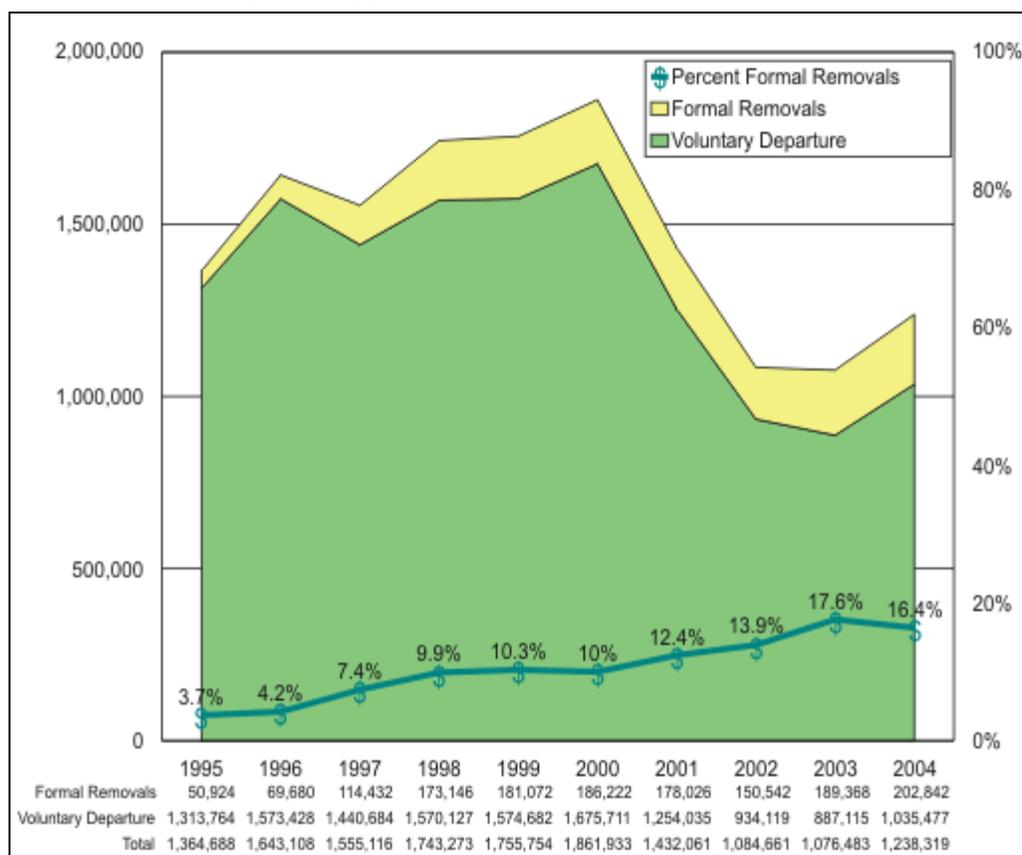
Criminal aliens are aliens who have committed crimes that make them removable. The potential pool of removable criminal aliens is in the hundreds of thousands. Some are incarcerated in federal, state, or local facilities, while others are free across the United States, because they have already served their criminal sentences.<sup>63</sup> DHS' Criminal Alien Program is directed at identifying criminal aliens in federal, state, and local prisons, and assuring that these aliens are taken into ICE custody at the completion of their criminal sentences. Although federal prisons have a system to notify ICE when there is an alien in custody, notification from state and local prisons and jails is not systematic, and many criminal aliens are released after their criminal sentences are completed rather than taken into ICE custody, making it more difficult to locate the aliens for deportation and raising the concern that the released aliens will commit new crimes. Like ICE, INS had historically failed to identify all removable imprisoned aliens.<sup>64</sup>

## Removal Statistics

The number of removals has declined since FY2000 (See **Figure 2**). In FY2000, INS removed 1.9 million aliens, the largest number of aliens removed in a single year. The total number of removals declined from FY2000 to FY2003, but increased in FY2004.

<sup>63</sup> Stana, *Challenges to Implementing the Immigration Interior Enforcement Strategy*, p. 5.

<sup>64</sup> Of 35,318 criminal aliens released between 1994-1999, at least 11,605 went on to commit new crimes. See Governmental Accountability Office, *Criminal Aliens: INS' Efforts to Identify and Remove Imprisoned Aliens Continues to Need Improvement*, (GAO/T-GGD-99-47), Feb. 25, 1999.

**Figure 2. Types of Removals: FY1995-FY2004**

Source: DHS Office of Immigration Statistics, *FY2004 Yearbook of Immigration Statistics*, January 2006, p. 159.

The decline in total removals was due primarily to a decrease in the number of voluntary departures. As **Figure 3** shows, the number of formal removals significantly increased after FY1996, when the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 made more crimes deportable offenses, increasing the number of aliens required to undergo formal removal proceedings.<sup>65</sup> In FY1996, there were 69,680 formal removals. The number of formal removals continuously increased between FY1996 and FY2000, then decreased in FY2001 and FY2002. The decrease between FY2001 and FY2002, may have been the result of a backlog in cases before the Board of Immigration Appeals (BIA).<sup>66</sup> Since FY2002, the number of formal removals has increased, reaching an all-time high of 204,193 aliens in FY2005. The increase in formal removals in FY2003, could be attributed to the Attorney General's decision to streamline the immigration appeals process, see discussion below.

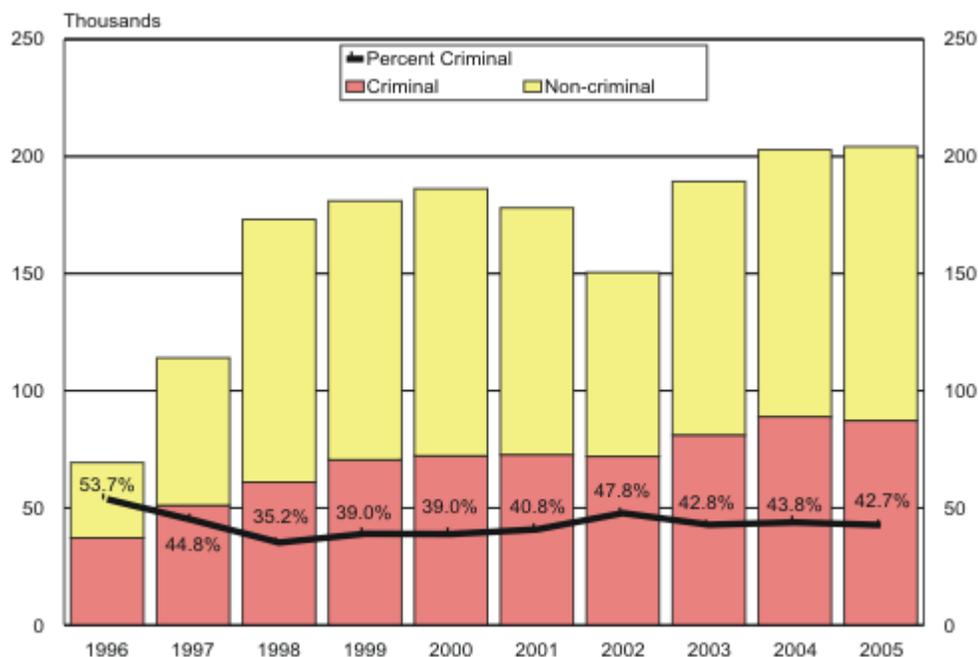
As previously noted, most of the removals from the United States are voluntary departures as opposed to formal removals. **Figure 2** illustrates the percent of formal removals compared to all

<sup>65</sup> See CRS Report 96-601, *Immigration Enforcement Legislation: Overview of House and Senate Passed H.R. 2202*, by (name redacted) and Joyce C. Violet. (Archived and available from the author.)

<sup>66</sup> The BIA backlog and its effect was the subject of a hearing in 2002. U.S. Congress, House Judiciary Committee, Subcommittee on Immigration and Claims, *The Operations of the Executive Office for Immigration Review (EOIR)*, hearings, 107<sup>th</sup> Cong., 2<sup>nd</sup> sess., Feb. 6, 2002. (Hereafter cited as Hearing, *The Operations of the Executive Office for Immigration Review (EOIR)*.)

removals increased steadily between FY1996 and FY2003, and then decreased in slightly between FY2003 and FY2004. The decrease was most likely the result of a decrease in apprehensions along the border (discussed below). In FY1996, 4.2% of all removals were formal removals, compared to 17.6% in FY2003. In FY2004, 16.4% of all removed aliens went through the formal removal process.

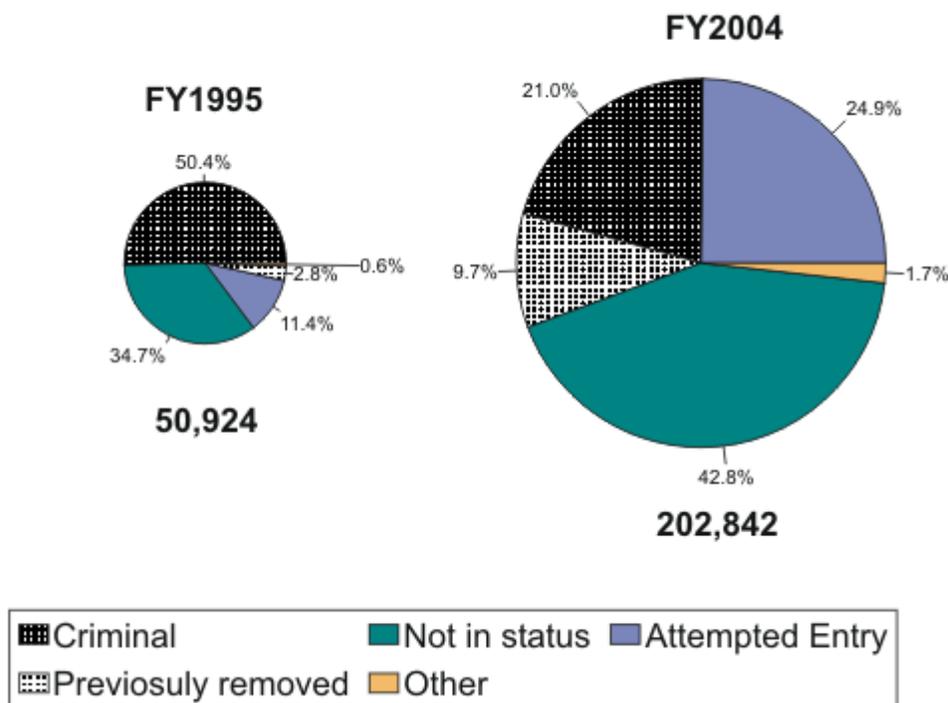
**Figure 3. Criminal and Noncriminal Formal Removals: FY1996-FY2005**



**Source:** FY1996-FY1997 from Immigration and Naturalization Service, *FY1997 Statistical Yearbook of the INS*. FY1998-FY2004 from DHS Office of Immigration Statistics, *FY2004 Yearbook of Immigration Statistics*, January 2006, p. 162. FY2005, DHS, *FY2005 Monthly Statistical Report, Year End*, September 2005.

In addition, as **Figure 3** demonstrates, since FY1996, the majority of aliens formally removed were noncriminal aliens. In FY1996, 53.7% of all formal removals were criminal aliens; since then, noncriminal aliens have comprised the majority of formally removed aliens. In FY2005, 42.7% of formally removed aliens were criminal aliens.

As shown in **Figure 4**, the three most common reasons for formal removals are (1) attempted illegal entry; (2) criminal grounds (i.e., committing a crime in the United States); and (3) not in status (i.e., unlawful presence). In addition, the proportion of the formally removed population which was removed due to being previously removed increased almost threefold between 1995 and 2004.

**Figure 4. Formal Removal by Reason: FY1995 and FY2004**

Source: DHS, *Yearbook of Immigration Statistics*, FY2004.

### Selected Removal Issues

The government's ability to remove aliens who do not have permission to be in the United States, or have violated the terms of their admission (e.g., aliens who commit crimes) has been an issue of continual interest for Congress. As discussed above, there are an estimated 11 million unauthorized aliens residing in the United States. Following is a discussion of some of the reasons why the removal policy has been unable to keep pace with the unauthorized population.

### Number of Investigators

On June 4, 2002, the INS had 1,944 on-duty special agents including supervisors, fewer than the number of officers in the Dallas police department.<sup>67</sup> In any given day, there were only 1,365 special agents to investigate fraud and smuggling cases, conduct enforcement operations at work sites, support local task forces, respond to local law enforcement officials, arrest immigration violators, and assist the Federal Bureau of Investigation (FBI) in their counterterrorism work.<sup>68</sup> The number of agents has a direct impact on the ability of ICE to be able to remove unauthorized aliens, as ICE agents are charged with locating and arresting removable aliens. In 2002, there

<sup>67</sup> Special agents refers to personnel in the 1811 job series.

<sup>68</sup> Testimony of Joseph R. Green, Assistant Commissioner for Investigations, Immigration and Naturalization Service, at House Judiciary Committee, Subcommittee on Immigration and Claims Hearing on "INS Interior Enforcement," (June 19, 2002).

were an estimated 9.3 million unauthorized aliens in the United States, which was approximately 4,784 unauthorized aliens per special agent.

The number of ICE special agents increased from a total of 5,449 in FY2003 to 5,614 in FY2004, and 5,769 in FY2005.<sup>69</sup> However, since agents from the former INS and the former U.S. Customs Service were combined into ICE, it is unknown what percentage of time the ICE special agents spend on immigration enforcement functions compared to tasks of the former U.S. Customs Service. As a result, it is not known if and to what extent the number of agents devoted to immigration enforcement has increased since the creation of DHS.

### *Executive Office for Immigration Review*

The ability to remove aliens is also influenced by the functioning of the immigration courts, as formally removed aliens who are not in expedited removal are entitled to a hearing before the courts. In FY2002, there was concern about the backlog of cases before the Board of Immigration Appeals (BIA).<sup>70</sup> As a result, then Attorney General John Ashcroft, made changes to streamline the appellate review within the immigration courts.

Recently, there has been an increase in immigration cases before the federal appeals courts. As **Figure 5** shows, between FY2000 and FY2005, the number of appeals has increased sevenfold, while the number of cases heard by BIA during the same time increased 43%. Immigration cases increased from 3.2% of the federal appeals court's workload in FY2000, to 18% of the workload in FY2005. In addition, some federal appeals judges have harshly criticized the BIA and immigration judges. Some appeals judges argue that the streamlining of the BIA has shifted the work to their courts.<sup>71</sup> When a federal appeals judge overturns the decision of an immigration judge, the case is returned to EOIR to be heard by a different immigration judge, increasing the alien's time in removal proceedings (i.e., the length of the removal process) and increasing the use of EOIR resources. If the alien is being detained, the delay in finalizing a removal decision also increases the consumption of detention resources.

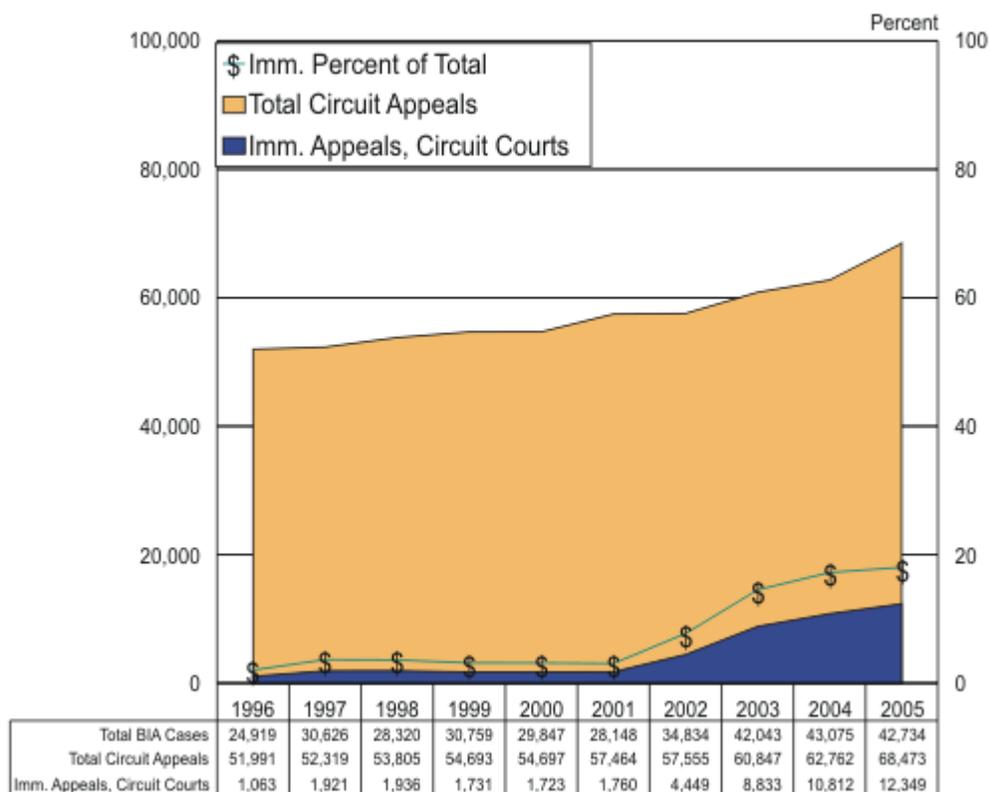
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<sup>69</sup> Unpublished data from the Department of Homeland Security.

<sup>70</sup> For example, see Hearing, *The Operations of the Executive Office for Immigration Review (EOIR)*.

<sup>71</sup> For example, see "Courts Criticize Judges' Handling of Asylum Cases," *New York Times*, Dec. 26, 2005; and Jason Ryan, "Attorney General Chastises Immigration Judges," *ABC News*, Jan. 11, 2006.

**Figure 5. BIA Cases, Total Appeals and Immigration Appeals before the Circuit Courts: FY 1996-FY2005**



**Source:** Administrative Office of the U.S. Courts, *Judicial Business*, and U.S. Department of Justice, Executive Office for Immigration Review, *Statistical Yearbooks*.

### *Long-Term Residents and Children*

In addition, there are some policy concerns surrounding the deportation of aliens who have lived in the United States for many years and established community ties. Deportation (removal) can be controversial and seem punitive for those who have been in the United States for long periods of time and for those who entered the United States as young children and know no other country. Long term residents often have to abandon homes and businesses when they are deported. In addition, these aliens often have ties in the communities where they reside, which can result in a backlash when the government attempts to remove the alien.<sup>72</sup>

Furthermore, some countries (e.g., Vietnam) refuse to accept the return of their nationals who entered the United States as children. These children often have few ties to their birth countries, and may not speak the language.<sup>73</sup> If the alien is being deported due to a criminal act, the home countries often contend that since U.S. society created the person's antisocial behavior, the United

<sup>72</sup> For example see, Kirk Johnson, "Case Riles Colorado Town," *New York Times*, Dec. 13, 2004, p. A18.

<sup>73</sup> For example see, Luke Turf, "Return to Sender," *Denver Westwood*, Nov. 25, 2004.

States should take responsibility for the person. However, others note that if these aliens had not violated the laws of the United States they would not be removable.

## **Detention**

The INA (§236) provides broad authority to detain aliens while awaiting a determination of whether they should be removed from the United States, and specifies categories of aliens subject to mandatory detention.<sup>74</sup> Aliens not subject to mandatory detention may be detained, paroled, or released on bond or their own recognizance. Decisions on parole made by the Secretary of DHS and bond decisions made by the Attorney General are not subject to review. Aliens paroled or released may be rearrested at any time.

The large majority of detained aliens have committed a crime while in the United States, have served their criminal sentence, and are detained while undergoing removal proceedings. Other detained aliens include those who arrive at a port of entry without proper documentation (i.e., expedited removal), but most of these aliens are quickly returned to their country of origin.<sup>75</sup> The majority of aliens arriving without proper documentation who claim asylum are held until their “credible fear hearing,” but some of these aliens are held until their asylum claims have been adjudicated.

The Office of Detention and Removal (DRO) in ICE is responsible for the daily detention of aliens, but under law the Attorney General may still retain the authority to arrest and detain aliens. The Illegal Immigrant Reform and Immigrant Responsibility Act of 1996 (IIRIRA) amended the INA, effectively specifying levels of detention priority and classes of aliens subject to mandatory detention. Mandatory detention is required for certain criminal and terrorist aliens who are removable, pending a final decision on whether the alien is to be removed.

In October 1998, the former INS issued a memorandum establishing detention guidelines consistent with the changes made by IIRIRA.<sup>76</sup> According to the guidelines, detainees are assigned to one of four detention categories: (1) required, (2) high priority, (3) medium priority, and (4) lower priority.<sup>77</sup> Aliens in required detention are mandatory detainees,<sup>78</sup> while aliens in the other categories may be detained depending on detention space and the facts of the case. Higher priority aliens should be detained before aliens of lower priority.<sup>79</sup> Additionally, the USA-

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<sup>74</sup> “Enemy combatants” at the Guantanamo U.S. military base in Cuba are not under the authority of DHS, nor are aliens incarcerated in federal, state, and local penitentiaries for criminal acts.

<sup>75</sup> Karen Musalo, et al., *The Expedited Removal Study Releases Its Third Report*, 77 *Interpreted Releases* 1189, 1191 (Aug. 21, 2000).

<sup>76</sup> Memorandum from Michael Pearson, INS Executive Associate Commissioner, Office of Field Operations, to Regional Directors, *Detention Guidelines Effective October 9, 1998*.

<sup>77</sup> High priority are aliens removable on security-related or criminal grounds who are not subject to required detention, and aliens who are a danger to the community or a flight risk. Medium priority detainees are inadmissible, non-criminal arriving aliens not in expedited removal and not subject to mandatory detention. Low priority detainees are other removable aliens not subject to required detention, and aliens who have committed fraud while applying for immigration benefits with DHS.

