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The Chief Justice
Earl Warren
Institute on Race,
Ethnicity & Diversity

Berkeley Law Center for
Research and Administration
2850 Telegraph Avenue
Suite 500
Berkeley, CA 94705
Phone: (510) 642-8568
Fax: (510) 643-7095

www.warreninstitute.org

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The Chief Justice Earl Warren Institute on Race, Ethnicity & Diversity is a multidisciplinary, collaborative venture to produce research, research-based policy prescriptions, and curricular innovation on issues of racial and ethnic justice in California and the nation.

For more information,
please contact:

Ana Djordjevich
Development &
Communications Officer
(510) 642-4102

ASSEMBLY-LINE JUSTICE: A REVIEW OF OPERATION STREAMLINE

by Joanna Lydgate*

EXECUTIVE SUMMARY

The current administration is committed to combating the drug and weapon trafficking and human smuggling at the root of violence along the U.S.-Mexico border.¹ But a Bush-era immigration enforcement program called Operation Streamline threatens to undermine that effort. Operation Streamline requires the federal criminal prosecution and imprisonment of all unlawful border crossers. The program, which mainly targets migrant workers with no criminal history, has caused skyrocketing caseloads in many federal district courts along the border. This Warren Institute study demonstrates that Operation Streamline diverts crucial law enforcement resources away from fighting violent crime along the border, fails to effectively reduce undocumented immigration, and violates the U.S. Constitution.

The Department of Homeland Security (DHS) began implementing Operation Streamline along the U.S.-Mexico border in 2005. The program has fundamentally transformed DHS's border enforcement practices. Before Operation Streamline began, DHS

Border Patrol agents voluntarily returned first-time border crossers to their home countries or detained them and formally removed them from the United States through the civil immigration system. The U.S. Attorney's Office reserved criminal prosecution for migrants with criminal records and for those who made repeated attempts to cross the border. Operation Streamline removed that prosecutorial discretion, requiring the criminal prosecution of all undocumented border crossers, regardless of their history.

Operation Streamline has generated unprecedented caseloads in eight of the eleven federal district courts along the border, straining the resources of judges, U.S. attorneys, defense attorneys, U.S. Marshals, and court personnel. The program's voluminous prosecutions have forced many courts to cut procedural corners. Magistrate judges conduct *en masse* hearings, during which as many as 80 defendants plead guilty at a time, depriving migrants of due process. Indeed, in December 2009, the U.S. Court of Appeals for the Ninth Circuit held that Operation

* The Warren Institute acknowledges the generous support of the Evelyn and Walter Haas, Jr. Fund, which has made this research possible. Joanna Lydgate is a William K. Coblentz Civil Rights Fellow with the Warren Institute and will graduate from UC Berkeley School of Law in 2010. She obtained her BA from Yale University in 2003.

1. See, e.g., Press Release, U.S. Department of Homeland Security, Obama Administration Announces National Strategy to Reduce Drug Trafficking and Flow of Bulk Cash and Weapons

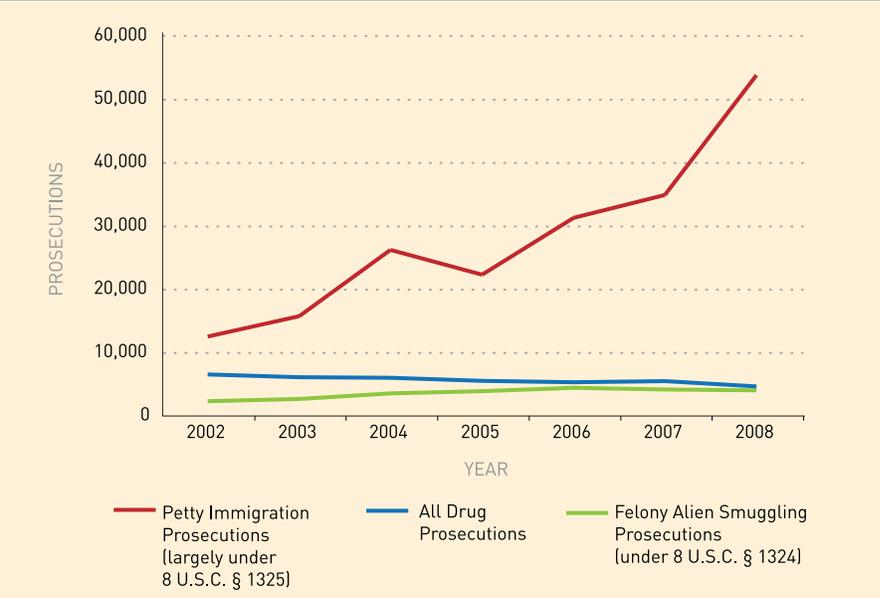
Across Southwest Border (June 5, 2009), available at http://www.dhs.gov/ynews/releases/pr_1244217118076.shtm; EXECUTIVE OFFICE OF THE PRESIDENT OF THE UNITED STATES, OFFICE OF NATIONAL DRUG CONTROL POLICY, NATIONAL SOUTHWEST BORDER COUNTERNARCOTICS STRATEGY (June 2009), available at http://www.whitehouse.gov/publications/swb_countersnarcotics_strategy09/swb_countersnarcotics_strategy09.pdf.

Streamline's *en masse* plea hearings in Tucson, Arizona violate federal law.² By focusing court and law enforcement resources on the prosecution of first-time entrants, Operation Streamline also diverts attention away from fighting drug smuggling, human trafficking, and other crimes that create border violence.

To examine Operation Streamline's effects, the Warren Institute observed Operation Streamline court proceedings and conducted interviews with judges, U.S. attorneys, defense attorneys, Border Patrol representatives, and immigration lawyers in four border cities in Texas, New Mexico, and Arizona. This report outlines the Warren Institute's findings. It concludes that Operation Streamline is not an effective means of improving border security or reducing undocumented immigration. Furthermore, Operation Streamline has unacceptable consequences for the agencies tasked with implementing the program, for the migrants it targets, and for the rule of law in this country.

The administration should therefore eliminate Operation Streamline and restore U.S. attorneys' discretion

FIGURE 1 | Operation Streamline's Effect: Petty Immigration Prosecutions vs. Felony Alien Smuggling Prosecutions in the Border District Courts



to prosecute serious crimes along the border. If the administration seeks to punish first-time border crossers, it need look no further than the civil immigration system.

BACKGROUND

Between 2002 and 2008, federal magistrate judges along the U.S.-Mexico border saw their misdemeanor immigration caseloads more than

quadruple. Criminal prosecutions of petty immigration-related offenses³ increased by more than 330% in the border district courts, from 12,411 cases⁴ to 53,697.⁵ Those caseloads continue to rise.⁶ During the same six-year period, felony alien smuggling prosecutions in the border courts rose at a comparatively sluggish rate,⁷ and drug prosecutions steadily declined (see Figure 1).⁸

2. *United States v. Roblero-Solis*, 588 F.3d 692 (9th Cir. 2009).

3. Petty offenses are misdemeanors with a maximum sentence of six months. Petty immigration-related offenses are almost exclusively prosecutions under 8 U.S.C. § 1325 for first-time unlawful entry into the United States.

4. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, 2002 ANNUAL REPORT OF THE DIRECTOR: JUDICIAL BUSINESS OF THE UNITED STATES COURTS Supplemental Table M-2: Petty Offense Defendants Disposed of by U.S. Magistrate Judges, by Major Offense (2003), available at <http://www.uscourts.gov/judbus2002/appendices/m02sep02.pdf>. The federal districts along the U.S.-Mexico border are: the Southern District of California, the District of Arizona, the District of New Mexico, the Western District of Texas, and the Southern District of Texas.

5. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, 2008 ANNUAL REPORT OF THE DIRECTOR: JUDICIAL BUSINESS OF THE UNITED STATES COURTS Supplemental Table M-2: Petty Offense Defendants Disposed of by U.S. Magistrate Judges, by Major Offense (2009), available at <http://www.uscourts.gov/judbus2008/appendices/M02Sep08.pdf>. Some of this increase in prosecutions may be due to improved reporting by the U.S. Attorney's Office.

See, e.g., Spencer S. Hsu, *Immigration Prosecutions Hit New High*, WASHINGTON POST, June 2, 2008.

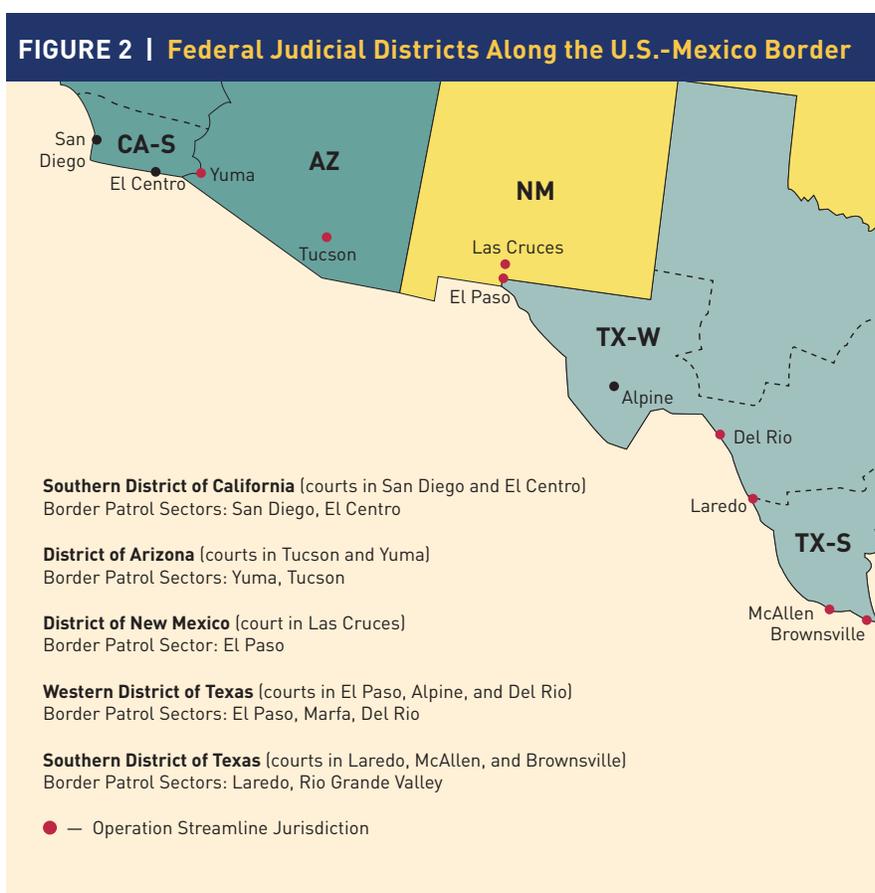
6. See TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, IMMIGRATION PROSECUTIONS FOR MARCH 2009 (2009), available at <http://trac.syr.edu/tracreports/bulletins/immigration/monthlymar09/fil>.

7. Drug prosecutions in the federal district courts along the border decreased from 6430 cases commenced in 2002 to 4966 cases commenced in 2008. See ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, 2002-2008 ANNUAL REPORTS OF THE DIRECTOR: JUDICIAL BUSINESS OF THE UNITED STATES COURTS Supplemental Table D-3: Cases Commenced, by Major Offense and District.

8. Data obtained from TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE using "TRAC Express" tool, searching by lead charge 8 U.S.C. § 1324 for the time period 2002 to 2008 for each border district, then adding the results together (data on file with author). Alien smuggling prosecutions under 8 U.S.C. § 1324 in the border district courts went from 2208 cases in 2002 to 3900 cases in 2008. *Id.*

Skyrocketing petty immigration prosecutions would seem to suggest a recent surge of migrants attempting to cross the U.S.-Mexico border, but there has been no such surge. The Border Patrol reports that its apprehensions have been declining since 2005.⁹ Rather, the immigration caseload in the border courts is largely the result of a set of zero-tolerance immigration enforcement programs. The first program began in Del Rio, Texas, in 2005, and DHS has since implemented similar programs in: Yuma, Arizona; Tucson, Arizona; Las Cruces, New Mexico; El Paso, Texas; Laredo, Texas; McAllen, Texas; and Brownsville, Texas.¹⁰ Though these zero-tolerance programs have various names, they are often referred to in the aggregate as “Operation Streamline.” And though they take slightly different forms, they share the same mandate: the criminal prosecution of all undocumented border crossers, even first-time entrants.¹¹

Most Operation Streamline defendants are migrants from Mexico or Central America who have no prior criminal convictions and who have attempted to cross the border in search



of work or to reunite with family in the United States. First-time offenders are prosecuted for misdemeanor illegal entry under 8 U.S.C. § 1325, which carries a six-month maximum sentence. Any migrant who has been deported in the past and attempts to

reenter can be charged with felony reentry under 8 U.S.C. § 1326, which generally carries a two-year maximum penalty but can involve up to a 20-year maximum if the migrant has a criminal record.¹² Defense attorneys estimate that 99% of Operation Streamline

9. NANCY RYTINA AND JOHN SIMANSKI, U.S. DEPARTMENT OF HOMELAND SECURITY, OFFICE OF IMMIGRATION STATISTICS, FACT SHEET, APPREHENSIONS BY THE U.S. BORDER PATROL: 2005-2008 (June 2009), available at http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_apprehensions_fs_2005-2008.pdf.

10. See, e.g., *Federal Courts Hit Hard by Increased Law Enforcement on Border*, THE THIRD BRANCH (Administrative Office of the U.S. Courts Office of Public Affairs, Washington, DC), July 2008, available at http://www.uscourts.gov/ttb/2008-07/article02_1.cfm; Press Release, U.S. Department of Homeland Security, U.S. Border Patrol Achieves Substantial Results in 2008 (November 5, 2008), available at http://www.cbp.gov/xp/cgov/newsroom/news_releases/archives/2008_news_releases/nov_2008/11052008.xml; Telephone Interview with Thomas Lindenmuth, Supervisory Assistant Federal Public Defender, McAllen, TX (November 17, 2009).

11. No Operation Streamline jurisdiction actually prosecutes *exactly 100%* of border apprehensions. The Border Patrol, as a matter of policy, does not refer for prosecution juveniles, parents traveling with minor children, certain persons with health conditions, and others who require prompt return to their country of origin for humanitarian reasons. See, e.g., Telephone Interview with Richard Durbin, Criminal Chief, U.S. Attorney’s Office, Western District of Texas (April 10, 2009).

12. If the defendant’s prior removal occurred after a felony conviction, the maximum possible penalty under 8 U.S.C. § 1326 is 10 years in prison. If the prior removal occurred after an aggravated felony conviction as defined by 8 U.S.C. § 1101(a)(43), the penalty can be up to 20 years.

13. See, e.g., Interview with William D. Fry, Supervisory Assistant Federal Public Defender, Del Rio, TX (September 1, 2009); Interview with Heather Williams, First Assistant Federal Public Defender, Tucson, AZ (September 2, 2009) (hereinafter Williams interview); Telephone Interview with Alex Melendez, CJA Panel Attorney, El Paso, TX (September 16, 2009).

Operation Streamline raises significant legal and policy concerns even in the cities where it has received its most careful implementation.

defendants plead guilty.¹³ In some locations, Border Patrol attorneys are deputized as special assistant U.S. attorneys¹⁴ to prosecute Operation Streamline cases, though the U.S. Attorney's Office has retained control elsewhere. While each criminal prosecution is pending, DHS processes the migrant for removal from the United States.