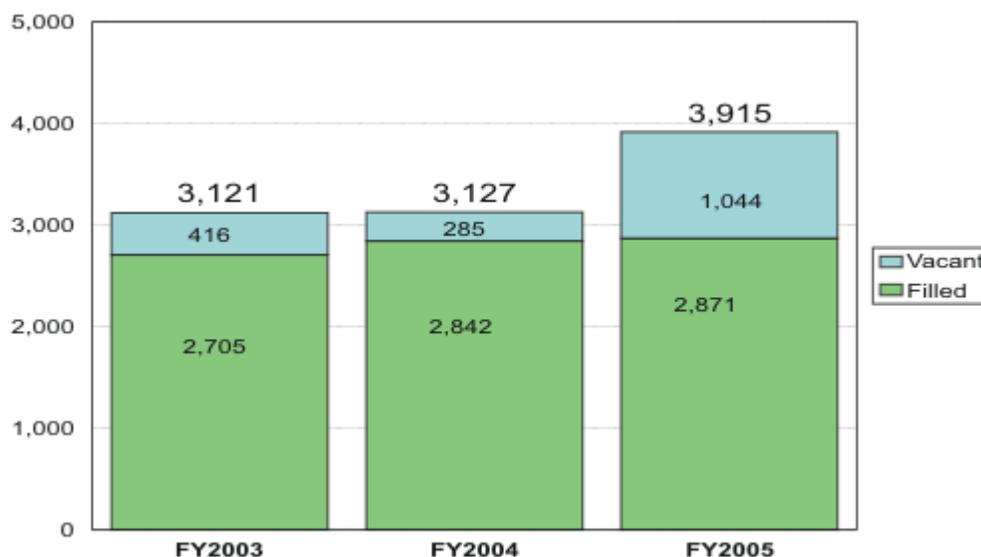
<sup>78</sup> There are some very limited exceptions to mandatory detention. An alien subject to mandatory detention may be released only if release is necessary to protect an alien who is a government witness in a major criminal investigation, or a close family member or associate of that alien, and the alien does not pose a danger to the public or a flight risk.

<sup>79</sup> Michael A. Pearson, *INS Detention Guidelines*, Oct. 7, 1998. Reprinted in *Bender’s Immigration Bulletin*, vol. 3, no. 21, Nov. 1, 1998, p. 1111. (Hereafter cited as Pearson, *INS Detention Guidelines*.)

PATRIOT Act<sup>80</sup> amended the INA to create a new section (236A), which requires the detention of an alien whom the Attorney General certifies as someone the Attorney General has “reasonable grounds” to believe is involved in terrorist activities or in any other activity that endangers national security.

In June 2005, 87% of detention bed space was filled with mandatory detainees, making bed space scarce and increasing the need for both good management of detention space, and alternative forms of detention.<sup>81</sup> A lack of bedspace can lead to an increase in the number of apprehended aliens who must be released into the community, and aliens who are not detained are less likely to appear for their removal proceedings and to leave the country if they are ordered removed. For example, in FY2005, 60% of nondetained aliens failed to appear for their removal hearing.<sup>82</sup> Moreover, only 18% of aliens released into the community who subsequently receive final removal orders leave the United States.<sup>83</sup> To counteract the high percentage of nondetained aliens who fail to leave the United States, DHS has a pilot program which began in Hartford, Connecticut, and was expanded to Atlanta and Denver in March 2004, that immediately detains all aliens subject to final orders of removal, so that ICE can ensure that the aliens depart from the United States.

**Figure 6. Number of Permanent Law Enforcement Officers in DRO, Filled and Vacant Positions: FY2003-FY2005**



**Source:** CRS presentation of unpublished data from DHS.

**Note:** In FY2005, DRO received an additional 788 positions through budget enhancements but ICE was under a hiring freeze.

<sup>80</sup> P.L. 107-56, signed into law on Oct. 26, 2001.

<sup>81</sup> DHS, *An Assessment of the Proposal to Merge Customs and Border Protection with Immigration and Customs Enforcement*, p. 35.

<sup>82</sup> Department of Justice, Executive Office for Immigration Review, *FY2005 Statistical Yearbook*, Feb. 2006, p. H3.

<sup>83</sup> DHS, *An Assessment of the Proposal to Merge Customs and Border Protection with Immigration and Customs Enforcement*, p. 33.

## **Detention Statistics**

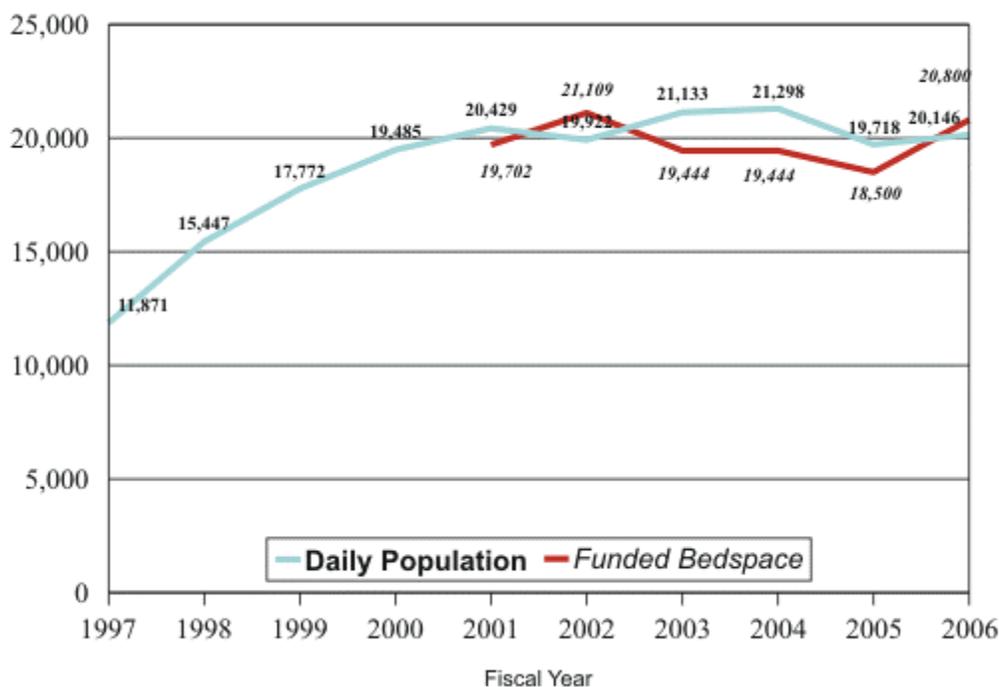
Although Congress increased the number of DRO officer positions by 25% between FY2004 and FY2005, the actual number of officers increased only slightly (see **Figure 6**), affecting the ability of DRO to detain and remove aliens. From FY2003 to FY2004, the number of officer positions increased by only six, but the actual number of officers working increased by 139, as the number of vacancies decreased. From FY2004 to FY2005, although the total number of officers increased by 788, the number of filled positions increased slightly, from 2,842 to 2,871, while the number of vacancies increased almost threefold. The lack of actual hires was the result of financial management issues, which lead to a hiring freeze in ICE and DRO between March 2004 and May 2005.<sup>84</sup>

As **Figure 7** shows, between FY1994 and FY2001 the average size of the daily noncitizen detention population increased steadily. There was a slight decrease in the size of the detention population between FY2001 and FY2002, and then a steady increase between FY2002 and FY2004. The daily population decreased between FY2004 and FY2005 and then increased in the beginning of FY2006. The size of the daily population increased by 129%, from 9,011 to 20,594, between FY1996, when IIRIRA was enacted, and FY2006. The largest increase occurred between FY1997 and FY1998, the year that all the provisions of the IIRIRA became enforceable. Some argue that the size of the detained population is dependent on the amount of detention space. Thus, the increase in the detained population after FY1998 reflects an increase in detention space, not in the number of people eligible to be detained.

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<sup>84</sup> For a discussion of ICE's financial management issues, see CRS Report RL33049, *FY2006 Appropriations for Border and Transportation Security*, by (name redacted) et al.

**Figure 7. Average Daily Detention Population: FY1997-FY2006, and Funded Bedspace: FY2001-FY2006**



**Source:** FY1997 through FY2002 CRS presentation of published DHS data. FY2004 through FY2006 CRS presentation of unpublished DHS data.

**Note:** FY2006 is the average daily population in detention through January 30, 2006.

**Figure 7** reveals that generally the daily detention population is higher than the funded number of beds. In FY2003 through FY2005, on average there were more than 1,000 aliens detained above funded bedspace, which implies that the funding to detain these aliens needs to be taken from elsewhere in DRO's or ICE's budget. In FY2006, so far the funded number of beds has outpaced the daily population.

### Selected Detention Issues

Since most nondetained aliens remain illegally in the United States, the detention of noncitizens relative to the availability of bedspace has been an ongoing Congressional issue.<sup>85</sup> Many contend that DHS does not have enough detention space to house all those who should be detained. They contend that the increase in the number of classes of aliens subject to mandatory detention has impacted the availability of detention space for lower priority detainees. There are over half a million aliens in the United States who have been ordered deported who are presumed to still be in the country. Some argue that these aliens would have left the country if they had been detained once they were ordered deported. As discussed above, only 18% of nondetained aliens with final

<sup>85</sup> U.S. Congress, Senate Committee on the Judiciary, Subcommittees on Immigration, Border Security, and Citizenship, and Terrorism, Technology and Homeland Security, *Strengthening Interior Enforcement: Deportation and Related Issues*, hearings, 109<sup>th</sup> Cong., 1<sup>st</sup> sess., Apr. 14, 2005.

orders of removal leave the United States. On the other hand, 94% of detained aliens who were part of the Hartford Pilot (mentioned above) were deported. Concerns have been raised that decisions about which aliens to release and when to release them may be based on the amount of detention space, not on the merits of individual cases, and that the amount of space may vary by area of the country, leading to inequities and disparate policies in different geographic areas.<sup>86</sup>

Furthermore, the overall increase in the number of noncitizens in DHS detention has raised questions about the cost of detaining noncitizens. For FY2004, DHS budgeted \$80 a day for each detainee held in detention.<sup>87</sup> This cost does not include transportation or the cost of deporting the alien.

### ***Coordination between CBP and ICE***

Reportedly, Immigration and Customs Enforcement's (ICE's) funding and accounting difficulties, as well as the failure to coordinate planning and budgets between ICE and Customs and Border Protection (CBP) has contributed to a resource imbalance. As CBP's apprehension capabilities grew, ICE's detention and removal capabilities did not. The imbalance has placed an increasing strain on the Office of Detention and Removal (DRO) resources, as well as impacted CBP's alien apprehensions.

There is no organizational requirement that CBP notify ICE's DRO of its apprehension initiatives and expected need for detention resources. Similarly, ICE is under no obligation to notify CBP about any new initiatives which may impact the availability of detention and removal resources.<sup>88</sup> In addition, although at points DRO units are responsible for the transport of aliens in CBP custody, some CBP officials have said that DRO is not providing the level of transport required, and as a result, the United States Border Patrol has had to assume an increasing share of transportation responsibilities.<sup>89</sup> Improved coordination between the ICE and CBP may have reduced the negative impact of this resource imbalance; however, DRO's removal functions are ultimately governed by appropriations. Better coordination can improve allocation of limited resources but the agency is still constrained by the funds available for detention space and removal costs.<sup>90</sup>

## **Alien Smuggling and Trafficking**

The INA specifies criminal penalties for bringing in and harboring certain aliens, commonly referred to as alien smuggling. Specifically, INA §274 prohibits and specifies penalties for any person who:

- attempts to bring in an alien at any place other than a POE;

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<sup>86</sup> The decision does not usually apply to aliens who are under mandatory detention. A high priority detainee may be released to make space for a mandatory detainee. Nonetheless, DHS does have explicit procedures for choosing between two mandatory detainees if there is not enough bed space. Pearson, *INS Detention Guidelines*, p. 1116.

<sup>87</sup> Unpublished DHS data obtained from Betty Mills-Carilli, Bureau of Immigration and Customs Enforcement Office of Congressional Affairs, Department of Homeland Security, Apr. 8, 2004.

<sup>88</sup> DHS, *An Assessment of the Proposal to Merge Customs and Border Protection with Immigration and Customs Enforcement*, p. 32.

<sup>89</sup> *Ibid.*, p. 38.

<sup>90</sup> *Ibid.*, p. 4.

- knowing or in reckless disregard that an alien is illegally present transports the alien within the United States;
- conceals, harbors, or shields the alien knowing or in reckless disregard that the alien is illegally present; and
- encourages or induces an alien to come to the United States, knowing or in reckless disregard that the alien will be illegally present.<sup>91</sup>

In addition, there are separate penalties for any person who aids or assists an alien who is inadmissible on criminal or security grounds, or brings in an alien for immoral purposes.<sup>92</sup>

Alien smuggling is a transnational crime due to the fact that it involves more than one country,<sup>93</sup> and typically the alien has consented (even paid) to be smuggled. In most cases when the aliens reach their destination, they have no continuing relationship with the smuggler.<sup>94</sup> In human trafficking, the alien may agree to be smuggled into the United States, but once they arrive they are subjected to exploitive arrangements, including prostitution or forced labor, that produce long-term profits for the trafficker. Under immigration law, a trafficked alien is a victim, while an alien who consents to be smuggled may be subject to criminal prosecution and deportation.

Alien smuggling and trafficking investigations are often complicated by language and humanitarian issues (e.g., the alien has been traumatized and is unable to aid in the investigation), as well as logistical challenges and difficulties (e.g., transporting, housing, and processing aliens). In addition, certain types of investigative techniques, such as controlled delivery operations,<sup>95</sup> cannot be used as humans are involved. Moreover, unlike drug trafficking cases where the contraband itself is proof of the illegal activity, the successful prosecution of alien smuggling cases relies on the availability of witnesses (unauthorized aliens) who may refuse to testify because of fear of retribution against themselves or their families.<sup>96</sup>

Many contend that alien smuggling of persons into the United States constitutes a significant risk to national security and public safety.<sup>97</sup> Since smugglers facilitate the illegal entry of persons into

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<sup>91</sup> The INA also establishes fines for transportation companies and employees of these companies (e.g., airlines, cruise lines, bus companies) who bring into the United States any alien who does not have a valid passport and, if required, an unexpired visa (§§271, 273).

<sup>92</sup> INA §§277, 278.

<sup>93</sup> In Dec. 2000, the United States and over 120 other countries signed the UN Convention against Transnational Organized Crime, and more than 75 of these countries signed the Protocol against the Smuggling of Migrants by Land, Sea and Air, which seeks to combat organized crime by harmonizing nations' criminal laws and promoting increased cooperation. Although the convention and the protocol have entered into force, the United States has not ratified the convention.

<sup>94</sup> Nonetheless, some ICE officers report that there has been a rise in smugglers holding the aliens hostage while extorting money from the alien's family. Personal communication with Patricia Schmidt, Assistant Special Agent in Charge, Phoenix Immigration and Customs Enforcement Office, Aug. 2, 2004.

<sup>95</sup> Controlled delivery is an investigative technique in which law enforcement knowingly allows a shipment to travel to its destination so that law enforcement can learn more about a criminal enterprise and the people involved.

<sup>96</sup> U.S. Government Accountability Office, *Combating Alien Smuggling, Opportunities Exist to Improve the Federal Response*, GAO-05-305, May 2005, p. 10. (Hereafter cited as GAO, *Combating Alien Smuggling, Opportunities Exist to Improve the Federal Response*.)

<sup>97</sup> Testimony of John P. Torres, Deputy Assistant Director, Smuggling and Public Safety, U.S. Immigration and Customs Enforcement, U.S. Department of Homeland Security, in U.S. Congress, House Committee on the Judiciary, Subcommittee on Immigration, Border Security, and Claims, *Pushing the Border Out on Alien Smuggling: New Tools and Intelligence Initiatives*, hearings, 108<sup>th</sup> Cong., 2<sup>nd</sup> sess., May 18, 2004. (Hereafter cited as Torres, *Pushing the* (continued...)

the United States, terrorists may use smuggling routes and organizations to enter undetected. It is estimated that the international alien smuggling and sex trafficking trade generates \$9.5 billion for criminal organizations worldwide, and the profits are used to finance additional criminal enterprises, such as the trafficking of drugs, weapons, or other contraband.<sup>98</sup>

In addition to generating billions of dollars in revenues for criminal enterprises,<sup>99</sup> alien smuggling can lead to collateral crimes including kidnaping, homicide, assault, rape, robbery, auto theft, high speed flight, vehicle accidents, identity theft, and the manufacturing and distribution of fraudulent documents. For example, smugglers may hold an alien hostage to extort a ransom from the alien's family.<sup>100</sup> In addition, smugglers often establish "safe houses" (also called "drop houses") where aliens are kept until they can be moved into the interior of the United States. The often squalid conditions of these "safe houses" endanger the lives of the aliens and create health and safety issues for people living in the community.<sup>101</sup> Also, others note an increase in traffic accident casualties due to the unsafe condition of vehicles used by smugglers. (Often smugglers rig the vehicles to hide as many aliens as possible, making the vehicle unsafe to operate.)<sup>102</sup> Some border deaths are tied to smuggling, as some smugglers mislead their charges about how far it is to the United States and how much water is needed to make the journey.<sup>103</sup>

Alien smuggling-related activities may be prosecuted under a variety of criminal statutes including immigration document fraud and bribery.<sup>104</sup> In addition, other federal crimes may be applicable as alien smuggling is listed among the Racketeer Influence and Corrupt Organization (RICO)<sup>105</sup> predicate offenses and is included in the definition of specified unlawful activities for money laundering statutes.<sup>106</sup> Furthermore, criminal and civil forfeiture statutes<sup>107</sup> may apply to alien smuggling cases. From October to March FY2005, ICE reported the seizure of \$7.8 million from alien smuggling investigations.

## **DHS' Role in the Anti-Smuggling Effort**

Under the INS, two separate entities in the organization, the border patrol (USBP) and the INS investigations program, conducted alien smuggling investigations. The Government Accountability Office (GAO) found that due to a lack of program coordination between the two

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(...continued)

*Border Out on Alien Smuggling.*)

<sup>98</sup> Ibid.

<sup>99</sup> GAO, *Combating Alien Smuggling, Opportunities Exist to Improve the Federal Response.*

<sup>100</sup> Statement of Representative Linda T. Sanchez, in U.S. Congress, House Committee on the Judiciary, Subcommittee on Immigration, Border Security, and Claims, *Pushing the Border Out on Alien Smuggling: New Tools and Intelligence Initiatives*, hearings, 108<sup>th</sup> Cong., 2<sup>nd</sup> sess., May 18, 2004.

<sup>101</sup> Statement of Michael W. Cutler, Fellow, Center for Immigration Studies, in U.S. Congress, House Committee on the Judiciary, Subcommittee on Immigration, Border Security, and Claims, *Pushing the Border Out on Alien Smuggling: New Tools and Intelligence Initiatives*, hearings, 108<sup>th</sup> Cong., 2<sup>nd</sup> sess., May 18, 2004.

<sup>102</sup> Personal Communication with Kevin Burns, CFO University Medical Center, Aug. 3, 2004.

<sup>103</sup> Personal Communication with Sister Elizabeth, Humane Borders, Aug. 3, 2004.

<sup>104</sup> GAO, *Combating Alien Smuggling, Opportunities Exist to Improve the Federal Response*, p.4.

<sup>105</sup> 18 U.S.C. §1961.

<sup>106</sup> 18 U.S.C. §1956. GAO, *Combating Alien Smuggling, Opportunities Exist to Improve the Federal Response*, p.6.

<sup>107</sup> ICE and the Department of Justice have noted that there is a lack of statutory civil forfeiture authority for seizing real property (such as stash houses) which can hamper smuggling investigations.

INS entities, there were several anti-smuggling units that overlapped in their jurisdictions, operated autonomously, and reported to different officials.<sup>108</sup> The abolishment of the INS and the transfer of its functions to DHS may have resolved some of these issues. According to an ICE Office of Investigations (OI) official, the border patrol has a minor role in alien smuggling and trafficking and is required to coordinate with OI before initiating anti-smuggling investigations.<sup>109</sup> Nonetheless, it is unclear that this coordination is functioning smoothly. (Recently a sting was compromised because of lack of coordination between ICE and CBP when ICE agents were trying to cross the border with money and drugs to uncover the entire smuggling operation.)<sup>110</sup>

### *ICE's Anti-Smuggling Role*

ICE works to identify and dismantle large-scale transnational smuggling organizations in collaboration with other law enforcement agencies, both foreign and domestic. Major investigations are conducted with the cooperation and assistance of other federal, state, and local law enforcement agencies, as well as the appropriate bureaus of foreign governments.<sup>111</sup> ICE reports that it coordinates the anti-smuggling efforts of all divisions in DHS, including investigations offices, overseas offices, inspections at ports-of-entry (POEs), and Border Patrol units between POEs.<sup>112</sup> It is also the primary DHS component for investigating alien smuggling, but Customs and Border Protection (CBP) and the U.S Coast Guard are also involved.

ICE is developing a foreign and domestic strategy to combat alien smuggling which includes implementing critical incident response teams, and using the money laundering statutes and the identification and seizure of assets and criminal proceeds to strip away the assets and profit incentive of smuggling organizations.<sup>113</sup> Nonetheless, reportedly ICE has not finalized its strategy for combating alien smuggling. Begun in summer 2003—soon after the formation of DHS—the strategy is being adjusted to focus on the southwest border and to encompass the smuggling of aliens, drugs, and other contraband.<sup>114</sup>

ICE places a significant emphasis on targeting alien smuggling organizations that present threats to national security, recognizing that terrorists are likely to align themselves with alien smuggling networks to obtain undetected entry into the United States.<sup>115</sup> It is widely believed that there are

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<sup>108</sup> Governmental Accountability Office, *Alien Smuggling: Management and Operational Improvements Needed to Address Growing Problems* (GAO/GGD-00-103), May 1, 2000.

<sup>109</sup> GAO, *Immigration Enforcement: DHS Has Incorporated Immigration Enforcement Objectives and Is Addressing Future Planning Requirements* (2004), p. 9.

<sup>110</sup> Personal communication with Immigration and Customs Enforcement Agents in Los Angeles, CA, Aug. 15, 2005.

<sup>111</sup> U.S. Immigration and Customs Enforcement website [http://www.bice.immigration.gov/graphics/enforce/invest/invest\\_hs.htm](http://www.bice.immigration.gov/graphics/enforce/invest/invest_hs.htm).

<sup>112</sup> U.S. Immigration and Customs Enforcement website [http://www.bice.immigration.gov/graphics/enforce/invest/invest\\_hs.htm](http://www.bice.immigration.gov/graphics/enforce/invest/invest_hs.htm).

<sup>113</sup> Testimony of Deputy Assistant Director, Smuggling and Public Safety, Bureau of Immigration and Customs Enforcement John P. Torres, in U.S. Congress, House Judiciary Committee, Subcommittee on Immigration, Border Security, and Claims, *Alien Smuggling: New Tools and Intelligence Initiatives*, hearings, 108<sup>th</sup> Cong., 2<sup>nd</sup> sess., May 18, 2004. (Hereafter cited as Torres, *Alien Smuggling: New Tools*.)

<sup>114</sup> GAO, *Combating Alien Smuggling, Opportunities Exist to Improve the Federal Response*, p. 1.

<sup>115</sup> Testimony of Interim Associate Special Agent in Charge, Bureau of Immigration and Customs Enforcement Thomas Homan, in U.S. Congress, House Judiciary Committee, Subcommittee on Immigration, Border Security, and Claims, *The Deadly Consequences of Illegal Alien Smuggling* hearings, 108<sup>th</sup> Cong., 1<sup>st</sup> sess., June 24, 2003. (Hereafter cited as Homan, *Deadly Consequences*.)

factors which have created an environment in which terrorist and smuggling enterprises may combine their criminal efforts to pose a significant threat to national security. These factors include the increase in sophistication of criminal organizations, the ability of these organizations to exploit public corruption, and the lax immigration controls in transit countries. In addition, smuggling pipelines that are used by unauthorized aliens and criminals seeking to enter the United States could also be used by terrorists to gain entrance into the United States.<sup>116</sup> DHS' global Anti-Smuggling/Human Trafficking Strategy concentrates efforts on intelligence-driven investigations against major violators, specifically targeting organizations with ties to countries that support terrorist organizations such as al Qaeda.<sup>117</sup>

### ***CBP's Anti-Smuggling Role***

The U.S. Border Patrol (USBP) in CBP is responsible for interdicting aliens smuggled between ports of entry. Generally, after the USBP makes an interdiction, the smuggled aliens are separated from members of the smuggling organization; interviews are conducted of both groups; sworn statements are solicited from material witnesses; fingerprints are taken; and other relevant information is accumulated. CBP refers to ICE's Office of Investigations only those cases that involve a significant scope, violence, or other egregious circumstances. The USBP also makes referrals to ICE based on more in-depth or strategic analyses conducted by USBP's intelligence units which routinely analyze alien-smuggling interdictions to develop information on smuggling patterns and identify leads warranting further investigation.<sup>118</sup>

### ***ICE and CBP Smuggling Memorandum of Understanding***

A recent GAO report noted that the effectiveness of ICE's anti-smuggling strategy would depend partly on the clarification of the ICE and CBP's roles in anti-smuggling activities. In April 2004, ICE and CBP signed a Memorandum of Understanding (MOU) which stated that,

- ICE would assume the full burden of administratively supporting, equipping, and funding the anti-smuggling units.
- ICE would have lead responsibility for certain nationally designated cases as well as Joint Terrorism Task Force cases.
- USBP would have responsibility for border-related interdiction activities, including checkpoint operations.
- USBP and ICE would be jointly responsible for ensuring the proper and timely sharing of information and intelligence.
- There is a need to develop a more comprehensive agreement regarding the working relationship between ICE investigations and CBP.

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<sup>116</sup> Torres, *Alien Smuggling: New Tools*.

<sup>117</sup> Testimony of Interim Assistant Director of Investigations, Bureau of Immigration and Customs Enforcement Charles H. Demore in U.S Congress, Senate Judiciary Committee, Subcommittee on Crime, Corrections, and Victims' Rights, *Alien Smuggling/Human Trafficking: Sending a Meaningful Message of Deterrence*, hearings, 108<sup>th</sup> Cong., 1<sup>st</sup> sess., July 25, 2003. (Hereafter cited as Demore, *Alien Smuggling/Human Trafficking*.)

<sup>118</sup> November 2004 MOU specified that the Border Patrol would actively prepare intelligence folders and forward them to ICE on a case-by-case basis as the need arises. GAO, *Combating Alien Smuggling, Opportunities Exist to Improve the Federal Response*, p. 14.

In November 2004, ICE and CBP signed a second MOU addressing the bureaus' roles and responsibilities, including provisions for sharing information and intelligence. The MOU reiterated that ICE's Office of Investigations has primary responsibility for all investigations, while the USBP has primary responsibility for interdictions between ports of entry. Nonetheless, the MOU stated that the missions of the two bureaus "are intricately connected and complementary."<sup>119</sup> However, at this time, there is no mechanism for tracking the status of cases referred to ICE by CBP, which may cause the agency to miss opportunities to identify and investigate large smuggling operations.<sup>120</sup> In addition, there have reportedly been communications issues between ICE and CBP during some smuggling investigations.<sup>121</sup>

## **The Role of Other Federal Agencies**

Other federal agencies, including the Department of Justice's Criminal Division, Federal Bureau of Investigation, U.S. Attorney's Office, Department of Treasury's Internal Revenue Service's Criminal Division, and the Financial Crimes Enforcement Network (FinCEN), play a role in combating alien smuggling. Likewise, since alien smuggling and document fraud are often linked, the Department of State's Bureau of Diplomatic Security also is involved in the anti-smuggling effort due to its mission to protect travel documents. Additionally, the Department of State's Bureau of International Narcotics and Law Enforcement Affairs coordinates international anti-smuggling efforts (e.g., helping countries draft alien smuggling legislation, providing funds to foreign countries that have intercepted smuggled aliens to assist in returning these aliens to their home countries). The Central Intelligence Agency's (CIA) Office of Transnational Issues provides analytical assessments related to alien smuggling, and the Department of Defense's National Security Agency (NSA) assists in the interdiction of smuggled aliens overseas.<sup>122</sup>

## ***Human Smuggling and Trafficking Center***

The Human Smuggling and Trafficking Center (HSTC) is an interagency group—including the Departments of Justice, State, and Homeland Security—which provides information to counter migrant smuggling, trafficking of persons, and clandestine terrorist travel. The center's three primary objectives are (1) prevention and deterrence of smuggling and related trafficking activities, (2) investigation and prosecution of the criminals involved in such activity, and (3) protection of and assistance for victims as provided in applicable law and policy.<sup>123</sup>

## **Selected Alien Smuggling Issues**

The number of individuals smuggled into the United States has increased dramatically, and smuggling organizations have become more sophisticated. Furthermore, there were concerns about the former INS' ability to combat alien smuggling, and it is unknown how many of these problems carried over into ICE. For example, the INS lacked the field intelligence staff to collect

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<sup>119</sup> *Ibid.*, p. 11.

<sup>120</sup> *Ibid.*, p. 3.

<sup>121</sup> Personal communication with Immigration and Customs Enforcement Agents and Customs and Border Patrol Agents, in Los Angeles and San Diego, CA, Aug. 15, 2005.

<sup>122</sup> GAO, *Alien Smuggling: Management and Operational Improvements Needed*, p. 5.

<sup>123</sup> The HSTC was established by the Intelligence Reform and Terrorist Prevention Act of 2004 (P.L. 108-408, §7202). See <http://www.state.gov/p/inl/c14079.htm>.

and analyze information on alien smuggling.<sup>124</sup> In addition, a 2000 GAO report noted the lack of program coordination and the absence of an automated case management system as impeding anti-smuggling efforts.<sup>125</sup>

Nonetheless, the ability of DHS to combine alien smuggling and money laundering investigations reportedly has aided in alien smuggling investigations. ICE has the ability to pursue money laundering charges related to smuggling since DHS has the authorities of the former U.S. Customs Service. This capacity did not exist in INS, and INS would have had to seek outside assistance to pursue additional charges.<sup>126</sup> On the other hand, there have been reports of a lack of coordination on alien smuggling between ICE and CBP which has led to inefficiencies in alien smuggling investigations.

### *Smuggling or Humanitarian Assistance*

The line between humanitarian assistance and alien smuggling is not always clearly defined. In 1986, the Reverend John Fife was convicted of alien smuggling for his work in the “sanctuary movement,” providing shelter to illegal aliens from Central American, most of whom were fleeing civil wars.<sup>127</sup> In July 2005, two volunteers from the group No More Deaths, which provides water and medical care to unauthorized aliens crossing the Arizona desert, were arrested and charged with alien smuggling. According to the volunteers, they were transporting three unauthorized aliens to a church in Tucson, Arizona to provide medical care. Nonetheless, the aliens were being transported in furtherance of their unlawful presence, and the group did not intend to notify USBP.<sup>128</sup>

In addition, the group Humane Borders sets up water stations in the desert for aliens trying to cross illegally into the United States and recently printed a map of the routes through the Arizona desert into the United States, illustrating USBP beacons, Humane Borders water stations, and migrant places of death. According to the group, the objective of the maps is to try to dissuade migrants from undertaking an illegal border crossing by warning them of the risks. However, others argue that Humane Borders is aiding and abetting illegal entry, and is engaging in alien smuggling.<sup>129</sup>

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<sup>124</sup> Stana, *Challenges to Implementing the Immigration Interior Enforcement Strategy*, pp. 5-6.

<sup>125</sup> U.S. General Accounting Office (GAO), *Alien Smuggling: Management and Operational Improvements Needed to Address Growing Problem*, GAO/GGD-00-103, May 2003, pp. 2-3. (Hereafter cited as GAO, *Alien Smuggling: Management and Operational Improvements Needed*.)

<sup>126</sup> GAO, *Immigration Enforcement: DHS Has Incorporated Immigration Enforcement Objectives and Is Addressing Future Planning Requirements*, p. 7.

<sup>127</sup> Marc Cooper, “Dead in Their Tracks,” *LA Weekly*, Feb. 24, 2006, p. 32.

<sup>128</sup> Michael Riely, “Migrant-aid Case Puts Border Policy Under Microscope,” *The Denver Post*, Jan. 2, 2006, p. A1.

<sup>129</sup> Lourdes Medrano, “Entrant Map Shows Border Roads, Water Tanks,” *Arizona Daily Star*, Jan. 25, 2006.

## Immigration Fraud

### Defining Immigration Fraud<sup>130</sup>

Immigration fraud is generally grouped into two types—immigration-related document fraud and immigration benefit fraud.

- Immigration-related document fraud includes the counterfeiting, sale and/or use of identity documents or “breeder documents” (i.e., documents used to confirm identity, such as birth certificates or Social Security cards),<sup>131</sup> as well as alien registration documents and stamps, employment authorizations, passports, visas, or any documents used to circumvent immigration laws.
- Benefit fraud encompasses the willful misrepresentation of a material fact to obtain an immigration benefit in the absence of lawful eligibility for that benefit.<sup>132</sup>

Some view immigration fraud as a continuum of events because people may commit document fraud en route to benefit fraud.

The INA addresses immigration fraud in several ways. First, the law makes “misrepresentation” (e.g., obtaining a visa by falsely representing a material fact or entering the United States by falsely claiming U.S. citizenship) a ground for inadmissibility.<sup>133</sup> Second, the INA has civil enforcement provisions, distinct from removal or inadmissibility proceedings, to prosecute individuals and entities that engage in immigration document fraud.<sup>134</sup>

In addition to the INA, §1546 of the U.S. Criminal Code makes it a criminal offense for a person to knowingly produce, use, or facilitate the production or use of fraudulent immigration documents such as visas, border crossing cards, and other documents covered by immigration-related statute or regulation. The U.S. Criminal Code furthermore criminalizes immigration fraud pertaining to the knowing falsification of naturalization, citizenship, or alien registry. More generally, the U.S. Criminal Code criminalizes the knowing commission of fraud in connection with a wide range of identification documents.<sup>135</sup>

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<sup>130</sup> For legal analysis and legislative action pertaining to immigration document fraud, see CRS Report RL32657, *Immigration-Related Document Fraud: Overview of Civil, Criminal, and Immigration Consequences*, by Yule Kim and (name redacted).

<sup>131</sup> For a sample of discussions on the impact of breeder documents on immigration fraud, see U.S. House of Representatives, Committee on the Judiciary, Subcommittee on Immigration and Claims, *Hearing on Counterfeiting And Misuse Of the Social Security Card and State and Local Documents*, July 22, 1999; U.S. National Commission on Terrorist Attacks upon the United States, *The 9/11 Commission Report*, Executive Summary, July 2004; U.S. General Accounting Office, Report GAO-03-920, *Social Security Numbers: Improved SSN Verification and Exchange of States’ Driver Records Would Enhance Identity Verifications*, September 2003; *New York Law Journal*, “Immigration Reform: Balancing Workers and Enforcement,” by Stanley Mailman and Stephen Yale-Loehr, Aug. 2005; and, Center for Immigration Studies, *America’s Identity Crisis: Document Fraud is Pervasive and Pernicious*, by Marti Dinerstein, Apr. 2002.

<sup>132</sup> U.S. House of Representatives, Committee on the Judiciary Subcommittee on Immigration and Claims, *Hearing on Visa Fraud and Immigration Benefits Application Fraud*, May 20, 1997.

<sup>133</sup> INA §212(c).

<sup>134</sup> INA §274(c).

<sup>135</sup> 18 U.S.C. §§1015, 1028.

## Measuring Fraud

Immigration fraud is reportedly widespread, though estimates of its pervasiveness are not available.<sup>136</sup> The conventional wisdom is that document fraud increased following the enactment of the Immigration Reform and Control Act of 1986, which first required employers to inspect the documents of prospective employees.<sup>137</sup> Large-scale black market enterprises providing counterfeit immigration documents and “breeder” documents developed to supply unauthorized alien workers with necessary papers. Given that calculations based upon the 2005 Current Population Survey estimated that 11.1 million aliens were residing in the United States without legal authorization, it is reasonable to presume that many of these unauthorized aliens are committing document fraud. Nonimmigrant visa fraud among aliens temporarily in the United States has also been an ongoing problem.<sup>138</sup> It is possible that many of those people who broker in immigration fraud are legal residents or citizens of the United States.

Many policy analysts maintain that the pervasiveness of immigration fraud facilitates the entry and assimilation of those aliens who pose threats to the United States. The National Commission on Terrorist Attacks Upon the United States (commonly known as the 9/11 Commission) showed that several of 19 hijackers responsible for the 9/11 attacks were able to obtain visas to enter the United States through the use of forged documents. Incomplete intelligence and screening enabled many of the hijackers to enter the United States despite flaws in their entry documents or suspicions regarding their past associations. According to the 9/11 Commission, up to 15 of the hijackers could have been intercepted or deported through more diligent enforcement of immigration laws.<sup>139</sup>

## Investigating Fraud

The types of fraud investigations range in circumstances and scope. Many investigations focus on facilitators, i.e., those who sell, distribute or manufacture counterfeit or altered documents and on criminal organizations that broker large-scale illegal schemes such as sham marriage rings or bogus job offers. Investigations of immigration benefit applications are another major activity.

As immigration enforcement strategies have changed and resources have shifted over time, it has long been evident that investigations of immigration fraud has declined as a priority. In FY1986, for example, the productive workyears devoted to fraud investigation reportedly equaled 256 special agents, and they completed 11,316 fraud cases. Ten years later (FY1995), there were 181 special agent workyears, and they completed only 6,455 cases.<sup>140</sup> When the INS issued its

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<sup>136</sup> For example see U.S. Government Accountability Office (GAO), *Immigration Benefits: Additional Controls and a Sanctions Strategy Could Enhance DHS's Ability to Control Benefit Fraud*, GAO-06-259, Mar. 2006.

<sup>137</sup> P.L. 99-603. The changes made by Immigration Reform and Control Act of 1986 are discussed in more detail below.

<sup>138</sup> For a range of discussions, see U.S. House of Representatives, Committee on the Judiciary Subcommittee on Immigration and Claims, *Hearing on Visa Fraud and Immigration Benefits Application Fraud*, May 20, 1997; and Subcommittee on Immigration, Border Security, and Claims, *Hearing on John Allen Muhammad, Document Fraud, and the Western Hemisphere Passport Exception*, May 13, 2003.

<sup>139</sup> U.S. National Commission on Terrorist Attacks upon the United States, *The 9/11 Commission Report*, Executive Summary, July 2004; and *Monograph on 9/11 and Terrorist Travel*, Aug. 2004.

<sup>140</sup> U.S. House of Representatives, Committee on the Judiciary Subcommittee on Immigration and Claims, *Hearing on Visa Fraud and Immigration Benefits Application Fraud*, testimony of Paul Virtue, May 20, 1997.

“Interior Enforcement Strategy” in 1999, however, minimizing immigration benefit fraud and other document abuse was listed as the fourth among five top priorities.<sup>141</sup>

Evaluations of the government’s efforts to combat immigration benefit fraud and document abuse have generally been critical.<sup>142</sup> GAO noted that “INS did not believe it had sufficient staff to reach its program goals.” GAO also reported that benefit fraud investigations were hampered by a lack of integrated information systems. “The operations units at the four INS service centers that investigate benefit fraud operate different information systems that did not interface with each other or with the units that investigate benefit fraud at INS district offices. ... Thus, INS was not in the best position to review numerous applications and detect patterns, trends, and potential schemes for benefit fraud.”<sup>143</sup>

### **Staffing of Fraud Investigations**

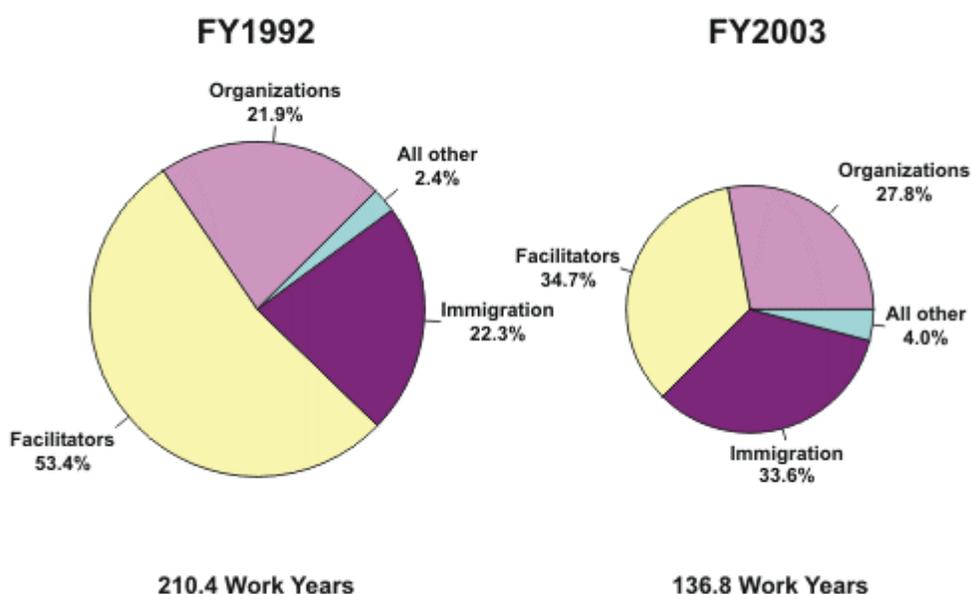
The cuts in fraud investigations between FY1992 and FY2003 appear to have been generally across the board in terms of types of investigations pursued. As **Figure 8** depicts, workyears spent investigating facilitators of counterfeit or altered documents, organizations that broker large-scale illegal schemes and persons suspected of immigration benefit fraud have all decreased. Note that the “all other” category in FY2003 includes the investigations of civil violations of document fraud (INA §274C) that were enacted in 1996, and likely account for its relative increase.

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<sup>141</sup> The five priorities (in rank order) were (1) identify and remove incarcerated criminal aliens from the United States and minimize recidivism; (2) deter, dismantle and diminish smuggling or trafficking of aliens; (3) respond to community reports and complaints about illegal immigration and build partnerships to solve local problems; (4) minimize immigration benefit fraud and other document abuse; and (5) block and remove employers’ access to undocumented workers. U.S. Department of Justice Immigration and Naturalization Service, *Fact Sheet on Interior Enforcement*, February 2, 1999.

<sup>142</sup> U.S. Department of Justice Office of the Inspector General, Inspections Division, *Immigration and Naturalization Service Document Fraud Records Corrections*, Report Number I-96-09 September 1996; U.S. Senate Committee on the Judiciary Subcommittee on Technology, Terrorism, and Government Information, Statement of Glenn A. Fine, October 12, 2001; U.S. Government Accountability Office, GAO-02-830T, *Identity Fraud: Prevalence and Links to Alien Illegal Activities*, June 25, 2002; U.S. Government Accountability Office, GAO-03-660T, *Homeland Security: Challenges to Implementing the Immigration Interior Enforcement Strategy*, April 10, 2003; U.S. Government Accountability Office, GAO-05-66, *Immigration Enforcement: DHS Has Incorporated Immigration Enforcement Objectives and Is Addressing Future Planning Requirements*, October 8, 2004.

<sup>143</sup> U.S. Government Accountability Office, GAO-03-660T, *Homeland Security: Challenges to Implementing the Immigration Interior Enforcement Strategy*, April 10, 2003.

**Figure 8. Fraud Investigations by Type or Target, FY1992 and FY2003**

**Source:** CRS analysis of DHS Office of Immigration Statistics PAS data.

### Selected Fraud Issues

There appears to be a continued lack of coordination between U.S. Citizenship and Immigration Services (USCIS) and ICE in the area of fraud and national security investigations.<sup>144</sup> USCIS established the Office of Fraud Detection and National Security to work with the appropriate law enforcement entities to handle national security and criminal “hits” on aliens and to identify systemic fraud in the application process. Many of these duties were formerly performed by the INS enforcement arm that is now part of ICE. The GAO has reported, “The difficulty between USCIS and ICE investigations regarding benefit fraud is not new.... As a result, some USCIS field officials told us that ICE would not pursue single cases of benefit fraud. ICE field officials who spoke on this issue cited a lack of investigative resources as to why they could not respond in the manner USCIS wanted.”<sup>145</sup>

The inter-agency coordination problems, coupled with the observable decline in investigator work years allocated to document and benefit fraud, are more relevant when considering the role bogus documents and benefit fraud play in facilitating other violations of law. Some maintain that limited enforcement resources should not be spent going after purveyors who primarily are providing false identification so that unauthorized aliens can work. Others argue that it is critical to investigate the black market in counterfeit documents and benefit fraud because it is especially

<sup>144</sup> For more discussion of inter-agency coordination issues, see CRS Report RL33319, *Toward More Effective Immigration Policies: Selected Organizational Issues*, by (name redacted).