The number of daily Operation Streamline prosecutions varies by location. In Del Rio, Texas, the program generates as many as 80 new prosecutions per day.¹⁵ In Tucson, Arizona, there are 70 daily prosecutions.¹⁶ In El Paso, Texas, the daily average is around 20 prosecutions.¹⁷ Because most migrants are prosecuted under 8 U.S.C. § 1325, the misdemeanor

statute, magistrate judges hear the bulk of Operation Streamline cases.¹⁸ The sheer number of defendants requires nearly all judges to combine the initial appearance, arraignment, plea, and sentencing into one *en masse* hearing.¹⁹ Many Operation Streamline defendants complete the entire criminal proceeding – meeting with counsel, making an initial appearance, pleading guilty, and being sentenced after waiving a presentence report – in a single day. Criminal Justice Act (CJA) Panel attorneys²⁰ serve as counsel for the majority of defendants and are appointed to represent up to 80 clients in one hearing, which can foreclose individualized representation.

GOALS OF THIS REPORT

Operation Streamline has been lauded by its designers but criticized by many others, including judges, U.S. attorneys, and federal public defenders. To understand how Operation Streamline is working, the Warren Institute visited four cities where versions of the program are in place: Del Rio, Texas; El Paso, Texas; Las Cruces, New Mexico; and Tucson, Arizona. The Warren Institute observed Operation Streamline court proceedings in each city and conducted numerous in-person and telephone interviews with judges, U.S. attorneys, defense attorneys, Border Patrol representatives, and immigration lawyers involved in Operation Streamline's implementation.²¹

This report concludes that Operation Streamline raises significant legal and policy concerns even in the cities where it has received its most careful implementation. From a policy perspective, there are reasons to question Operation Streamline's efficacy. Recent reductions in border apprehensions are likely attributable to factors

14. See 28 U.S.C. § 543.

15. The number of daily Operation Streamline prosecutions varies in Del Rio. There is currently a cap of 80 prosecutions per day, and Del Rio Magistrate Judge Victor Garcia reports that the court does generally see 80 daily prosecutions between January and May, when border crossing rates are at their peak. Interview with Hon. Victor Garcia, U.S. Magistrate Judge, Western District of Texas, Del Rio, TX (September 1, 2009). During what Judge Garcia describes as the "low season," however, the Operation Streamline docket is less busy. *Id.*

16. See, e.g., Interview with Hon. John M. Roll, Chief Judge, District of Arizona, Tucson, AZ (September 2, 2009).

17. This rough average was calculated from the caseload statistics of the three magistrate judges in El Paso for the months of January 2009, February 2009, and November 2009. E-mail from Hon. Richard Mesa, United States Magistrate Judge, Western District of Texas, El Paso, TX to Joanna Lydgate (December 14, 2009, 2:32:32 PM PST) (on file with author); WESTERN DISTRICT OF TEXAS, MAGISTRATE JUDGE CRIMINAL PROCEEDINGS FOR THE MONTH OF JANUARY 2009, provided by Magistrate Judge Norbert Garney's courtroom staff (on file with author).

18. In many Operation Streamline locations, defendants with prior removals are charged with one count of illegal reentry under 8 U.S.C. § 1326 and a second count of illegal entry under 8 U.S.C. § 1325. Most plead guilty to the lesser illegal entry charge.

19. The exception to this rule is El Paso, where defendants receive two court appearances: an initial appearance, and a plea and sentencing hearing about two weeks later.

20. The Criminal Justice Act Panel consists of attorneys in private practice who are appointed to represent indigent criminal defendants in the United States district courts. See 18 U.S.C. § 3006A.

21. In total, the Warren Institute completed 23 in-person and telephone interviews with eight judges, five federal public defenders, four U.S. attorneys, three Border Patrol representatives, two CJA Panel attorneys, and two immigration lawyers.

other than Operation Streamline, and the program diverts resources away from prosecuting the crimes that create violence along the border, such as drug smuggling and human trafficking. Operation Streamline also has troubling consequences for the border district courts, for the federal law enforcement agencies that run the program, and for the migrants it targets. The program's substantial cost to taxpayers is another cause for concern. From a legal perspective, Operation Streamline's voluminous prosecutions require group proceedings that do not comport with due process and a caseload for defense attorneys that can result in ineffective assistance of counsel. Where Border Patrol attorneys prosecute Operation Streamline cases, prosecutorial independence may also be compromised.

POLICY CONCERNS

While DHS has promoted Operation Streamline as a primary cause of the recent decline in apprehensions along the U.S.-Mexico border, there are reasons to question DHS's claim. What

is clear, however, is that Operation Streamline diverts resources away from prosecuting more serious crimes, that it has negative consequences for the workload of the district courts and for the behavior of migrants, and that it is a costly program to run.

Questionable deterrent capacity

According to DHS, Border Patrol apprehensions have been declining since 2005, when Operation Streamline first began.²² While DHS recognized in a June 2009 report that this decline "may be due to a number of factors including declining U.S. economic growth,"²³ the agency has consistently given Operation Streamline credit for the reduction in apprehensions.²⁴ The agency has reported, for example, that during the last quarter of 2008, Operation Streamline caused apprehensions to fall by nearly 70% in Yuma, Arizona, by nearly 70% near Del Rio, Texas, and by 22% near Laredo, Texas.²⁵

Yet DHS's numbers do not tell the full story. The general decline in border apprehensions did not begin

in 2005 – when DHS introduced Operation Streamline – but in 2000.²⁶ Apprehensions reached a decade peak in 2000,²⁷ then steadily decreased until 2003, went up slightly in 2004 and 2005, and decreased again until 2008.²⁸ DHS points out that between 2005 and 2008, apprehensions went down by 465,137, or 39%, but they had gone down by a very similar rate – 44%, or 744,443 apprehensions – between 2000 and 2003, well before Operation Streamline began. The degree to which the recent decline in apprehensions can be attributed to Operation Streamline is therefore highly debatable.

Indeed, a recent study by the Center for Comparative Immigration Studies at the University of California, San Diego²⁹ suggests other explanations for the fluctuation in apprehensions. The UC San Diego researchers interviewed Mexican migrants between 2005 and 2009 and found that the primary factors deterring border crossings were the increased cost of crossing the border, coupled with the current state of the U.S. economy.³⁰ Many of the judges

22. RYTINA AND SIMANSKI, *supra* note 9, at 1 ("The number of apprehensions made by the Border Patrol declined for the third year in a row to 724,000 in 2008 after reaching a mid-decade peak of 1,189,000 in 2005").

23. *Id.* at 2.

24. See, e.g., U.S. Department of Homeland Security, Remarks by Homeland Security Secretary Michael Chertoff and Attorney General Mukasey at a Briefing on Immigration Enforcement and Border Security Efforts (February 22, 2008), available at http://www.dhs.gov/xnews/releases/pr_1203722713615.shtm; Press Release, U.S. Department of Homeland Security, CBP Border Patrol Apprehensions Down Along Southern Border (July 7, 2007), available at http://www.cbp.gov/xp/cgov/newsroom/news_releases/archives/2007_news_releases/072007/07072007.xml; Fact Sheet, U.S. Department of Homeland Security, Securing America's Borders CBP 2006 Fiscal Year in Review (October 30, 2006), available at http://www.dhs.gov/xnews/releases/pr_1162226345208.shtm.