<sup>145</sup> U.S. Government Accountability Office, *Management Challenges Remain in Transforming Immigration Programs*, GAO-05-81, Oct. 2004.

important to international terrorists, organized crime syndicates, and alien smuggling rings—all of whom rely on fraudulent documents to minimize detection.

## **Worksite Enforcement**

The INA prohibits the unlawful employment of aliens and related discrimination.<sup>146</sup> These prohibitions were added to the INA by the Immigration Reform and Control Act of 1986 (IRCA). The provisions on unlawful employment sought to deter unauthorized immigration by reducing the magnet of employment. These provisions, as amended, make it unlawful for an employer to knowingly hire, or recruit or refer for a fee, or continue to employ an alien who is not authorized to be so employed. They require employers to verify the employment eligibility of new hires by examining documents that establish identity and work eligibility, and to complete and retain verification forms. Employers violating these requirements may be subject to civil and/or criminal penalties, known as employer sanctions.<sup>147</sup> The term employer sanctions is also used generally to refer to the provisions on unlawful employment. The ICE Office of Investigations has primary responsibility for enforcing these provisions. The related anti-discrimination provisions, as amended, prohibit employment discrimination against U.S. citizens or work-authorized aliens based on national origin or on citizenship or immigration status. These provisions are enforced by the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC) in the Civil Rights Division of the U.S. Department of Justice.<sup>148</sup>

Full enforcement of the employer sanctions provisions began in June 1988 in the nonagricultural sector and in December 1988 in agriculture. Primary enforcement responsibility at the time rested with the former INS as part of its investigations program.<sup>149</sup> In the early years, educating employers about their responsibilities in order to promote voluntary compliance continued to be a key focus of the program. At the same time, an increasing emphasis was placed on enforcing penalties against violators. At that time, enforcement of employer sanctions combined “traditional investigations—based on leads about suspected violations—with compliance investigations based on neutral, or random, selection of employers.”<sup>150</sup>

## **Policy Changes**

Policies governing the enforcement of employer sanctions have changed over the years. On April 5, 1991, then-INS Commissioner Gene McNary issued a memorandum ordering the Office of Enforcement and the Office of the General Counsel to launch a six-month initiative to strengthen enforcement of employer sanctions.<sup>151</sup> An implementation plan accompanying the memorandum

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<sup>146</sup> INA §§274A-274B.

<sup>147</sup> INA §274A, 8 U.S.C. §1324a. For further discussion of these legal provisions, CRS Report RS22180, *Unauthorized Employment of Aliens: Basics of Employer Sanctions*, by (name redacted). (Hereafter cited as CRS Report RS22180.)

<sup>148</sup> INA §274B, 8 U.S.C. §1324b. These provisions will not be discussed further here. See CRS Report RS22180. Additional information is also available at the OSC website <http://www.usdoj.gov/crt/osc/index.html>.

<sup>149</sup> The Border Patrol also had a role in enforcing employer sanctions.

<sup>150</sup> U.S. Department of Justice, Immigration and Naturalization Service, “Second Report on the Implementation of IRCA,” *INS Reporter*, summer 1989, pp. 2-3.

<sup>151</sup> U.S. Department of Justice, Immigration and Naturalization Service, “Employer Sanctions Program Policy,” memorandum, April 5, 1991. The memorandum and accompanying implementation plan are reprinted in *Interpreter Releases*, vol. 68, no. 14 (April 15, 1991), pp. 445-455.

stated: “The message to employers must be unequivocal—INS is prepared to vigorously enforce administrative and criminal sanctions against those who violate the law.” According to the implementation plan, INS investigators were to spend at least 30 percent of their time for the remainder of FY1991 on each of three investigations program priorities—employer sanctions, criminal aliens, and fraud. New fraud cases were to focus predominantly on employer sanctions-related fraud. In addition, INS worksite enforcement resources were to be directed toward enforcement activities and not used for employer education.<sup>152</sup> In January 1992, the enhanced worksite enforcement initiative was extended indefinitely.

In February 1995, President Clinton issued a memorandum which identified worksite enforcement and employer sanctions as a major component of the Administration’s overall strategy to deter illegal immigration. The Administration’s approach was to “target enforcement efforts at employers and industries that historically have relied upon employment of illegal immigrants.”<sup>153</sup>

For FY1996, the Clinton Administration requested, and Congress appropriated, significant funding increases for interior enforcement, including worksite enforcement and employment eligibility verification. At that time, Congress also enacted the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), which established three pilot programs for employment eligibility confirmation; reduced the number of acceptable documents for purposes of completing employment eligibility verification forms, known as I-9 forms; and provided employers with the possibility of a “good faith” defense against technical violations of I-9 requirements.<sup>154</sup> During the 1995-1998 period, INS conducted numerous onsite workplace raids and arrested thousands of unauthorized aliens.

In 1998, INS changed its approach to worksite enforcement.<sup>155</sup> Apparently, the change was prompted largely by complaints about INS tactics during worksite raids. The new procedures responded to complaints by Congress and others, and incorporated the “best practices” of various offices.<sup>156</sup> An INS memorandum at that time noted that “worksite enforcement operations [actions by INS to arrest unauthorized aliens at a worksite] are sometimes misunderstood by the general public” leading to a lack of public support.<sup>157</sup> Given that the “purpose of worksite enforcement is to deter the unlawful employment of aliens... worksite enforcement investigations that involve alien smuggling, human rights abuses, and other criminal violations must take precedence.”<sup>158</sup>

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<sup>152</sup> Quoted in “INS Continues Enhanced Employer Sanctions Effort,” *Interpreter Releases*, vol. 69, no. 8 (March 2, 1992), p. 253.

<sup>153</sup> U.S. President (Clinton), “Deterring Illegal Immigration,” 60 *Federal Register* 7885-7889, Feb. 13, 1995.

<sup>154</sup> See CRS Report RS22180, *Unauthorized Employment of Aliens: Basics of Employer Sanctions*, by (name redacted).

<sup>155</sup> U.S. Department of Justice, Immigration and Naturalization Service, “Immediate Action Directive for Worksite Enforcement Operations,” memorandum, May 22, 1998. The memorandum and attachments are reprinted in *Interpreter Releases*, vol. 75, no. 27 (July 17, 1998), pp. 987-996.

<sup>156</sup> See William Branigin, “Criticism Prompts INS to Make New Rules for Work Site Raids; Some Fear Guidelines Will Limit Enforcement Capability,” *Washington Post*, May 30, 1998, p. A2.

<sup>157</sup> According to the memorandum, worksite enforcement operations had to be approved by either a regional director or the Executive Associate Commissioner for Field Operations (or their designees), depending on the “sensitivity of the proposed operation.”

<sup>158</sup> U.S. Department of Justice, Immigration and Naturalization Service, “Immediate Action Directive for Worksite Enforcement Operations,” memorandum, May 22, 1998. The memorandum and attachments are reprinted in *Interpreter Releases*, vol. 75, no. 27 (July 17, 1998), pp. 987-996.

As discussed above, in 1999, INS unveiled a new interior enforcement strategy, which included five priorities, two of which related to worksite enforcement. In a prepared statement for a July 1999 hearing by the House Judiciary Committee's Subcommittee on Immigration and Claims, INS Executive Associate Commissioner for Policy and Planning Robert Bach explained the relationship between these two worksite enforcement priorities as follows:

INS believes there is a clear nexus between defeating smuggling organizations—which is Priority 2—and blocking access to and removing undocumented workers—Priority 5. Disrupting and dismantling a smuggling organization that transports undocumented workers across the U.S. border will have a direct impact on limiting employers' access to this exploitable source of labor. Additionally, anti-smuggling efforts generate leads on employers and industries employing undocumented workers.<sup>159</sup>

According to Bach, the new interior enforcement strategy emphasized both working cooperatively with employers to improve their compliance with employment eligibility verification requirements and reduce unauthorized employment, as well as prosecuting employers who violate the law. He indicated that INS would focus on criminal employer cases, cases in which there was a pattern or practice of knowingly employing unauthorized workers, and would target, in particular, employers who abused their workers and who violated multiple laws.<sup>160</sup>

Under the 1999 interior enforcement strategy, INS pursued the general tactical approach of auditing I-9 forms to identify suspected unauthorized aliens. It did so on a large-scale basis in an operation targeting the meatpacking industry, called "Operation Vanguard." Launched in the fall of 1998, Operation Vanguard involved subpoenaing the I-9 forms and other employment records of workers in all the meatpacking plants in Nebraska and in some plants in Iowa and South Dakota. By checking these records against INS, Social Security Administration, and other databases, INS developed lists of employees whose work authorization it could not verify. These lists were then distributed to employers, who arranged interviews for the workers with INS.

At the July 1999 House Immigration and Claims Subcommittee hearing, Mark Reed, then director of the INS Central Region office, maintained that the Operation Vanguard approach was more effective than the workplace raids and arrests of past years:

If the numbers were smaller, if we had less people in the United States unlawfully, if we had less employers engaging in this, doing raids and removing people would be a much more effective strategy, but we simply can't do that.<sup>161</sup>

Operation Vanguard prompted a strong political backlash, however, and was ended. Testifying at a May 2005 joint hearing by the Senate Judiciary Committee's Subcommittees on Immigration, Border Security, and Citizenship and Terrorism, Technology, and Homeland Security, Reed, now with a consulting firm, offered his retrospective views on Operation Vanguard:

Vanguard demonstrated an efficient and effective capability to bar unauthorized workers from employment in any given sector. When the capability was realized, it was stopped as well. In reality, the implementation of Vanguard was not good government.... Depriving

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<sup>159</sup> U.S. Congress, House Committee on the Judiciary, Subcommittee on Immigration and Claims, *Immigration and Naturalization Service's Interior Enforcement Strategy*, 106<sup>th</sup> Cong., 1<sup>st</sup> sess., July 1, 1999 (Washington: GPO, 2000), p. 7. (Hereafter cited as 1999 House Hearing on INS's Interior Enforcement Strategy.)

<sup>160</sup> *Ibid.*, p. 13.

<sup>161</sup> *Ibid.*, p. 40.

these [meatpacking] plants the ability to remain competitive was a major threat to the livelihood of everyone in the community.

In the aftermath of the September 11, 2001 attacks, interior enforcement resources were redirected from traditional program areas, including worksite enforcement, to national security-related investigations. While criminal employer cases remained a stated priority of the worksite enforcement program, they became subordinate to “removing unauthorized workers from critical infrastructure facilities such as airports, military bases, research facilities, nuclear plants, etc.”<sup>162</sup> A 2003 memorandum issued by ICE headquarters suggests the extent of the post-9/11 emphasis on critical infrastructure investigations. The memorandum requires field offices to request headquarters approval before opening a worksite enforcement investigation not related to critical infrastructure protection.<sup>163</sup>

### *Coordination with Department of Labor*

While ICE has primary responsibility for enforcing INA provisions on the unlawful employment of aliens, the Department of Labor (DOL) also has a role. The INA requires that employers retain completed I-9 employment eligibility verification forms and make them available for inspection by DOL. In addition to this statutory role, it is widely believed that DOL, specifically the Employment Standards Administration (ESA), can help reduce unauthorized employment by carrying out its core responsibilities to enforce labor standards. Enforcing labor standards can help deter unauthorized employment, it is argued, by depriving employers of some of the potential financial advantages of employing unauthorized workers at substandard wages and working conditions.

In 1992, INS and DOL’s ESA entered into a memorandum of understanding (MOU) to improve cooperation and coordination between the agencies.<sup>164</sup> Under the terms of the 1992 MOU, ESA was given authority to issue warning notices to employers for violations of the employment eligibility verification requirements. ESA also was to promptly refer suspected substantive violations to INS. At the same time, the MOU stated that ESA, would not take any action which would compromise its ability to carry out its fundamental mission [of enforcing labor standards statutes], regardless of the workers’ immigration status. DOL officials took the position that investigating worksite immigration matters, beyond reviewing I-9 forms, could impede their efforts to enforce worker protection laws.<sup>165</sup> Thus, ESA’s role was limited mainly to reviewing employers’ I-9 forms and reporting results to INS.

ESA and INS signed a new MOU in 1998 that sought to address DOL’s concerns about conducting worksite immigration enforcement and to clarify the enforcement roles and

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<sup>162</sup> 2004 Senate Hearing on a Guest Worker Program, p. 66.

<sup>163</sup> See U.S. General Accountability Office, *Immigration Enforcement: Preliminary Observations on Employment Verification and Worksite Enforcement Efforts*, GAO-05-822T, June 21, 2005, p. 18. (Hereafter cited as 2005 GAO Testimony.)

<sup>164</sup> U.S. Department of Labor, Employment Standards Administration, and U.S. Department of Justice, Immigration and Naturalization Service, *Memorandum of Understanding Between the Immigration and Naturalization Service, Department of Justice, and the Employment Standards Administration, Department of Labor*, [1992]. Available in *Interpreter Releases*, vol. 69, no. 25 (July 6, 1992), pp. 829-833.

<sup>165</sup> See U.S. General Accountability Office, *Illegal Aliens: Significant Obstacles to Reducing Unauthorized Employment Exist*, GAO/GGD-99-33, April 1999, p. 19. (Hereafter cited as 1999 GAO report.)

responsibilities of each agency.<sup>166</sup> Under the 1998 MOU, ESA investigators are to inspect employer compliance with I-9 requirements in conjunction with labor standards enforcement only in directed investigations, that is, investigations not based on complaints. According to the MOU, this limitation “is intended and will be implemented so as to avoid discouraging complaints from unauthorized workers who may be victims of labor standards violations by their employer.” During these compliance inspections, ESA investigators are not to make inquiries about workers’ immigration status and are not to issue warning notices or Notices of Intent to Fine. ESA is to promptly refer to INS all suspected serious violations uncovered during directed investigations. While this MOU remains in effect, it is of less relevance at the present time in light of ICE’s current worksite enforcement focus on critical infrastructure facilities.

### Program Performance

As discussed above, employers who violate INA provisions on the unlawful employment of aliens may be subject to civil and/or criminal penalties. For violations of I-9 paperwork requirements or of the prohibition against knowingly hiring or continuing to employ aliens who lack employment authorization, employers may be subject to fines. If ICE believes that an employer has committed a violation of these provisions, the agency may issue the employer a Notice of Intent to Fine (NIF). A NIF may result in a Final Order for civil money penalties, a settlement, or a dismissal.<sup>167</sup> Employers convicted of having engaged in a pattern or practice of knowingly hiring or continuing to employ unauthorized aliens may face fines and/or imprisonment.<sup>168</sup>

**Table I. Worksite Enforcement Program Performance: FY1999-FY2003**

| Fiscal Year                                       | FY1999      | FY2000      | FY2001      | FY2002    | FY2003    |
|---------------------------------------------------|-------------|-------------|-------------|-----------|-----------|
| Criminal Employer Cases Presented for Prosecution | 182         | 109         | 239         | 21        | 4         |
| Notices of Intent to Fine (NIFs) Issued           | 443         | 213         | 141         | 73        | 16        |
| Fine Amounts Collected                            | \$3,690,575 | \$2,234,181 | \$1,599,323 | \$509,835 | \$212,322 |

**Source:** CRS Presentation of DHS data. The data on fine collections are from the DHS Debt Management Center; the other data are from the LYNX database.

**Table 1** provides data on worksite enforcement program performance for FY1999 through FY2003.<sup>169</sup> As shown, the number of NIFs issued and the amount of fine collections decreased steadily during this period. Policy changes and reallocations of resources can help explain these trends. As discussed above, INS’s 1999 interior enforcement strategy de-emphasized non-criminal employer cases, which can generate administrative fines, in favor of criminal cases. In accordance

<sup>166</sup> U.S. Department of Labor, Employment Standards Administration, and U.S. Department of Justice, Immigration and Naturalization Service, *Memorandum of Understanding Between the Immigration and Naturalization Service, Department of Justice, and the Employment Standards Administration, Department of Labor*, Nov. 23, 1998. Available in *Interpreter Releases*, vol. 75, no. 47 (Dec. 14, 1998), pp. 1711-1721.

<sup>167</sup> Employers have 30 days to request a hearing before an Administrative Law Judge in DOJ’s Executive Office for Immigration Review (EOIR) to contest a NIF. If no hearing is requested, ICE issues a Final Order for civil money penalties. If a hearing is requested, the process may end in a Final Order, a settlement, or a dismissal.

<sup>168</sup> For information on current penalties, see CRS Report RS22180, *Unauthorized Employment of Aliens: Basics of Employer Sanctions*, by (name redacted).

<sup>169</sup> These data were provided by ICE to the Senate Immigration Subcommittee as part of the agency’s written response to questions following the February 2004 hearing. A CRS request for additional data is currently pending with ICE.

with this strategy, “criminal employer cases presented for prosecution” became the only worksite enforcement program production quota assigned to INS field offices in FY1999.<sup>170</sup>

In light of the priority given to criminal prosecutions, however, the significant decrease from FY1999 to FY2000 in this measure is puzzling. The decreases in the three measures between FY2001 and FY2002 presumably reflect, at least in part, the post-September 11, 2001 redirection of enforcement resources toward national security-related investigations. Underreporting may also have contributed to these decreases, especially the sharp drops in “criminal cases presented for prosecution.” According to ICE, data for FY2002 and FY2003 may understate actual activity.

While the availability of resources and policy shifts help explain changes in worksite enforcement program performance over time, the program also faces more perennial challenges that impact performance. Among these challenges are the applicable legal standards for sanctioning employers and the prevalence of fraudulent documents. INA §274A makes it unlawful for employers to knowingly hire or continue to employ unauthorized aliens. Under the law, an employer is required to attest that he or she has verified that an employee is not unauthorized to work by examining documentation provided by the employee. An employer is considered to be in compliance with this examination requirement “if the document reasonably appears on its face to be genuine.” INA §274A also provides that an employer who establishes that he or she has complied in good faith with the I-9 requirements has an affirmative defense against the charge of knowingly hiring an unauthorized alien. The widespread availability and use of fraudulent documents<sup>171</sup> makes it difficult to prove that an employer knowingly hired an unauthorized alien and, thus, should be subject to penalties. With respect to sanctions for violations of the I-9 requirements, a 1996 amendment to INA §274A provides employers with the possibility of a good faith defense against technical or procedural violations.

## **Current Policy Issues and Options**

Worksite enforcement is a current focus of congressional interest. Among the reasons for this is the large and growing unauthorized alien population, the majority of whom are in the labor force. According to estimates by the Pew Hispanic Center, in 2004 the unauthorized alien population totaled about 10.3 million and the unauthorized alien working population totaled about 6.3 million.<sup>172</sup> Particularly since the 2001 terrorist attacks, security concerns have been raised about having such a large unauthorized population.

In addition, the issue of worksite enforcement has gained attention recently in connection with guest worker proposals. In January 2004, President Bush outlined a proposal for a new temporary worker program, and called for increased workplace enforcement as part of the program.<sup>173</sup> As

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<sup>170</sup> INS noted criminal employer investigations require a greater expenditure of investigative hours than administrative [non-criminal] cases, and as a result, the number of administrative case completions, fines, and administrative arrests declined dramatically with the 1999 redirection. 2004 Senate Hearing on a Guest Worker Program, p. 65.

<sup>171</sup> *Fraudulent documents* refers here both to counterfeit documents and to genuine documents used fraudulently, such as by someone other than the individual to whom they were issued.

<sup>172</sup> Jeffrey S. Passel, *Unauthorized Migrants: Numbers and Characteristics*, Pew Hispanic Center, June 14, 2005, at <http://www.pewhispanic.org>.

<sup>173</sup> For information about the guest worker issue, see CRS Report RL32044, *Immigration: Policy Considerations Related to Guest Worker Programs*, by (name redacted).

Congress turns its attention to worksite enforcement, there are several key policy issues it may opt to consider:

### ***Resources***

Historically, as discussed above, investigative time devoted to employer cases has been limited. In the aftermath of the 2001 terrorist attacks, resources available for worksite enforcement further dwindled, as interior enforcement increasingly focused on national security investigations. Policy questions include whether additional personnel or other resources would improve the performance of the worksite enforcement program and whether such resources should be provided.

### ***Employment Eligibility Verification***

Related to worksite enforcement and its goal of reducing unauthorized employment is the process of employment eligibility verification. Under the mandatory I-9 system, employers examine documents to verify a new hire's identity and work authorization, and employers and employees complete I-9 forms. There is broad agreement that the widespread availability and use of fraudulent documents has largely undermined the I-9 system. Another available mechanism for employment eligibility verification is the Basic Pilot program, in which participating employers electronically verify new hires' I-9 information through Social Security Administration and CIS databases to determine whether individuals are authorized to work. The Basic Pilot program is now available nationwide and participation is, for the most part, voluntary.<sup>174</sup> Policy questions include whether to revise or replace the current verification systems. Options under discussion include making the Basic Pilot program mandatory for some subset of, or all, employers, and requiring job seekers to have some type of tamper-proof work authorization document. These and other options may, in turn, raise concerns about privacy and discrimination.

### ***Employer Sanctions***

Another policy question concerns whether the current penalties for employers who violate the law on the unlawful employment of aliens should be changed. Some have argued that employer sanctions and the prohibition against hiring unauthorized aliens should be repealed entirely, on the grounds that they have not succeeded in curbing unauthorized employment and have had other negative effects, such as lowering wages and undercutting efforts to improve working conditions. Others have argued, alternatively, that existing penalties should be raised and vigorously enforced to increase their deterrent effect.

Some have argued that worksite enforcement has never been truly implemented as employer sanctions were never systematically enforced. The former INS conducted few inspections and they were generally performed randomly instead of targeting industries that were most likely to hire unauthorized aliens.<sup>175</sup>

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<sup>174</sup> For additional information on the Basic Pilot program, see U.S. Department of Homeland Security, U.S. Citizenship and Immigration Services, *Report to Congress on the Basic Pilot Program*, June 2004. This and other pilot program evaluation reports are available at <http://www.uscis.gov/graphics/aboutus/repstudies/piloteval/PilotEval.htm>.

<sup>175</sup> Reyes, *Holding the Line? The Effect of Recent Border Build-up on Unauthorized Immigration*, p. 80.

### ***Role of Other Federal Agencies in Worksite Enforcement***

There are other federal agencies which could play a larger role in aiding DHS's worksite enforcement efforts. The most obvious agencies who could aid in worksite enforcement are the Department of Labor (DOL), since many argue that those who commit wage and hour violations are also likely to use unauthorized alien labor, and Social Security Administration (SSA), since the agency can detect possible fraudulent uses of social security numbers (SSN's). However, increasing the immigration enforcement role of other federal agencies is controversial and could distract the agencies from their primary missions. GAO has testified that coordination between the INS and with other federal agencies was sometimes problematic, noting that the Department of Labor (DOL) was hesitant to delve into work authorization issues as it might cause workers to fail to report potential wage and safety violations.<sup>176</sup>

In addition, recently ICE has been criticized for impersonating other federal agencies to locate unauthorized aliens. For example, in 2005, ICE agents conducted an operation by pretending to be from the Occupational Safety and Health Administration (OSHA), and tricking workers into attending a "mandatory training session." The operation was successful, leading to the arrest of 48 unauthorized workers, but was also criticized by the DOL, local officials, and immigration and job safety advocates, who argued that the operation could cause immigrant workers to distrust safety officials responsible for protecting the workers by reducing injury rates.<sup>177</sup>

*Department of Labor.* Discussing the MOU at the July 1999 House hearing, John Fraser, then Deputy Administrator of ESA's Wage and Hour Division, described "the fundamental dilemma of worksite enforcement" for DOL:

DOL needs the cooperation of workers, including undocumented workers, to report on labor standards violations or provide information needed to develop enforcement cases. Unfortunately, many vulnerable low-wage workers—the primary focus of DOL labor standards enforcement—are often much less willing to report workplace exploitation or cooperate in DOL investigations when they perceive that doing so threatens their continued employment either because of retaliation by their employer or because contact with DOL could trigger an INS action to deport them, their family or their friends.<sup>178</sup>

As discussed above, in 1998 and 1999, the INS experimented with alternative raids called Operation Vanguard, using SSA's work records to identify unauthorized aliens rather than conducting worksite raids. Operation Vanguard did not result in many deportations, but may have worked as a deterrent, reducing the desirability of the meat packing industry to unauthorized aliens. Nonetheless, Operation Vanguard was criticized by workers, farmers, and industry leaders for violating workers' privacy rights and targeting Hispanics. In 1999, SSA stopped allowing INS to check employee records against their database, citing privacy concerns, unless INS has "reasonable cause to believe that a worker is unauthorized."<sup>179</sup>

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<sup>176</sup> Testimony of Richard M. Stana, Director of Justice Issues, GAO, at House Judiciary Committee, Subcommittee on Immigration and Claims Hearing on "INS Interior Enforcement," June 19, 2002.

<sup>177</sup> Steven Greenhouse, "U.S. Officials Defend Ploys to Catch Immigrants," *New York Times*, Feb. 11, 2006, p. A8.

<sup>178</sup> Testimony of Acting Administrator, Wage and Hour Division, Department of Labor, John R. Fraser, in U.S. Congress, House Committee on the Judiciary, Subcommittee on Immigration and Claims, *Oversight hearing on the Immigration and Naturalization Service's Interior Enforcement Strategy*, hearings, 106<sup>th</sup> Cong., 1<sup>st</sup> sess., July 1, 1999.

<sup>179</sup> Reyes, *Holding the Line? The Effect of Recent Border Build-up on Unauthorized Immigration*, p. 83.

Mark Krikorian, Executive Director of the Center of Immigration Studies, testified that in the late 1990's the INS received criticism for worksite enforcement in Nebraska's meat packing plants and Georgia's onion fields. As a result, it developed a new interior enforcement strategy which focused entirely on criminal aliens and smugglers.<sup>180</sup>

*Social Security Administration (SSA)*. SSA has data which could be used to aid DHS in the identification of unauthorized alien workers. For example, SSA maintains a Nonwork Alien File which contains social security numbers (SSNs) issued to aliens without work authorization. Earnings posted to numbers in the Nonwork Alien File might indicate that an alien is working without authorization. However, the alien may have received work authorization after the nonwork SSN was issued. DHS has said that the agency would have to invest significant resources to determine whether the alien is working without authorization, and that this use of resources may not be cost effective and would pull resources from other national security-related initiatives. In addition, neither SSA nor DHS can easily update work status, since their records lack a common identifier.<sup>181</sup>

In addition to data issues, there may be public resistance to SSA increasing their role in the enforcement of immigration laws. For example, in 2002, a policy change at SSA that substantially increased the number of "no-match" letters sent to employers received much attention due to its impact on unauthorized aliens. No-match letters are sent to employers to inform them of a discrepancy between a W-2 form and SSA's records, so that workers can be properly credited with their earnings, and to combat identity fraud. Importantly, receipt of a no-match letter does not imply that the employee is using a fraudulent SSN; the discrepancy could be the result of a clerical error. For tax years 1993 through 2000, an employer only received no-match letters if 10 or more employees had discrepancies and the number of employees with mismatches equaled at least 10% of the employer's workforce.<sup>182</sup>

For the 2001 tax year, SSA implemented a new policy of sending no-match letters to every employer with at least one employee with discrepancies on his or her W-2. For tax year 2000, SSA sent out approximately 110,000 no-match letters<sup>183</sup> compared to approximately 950,000 for tax year 2001. However, the result was an increase in complaints from employers who did not understand the purpose of the no-match letter. In addition, immigration advocates contend that tens of thousands of aliens left their jobs or were fired as a result of the letters.<sup>184</sup> Due to the controversy, SSA again changed their policy, sending out approximately 110,000 no-match letters for tax year 2002.<sup>185</sup>

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<sup>180</sup> Testimony of Executive Director of the Center of Immigration Studies, Mark Krikorian, in U.S. Congress, House Judiciary Committee, Subcommittee on Immigration, Border Security, and Claims, *Department of Homeland Security Transition: Bureau of Immigration and Customs Enforcement*, hearings, 108<sup>th</sup> Cong., 1<sup>st</sup> sess., Apr. 10, 2003. (Hereafter cited as Krikorian, *Department of Homeland Security Transition: Bureau of Immigration and Customs Enforcement*.)

<sup>181</sup> Testimony of Barbara D. Bobjerg, Director Education, Workforce, and Income Security Issues, Government Accountability Office, in U.S. Congress, Ways and Means Committee, Subcommittees on Social Security and on Oversight, *Second in a Series of Hearings on Social Security Number High Risk Issues*, hearings, 109<sup>th</sup> Cong., 2<sup>nd</sup> sess., Feb. 16, 2006.

<sup>182</sup> "Social Security No-Match Letter," *Interpreter Releases*, vol. 80, Apr. 7, 2003, pp. 508-509.

<sup>183</sup> *Ibid.*, p. 508.

<sup>184</sup> Mary Beth Sheridan, "Social Security Scales Back Worker Inquiries," *Washington Post*, June 18, 2003, p. A6. No-match letters for tax year 2001 were sent in calendar year 2002.

<sup>185</sup> Unpublished data from SSA.

## **Immigration Enforcement at Ports of Entry: Immigration Inspections<sup>186</sup>**

The Immigration and Nationality Act (INA) requires the inspection of all aliens who seek entry into the United States<sup>187</sup> and in some cases at a preinspection site in a foreign country.<sup>188</sup> The purpose of the inspection is to determine the admissibility of a traveler to the United States. Section 287 of the INA enumerates the following authorities for immigration officers, including immigration inspectors:

- to question under oath any person seeking to enter the United States in order to determine admissibility, and
- to search, without warrant, the person and belongings of any applicant seeking admission.<sup>189</sup>

The majority of immigration inspections take place during the *primary* inspections process. Primary inspections is the first level of inspection, which consists of a brief interview with an inspector, a cursory check of the traveler's documents, and a query of the Interagency Border Inspection System (IBIS). Primary inspections are quick (usually lasting no longer than a minute), however, if the inspector is suspicious that the traveler may be in violation of the INA or other U.S. laws, the traveler is referred to a secondary inspection.

During *secondary* inspections, aliens are questioned extensively and travel documents are further examined. Several immigration databases are queried as well, including lookout databases.<sup>190</sup> The majority of travelers, however, are not subject to a secondary inspection.

In addition to conducting inspections, immigration inspectors enforce various criminal and immigration statutes. For example, immigration inspectors are on the front line with respect to intercepting fraudulent documents used by aliens as well as intercepting aliens, drugs, weapons and explosives that are smuggled into the United States. Immigration inspectors also encounter criminal aliens who attempt to gain entry into the United States. While immigration inspectors may encounter enforcement-related issues during primary inspections, it is during secondary inspections that immigration inspectors conduct enforcement-related activities. In FY2003, immigration inspectors spent 13% of their time on enforcement-related activities.<sup>191</sup> Over the most recent four years for which data are available, the time spent by immigration inspectors on

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<sup>186</sup> While CBP inspectors conduct other types of inspections (i.e., custom and animal and plant health inspections), only immigration inspections are discussed in this report. For additional information on CBP inspections, see CRS Report RL32399, *Border Security: Inspections Practices, Policies, and Issues*, by (name redacted) et al.

<sup>187</sup> §235 of the INA.

<sup>188</sup> Section 123 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA; P.L. 104-208) required the Attorney General to establish preinspection stations in at least five foreign airports that are identified as being one of ten foreign airports that serve as the last point of departure for the greatest number of inadmissible aliens.

<sup>189</sup> §287(b)(c) of the INA.

<sup>190</sup> 11 Lookout databases contain information on aliens who are inadmissible for entry into the United States.

<sup>191</sup> CRS analysis of the former Immigration and Naturalization Service (INS) PAS data. During the years examined, the former INS tracked the hours immigration inspectors spent on several activities, including enforcing immigration law. CRS also included hours spent on processing expedited removal cases and escorting aliens (detention duty) as enforcement hours.

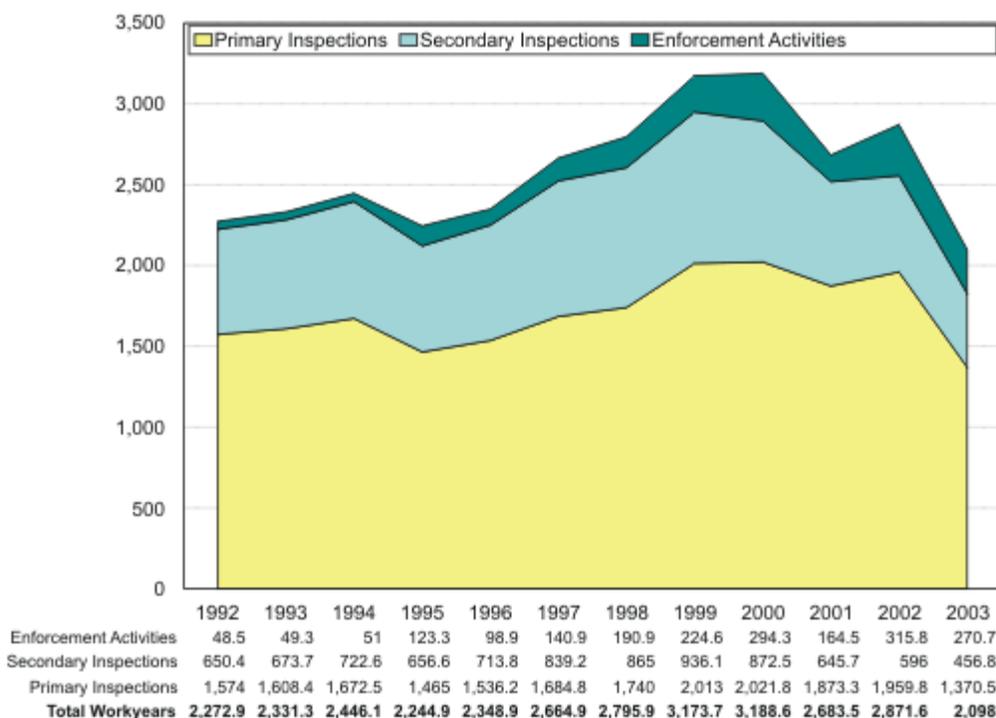
enforcement activities has steadily risen, with the exception of FY2001 when it dropped 3% from FY2000 (see **Figure 9** and **Table 2**).

**Table 2. Percentage of Inspector Hours Spent on Primary and Secondary Inspections and Enforcement Activities: FY 1992-FY2003**

|      | Primary | Secondary | Enforce |      | Primary | Secondary | Enforce |
|------|---------|-----------|---------|------|---------|-----------|---------|
| 1992 | 69.20%  | 28.6%     | 2.1%    | 1998 | 62.2%   | 30.9%     | 6.8%    |
| 1993 | 69%     | 28.9%     | 2.1%    | 1999 | 63.4%   | 29.5%     | 7.1%    |
| 1994 | 68.4%   | 29.5%     | 2.1%    | 2000 | 63.4%   | 27.4%     | 9.2%    |
| 1995 | 65.3%   | 29.2%     | 5.5%    | 2001 | 69.8%   | 24.1%     | 6.1%    |
| 1996 | 65.4%   | 30.4%     | 4.2%    | 2002 | 68.2%   | 20.8%     | 11%     |
| 1997 | 63.2%   | 31.5%     | 5.3%    | 2003 | 65.3%   | 21.8%     | 12.9%   |

Source: CRS Analysis of data from DHS's Performance Analysis System (PAS).

**Figure 9. Inspector Workyears by Type: FY 1992-FY2003**



Source: CRS Analysis of data from DHS's Performance Analysis System (PAS).

Immigration inspectors generate cases that are referred to ICE's investigative unit for investigation and prosecution.<sup>192</sup> An analysis of the data shows that the number of cases that were referred to investigations during the period that was analyzed peaked in 2002, at 1,782 cases (see

<sup>192</sup> At some ports of entry (i.e., San Ysidro), senior level immigration inspectors perform investigative activities.

**Table 3).** In FY2003, the number of cases referred to investigations dropped 42% from FY2002, to 1,028 cases.

**Table 3. Immigration Inspections: Cases Referred to Investigations for Prosecution and Interception of Smuggled Aliens, Narcotics, and Contraband: FY2000-FY2003**

| Year | Cases referred | Intercepted Aliens | Intercepted narcotics | Intercepted contraband |
|------|----------------|--------------------|-----------------------|------------------------|
| 2000 | 636            | 19,857             | 3,764                 | N.A.                   |
| 2001 | 1,676          | 31,261             | 4,892                 | 320                    |
| 2002 | 1,782          | 32,173             | 3,913                 | 945                    |
| 2003 | 1,028          | 34,473             | 1,988                 | 1,359                  |

**Source:** CRS analysis of PAS data.

**Note:** Contraband includes weapons and explosives. Data on contraband not available for FY2002.

## Interception of Smuggled Goods

Immigration inspectors play a key role in intercepting the smuggling of humans, narcotics and contraband. The interception of aliens that are smuggled into the United States led all other types of smuggling at U.S. ports of entry for the years that were analyzed by CRS. During the four years that were analyzed by CRS, immigration inspectors intercepted more aliens and narcotics being smuggled into the country each year after FY2000 (see **Table 2**).

## Databases

Immigration inspectors use several systems and databases to assist them with identifying aliens who are potentially inadmissible under the INA or otherwise may pose a threat to the country. In particular, four systems are commonly used to screen out individuals:

- Interagency Border Inspections System (IBIS),<sup>193</sup>
- Automated Biometrics Identification System (IDENT),<sup>194</sup>
- National Crime Information System (NCIC III),<sup>195</sup> and
- Passenger Analysis Unit System.<sup>196</sup>

<sup>193</sup> IBIS is an interagency inspections system that is used by immigration inspectors at ports of entry to verify and obtain information on aliens presenting themselves for entry into the United States. IBIS is a broad system that interfaces with other data systems and databases, and thus, is able to obtain such information as whether an alien is admissible, an alien's criminal information, and whether an alien is wanted by law enforcement.

<sup>194</sup> IDENT is an immigration system used by inspectors during primary inspections and ICE agents when they come into contact with aliens. IDENT is composed of two databases: (1) a "lookout" database that contains fingerprints and photographs of aliens who have been previously deported or have a criminal history; and (2) a "recidivist" database that contains fingerprints and photographs of illegal aliens who have been apprehended by the border patrol.

<sup>195</sup> The FBI's NCIC III is a computerized index of criminal information on individuals who have come into contact with the law enforcement community. Fingerprint information is submitted to the FBI by participating federal, state and local law enforcement agencies. NCIC III also contains names of wanted persons as well as the names of violent gangs and terrorists. NCIC interfaces with IBIS.

In FY2003, these systems intercepted over 207,000 aliens. In FY2002, over 254,000 aliens were intercepted, an increase of over 66,000 from FY2001.

## **Selected Immigration Inspections Issues**

Since the September 11, 2001, terrorist attacks, considerable concern has been raised because the 19 terrorists were aliens who apparently entered the United States on temporary visas. Although the INA bars terrorists, consular officers issuing the visas and immigration inspectors working at the borders did not have access to *all* the law enforcement and intelligence data that might identify potential terrorists. Congress has enacted major laws requiring information sharing and interoperable databases to screen potential terrorists and criminal aliens, the most recent being the REAL ID Act of 2005.<sup>197</sup> Whether these provisions are being successfully implemented remains an important policy question.<sup>198</sup>

### ***Screening Aliens and Implementation of the US-VISIT Program***

While the U.S. Visitor and Immigrant Status Indicator Technology (US-VISIT) program—the automated entry and exit data system that is present at various ports of entry—has been heralded as a tool to enhance border security, critics question whether it will effectively track the entry-exit of suspicious foreign nationals.<sup>199</sup> Some have expressed concern that most Canadians and the 6.4 million Mexicans with border crossing cards are not subjected to the requirements of the US-VISIT program,<sup>200</sup> thus establishing a variety of avenues for potential terrorists and criminals to elude detection through US-VISIT’s biometric background checks.

While almost all observers agree that the implementation of US-VISIT has proven to be challenging, especially at land ports of entry, many express confidence that it will ultimately be successful. Administration officials cite the number of aliens apprehended or denied entry as the result of the various systems and databases that comprise US-VISIT as evidence that US-VISIT can achieve its objectives. In 2004, the Administration reported that 100 aliens had “hits” in US-VISIT.<sup>201</sup>

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(...continued)

<sup>196</sup> CBP’s Passenger Analysis Unit is an automated targeting system, located at ports of entry, that is based on strategic intelligence about threats. This system identifies individuals who may need to be more closely scrutinized.

<sup>197</sup> P.L. 109-13.

<sup>198</sup> For evaluations, see U.S. General Accounting Office, *Information Technology: Terrorist Watch Lists Should Be Consolidated to Promote Better Integration and Sharing*, GAO-03-322, Apr. 15, 2003; and U.S. General Accounting Office, *Border Security: Challenges in Implementing Border Technology*, GAO-03-546T, Mar. 12, 2003.

<sup>199</sup> For a full discussion of US-VISIT, see CRS Report RL32234, *U.S. Visitor and Immigrant Status Indicator Technology (US-VISIT) Program*, by Lisa M. Seghetti and (name redacted).

<sup>200</sup> Other categories of foreign nationals that are currently exempt from the requirements of the program include (1) certain visa categories, such as those for diplomats, ambassadors, and foreign government employees and their families who are in transit; (2) other classes of visitors the Secretaries of State and Homeland Security jointly determine should be exempt; and (3) children under the age of 14 and senior over the age of 79.

<sup>201</sup> U.S. Congress, House Committee on the Judiciary, Subcommittee on Immigration, Border Security, and Claims, oversight hearing on *Funding for Immigration in the President’s 2005 Budget*, testimony of Seth Stodder, Feb. 25, 2004.

Currently, the US-VISIT program is being implemented at land POEs and therefore only includes a fraction of the total traveling public. According to a DHS Office of Inspector General report published in February 2005, only 2.7% of the traveling public are vetted. The remaining 97.3% are currently exempt from the requirements of the program. To put this in context, of the 97.3% that are not screened through US-VISIT, the plurality (34%) are citizens of the United States, roughly 29% comprise of Mexicans who possess a Laser Visa and 15% are visa-exempt Canadians. Another major category is comprised of Legal Permanent Residents of the United States (which make up 21% of the entering population).

DHS' OIG expressed concern about the number of travelers who are currently exempt from the requirements of the program, including Mexican nationals in possession of a BCC (unless traveling beyond the border zone), and visa-exempt Canadian nationals. Visa-exempt Canadian nationals are exempt from the current travel document requirements,<sup>202</sup> at least until the Western Hemisphere Travel Initiative is implemented,<sup>203</sup> Mexican nationals in possession of a Laser Visa are also exempt from such requirements.<sup>204</sup>

### ***Biometric Verification System (BVS)***

Mexican nationals who plan to stay in the United States for a specified period of time, travel within a certain geographical distance from the border and possess a Laser Visa are exempt from the requirements of the US-VISIT program. The Administration exempted this category of individuals primarily due to the extensive background check that includes the querying of several criminal and watchlisting databases that is conducted on all Laser Visa applicants. The Administration also contends that the Laser Visa document is read and scanned at the time the Mexican national presents himself for entry to the U.S. at a POE, thus providing an extra layer of security. Observers note, however, that the equipment necessary to read and scan the documents are not at every POE. At POEs where the equipment is being piloted, the equipment is reportedly in the secondary inspections area and does not operate 100% of the time. Moreover, the BVS is not integrated with other critical data systems and databases.

### **Enforcement Between Ports of Entry<sup>205</sup>**

The law prohibits aliens from entering or attempting to enter the United States at any time or place which has not been designated by an immigration officer (i.e., a port of entry). It also prohibits any alien from eluding inspection by immigration officers.<sup>206</sup> The United States Border Patrol (USBP) is tasked with detecting and preventing the entrance of aliens trying to evade inspection by crossing into the United States between ports of entry (POEs). USBP's primary mission is to detect and prevent the entry of terrorists, weapons of mass destruction, and unauthorized aliens from coming into the country, and to interdict drug smugglers and other criminals between official ports of entry.