25. Hsu, *Immigration Prosecutions Hit New High*, *supra* note 5.

26. After FY 2000, apprehensions declined for three years. There were 1,266,214 apprehensions in FY 2001, 955,310 in FY 2002, and 931,557 in FY 2003. Apprehensions then climbed slightly to 1,160,395 in FY 2004 and 1,188,977 in FY 2005 before declining again to 1,089,096 in FY 2006; 876,803 in FY 2007; and 723,840 in FY 2008. See TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, REPORT: CONTROLLING THE BORDERS Figure 2: National Trends in Apprehensions and Staffing (April 4, 2006); RYTINA AND SIMANSKI, *supra* note 9, at 1-2.

27. RYTINA AND SIMANSKI, *supra* note 9, at 1.

28. See *supra* note 26.

29. MEXICAN MIGRATION AND THE U.S. ECONOMIC CRISIS: A TRANSACTIONAL PERSPECTIVE (Wayne A. Cornelius et al. eds., 2010).

30. *Id.* at xiii.

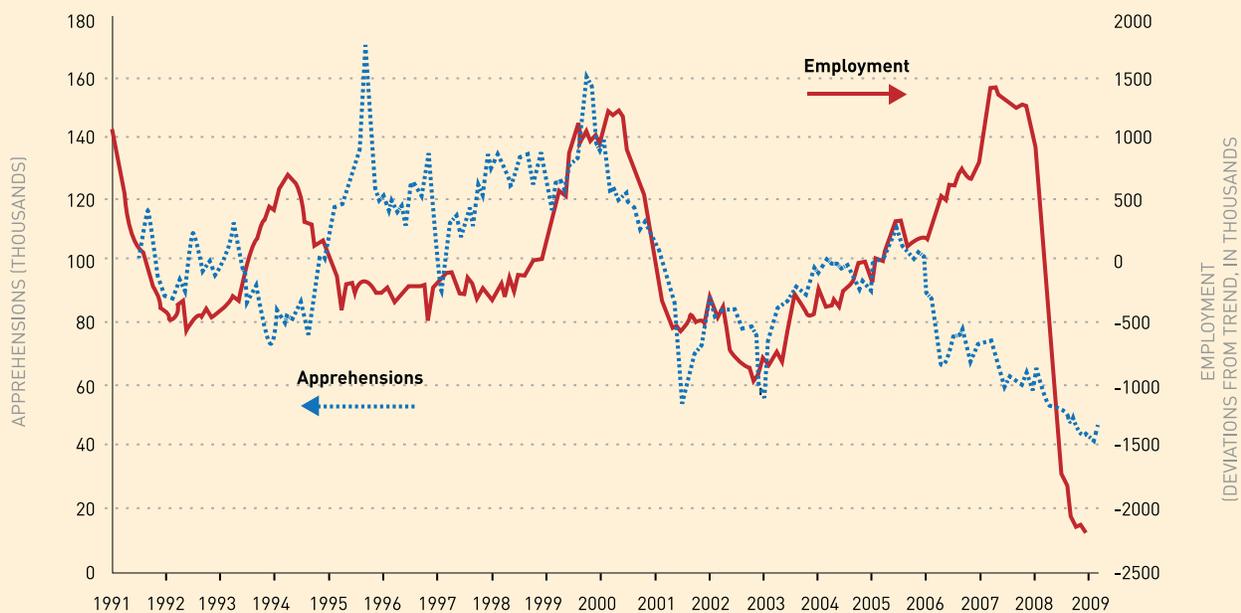
and practitioners the Warren Institute interviewed in Arizona, New Mexico, and Texas also cited the economy as the primary cause of the decline in apprehensions, and their observations are backed up by census data from the Mexican government,³¹ as well as the opinions of numerous experts in the

fields of economics and migration.³² The U.S. unemployment rate has more than doubled since 2000, when border apprehensions began falling, and as Figure 3 demonstrates, border apprehensions have largely tracked the U.S. job market since 1991.³³

Beyond the U.S. economy's effect

on migration patterns, DHS enforcement efforts of a different variety may be contributing to lower border apprehension rates. In the same year it introduced Operation Streamline, DHS implemented the "Secure Border Initiative," which deployed various technologies and infrastructure to aid

FIGURE 3 | Apprehensions Versus Detrended Employment, 1991 to 2009³⁴



Source: Bureau of Labor Statistics; Department of Homeland Security; Authors' calculations.
Note: Nonfarm payroll employment is expressed in deviations from long-run trend. Apprehensions are shifted 6 months forward. Employment and apprehensions have been seasonally adjusted by the Dallas Fed.

31. Julia Preston, *Mexican Data Show Migration to U.S. in Decline*, NEW YORK TIMES, May 14, 2009 (citing Mexican census data revealing that “about 226,000 fewer people emigrated from Mexico to other countries during the year that ended in August 2008 than during the previous year, a decline of 25%. All but a very small fraction of emigration, both legal and illegal, from Mexico is to the United States. . . . Mexican and American researchers say that the current decline, which has also been manifested in a decrease in arrests along the border, is largely a result of Mexicans’ deciding to delay illegal crossings because of the lack of jobs in the ailing American economy.”).

32. See, e.g., Diana Washington Valdez, *Officials: Apprehensions dip as U.S. economy struggles*, EL PASO TIMES, October 20, 2008 (quoting Tom Fullerton, professor of economics and finance at the University of Texas at El Paso and an expert on the border economy, as saying that “fewer Mexican nationals are trying to cross the border because they know the U.S. economic down-

turn has resulted in diminished job prospects”); Christopher Sherman, *Third Year of Fewer Illegal Immigrants Caught*, ASSOCIATED PRESS, June 16, 2009 (quoting Jeffrey Passel, senior demographer at the Pew Hispanic Center, as saying that the main reason Mexicans emigrate to the U.S. is for jobs, “and there aren’t any”).

33. According to the Bureau of Labor Statistics, the unemployment rate was 4.0% in May 2000 and 9.4% in May 2009. See BUREAU OF LABOR STATISTICS, DATABASES, LABOR FORCE STATISTICS FROM THE CURRENT POPULATION SURVEY, available at [http://data.bls.gov/PDQ/servlet/SurveyOutputServlet?series_id=LNS140000000](http://data.bls.gov/PDQ/servlet/SurveyOutputServlet?series_id=LNS14000000). See also Catherine Rampell, *Illegal Immigration as a Job Market Predictor*, NEW YORK TIMES, May 15, 2009.

34. Graph courtesy of Pia M. Orrenius, senior economist at the Federal Reserve Bank of Dallas.

Border Patrol agents.³⁵ The initiative was accompanied by major increases in Border Patrol staffing, which have nearly doubled the size of the Border Patrol since 2001.³⁶ It is impossible to isolate the relative success of Operation Streamline as compared with these and other recent enforcement efforts.

Finally, federal defenders, judges, and immigration attorneys interviewed by the Warren Institute questioned whether migrants are aware of Operation Streamline or understand how it works. In at least one sector – El Paso – the Border Patrol has tried to publicize its zero-tolerance program across the border in Mexico.³⁷ Beyond such direct efforts, DHS insists that news of these programs spreads among migrants by word of mouth. But federal defenders reported that many of their clients are caught off guard by the criminal prosecution and cannot begin to grasp how it will affect them in the longer term because they do not, at a basic level, understand

At a time when combating violence along the U.S.-Mexico border is a top priority for DHS and the Department of Justice, Operation Streamline is a wasteful expenditure of resources.

the concept of bars to reentry or what it means to be charged with a misdemeanor or a felony in the United States.³⁸

Defense attorneys also emphasized that many of their clients have traveled a great distance and spent a good deal of money to reach the border.³⁹ Some have family members already residing in the United States with whom they wish to reunite. Others are caring for children, sick family members, or aging parents and are unable to find work to support those relatives in their own country. These personal circumstances can be more powerful than any criminal sanction.

Diverting resources

Drug-cartel violence along the U.S.-Mexico border has been on the rise in recent years.⁴⁰ The U.S. Government Accountability Office reports that drug-related murders more than doubled in Mexican border cities between 2007 and 2008, reaching 6,200 deaths.⁴¹ The Department of Justice has described Mexican drug trafficking organizations as “the greatest organized crime threat to the United States.”⁴²

At a time when combating violence along the U.S.-Mexico border is a top priority for DHS and the Department of Justice,⁴³ Operation Streamline is

35. U.S. Department of Homeland Security, Secure Border Initiative, http://www.cbp.gov/xp/cgov/border_security/sbi/.

36. The number of Border Patrol agents nationwide was 9,821 in 2000. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, REPORT ON THE IMPACT ON THE JUDICIARY OF LAW ENFORCEMENT ACTIVITIES ALONG THE SOUTHWEST BORDER: PREPARED FOR THE U.S. HOUSE OF REPRESENTATIVES AND SENATE COMMITTEES ON APPROPRIATIONS 56 (July 2008) (on file with author). It was expected to reach 19,700 by the end of September 2009. U.S. GOVERNMENT ACCOUNTABILITY OFFICE, CBP COULD IMPROVE ITS ESTIMATION OF FUNDING NEEDED FOR NEW BORDER PATROL AGENTS (June 15, 2009), available at <http://www.gao.gov/products/GAO-09-542R>. There is a strong correlation between increases in Border Patrol personnel and increases in immigration prosecutions in the district courts. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, REPORT ON THE IMPACT ON THE JUDICIARY OF LAW ENFORCEMENT ACTIVITIES ALONG THE SOUTHWEST BORDER, at 7.

37. Interview with Joe Perez, U.S. Customs and Border Protection, Office of Public Affairs, El Paso Sector, El Paso, TX (March 26, 2009).

38. Telephone Interview with Edgar Holguin, Assistant Federal Public

Defender, El Paso, TX (March 30, 2009) (hereinafter Holguin interview); Interview with Robert Kinney, Supervisory Assistant Federal Public Defender, Las Cruces, NM (March 25, 2009) (hereinafter Kinney interview).

39. See, e.g., Interview with Richard Bacal, CJA Panel Attorney, Tucson, AZ (September 2, 2009) (hereinafter Bacal interview).

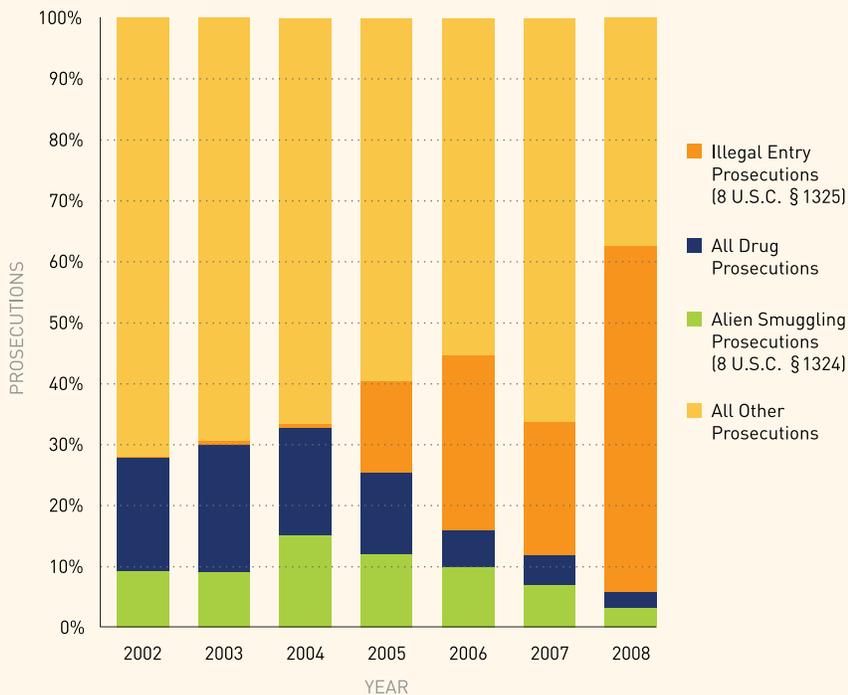
40. See, e.g., Randal C. Archibold, *Mexican Drug Cartel Violence Spills Over, Alarming U.S.*, NEW YORK TIMES, March 22, 2009; *Mexico Under Siege: The drug war at our doorstep*, LOS ANGELES TIMES, <http://projects.latimes.com/mexico-drug-war/#/its-a-war>.

41. U.S. GOVERNMENT ACCOUNTABILITY OFFICE, FIREARMS TRAFFICKING: U.S. EFFORTS TO COMBAT ARMS TRAFFICKING TO MEXICO FACE PLANNING AND COORDINATION CHALLENGES 1 (June 2009), available at <http://www.gao.gov/new.items/d09709.pdf>.

42. U.S. DEPARTMENT OF JUSTICE, NATIONAL DRUG THREAT ASSESSMENT 2009 iii (December 2008), available at <http://www.justice.gov/ndic/pubs31/31379/31379p.pdf>.

43. See *supra* note 1.

FIGURE 4 | Snapshot: Operation Streamline's Effect in Arizona⁴⁴



a wasteful expenditure of resources. The program channels law enforcement funding and attention toward the apprehension and prosecution of low-level offenders, rather than focusing on the crimes that create border violence, including human trafficking and drug smuggling. As petty immigration prosecutions have increased in the border district courts, drug prosecutions have declined (see Figure 1). While alien smuggling prosecutions have risen somewhat since 2002 when charted across all of the border courts,

they too have been on the decline in certain areas, such as the District of Arizona (see Figure 4).

This disturbing trend may result from Operation Streamline's high caseloads, which can force U.S. attorneys to cut back on prosecuting more serious crimes along the border. Operation Streamline strips Assistant U.S. Attorneys (AUSAs) of discretion to prosecute the crimes they deem most serious. As a result, AUSAs have lamented their inability to aggressively prosecute the criminal organizations

behind drug smuggling and human trafficking because of their immigration caseloads. In 2006, for example, AUSA Clint Johnson of Las Cruces was quoted as saying, "Because of the [immigration] caseload, we can't always be as proactive as we'd like to be because we're so busy being reactive. [Drug and human trafficking] cases do exist, we do work them up the ladder. To be very honest, would I like to spend a lot more time trying to work up the ladder to some of these organizations? Most definitely."⁴⁵

Data from the border district courts supports this trend; a January 2009 *New York Times* article reported that, as immigration prosecutions have risen over the past five years, white-collar prosecutions, weapons prosecutions, organized crime prosecutions, public corruption prosecutions, and drug prosecutions have declined.⁴⁶ The *New York Times* interviewed Judge George Kazen of Laredo, Texas, who expressed concern that AUSAs in his district are not adequately targeting weapons smugglers or violent drug cartels.⁴⁷ "The U.S. attorney isn't bringing me those cases," he said. "They're just catching foot soldiers coming across the border. . . . But they will tell you that they don't have the resources to drive it and develop a conspiracy case."⁴⁸ The article further noted that, as a result of

44. Total prosecutions, 8 U.S.C. § 1324 prosecutions, and 8 U.S.C. § 1325 prosecutions obtained from the Transactional Records Access Clearinghouse (TRAC) using the "TRAC Express" tool, searching by lead charge 8 U.S.C. § 1325 for the District of Arizona for the years 2002 to 2008 (data on file with author). For drug prosecution data, see ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, 2002-2008 ANNUAL REPORTS OF THE DIRECTOR: JUDICIAL BUSINESS OF THE UNITED STATES COURTS Supplemental Table D-3: Cases Commenced, by Major Offense and District.