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<sup>202</sup> See §212 of INA and 21 C.F.R.

<sup>203</sup> See P.L. 108-458.

<sup>204</sup> See 21 C.F.R.

<sup>205</sup> For a more detailed analysis of the U.S. Border Patrol, please refer to CRS Report RL32562, *Border Security: The Role of the U.S. Border Patrol*, by (name redacted).

<sup>206</sup> INA §275(a). The first offense under this statute is a fine or imprisonment for not more than six months, or both. The penalty for any subsequent offenses under the statute is fine or imprisonment for not more than two years, or both.

The USBP patrols 8,000 miles of the international borders with Mexico and Canada and the coastal waters around Florida and Puerto Rico.<sup>207</sup> The Southwestern border accounts for over 97% of all illegal alien apprehensions and as a result of this commands the lion's share of USBP resources and manpower. The Northern border, conversely, poses a severe logistical challenge given its length, geography, and comparative lack of manpower.

About 90% of USBP agents are deployed along the Southwest border with Mexico. This deployment reflects the USBP's decade long policy of "Prevention Through Deterrence," which aims to place enough agents and resources directly on the border to deter would-be border crossers and reroute illegal border traffic from traditional urban routes to less populated and geographically harsher areas, providing USBP agents with a tactical advantage over illegal border crossers and smugglers.<sup>208</sup> It also reflects the operational reality that the vast majority of unauthorized migration into the U.S. originates in Mexico.

Shortly after the creation of DHS, the USBP was directed to formulate a new Border Patrol National Strategy that would better reflect the realities of the post 9/11 security landscape. In March of 2005, the USBP unveiled the new strategy, which places greater emphasis on interdicting terrorists and features five main objectives:

- establishing the substantial probability of apprehending terrorists and their weapons as they attempt to enter illegally between the ports of entry;
- deterring illegal entries through improved enforcement;
- detecting, apprehending, and deterring smugglers of humans, drugs, and other contraband;
- leveraging "Smart Border" technology to multiply the deterrent and enforcement effect of agents; and
- reducing crime in border communities, thereby improving the quality of life and economic vitality of those areas.<sup>209</sup>

In the national strategy, DHS notes that while many classify aliens attempting to enter the country illegally between POE as "economic migrants," an "ever present threat exists from the potential for terrorists to employ the same smuggling and transportation networks, infrastructure, drop houses, and other support then use these masses of illegal aliens as 'cover' for a successful cross-border penetration."<sup>210</sup> In an attempt to address this threat, the USBP's new strategy focuses on laying the foundation for achieving operational control over the border. The USBP defines operational control as "the ability to detect, respond to, and interdict border penetrations in areas

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<sup>207</sup> The USBP does not patrol the border between Alaska and Canada; for the purposes of this report the Northern border is the border between the contiguous United States and Canada.

<sup>208</sup> U.S. General Accounting Office, *Border Security: Agencies Need to Better Coordinate Their Strategies and Operations on Federal Lands*, GAO-04-590, June 2004, pp.10-11. Testimony of George Regan, Acting Associate Commissioner, Enforcement, Immigration and Naturalization Service, in U.S. Congress, House Committee on the Judiciary, Subcommittee on Immigration and Claims, *Combating Illegal Immigration: Progress Report*, 105<sup>th</sup> Cong., 1<sup>st</sup> sess., Apr. 23, 1997.

<sup>209</sup> Department of Homeland Security, Bureau of Customs and Border Protection, "National Border Patrol Strategy," Mar. 1, 2005.

<sup>210</sup> *Ibid.*

deemed as high priority for threat potential or other national security objectives.”<sup>211</sup> The strategy places greater emphasis on a hierarchical and vertical command structure, featuring a direct chain of command from headquarters to the field.

The strategy also builds on the “Prevention Through Deterrence” strategy outlined in the agency’s previous National Strategic Plan by placing added emphasis on enhancing its ability to rapidly deploy agents in response to emerging threats. Tactical, operational, and strategic intelligence is critical to this new emphasis on rapid deployment, as it will allow the USBP to assess risks and target its enforcement efforts to best address those risks. According to the strategy, much of this intelligence will be generated through the use of next generation surveillance systems, including cameras, sensors, and other technologies. Additionally, the USBP will coordinate closely with CBP’s Office of Intelligence and other DHS and Federal agencies’ intelligence apparatuses. Lastly, the new USBP National Strategy formulates different strategies tailored to each of the agency’s three operational theaters: the Southwest border, the Northern border, and the coastal waters around Florida and Puerto Rico.

### **Apprehensions<sup>212</sup>**

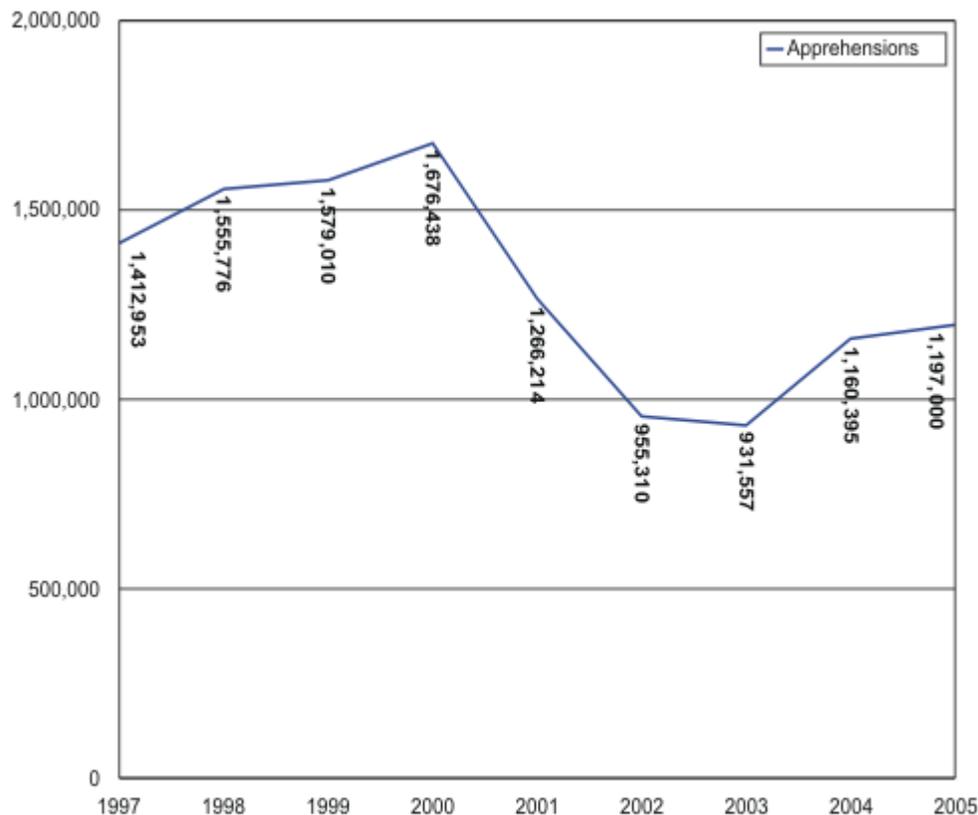
The impact of the “Prevention Through Deterrence” strategy has been difficult to gauge. There is considerable evidence that it has made border crossing more challenging, expensive, and dangerous for illegal aliens. However, the total number of aliens apprehended increased steadily from 1994 to 2000 as the number of personnel and resources deployed along the border more than doubled. It is possible that the increased presence of agents and resources stationed on the border led the INS to catch more unauthorized aliens, accounting for the increase in apprehensions. It is also possible that the increase in apprehensions during that period instead reflects an increase in the number of people trying to enter the country in order to benefit from the quickly growing economy of the mid to late 1990s.

**Figure 10** shows the recent trends in USBP apprehensions along the border. USBP apprehensions increased steadily through the late 1990s, reaching a peak of 1.68 million in 2000. From 2000 to 2003 apprehensions have declined steadily, reaching a low of 931,557 in 2003. This reduction could be attributed to the “Prevention Through Deterrence” strategy finally reaching a critical mass of enough agents and resources placed directly on the border to severely inhibit illegal migrants from entering the country. Conversely, the reduction may be the result of fewer unauthorized aliens trying to enter the country due to the economic recession and rising unemployment during this period that made finding low paying jobs increasingly difficult for illegal aliens. In addition, the reduction could be an indication that increasing staffing does not increase the USBP’s effectiveness. In FY2004, apprehensions increased by 25% to 1.16 million; apprehensions remained relatively stable in FY2005, increasing slightly to 1.2 million.

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<sup>211</sup> *Ibid.*, p. 3.

<sup>212</sup> Apprehensions have long been used as a performance measure by the USBP. However, it is impossible to gauge solely from apprehensions data whether increases or decreases in apprehensions are due to unauthorized migration patterns or border enforcement policies and resources. An increase in apprehensions could be due to an increase in the number of unauthorized migrants attempting to enter the country. The same increase could also be due to increased patrolling of the border, as the additional agents make more arrests. Or it could be due to both an increase in the number of people attempting to illegally enter the country and increased patrolling. Lastly, it could be due to neither, and merely be a statistical anomaly.

**Figure 10. Border Patrol Apprehensions: FY1997-FY2005**

**Source:** CRS presentation of data from: for 1997, Immigration and Naturalization Service, *FY1997 Statistical Yearbook of the INS*. For FY1998-FY2004, DHS Office of Immigration Statistics, *FY2004 Yearbook of Immigration Statistics*, January 2006. FY2005, DHS, *FY2005 Monthly Statistical Report, Year End*, September 2005.

## Enforcement of Immigration Laws and Local Law Enforcement<sup>213</sup>

DHS has a limited number of interior investigators who are charged with enforcing immigration, customs, and other federal law within the interior of the country, compared to over 600,000 state and local law enforcement officers.<sup>214</sup> In an effort to carry out the country's anti-terrorism mission and strengthen the interior enforcement of immigration law, DHS has entered into agreements (Memoranda of Understanding) with several localities that include the deputizing of local law enforcement officers to assist the federal government with enforcing certain aspects of immigration law.<sup>215</sup>

<sup>213</sup> For additional information, see CRS Report RL32270, *Enforcing Immigration Law: The Role of State and Local Law Enforcement*, by (name redacted), (name redacted), and (name redacted).

<sup>214</sup> According to DHS Congressional Affairs Office, as of Feb. 25, 2005, there are 5,500 ICE agents.

<sup>215</sup> Currently, DHS has entered into four MOUs, with the states of Florida and Alabama, the Los Angeles, California Sheriff Department, and the state of Arizona.

The origins of these agreements date back to 1996. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 amended the INA by permitting the Attorney General to enter into written agreements with states and localities to allow law enforcement personnel to perform certain immigration functions relating to the investigation, apprehension, or detention of aliens so long as it is consistent with state and local law. The law required that law enforcement personnel performing such functions have knowledge of relevant federal laws and receive adequate training to perform the functions.

Proponents of these agreements argue that the initiative would assist DHS to enforce the immigration law further into the interior of the United States.<sup>216</sup> Also, they assert that the initiative would make it easier to arrest more potential terrorists and foreign born criminals, thus providing an elevated level of security for the nation.<sup>217</sup>

Opponents contend, however, that these agreements undermine the relationship between local law enforcement agencies and the communities they serve,<sup>218</sup> noting that there are existing tensions between local law enforcement agencies and many minority communities, and this tension is heightened when local law enforcement engages in immigration enforcement.<sup>219</sup> For example, potential witnesses and victims of crime may be reluctant to come forward to report crimes in fear of actions that might be taken against them by DHS. They contend that the initiative could result in the reduction of local law enforcement resources as well as the inconsistent application of immigration law across jurisdictions.<sup>220</sup> Some law enforcement officers have raised concerns about the complexities of immigration law creating liability issues.<sup>221</sup>

## Resource Allocation

Previously in this report, workload measures were presented for the different types of immigration enforcement activities. For example, for removals, workload was measured in the number of removals, for worksite enforcement in NIFs, for inspectors, the number of inspections. Nonetheless, none of these measures are comparable with each other. For example, comparing the number of inspections with the number of removals does not provide any insight into resource allocation, especially since the staff time devoted to each task is different. It may take three

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<sup>216</sup> For example see the Clear Law Enforcement for Criminal Alien Removal (CLEAR) Act of 2005 (H.R. 3137); the Homeland Security Enhancement Act of 2005 (S. 1362); the Save America Comprehensive Immigration Act of 2005 (H.R. 2092); Comprehensive Enforcement and Immigration Reform Act of 2005 (H.R. 1438); Rewarding Employers that Abide by the Law and Guaranteeing Uniform Enforcement to Stop Terrorism Act of 2005 (H.R. 3333); Scott Gardner Act (H.R. 3776); and the Enforcement First Immigration Reform Act of 2005 (H.R. 3938).

<sup>217</sup> Testimony of U.S. Immigration and Customs Enforcement, in U.S. Congress, Senate Committee on the Judiciary, Subcommittee on Immigration, Border Security and Citizenship, *State and Local Authority to Enforce Immigration Law: Evaluating a United Approach to Stop Terrorists*, hearings, 108<sup>th</sup> Cong., 2<sup>nd</sup> sess., Apr. 22, 2004.

<sup>218</sup> Testimony of Human Rights Watch, in U.S. Congress, Senate Committee on the Judiciary Subcommittee on Immigration, Border Security and Citizenship, *State and Local Authority to Enforce Immigration Law: Evaluating a United Approach to Stop Terrorists*, 108<sup>th</sup> Cong., 2<sup>nd</sup> sess., Apr. 22, 2004.

<sup>219</sup> Testimony of Marisa Demeo, Regional Counsel, Mexican American Legal Defense Fund, House Judiciary Committee, Subcommittee on Immigration and Claims, *INS Interior Enforcement*, hearings, 107<sup>th</sup> Cong., 2<sup>nd</sup> sess., June 19, 2002.

<sup>220</sup> *Ibid.*

<sup>221</sup> For an example of this argument, see interview with Gene Voegtlin, legislative counsel for the International Association of Chiefs of Police, in Miriam Jorden, "Cities and States Take on Difficult Duty of Handling Undocumented Workers," *The Wall Street Journal*, Feb. 2, 2006, p. B1.

minutes of an inspectors time to process an alien entering the country, where as it may take days or weeks for a special agent to locate and apprehend one illegal alien.

This section examines the *actual hours* spent on different tasks by Special Agents and Immigration Agents from 1992 through 2003. As previously discussed, during 2004, ICE and CBP switched their accounting system from INS' Performance Analysis System (PAS) to the U.S. Customs Service's Treasury Enforcement Communications System (TECS), and as a result, data for 2004 onward are not comparable with previous years. TECS contains fewer data fields than PAS, which means that some of the data in PAS do not exist in TECS. In addition, the data for FY2004 are incomplete in both systems, as the different parts of ICE did not switch from PAS to TECS at the same time.

## **Interior Enforcement Hours**

As discussed above, activities typically label as interior enforcement include the detention and removal of aliens who entered illegally or violated the terms of their admittance, alien smuggling and trafficking investigations, worksite enforcement, and investigations of benefit and document fraud.

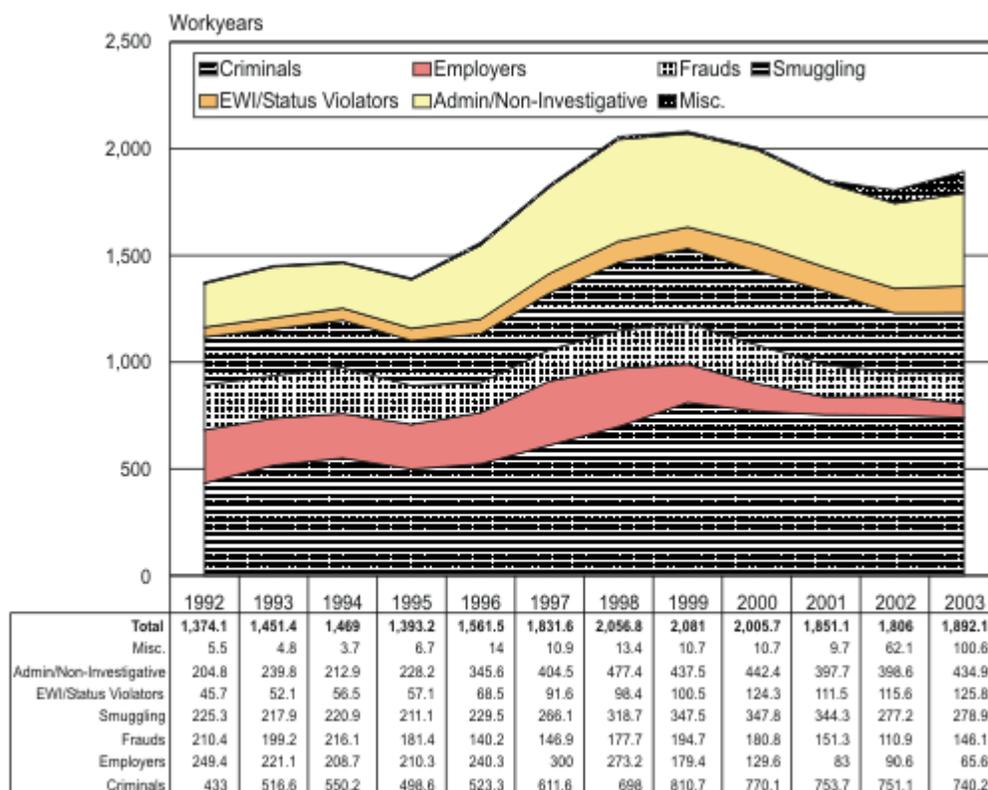
### **Overview**

**Figure 11** shows that, of the years examined, the number of hours devoted to “interior” enforcement activities was lowest in FY1992 (1,375 workyears).<sup>222</sup> The number of workyears increased slightly between FY1992 and FY1994, and then decreased in FY1995 (1,393 workyears). Between FY1995 and FY1999, the number of workyears increased. Of the years analyzed, the number of workyears reached a peak of 2,081 in FY1999 (the same year that INS released its interior enforcement strategy), declined until FY2002 (1,806), and then increased in FY2003 (1,892).

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<sup>222</sup> A workyear is equal to 2,080 hours of work and represents the work performed by one full-time investigator in a year.

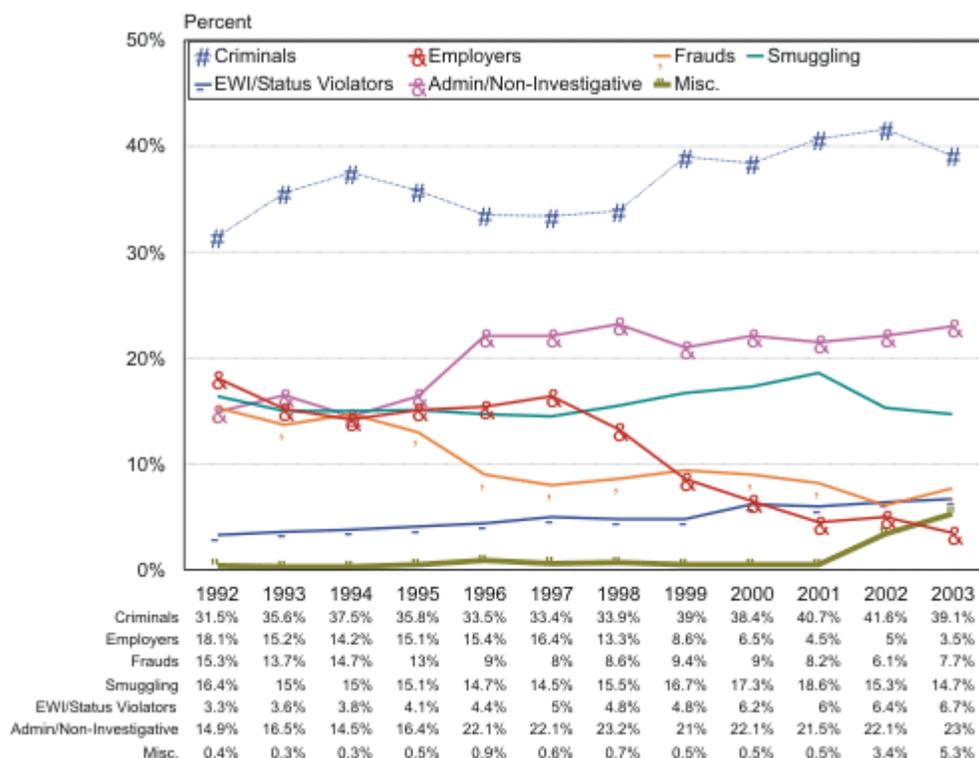
**Figure 11. Workyears Devoted to Interior Immigration Enforcement Activities by Type: FY1992-FY2003**



**Source:** CRS analysis of data from DHS' Performance Analysis System (PAS).

Between FY1992 and FY2003, the largest number of workyears were devoted to locating and arresting criminal aliens, approximately one-third of all the workyears (see **Figure 12**). The proportion of workyears related to worksite enforcement has decreased, though not consistently, since FY1992. In FY1992, worksite enforcement accounted for 18.1% of all workyears, whereas in FY2003, worksite enforcement only comprised 3.5% of all workyears. Similarly, the percentage of workyears devoted to fraud investigations was larger in FY1992 (15.3%) than in FY2003 (7.7%). Conversely, the proportion of total hours devoted to status violations and non-investigative work were larger in FY2003 than in FY1992. The percentage of time devoted to smuggling remained relatively stable compared to the trends in the other types of investigations. Notably, in FY2004 and FY2005, ICE suffered funding shortfalls, resulting in training, travel, recruitment, pay, and awards shortages, and as a result it is unlikely that ICE was able to devote additional resources to immigration enforcement during those years.<sup>223</sup>

<sup>223</sup> DHS, *An Assessment of the Proposal to Merge Customs and Border Protection with Immigration and Customs Enforcement*, p. 1.

**Figure 12. Percent of Workyears by Enforcement Activity: FY1992-FY2003**

Source: CRS analysis of data from DHS' Performance Analysis System (PAS).

## Criminal

Historically, the largest proportion of work hours have been devoted to criminal alien cases (see **Figures 11 and 12**). In FY1992, 433 workyears were spent locating and arresting criminal aliens. That number increased in FY1993 and FY1994 (550), and then decreased in FY1995 (498). Between FY1997 and FY1999, the number of hours devoted to criminal aliens increased, and peaked in FY1999 at 811 workyears. The number of hours devoted to these cases decreased between FY1999 and FY2003. In FY2003, the number of workyears devoted to criminal alien cases was 740, almost double the amount of hours spent on these cases in FY1992.

In addition, the increase in actual hours does not correspond to a doubling of the proportion of time spent on criminal alien cases. In FY1992, 31.5% of all hours were spent on criminal alien cases. The proportion of time increased to 37.5% in FY1994, and decreased to 33.4% in FY1997. Between FY1997 and FY2002, the percentage of time devoted to criminal alien cases rose to 41.6% and then decreased to 39.1% in FY2003.

**Figure 13. Workyears Spent on Criminal Aliens, and Number of Criminal Alien Removals: FY1992-FY2003**



**Source:** CRS analysis of data from DHS' Performance Analysis System (PAS), and FY1992-1997 from Immigration and Naturalization Service, *FY1997 Statistical Yearbook of the INS*. FY1998-FY2004 from DHS Office of Immigration Statistics, *FY2004 Yearbook of Immigration Statistics*, January 2006, p. 162. FY2005, DHS, *FY2005 Monthly Statistical Report, Year End*, September 2005.

**Figure 13** shows that the number of workyears devoted to criminal aliens and the number of criminal alien removals are highly correlated. As the number of workyears devoted to criminal aliens increased, so did the number of aliens removed on criminal grounds. However, from FY2002 to FY2003, the number of hours decreased slightly while the number of criminal removals increased, which may be related to the drop in criminal removals in FY2002. Based on this analysis, one could argue that an increase in resources for criminal alien investigations would result in an increase in removals of criminal aliens. Nonetheless, there may be a limit to the effect that addition of resources will have on criminal alien investigations. For example, an increase in the number of criminal alien arrests would increase the workload of the Executive Office for Immigration Review (EOIR). Thus, if ICE significantly increases their arrests of criminal aliens, the removal cases will still have to be adjudicated by EOIR before the alien can be removed. In addition, since criminal aliens are subject to mandatory detention, increasing the arrests of criminal aliens will increase the need for detention bedspace.

### Worksite Enforcement

An analysis of INS investigation workload data reveals that time spent on employer cases by agents, supervisors, and non-clerical support personnel accounted for less than 18% of total

investigation workyears in each year from FY1992 through FY2003 (See **Figures 11 and 12**). One factor routinely cited to explain why a greater share of interior enforcement resources was not available for employer cases is the growth of the criminal alien workload in the 1990s.<sup>224</sup> According to Under Secretary Hutchinson, the criminal alien workload “eventually grew to the point that it consumed more investigative hours than any other enforcement activity.”<sup>225</sup>

**Figures 11 and 12** reflect a series of changes to the worksite enforcement program that occurred over the FY1992-FY2003 period. During the first half of this period, as **Figures 11 and 12** show, time spent on worksite enforcement, both in terms of number of workyears and as a percentage of total investigations workyears, decreased until FY1994 and then began increasing. The mid-1990s increase coincided with actions by the Clinton Administration and Congress to bolster worksite enforcement.

After FY1997, as **Figures 11 and 12** show, time spent on employer cases trended downward. In FY2003, worksite enforcement accounted for 3.5% of the total investigation workyears, less than one-fifth of its share in FY1992. The start of this decline coincided with a change in INS’s approach to worksite enforcement, set forth in a May 1998 memorandum by INS Executive Associate Commissioner for Field Operations Michael Pearson.<sup>226</sup> Apparently, the change was prompted largely by complaints about INS tactics during worksite raids. According to Pearson, the new procedures described in the memorandum and the accompanying materials responded to complaints by Congress and others, and incorporated the “best practices” of various offices.<sup>227</sup>

## **Fraud**

As **Figures 11 and 12** illustrate, fraud investigations have declined from FY1992 through FY2003, both as percent of interior enforcement and in terms of actual workyears. Although there appears to be an upturn, most likely due to the 1999 Interior Enforcement Strategy mentioned previously, the overall trends have been downward. As a percent of interior enforcement workyears, fraud investigations dropped from 15.3% in FY1992 to 7.7% in FY2003. Actual workyears fell from 210 to 146 over the same period.

## **Smuggling**

For the years analyzed, the peak workyears and the largest percentage of all interior enforcement hours devoted to alien smuggling correspond to the first three years of the INS interior enforcement strategy (FY1999 through FY2001) when alien smuggling was the agency’s second

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<sup>224</sup> As explained by former DHS Under Secretary for Border and Transportation Security Asa Hutchinson in written response to questions from the Senate Judiciary Committee’s Subcommittee on Immigration, Border Security and Citizenship, resources from worksite enforcement and other enforcement activities were diverted in the 1990s to locate and remove criminal aliens.

<sup>225</sup> U.S. Congress, Senate Committee on the Judiciary, Subcommittee on Immigration, Border Security and Citizenship, *Evaluating a Temporary Guest Worker Program*, 108<sup>th</sup> Cong., 2<sup>nd</sup> sess., Feb. 12, 2004 (Washington: GPO, 2004), p. 66. (Hereafter cited as 2004 Senate Hearing on a Guest Worker Program).

<sup>226</sup> U.S. Department of Justice, Immigration and Naturalization Service, “Immediate Action Directive for Worksite Enforcement Operations,” memorandum, May 22, 1998. The memorandum and attachments are reprinted in *Interpreter Releases*, vol. 75, no. 27 (July 17, 1998), pp. 987-996.

<sup>227</sup> See William Branigin, “Criticism Prompts INS to Make New Rules for Work Site Raids; Some Fear Guidelines Will Limit Enforcement Capability,” *Washington Post*, May 30, 1998, p. A2.

highest priority. (The removal of criminal aliens was the first priority.) After FY2001, the number of workyears as well as the percentage of all hours devoted to alien smuggling declined, possibly as a result of shifting priorities after the terrorist attacks in September 2001. The number of hours devoted to smuggling cases was the lowest in FY1995 (211 workyears), and largest in FY1999 and FY2000 (348 workyears). The proportion of all interior enforcement hours devoted to alien smuggling was smallest in FY1997 (14.5%), and largest in FY2001 (18.6%). In FY2003, 279 workyears were devoted to smuggling cases which corresponded to 14.7% of all interior enforcement workyears. Nonetheless, according to ICE the resources and time devoted to alien smuggling are larger if other relevant investigative programs (such as criminal aliens, identity and benefit fraud, and the Joint Terrorism Task Force) are included in the total.<sup>228</sup> (See **Figures 11 and 12.**)

### **Status Violators**

Status violators are aliens who have entered without inspection or have overstayed their visas (i.e., the alien is out of status). As shown in **Figure 11**, the number of hours spent on status violators almost tripled between FY1992 and FY2000, from 46 workyears to 124 workyears. The percentage of overall investigative time spent on status violation investigations doubled during that time period, as did the resident unauthorized alien population in the United States.<sup>229</sup> (See **Figure 12.**) In FY1992, 3.3% of all hours were devoted to status violations compared to 6.7% of all hours in FY2003. The number of hours spent on status violators, as well as the percent of time devoted to status violators, declined between FY2000 and FY2001, then increased between FY2001 and FY2003. Nonetheless, it is interesting to note, that in the most recent data year, only 6.7% of investigative hours were spend on status violators when the unauthorized population was estimated to be almost 10 million.

### **Administrative and Other**

The amount of hours spent on administrative and non-investigative tasks more than doubled between FY1992 and FY1998, from 205 workyears to 477 workyears, as illustrated in **Figure 11**. Similarly, as shown in **Figure 12**, the percent of hours devoted to administrative tasks increased from 14.9% to 23.2%, the largest proportion devoted to administrative duties for any year. It is interesting to note that in 1999, INS released its interior enforcement strategy which may account for the increase in non-investigative hours. In addition, the increase in administrative and other hours may be the result of an increase in time devoted to developing databases, including the development of an entry/exit system which was mandated in IIRIRA in 1996.

In FY2003, 23% of all hours (435 workyears) were devoted to administrative and non-investigative tasks. In addition, the percent of time devoted to miscellaneous tasks remained under 1% until FY2002 and FY2003, and then increased in both years. (See **Figure 12.**) This increase may be attributable to the productivity time lost/needed when DHS was being formed.

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<sup>228</sup> GAO, *Combating Alien Smuggling, Opportunities Exist to Improve the Federal Response*, p. 23.

<sup>229</sup> Robert Warren, of the former INS, estimated that the unauthorized population was 3.4 million in 1992, and Jeffery Passel, currently of the Pew Hispanic Center, estimated that the unauthorized population was 9.3 million in 2002 and 10.3 million in 2004. For a full discussion of these estimates see CRS Report RS21938, *Unauthorized Aliens in the United States: Estimates Since 1986*, by (name redacted).

## **Border Enforcement**

### **Inspectors**

As **Figure 9** and **Table 2** above shows, the number of hours spent on inspection duties increased between FY1992 (2,273 workyears) and FY1994 (2,446 workyears), decreased in FY1995 (2,245 workyears), and then steadily increased until FY2000 (3,189 workyears). The total number of hours decreased between FY2000 and FY2001, increased between FY2001 and FY2002, and then decreased to the lowest level of the period in FY2003 (2,098 workyears).

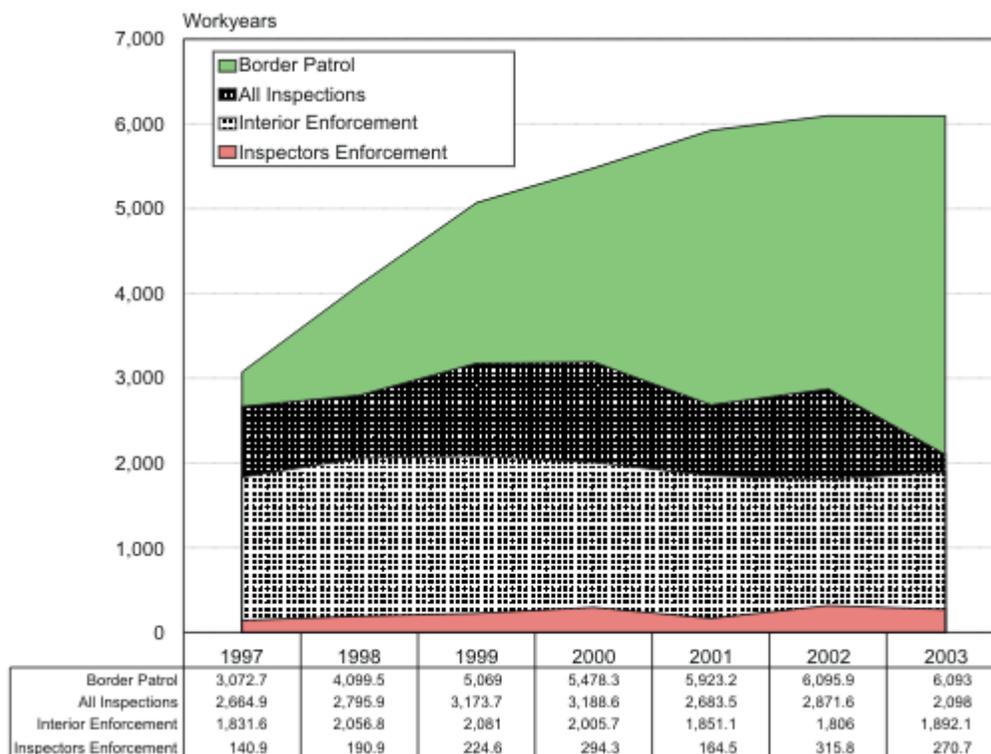
The largest percentage of hours for inspectors is spent in primary inspections, and this proportion has been fairly constant through the years analyzed, ranging from 62.2% (FY1998) to 69.8% (FY2001). In FY2003, immigration inspectors spent 13% of their time on enforcement-related activities.<sup>230</sup> Over the previous 11 years, the time spent by immigration inspectors on enforcement activities has steadily risen, with the exceptions of FY1996 when the percentage dropped by one percent from FY1995, and FY2001 when the percentage dropped by three percent from FY2000. (See **Figure 9** and **Table 2**.)

### **USBP**

The number of hours worked by the USBP, mostly spent patrolling the border between points of entry, almost doubled between FY1997 and FY2002, from 3,073 workyears to 6,096 workyears (See **Figure 14**). The number of USBP workyears decreased slightly, by three workyears between FY2002 and FY2003. The workyears for USBP increased dramatically between FY2003 and FY2005. In FY2004, USBP spent 6,591 workyears on enforcement efforts, and in FY2005, 8,018 workyears.

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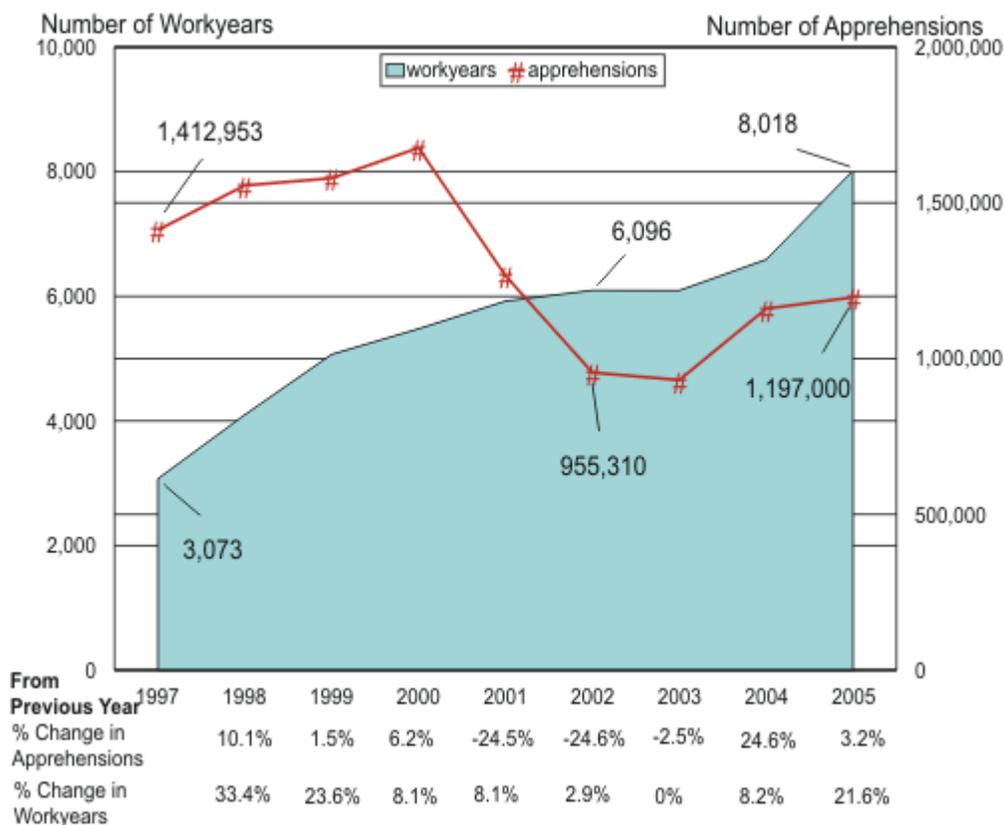
<sup>230</sup> CRS analysis of the former Immigration and Naturalization Service (INS) PAS data. During the years examined, the former INS tracked the hours immigration inspectors spent on several activities, including enforcing immigration law. CRS also included hours spent on processing expedited removal cases and escorting aliens (detention duty) as enforcement hours.

**Figure 14. USBP, Inspectors, and Interior Enforcement Workyears: FY1997-FY2003**

**Source:** CRS analysis of data from the Performance Analysis System (PAS).

Interestingly, as illustrated in **Figure 15**, an increase in workyears does not automatically result in an increase in apprehensions. Between FY1997 and FY2000, both workyears and apprehensions increased. In FY2001 and FY2002, although USBP workyears continued to increase, the number of apprehensions decreased. Between FY2003 and FY2004, the workyears increased eight percent from 6,093 to 6,591, while apprehensions increased 25% from 931,557 to 1.2 million. Comparatively, between FY2004 and FY2005, the number of USBP workyears increased 22% from 6,591 to 8,018, while the number of apprehensions increased only 3%. The decrease in apprehensions since FY2000 may be attributable to fewer unauthorized aliens trying to enter the country due to the economic recession, and the increased difficulty finding employment. USBP argues that the reason why apprehensions do not seem to be increasing at the same rate as resources is because the “Prevention through Deterrence” strategy is finally reaching a critical mass of enough agents and resources placed directly on the border to severely inhibit illegal migrants from entering the country.<sup>231</sup> It may be that additional agents do not have a large effect on apprehensions, or that the additional number of agents is not large enough to actually increase apprehensions.

<sup>231</sup> See CRS Report RL32562, *Border Security: The Role of the U.S. Border Patrol*, by (name redacted).

**Figure 15. Border Patrol: Apprehension, Workyears, and Percent Change, FY1997-FY2005**

**Source:** CRS analysis of unpublished DHS data; CRS presentation of data from the following sources: for 1997, Immigration and Naturalization Service, FY1997 Statistical Yearbook of the INS. For FY1998-FY2004, DHS Office of Immigration Statistics, FY2004 Yearbook of Immigration Statistics, January 2006. FY2005, DHS, FY2005 Monthly Statistical Report, Year End, September 2005.

## Comparison

**Figure 14** illustrates that many more resources (measured in staff hours) have been allotted to enforcement between the ports of entry than enforcement within the United States and at the ports of entry. While the amount of USBP resources significantly increased between FY1997 and FY2003, the resources for both inspections and interior enforcement increased more modestly between FY1997 and FY1999, while inspection hours also increased between FY1999 and FY2000. Hours for interior enforcement, saw a mix of increases and decreased during that period. Between FY2000 and FY2002 interior enforcement hours decreased, and then increased between FY2002 and FY2003. Nonetheless, for the years analyzed, workyears spent on interior enforcement were highest in FY1999, the first year of the INS' interior enforcement strategy. Inspection hours decreased between FY2000 and FY2001, increased in FY2002, and then decreased again in FY2003. The amount of time inspectors spend on enforcement activities, increased between FY1997 and FY2000, decreased substantially in FY2001, and then increased substantially in FY2002. Between FY2002 and FY2003, the number of inspector enforcement hours decreased.

Comparing FY1997 with FY2003, the USBP hours almost doubled from 3,073 to 6,093 workyears, while the interior enforcement hours increased slightly from 1,832 to 1,892 workyears, and the number of inspection hours fell from 2,665 to 2,098. Nonetheless, a comparison of FY1997 and FY2003, shows that amount of time inspectors spent on enforcement activities almost doubled, from 141 workyears to 271 workyears. Importantly, inspection hours are dependent on workload, (i.e., how many people are entering the country in any one year), but since the number of aliens illegally present in the country continues to grow, it is difficult to argue that there has been a decrease in the interior or border enforcement workload.

## DHS Organizational Structure

Questions have been raised concerning the impact of DHS's organizational structure on the effective enforcement of immigration laws.<sup>232</sup> Nonetheless, any attempt to determine the consequence of DHS's structure on immigration enforcement, involves disentangling (1) issues that remain from the former INS (i.e., are the problems encountered by ICE and CBP the same as those found in the former INS); (2) issues related to the time needed for a newly created department to function smoothly; and (3) issues related to the separation of immigration enforcement functions into separate agencies—especially the distinction between CBP and ICE. Although this section focuses on some of the issues facing the new department, it is important to note that there are benefits to combining the disparate agencies in the new department.. For example, ICE can pursue money laundering charges related to smuggling and document fraud through the Financial Investigations Division. This capacity did not exist in INS, and INS would have had to seek outside assistance to pursue additional charges.<sup>233</sup>

## Inherited INS Issues

Over the years, GAO completed several reports on the management in the former INS which noted that INS faced significant challenges in assembling the basic systems and processes that organizations need to complete their goal.<sup>234</sup> GAO found a lack of

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<sup>232</sup> For example see U.S. Congress, Senate Committee on Homeland Security and Governmental Affairs, *The Department of Homeland Security: The Road Ahead*, 109<sup>th</sup> Cong., 1<sup>st</sup> sess., Jan. 26, 2005; U.S. Congress, House Homeland Security Committee, Subcommittee on Management, Integration, and Oversight, *CBP and ICE: Does the Current Organizational Structure Best Serve U.S. Homeland Security Interests?* 109<sup>th</sup> Cong., 1<sup>st</sup> sess., Mar. 9, 2005; and U.S. Congress, House Homeland Security Committee, Subcommittee on Management, Integration, and Oversight, *CBP and ICE: Does the Current Organizational Structure Best Serve U.S. Homeland Security Interests? Part 2*, 109<sup>th</sup> Cong., 1<sup>st</sup> sess., Nov. 15, 2005.

<sup>233</sup> GAO, *Immigration Enforcement: DHS Has Incorporated Immigration Enforcement Objectives and Is Addressing Future Planning Requirements*, p. 7.

<sup>234</sup> For example, see U.S. Government Accountability Office (GAO), *Criminal Aliens: INS' Efforts to Identify and Remove Imprisoned Aliens Continue to Need Improvement*, GAO/T-GGD-99-47, Feb. 25, 1999; U.S. Government Accountability Office, *Illegal Aliens: Significant Obstacles to Reducing Unauthorized Alien Employment Exist*, GAO/GGD-99-33, Apr. 2, 1999; U.S. Government Accountability Office, *Alien Smuggling: Management and Operational Improvements Needed to Address Growing Problem*, GAO/GGD-00-103, May 1, 2000; U.S. Government Accountability Office, *Immigration Benefit Fraud: Focused Approach Is Needed to Address Problems*, GAO-02-66, Jan. 31, 2002.