45. *Immigration Crisis Tests Federal Courts on Southwest Border*, THE THIRD BRANCH (Administrative Office of the U.S. Courts Office of Public Affairs, Washington, DC), June 2006, available at <http://www.uscourts.gov/tb/06-06/border/index.html>.

46. Solomon Moore, *Push on Immigration Crimes Is Said to Shift Focus*, NEW YORK TIMES, January 11, 2009. The article, citing data from TRAC, reports that white-collar prosecutions have fallen by 18% over the past five years, weapons prosecutions by 19%, organized crime prosecutions by 20%, and public corruption prosecutions by 14%. "Drug prosecutions — the enforcement priority of the Reagan, first Bush and Clinton administrations — have declined by 20 percent since 2003." *Id.*

47. *Id.*

48. *Id.*

their immigration caseloads, U.S. attorneys on the southwest border generally “decline to prosecute drug suspects with 500 pounds of marijuana or less — about \$500,000 to \$800,000 worth.”⁴⁹ This often results in local agencies handling those drug prosecutions and becoming overwhelmed themselves.⁵⁰

Effect on the border district courts

Operation Streamline’s numerous prosecutions also exact a significant cost from the personnel working in the border courts. A July 2008 report by the Administrative Office of the U.S. Courts addressed Operation Streamline’s impact on the judiciary.⁵¹ The report noted that “recruitment and retention” problems in the border district courts are “exacerbated because many employees at border locations are experiencing burnout due to the nature and sheer volume of the work.”⁵² Judges the Warren Institute interviewed echoed those

concerns.⁵³ The AO report concluded that “There are simply not enough jail beds, holding cells, courtrooms, and related court facilities along the border to handle all the cases that the government would like to prosecute under Operation Streamline II and other initiatives.”⁵⁴

Judge Robert Brack of Las Cruces is an example of Operation Streamline’s impact on the judiciary. As a district judge, Judge Brack presides over felony reentry prosecutions under 8 U.S.C. § 1326. He consistently carries one of the highest immigration caseloads of any district judge in the country; in July 2008, ABC News named him “America’s busiest judge.”⁵⁵ In 2008, Judge Brack sentenced close to 1,400 criminal defendants; the national average, he says, is around 75.⁵⁶ The Transactional Records Access Clearinghouse (TRAC) at Syracuse University ranked Judge Brack the district judge with the highest number

of immigration criminal cases in both March 2008 and March 2009.⁵⁷ In both years, unlawful reentry under 8 U.S.C. § 1326 was the most frequent lead charge in his courtroom.⁵⁸ As a result of his disproportionate criminal immigration caseload, Judge Brack’s civil docket has had to be correspondingly reduced. He carries about 50% of the civil caseload that other district judges in New Mexico carry but about eight times the criminal caseload.⁵⁹ The Las Cruces court has also had to transfer other kinds of felony cases to make room for its immigration docket; in 2007, the court transferred about 600 felony cases to Albuquerque.⁶⁰

Operation Streamline can also lead to low morale and a lack of training among U.S. attorneys, by requiring AUSAs to focus their energy on low-level immigration prosecutions.⁶¹ Carol C. Lam, a former U.S. attorney in the Southern District of California, has noted that, “If two-thirds of a U.S.

49. *Id.*

50. *Id.* See also Dianne Solis, *Immigration prosecutions surge under Bush’s watch*, THE DALLAS MORNING NEWS, January 13, 2009 (quoting former Dallas U.S. Attorney Richard Roper as saying, “The practical effect [of a zero-tolerance approach to immigration] is it hurts our ability to prosecute white-collar fraud. If we don’t do them in the U.S. attorney’s office they won’t get done because they are so labor-intensive. It is difficult for the local district attorney’s office to handle that.”).

51. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, REPORT ON THE IMPACT ON THE JUDICIARY OF LAW ENFORCEMENT ACTIVITIES ALONG THE SOUTHWEST BORDER, *supra* note 36.

52. *Id.* at 14-15.

53. See, e.g., Interview with Hon. Norbert Garney, Magistrate Judge, Western District of Texas, El Paso, TX (March 25, 2009) (hereinafter Garney interview); Interview with Hon. Richard Mesa, Magistrate Judge, Western District of Texas, El Paso, TX (March 25, 2009).

54. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, REPORT ON THE IMPACT ON THE JUDICIARY OF LAW ENFORCEMENT ACTIVITIES ALONG THE SOUTHWEST BORDER, *supra* note 36, at 18.

55. Russell Goldman, *What’s Clogging the Courts? Ask America’s Busiest Judge*, ABC NEWS, July 23, 2008, available at <http://abcnews.go.com/TheLaw/story?id=5429227&page=1>.

56. Interview with Hon. Robert Brack, U.S. District Judge, District of New Mexico, Las Cruces, NM (March 24, 2009) (hereinafter Brack interview).

57. See TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, SURGE IN IMMIGRATION PROSECUTIONS CONTINUES (2008), available at <http://trac.syr.edu/immigration/reports/188>; TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, PROSECUTIONS FOR MARCH 2009, REFERRING AGENCY: IMMIGRATION AND CUSTOMS IN HOMELAND SECURITY (2009), available at <http://trac.syr.edu/tracreports/bulletins/h saa/monthlymar09/fil>.

58. “Reentry of deported alien” under 8 U.S.C. § 1326 ranked first, followed by “Fraud and misuse of visas, permits, and other documents” under 18 U.S.C. § 1546 and “Entry of alien at improper time or place; etc.” under 8 U.S.C. § 1325. See *id.* and TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, SURGE IN IMMIGRATION PROSECUTIONS CONTINUES, *supra* note 57 at Table 4; TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, PROSECUTIONS FOR MARCH 2009, REFERRING AGENCY: IMMIGRATION AND CUSTOMS IN HOMELAND SECURITY, JUDGE: ROBERT C. BRACK (2009) (data on file with author).

59. E-mail from Hon. Robert Brack, U.S. District Judge, District of New Mexico, Las Cruces, NM to Joanna Lydgate (October 29, 2009, 5:02:05 PM PST) (on file with author).

60. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, REPORT ON THE IMPACT ON THE JUDICIARY OF LAW ENFORCEMENT ACTIVITIES ALONG THE SOUTHWEST BORDER, *supra* note 36, at 27.

61. See Solomon Moore, *Push on Immigration Crimes Is Said to Shift Focus*, *supra* note 46.

attorney's office is handling low-level narcotics and immigration crimes, young prosecutors may not have the opportunity to learn how to do a wire-tap case, or learn how to deal with the grand jury, or how to use money laundering statutes or flip witnesses or deal with informants and undercover investigations. That's not good law enforcement."⁶²

Concerns about morale and training exist for federal public defenders along the border as well. Jon Sands, Federal Public Defender for the District of Arizona, says his office has combated burn-out among its employees by working with the Tucson district court to ensure that a bulk of the Operation Streamline cases are distributed to the CJA Panel and that attorney-client ratios are manageable. However, he notes that other Federal Public Defender's offices have not been so fortunate. In border locations where the CJA Panel is small, federal defenders have to handle most, if not all, of the Operation Streamline docket. The repetitive nature and high volume of the work can, Mr. Sands emphasizes, lead to high turnover rates and to difficulty recruiting new lawyers.⁶³

Finally, Operation Streamline has stretched the U.S. Marshals Service thin. Among other things, U.S. Marshals are tasked with apprehending federal fugitives, protecting the federal judiciary, operating the Witness Security Program, and transporting federal prisoners.⁶⁴ A February 2008 internal report by the Marshals Service suggested that the Marshals' immigration workload has made it difficult for them to focus on other crucial responsibilities.⁶⁵ According to the report, the Marshals are "being forced to balance the apprehension of child predators and sex offenders against the judicial security requirements" involved in handling immigration detainees.⁶⁶

Effect on the behavior of migrants

To the extent that migrants are aware of Operation Streamline's zero-tolerance zones, as DHS claims, several additional concerns arise. First, Operation Streamline may drive more migrants to use professional human smugglers (popularly known as *coyotes*), out of a belief that *coyotes* can identify border areas where migrants are least likely to be apprehended. Ninety percent of

the migrants interviewed for the UC San Diego Study had hired a *coyote* for their most recent border crossing.⁶⁷ Robert Kinney, head of the Las Cruces Federal Defender's Office, says people in his community refer to Operation Streamline as "a *coyote* employment bill."⁶⁸ This increased reliance on professional smugglers heightens border violence⁶⁹ and may make it more difficult for Border Patrol agents to apprehend unlawful entrants.

Second, as Judge Brack and others noted, zero-tolerance zones may force migrants to attempt to cross along stretches of the border that are remote and physically hazardous and therefore less likely to be heavily manned by Border Patrol agents.⁷⁰ This can lead to more migrant deaths from harsh conditions, including heat exhaustion and drowning. According to a recent report by Mexico's National Commission of Human Rights and the American Civil Liberties Union, border crossing deaths have increased in recent years, "despite the economic downturn, fewer migrant crossings, and a steady drop in apprehensions."⁷¹

Third, Operation Streamline may drive more migrants to attempt to enter the United States using false

62. *Id.*

63. Telephone Interview with Jon Sands, Federal Public Defender, District of Arizona (September 17, 2009) (hereinafter Sands interview).

64. Fact Sheet, U.S. Marshals Service, United States Marshals 1 (April 2009), available at <http://www.usmarshals.gov/duties/factsheets/general-1209.pdf>.

65. See, e.g., Jeff Bliss, *Bush Crackdown on Illegal Aliens Stretches Marshals to Limit*, BLOOMBERG NEWS, March 12, 2008.

66. *Id.*

67. MEXICAN MIGRATION AND THE U.S. ECONOMIC CRISIS: A TRANSNATIONAL PERSPECTIVE, *supra* note 29, at 63.

68. Kinney interview, *supra* note 38.

69. See, e.g., Julia Preston, *Two Arrested in Attempt to Crash Border*, NEW YORK TIMES, September 23, 2009 ("[ICE official Michael Unzueta] said that violence linked to human smuggling was rising because the business has become dominated by well-organized criminal groups in Mexico.")

70. Brack interview, *supra* note 56.

71. AMERICAN CIVIL LIBERTIES UNION OF SAN DIEGO AND IMPERIAL COUNTIES & MEXICO'S NATIONAL COMMISSION OF HUMAN RIGHTS, HUMANITARIAN CRISIS: MIGRANT DEATHS AT THE U.S.-MEXICO BORDER 9 (October 1, 2009), available at <http://www.aclu.org/files/pdfs/immigrants/humanitariancrisisreport.pdf>.

identity documents. Under Operation Streamline, being caught in an illegal crossing area means definite prosecution and detention, so taking a chance on walking through a border checkpoint with false papers may become more attractive. Assistant Federal Public Defender Edgar Holguin reports a “dramatic” rise in cases involving the use of fraudulent documents in El Paso.⁷² Mr. Holguin’s observation is supported by data from TRAC, which shows recent nationwide increases in prosecutions related to the fraudulent use of identity documents.⁷³

Finally, while there is reason to question how successful Operation Streamline has been at keeping undocumented immigrants *out of* the United States, enforcement efforts like Operation Streamline appear to be effective at keeping undocumented immigrants *in* the United States.⁷⁴ The UC San Diego researchers found that border enforcement programs like Operation Streamline, by making it more difficult for migrants to enter the United States, prevent them from leaving once they have entered, which is known as “reduced circularity of migration.”⁷⁵ The anecdotal observations of Mr. Holguin support these findings.⁷⁶

U.S. Customs and Border Protection is set to receive more than \$3.5 billion in 2010 to fund the Border Patrol agents that make Operation Streamline possible.

Cost to taxpayers

Operation Streamline is also costly to U.S. taxpayers. While Operation Streamline’s budget is not publicly available, a basic review of the resources required to run the program suggests that its costs are likely significant.

Operation Streamline requires increased funding for DHS, to support the Border Patrol agents and agency attorneys that enable the program. DHS’s U.S. Customs and Border Protection agency alone is set to receive \$10.1 billion in funding for fiscal year 2010, more than \$3.5 billion of which will fund the Border Patrol agents that make Operation Streamline possible.⁷⁷ Operation Streamline also requires significant funding for the district courts, U.S. attorneys, federal public defenders, CJA Panel attorneys, U.S. Marshals, and the Office of the Federal Detention

Trustee in each of the federal districts along the border. An examination of just one of these agencies’ 2010 fiscal year budget requests begins to reveal the potential magnitude of Operation Streamline’s costs.

The Department of Justice has asked for a funding increase of \$231.6 million for fiscal year 2010 to support its contributions to immigration enforcement along the southwest border, including Operation Streamline.⁷⁸ The DOJ request includes \$8.1 million to fund new U.S. attorney positions in response to the rising caseload along the U.S.-Mexico border. DOJ has also requested \$144.3 million for the U.S. Marshals Service to create 700 new positions and construct new courthouse space to “better accommodate immigration enforcement initiatives, such as DHS’[s] Secure Communities and Operation Streamline.”⁷⁹

72. Holguin interview, *supra* note 38.

73. For example, prosecutions under 18 U.S.C. § 1028 (fraud and related activity – ID documents) in fiscal year 2009 will likely be up 89% from 2004. TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, TRAC DATA INTERPRETER: PROSECUTIONS FOR 2009: LEAD CHARGE: 18 USC 1028 - FRAUD AND RELATED ACTIVITY - ID DOCUMENTS (2009)(data on file with author).

74. MEXICAN MIGRATION AND THE U.S. ECONOMIC CRISIS: A TRANSNATIONAL PERSPECTIVE, *supra* note 29, at 56-59.

75. *Id.*

76. Holguin interview, *supra* note 38 (“I think one of the things you’re seeing is people leave the U.S. a lot less frequently than they used to. People would return to Mexico two to three times a year, for Christmas, a wedding, a funeral, and they would come back. Now people are foregoing those trips.”).

77. Press Release, United States Congress, Committees on Appropriations, FY2010 Conference Summary: Homeland Security Appropriations (Oct. 7, 2009), available at http://appropriations.house.gov/pdf/Homeland_Security_FY10_Conference.pdf.

78. U.S. DEPARTMENT OF JUSTICE, FISCAL YEAR 2010 BUDGET REQUEST 1 (2009), available at <http://www.usdoj.gov/jmd/2010factsheets/pdf/safeguarding-our-swb.pdf>.

79. *Id.* at 5.