- clearly delineated roles and responsibilities leading to overlapping responsibilities and ineffective use of resources (e.g., lacking the ability to determine staffing needs);
- policies and procedures to balance competing priorities such as working level guidance;<sup>235</sup>
- effective internal and external communication and coordination (i.e., a lack of clarity on responsibilities and authorities); and
- automated systems to provide accurate and timely information to support its operations.

In testimony before the House Judiciary Committee, Subcommittee on Immigration, Border Security, and Claims in April 2003, GAO noted that “unless these elements were established, enforcing immigration laws..., and effectively participating in the government wide efforts to combat terrorism would be problematic *regardless of how the immigration function was organized.*”<sup>236</sup>

INS faced numerous challenges implementing its interior enforcement strategy.<sup>237</sup> Historically, Congress and INS devoted five times more resources (staff and funding) to border enforcement than to interior enforcement.<sup>238</sup> The INS claimed that it lacked sufficient staff to reach its interior enforcement goals, but the agency never performed a systematic assessment of their staffing needs to reach program goals and the best allocation of existing staff resources.<sup>239</sup> GAO testified in 2003 that the challenges in the Interior Enforcement program would require high-level attention and a concerted effort from ICE. For example, there were hundreds of thousands of criminal aliens, the number of aliens smuggled into the United States had grown along with the complexity of the alien smuggling operations, tens of thousands of aliens illegally seek to gain immigration benefit, and millions of unauthorized aliens use fraudulent documents to gain employment.<sup>240</sup>

In a 2004 report, GAO found that DHS management issues were similar to those in the former INS. For example, as in the former INS, DHS lacks clarity and formal guidelines for addressing overlapping roles and responsibilities of ICE and CBP, which has lead to disagreements, confusion, and institutional barriers between the two agencies.<sup>241</sup>

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<sup>235</sup> Testimony of Richard M. Stana, Director of Justice Issues, GAO, U.S. Congress, House Judiciary Committee, Subcommittee on Immigration and Claims, *INS Interior Enforcement*, hearings, 107<sup>th</sup> Cong., 2<sup>nd</sup> sess., June 19, 2002.

<sup>236</sup> Stana, *Addressing Management Challenges that Face Immigration Enforcement Agencies*, p. 2.

<sup>237</sup> Government Accountability Office, *Homeland Security: Challenges to Implementing Interior Enforcement Strategy*, Apr. 10, 2003 (GAO-03-660T).

<sup>238</sup> Testimony of Director Homeland Security and Justice Issues, Government Accountability Office, Richard M. Stana, in U.S. Congress, House Judiciary Committee, Subcommittee on Immigration, Border Security, and Claims, *Challenges to Implementing the Immigration Interior Enforcement Strategy*, hearings, 108<sup>th</sup> Cong., 1<sup>st</sup> sess., Apr. 10, 2003, GAO-03-660T, p. 1. (Hereafter cited as Stana, *Challenges to Implementing the Immigration Interior Enforcement Strategy*.)

<sup>239</sup> *Ibid.*, p. 6.

<sup>240</sup> Government Accountability Office, *Homeland Security: Challenges to Implementing Interior Enforcement Strategy*, Apr. 10, 2003 (GAO-03-660T).

<sup>241</sup> Testimony of Director Homeland Security and Justice Issues, Government Accountability Office, Richard M. Stana, in U.S. Congress, House Judiciary Committee, Subcommittee on Immigration, Border Security, and Claims, *Addressing Management Challenges that Face Immigration Enforcement Agencies*, 109<sup>th</sup> Cong., 1<sup>st</sup> sess., May 5, 2005, (continued...)

## **Database Integration**

INS had a longstanding history of using antiquated databases and in some cases had paper-based systems. Several GAO reports and one by the DOJ Inspector General noted the outdated systems and databases that immigration officials used to conduct their daily business.<sup>242</sup> Prompted by the 2001 terrorist attacks, in 2002 Congress passed the Enhanced Border Security and Visa Entry Reform Act of 2002.<sup>243</sup> The act mandated the integration of immigration data systems and databases. The act also called for the integration of data systems and databases that contain federal law enforcement and intelligence information relevant to making decisions on visa admissibility and the removal of aliens.

Many assert that the need for all agencies involved in admitting aliens to share intelligence and coordinate activities is essential for U.S. immigration policy to be effective in securing the homeland. Some maintain that the reforms Congress made in the mid-1990s requiring all visa applicants to be checked against lookout databases were inadequate because the databases across the relevant agencies were not interoperable and the various agencies were territorial with their data. They maintain that, in the long run, the most efficient and effective guard against the entry of aliens who would do us harm is an interagency and inter-departmental database that is accessible in “real time” to consular officers, CBP inspectors, and key law enforcement and intelligence officials.

Others point to the cost, time, and complexity of developing interoperable databases. They cite the difficulty thus far in determining what biometric identifiers are most appropriate for screening aliens.<sup>244</sup> They point out competing technologies of the existing databases in which various key agencies have already heavily invested. Some maintain that success of the interoperable database technology depends on 100% inclusion of aliens applying for visas and seeking admission, but that the sheer scope of such a system poses “real time” implementation issues. They also warn that if intelligence data becomes too accessible across agencies, national security may actually be breached because sensitive information may be more likely to fall into the wrong hands. Privacy concerns arise as well as the data sharing and interoperability broadens.

## **Separation of Immigration Functions into Separate DHS Agencies**

When ICE and CBP were created, neither agency was given responsibility for all immigration enforcement activities, and neither was designated the lead agency in immigration enforcement. ICE received INS’ investigations and intelligence functions, as well as its detention and removal. CBP received the inspections functions and the border patrol. CBP and ICE need to heavily rely

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(...continued)

(GAO-05-664T), p. 13. (Hereafter cited as Stana, *Addressing Management Challenges that Face Immigration Enforcement Agencies*.)

<sup>242</sup> For example see Government Accountability Office, *Immigration and Naturalization Service: Overview of Recurring Management Challenges*, Oct. 17, 2001 (GAO-02-168T); Government Accountability Office, *Information Technology: Terrorist Watchlists Should be Consolidated to Promote Better Integration and Information Sharing*, Apr. 2003 (GAO-03-322); and Department of Justice, Office of the Inspector General, *Status of IDENT/IAFIS Integration*, June 2003 (I-2003-005).

<sup>243</sup> P.L. 107-173.

<sup>244</sup> U.S. Congress, Senate Committee on the Judiciary Subcommittee on Technology, Terrorism and Government Information, *Border Technology: Keeping Terrorists Out of the United States—2003*, hearing, Mar. 12, 2003.

on each other because within the new structure, enforcement efforts initiated by CBP often are supposed to be completed by ICE. In addition, CBP border patrol agents are dependent on ICE's DRO for the detention and removal of some of the aliens that they apprehend.<sup>245</sup> Nonetheless, there have been reports of rivalries between ICE and CBP, which inhibit coordination. Moreover, the creation of the DHS has meant that in order to implement an interior enforcement strategy, ICE has to coordinate with CBP and Bureau of Citizenship and Immigration Services (USCIS).<sup>246</sup> As discussed above, when the Department of Homeland Security was formed, USCIS was tasked with the adjudication (service) functions of the former INS.

INS and U.S. Customs Service investigators and intelligence analysts were merged into ICE's investigations and intelligence offices, and INS' detention and removal program was placed in ICE's detention and removal office (DRO). Traditionally, INS investigators specialized in immigration enforcement (e.g., locating criminal aliens, alien smuggling) while Customs investigators specialized in customs enforcement (e.g., drug smuggling, money laundering). In addition, INS investigators primarily investigated civil violations of immigration law, while customs investigators investigated criminal violations related to Customs law. INS and Customs investigators brought their own cultures, policies, mission priorities, procedures to the newly created ICE, which is the second largest investigative bureau in the federal government with approximately 20,000 employees.<sup>247</sup> Conversely, CBP blended entities with similar missions.

Although much of the Congressional attention has focused on the division of ICE and CBP, some issues have also been raised concerning the interaction between USCIS and ICE. INS' approach to benefit fraud was fragmented and unfocused. INS also failed to establish guidance to assure that high-priority cases were investigated.<sup>248</sup> With the creation of DHS, investigating benefit fraud became the responsibility of ICE. Nonetheless, ICE reportedly did not do this, and USCIS established its own benefits fraud investigations unit. According to ICE, it only handles cases of large and expansive benefit fraud which are referred to them from USCIS. All other cases of benefit fraud are handled by USCIS.<sup>249</sup>

## **OIG Merger Report**

DHS' Office of the Inspector General (OIG) examined the merits of merging CBP and ICE, in a report based largely on testimonial evidence. The OIG analyzed whether the difficulties encountered were due to the implementation of the new department or to inherited pre-existing conditions from the former INS. The report also considered other factors such as funding problems and accounting system difficulties. The OIG concluded that organizational structure at the time<sup>250</sup> contributed to the problems in three major areas: (1) coordination between

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<sup>245</sup> As discussed above, most aliens apprehended by border patrol take voluntary departure rather than undergo the formal removal process. DHS *An Assessment of the Proposal to Merge Customs and Border Protection with Immigration and Customs Enforcement*, p. 3.

<sup>246</sup> Stana, *Addressing Management Challenges that Face Immigration Enforcement Agencies*, p. 5.

<sup>247</sup> U.S. Government Accountability Office, *Immigration Enforcement: DHS Has Incorporated Immigration Enforcement Objectives and Is Addressing Future Planning Requirements*, GAO-05-66, Oct. 2004, p. 5. (Hereafter cited as GAO, *Immigration Enforcement: DHS Has Incorporated Immigration Enforcement Objectives and Is Addressing Future Planning Requirements*.)

<sup>248</sup> Stana, *Challenges to Implementing the Immigration Interior Enforcement Strategy*, p. 10.

<sup>249</sup> Meeting with ICE presentation.

<sup>250</sup> In Oct. 2005, the Directorate of Border and Transportation Security was abolished, and ICE and CBP were placed directly under the Secretary of Homeland Security. For more information on the organization and restructuring of (continued...)

apprehensions and detention and removal efforts, (2) coordination between interdiction and investigative efforts, and (3) coordination of intelligence activities.<sup>251</sup>

The report found that the role of integrating ICE and CBP activities had been the responsibility of Directorate of Border of Transportation Security (BTS) which oversaw both ICE and CBP, but due to staffing shortfalls and a lack of authority (including budget authority) over the bureaus, BTS failed to: (1) prevent ICE and CBP from working at cross purposes; (2) synchronize CBP and ICE operations; and (3) resolve conflicts between the two agencies. The report concluded that CBP and ICE had failed to coordinate efforts, and that each organization engaged in discrete planning and strategy development processes (leading to different priorities), and field staff were accountable to separate chains of command. In addition, the report indicated that the division between ICE and CBP is marked by a clear institutional barrier, and the shortfalls in operational coordination and information sharing have fostered negative relations between CBP and ICE personnel, including competition and mistrust.<sup>252</sup>

Many have said that a merger the magnitude of DHS would take five years or more to settle into satisfactory operations; however, the OIG concluded that the integration has not progressed as well as expected, noting that the people they interviewed almost universally stated that the current problems were seen as unresolvable because of the “unnatural separation” of interdependent functions.<sup>253</sup> Nonetheless, DHS responded to the OIG’s recommendation to merge ICE and CBP by maintaining another reorganization would entail costs, including loss of employee productivity during the transition. In addition, DHS noted that the new organization could be too big and unwieldy, with an overly large span of control. Moreover, the report indicated that other agencies may fear that a combined border security agency would become the dominant law enforcement entity.<sup>254</sup>

Furthermore, the Secretary of Homeland Security, Michael Chertoff, undertook a review of the department (called the Second Stage Review) and after careful study concluded that the best course was not to merge ICE and CBP, but to institute a new management structure to reduce bureaucracy, improve accountability, and enhance coordination. Secretary Chertoff also concluded that a merger would diminish the roles of the Assistant Secretary of ICE and the Commissioner of CBP, creating a new bureaucratic reporting mechanism which would diminish coordination rather than enhance it. Secretary Chertoff recommended innovation rather than another massive reorganization.<sup>255</sup>

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(...continued)

immigration functions within DHS, see CRS Report RL33319, *Toward More Effective Immigration Policies: Selected Organizational Issues*, by (name redacted).

<sup>251</sup> Department of Homeland Security, Office of Inspector General, *An Assessment of the Proposal to Merge Customs and Border Protection with Immigration and Customs Enforcement*, Nov. 2005, p. 2. (Hereafter cited as DHS, *An Assessment of the Proposal to Merge Customs and Border Protection with Immigration and Customs Enforcement*.)

<sup>252</sup> *Ibid.*, p. 3.

<sup>253</sup> *Ibid.*, pp. 6, 10.

<sup>254</sup> *Ibid.*, pp. 19-20.

<sup>255</sup> Testimony of Stewart Baker, Assistant Secretary of Policy, Department of Homeland Security, in U.S. Congress, House Homeland Security Committee, Subcommittee on Management, Integration, and Oversight, *CBP and ICE: Does the Current Organizational Structure Best Serve U.S. Homeland Security Interests? Part 2*, 109<sup>th</sup> Cong., 1<sup>st</sup> sess., Nov. 15, 2005.

## ***Investigations***

The OIG concluded that the current organizational structure has also hampered coordination of interdiction and investigative efforts. Since the investigative functions have been separated into ICE, CBP officers have reported that ICE no longer accepts as many case referrals from CBP inspectors and border patrol agents. ICE reported that investigative coordination is declining because CBP increasingly refers cases to other agencies such as the FBI and DEA without notifying ICE. In addition, ICE has reported that investigations have been compromised due to CBP's "inexperienced" investigative work.<sup>256</sup> Reportedly, CBP is now developing its own investigative capabilities. Nonetheless, CBP and ICE managers have asserted that the policy is to refer all cases to ICE for investigation.<sup>257</sup>

## ***Intelligence***

With the formation of DHS, all immigration intelligence agents including those from the border patrol were placed in ICE's intelligence program, which is responsible for collecting, analyzing, and disseminating immigration related intelligence used by ICE, CBP and USCIS.<sup>258</sup> However, CBP recently established its own intelligence program. CBP and ICE intelligence requirements overlap to a large extent, but the two bureaus have separate intelligence structures and products. The OIG reported that the intelligence coordination needs to improve, and that the only significant coordination between ICE and CBP relates to intelligence received from other agencies.<sup>259</sup>

The organization's primary means of sharing intelligence is through the Treasury Enforcement Communications System (TECS) which was not designed for this purpose as it does not highlight trends or detect anomalies. In addition, most CBP personnel lack the required clearance to retrieve critical information entered into TECS by ICE. The OIG concluded that the reliance on the system is inhibiting the timely and effective exchange of information.<sup>260</sup>

## **Conclusion**

Many duties are incorporated under the banner of immigration enforcement. These include removing aliens who should not be in the United States, investigating alien smuggling and trafficking, patrolling between and at ports of entry, combating document and benefit fraud, and enforcing the prohibitions against employers hiring aliens without work authorization. Due to the breadth of immigration enforcement activities, the allocation of resources appears to be significant in determining the ability to enforce the immigration laws. Nonetheless, some contend a policy based solely on enforcement is bound to fail, and only a legalization program, providing a clean slate, can reduce the unauthorized population.<sup>261</sup> However, others assert that the United

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<sup>256</sup> DHS, *An Assessment of the Proposal to Merge Customs and Border Protection with Immigration and Customs Enforcement*, p. 5.

<sup>257</sup> *Ibid.*, p. 45.

<sup>258</sup> Stana, *Challenges to Implementing the Immigration Interior Enforcement Strategy*, p. 11.

<sup>259</sup> DHS, *An Assessment of the Proposal to Merge Customs and Border Protection with Immigration and Customs Enforcement*, p.6.

<sup>260</sup> *Ibid.*, pp. 6, 13.

<sup>261</sup> For an example of this agreement see, Douglas S. Massey, *Backfire at the Border: Why Enforcement Without* (continued...)

States has not tried immigration enforcement, arguing that most of the resources have been devoted to border enforcement, and that the United States has not fully engaged in other types of immigration enforcement, most notably worksite enforcement.<sup>262</sup>

The majority of aliens come to the United States for economic opportunities and for family reunification. The ability to contain illegal migration caused by those seeking family reunification may also depend on the ability of DHS to clear the backlog of immigration petitions, and process new petitions. In addition, the per-country ceilings on certain types of family based immigration affect the ability of aliens from countries with high levels of immigration (e.g., the Philippines) to immigrate.<sup>263</sup> Congressional action would be needed to change the per-country ceilings.<sup>264</sup> Some maintain that only reform of the legal immigration system can decrease illegal immigration.<sup>265</sup>

In addition, the amount of illegal migration may also be dependent on the economic health of the sending countries, especially of those countries in the Americas. Factors in other countries effect the desire of their populations to immigrate, legally or illegally, to the United States. For example, between 2000 and 2003, Uruguay experienced a recession increasing the propensity of its citizens to live and work illegally in the United States.<sup>266</sup> Thus, some argue that only a guest worker program, creating opportunities for a large number of immigrants to come to the United States to work, could significantly reduce the unauthorized migration.<sup>267</sup> However, others argue that better worksite enforcement and enforcement document fraud would make it more difficult for unauthorized aliens to find work, resulting in a decrease in the unauthorized population.<sup>268</sup> It is possible that a combination of a guest worker program and increased worksite enforcement may be utilized to reduce the unauthorized population.

Although within the United States, the enforcement of immigration law is primarily the responsibility of the Department of Homeland Security's Bureaus of Immigration and Customs Enforcement (ICE) and Customs and Border Protection (CBP), one possible option to aid in the reduction of the unauthorized alien population might be to increase the coordination and information sharing with other federal agencies, such as the Social Security Administration and the Department of Labor. Another approach may be to increase the role of local law enforcement agencies in the enforcement of immigration laws.<sup>269</sup> Yet many fear that these options will distract

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(...continued)

*Legalization Cannot Stop Illegal Immigration*, Cato Institute, June 13, 2005.

<sup>262</sup> Mark Krikorian, *Giving Enforcement a Chance: Before We Give Up on Immigration Enforcement, Why Don't We Try It?* (Washington, Center for Immigration Studies, Feb. 2006).

<sup>263</sup> INA §202(a)(2) establishes per-country ceiling at 7% of the worldwide level.

<sup>264</sup> See CRS Report RL32235, *U.S. Immigration Policy on Permanent Admissions*, by (name redacted).

<sup>265</sup> For example see, T. Alexander Alienikoff, "Legal Immigration Reform: Toward Rationality and Equity," in Richard D. Lamm and Alan Simpson, eds., *Blue Prints for an Ideal Legal Immigration Policy*, Center for Immigration Studies, Center Paper #17, Mar. 2001.

<sup>266</sup> *Federal Register*, Mar. 7, 2003, vol. 68, no. 45, pp. 10954-10957.

<sup>267</sup> For a full discussion see CRS Report RL32044, *Immigration: Policy Considerations Related to Guest Worker Programs*, by (name redacted).

<sup>268</sup> Mark Krikorian, *Giving Enforcement a Chance: Before We Give Up on Immigration Enforcement, Why Don't We Try It?* (Washington, Center for Immigration Studies, Feb. 2006).

<sup>269</sup> Some local law enforcement agencies have used local laws, such as laws against trespassing and the housing codes, to arrest unauthorized aliens. For example see, Dan McLean, "Police Outline Prosecution of 'Trespassing' Alien," *Union Leader*, June 29, 2005, p. A1; and Patrik Jonsson, "To Curb Illegal Immigration, South Cracks Down on Housing Codes," *Christian Science Monitor*, Jan. 16, 2006.

the agencies from their primary missions and could hinder the agencies ability to perform other functions if unauthorized aliens will not interact with them.

In some instances, the enforcement of certain immigration laws can be controversial. Although few would argue that aliens should be allowed to enter without being inspected by an immigration officer, and that smugglers and traffickers should not be punished, enforcement against longer-term, noncriminal, unauthorized aliens is often politically difficult due to these aliens' long standing ties to their communities. Often these aliens are integrated in their communities, and the government's attempts to remove them can result in a backlash from the community. Furthermore, there are concerns that increased enforcement against aliens working illegally will disrupt sectors of the economy that depend on foreign labor, and harm the United States economy. The conflicting pressures to reduce the unauthorized population while safeguarding the U.S. economy and maintaining good will among the populace, as well as resource constraints and management issues in DHS, combine to make immigration enforcement policy a complex issue.

## Appendix. List of Acronyms

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|              |                                                                                         |
|--------------|-----------------------------------------------------------------------------------------|
| <b>BIA</b>   | Board of Immigration Appeals (in the Executive Office for Immigration Review)           |
| <b>CBP</b>   | Bureau of Customs and Border Protections (in the Department of Homeland Security)       |
| <b>DHS</b>   | Department of Homeland Security                                                         |
| <b>DOJ</b>   | Department of Justice                                                                   |
| <b>DOS</b>   | Department of State                                                                     |
| <b>DRO</b>   | Office of Detention and Removal (in the Bureau of Immigration and Customs Enforcement)  |
| <b>EOIR</b>  | Executive Office for Immigration Review (in the Department of Justice)                  |
| <b>ESA</b>   | Employment Standards Administration (in the Department of Labor)                        |
| <b>ICE</b>   | Bureau of Immigration and Customs Enforcement (in the Department of Homeland Security)  |
| <b>IJ</b>    | Immigration Judge (works in Executive Office for Immigration Review)                    |
| <b>INA</b>   | Immigration and Nationality Act (Title 8 of the United States Code)                     |
| <b>OI</b>    | Office of Investigations (in the Bureau of Immigration and Customs Enforcement)         |
| <b>OR</b>    | Own Recognizance                                                                        |
| <b>NIT</b>   | Notice of Intent to Fine                                                                |
| <b>NTA</b>   | Notice to Appear                                                                        |
| <b>POE</b>   | Port of entry                                                                           |
| <b>SSA</b>   | The Social Security Administration                                                      |
| <b>SSN</b>   | Social Security Number                                                                  |
| <b>USBP</b>  | United States Border Patrol (in the Bureau of Customs and Border Protections)           |
| <b>USCIS</b> | Bureau of Citizenship and Immigration Services (in the Department of Homeland Security) |

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