An example of Operation Streamline’s estimated fiscal impact at the district level provides further evidence of the program’s expense. The Tucson district court processes 70 Operation Streamline defendants each day, and while many migrants receive a sentence of time-served, others receive sentences as high as 180 days, making the average detention period approximately 30 days.⁸⁰ It costs DHS approximately \$100 per day to detain an immigrant,⁸¹ which results in a cost of about \$52.5 million per year to detain Operation Streamline defendants in Tucson.⁸² Roughly \$2 million of that money is spent on first-time entrants who have no prior criminal convictions.⁸³ And it costs taxpayers at least another \$2 million dollars per year to compensate the CJA Panel attorneys who represent the majority of Operation Streamline defendants in Tucson.⁸⁴

Operation Streamline also exacts a cost from state courts and prosecutors, who are left to manage the overflow

of criminal cases that federal prosecutors can no longer handle because of their Operation Streamline case-loads. In 2001, the “Southwest Border Prosecution Initiative” (SWBPI) was created to provide grants to border region courts experiencing high levels of crime. Now that Operation Streamline has diverted federal resources to prosecuting low-level immigration offenses, states use SWBPI grant money as reimbursement for taking the drug and other cases that federal courts have declined.⁸⁵ In 2009, the SWBPI cost taxpayers approximately \$31 million.⁸⁶

LEGAL CONCERNS

Despite their best efforts, it is extremely difficult for border jurisdictions to implement Operation Streamline without depriving migrants of procedural due process and effective assistance of counsel.⁸⁷ The high volume of daily prosecutions requires proceedings in which dozens of defendants appear at once, and not all migrants receive

timely appearances. As a result, the U.S. Court of Appeals for the Ninth Circuit recently found that Operation Streamline’s *en masse* hearings in Tucson violate federal law, and more than one judge the Warren Institute interviewed described the program as “assembly-line justice.”⁸⁸

Due process

The Chief Judge of the District of New Mexico, Martha Vázquez, has summarized the due process concerns that arise in border districts as immigration caseloads skyrocket:

“The increase in our criminal caseload, especially in Las Cruces, has caused us to conduct hearings in a way that we’ve never had to conduct them before, and in a way that other jurisdictions don’t have to. . . . We have . . . up to 90 defendants in a courtroom. Our magistrate judges try very hard to conduct their hearings in a way that is understandable to the defendants. But most of our defendants have a first or second grade education in their

80. Brady McCombs, *Zero tolerance working, says border patrol*, ARIZONA DAILY STAR, April 6, 2008. On the day the Warren Institute observed Operation Streamline proceedings in Tucson, the average sentence among the defendants who pled guilty that day was 31.5 days.

81. Fact Sheet, U.S. Department of Homeland Security, *ICE Detention Reform: Principles and Next Steps*, October 6, 2009, available at http://www.dhs.gov/xlibrary/assets/press_ice_detention_reform_fact_sheet.pdf (noting that the cost of detaining an immigrant varies by location but can exceed \$100 per day).

82. This assumes a detention cost of \$100 per migrant per day, with five days of Operation Streamline proceedings per week, for 50 weeks each year (accounting for about 10 federal holidays).

83. One Tucson magistrate judge reports that at least 30 Operation Streamline defendants receive a sentence of something other than time-served each day. E-mail from Hon. Bernardo Velasco, United States Magistrate Judge, District of Arizona, Tucson, AZ to Joanna Lydgate (November 3, 2009, 1:33:35 PM PST) (on file with author). Given that there are 70 prosecutions each day, that leaves approximately 40 defendants who are sentenced to time-served. Time-served in Tucson works out to one or two days in detention, unless the migrant is apprehended over a weekend, in which case she may spend three or four days in detention. Williams interview, *supra* note 13. This calculation thus assumes an average detention period of two days and an average daily detention cost of \$100, multiplied by 40 defendants each day, five days per week, 50 weeks per year.

84. CJA attorneys are paid \$110 per hour and typically spend five hours on Operation Streamline proceedings in a day. Approximately 15 CJA attorneys participate in the Operation Streamline proceedings each day, five days per week. Bacal interview, *supra* note 39. That results in an average weekly cost of \$41,250 and an annual cost of \$2,062,500.

85. See, e.g., U.S. Department of Justice Office of the Inspector General, *Audit Report: Southwest Border Prosecution Initiative Program* (March 2008), available at <http://www.usdoj.gov/oig/reports/OJP/a0822/final.pdf>.

86. U.S. Department of Justice, Office of Justice Programs, BJA Programs: Southwest Border Prosecution Initiative, available at <http://www.ojp.usdoj.gov/BJA/grant/southwest.html>.

87. The Due Process Clauses of the Fifth and Fourteenth Amendments protect undocumented immigrants. See *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) (“Once an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all ‘persons’ within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent.”).

88. See, e.g., Garney interview, *supra* note 53.



A view of the Tucson courtroom where 70 Operation Streamline defendants plead guilty each day.

native countries. Some of them are not even able to read in their native languages. And so, we explain to them their constitutional rights in a legal system entirely foreign to them.”⁸⁹

Operation Streamline court proceedings tend to conform with Chief Judge Vázquez’s description. Most defendants receive just one court appearance, which serves as an arraignment, plea, and sentencing.⁹⁰ Defendants are processed in groups, with up to 80 defendants arraigned each day in Del Rio, 70 in Tucson, and an average of 20 in El Paso.⁹¹

A defense attorney may have as little as a few minutes (in Del Rio) or as much as half an hour (in El Paso and Tucson) to meet her Operation Streamline client, assess the client’s competency, explore potential defenses or claims to immigration relief (including whether the client may face persecution if returned to his home country), obtain mitigating information, and advise her client whether to accept a plea.⁹² The client’s ability to ever legally reside in the United States may hang in the balance during these few minutes, as a

removal order and a conviction under 8 U.S.C. §§ 1325 or 1326 can make it impossible for a client to later obtain permanent residency or U.S. citizenship.

Operation Streamline’s accelerated, *en masse* hearings also contravene Federal Rule of Criminal Procedure 11, which lays out the due process requirements a court must satisfy before it can accept a defendant’s guilty plea.⁹³ The court must, for example, address the defendant personally, make sure he understands the constitutional rights he is waiving, and

89. *Immigration Crisis Tests Federal Courts on Southwest Border*, *supra* note 45.

90. In El Paso, however, Operation Streamline defendants receive two appearances: an initial appearance within 48 hours of arrest, and a plea and sentencing hearing about two weeks later.

91. See *supra* notes 15-17.

92. *Oversight Hearing on the Executive Office for United States Attorneys Before the Subcommittee on Commercial and Administrative Law of the H. Comm. on the*

Judiciary, 110th Cong. 7 (June 25, 2008) (Amended Written Statement of Heather E. Williams, First Assistant Federal Public Defender, District of Arizona, Tucson), available at <http://judiciary.house.gov/hearings/pdf/Williams080625.pdf>.

93. See U.S. CONST. AMD. VI; *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932); *Brescia v. New Jersey*, 417 U.S. 921 (1974).

In December 2009, the Ninth Circuit Court of Appeals held that Operation Streamline’s group hearings in Tucson violate federal law.

determine that his plea is voluntary.⁹⁴ Those requirements cannot be met in many Operation Streamline plea proceedings, during which the judge addresses a group of up to 70 or 80 defendants.⁹⁵ In December 2009, the Ninth Circuit Court of Appeals held that Operation Streamline’s group hearings in Tucson violate Rule 11 and that the court “cannot permit this rule to be disregarded in the name of efficiency.”⁹⁶ While the Court of Appeals’ ruling is a positive development, it does not bind jurisdictions outside of the Ninth Circuit, and it has not hindered Operation Streamline in Tucson. As of the publication of this report, Tucson magistrate judges are using a variety of different plea procedures to comply with the Ninth Circuit’s opinion, and while plea

hearings are taking longer than they used to, the court still processes 70 Operation Streamline defendants each day.⁹⁷

Some Operation Streamline defendants may also have defenses that are not identified because of the speed and *en masse* nature of the proceedings. These can include claims to immigration relief, such as eligibility for asylum, withholding of removal, relief under the Convention Against Torture, or adjustment of status. A small number of defendants already have legal status in the United States but are not given the opportunity to clarify that status upon arrest. The Federal Public Defender’s offices in Tucson, Las Cruces, El Paso, and Del Rio all cited examples of U.S. citizens and legal permanent residents

they have represented in Operation Streamline court proceedings.⁹⁸

Effective assistance of counsel

Another constitutional issue of great concern among the judges and practitioners the Warren Institute interviewed was effective assistance of counsel. While the Federal Public Defender (FPD) has built up significant institutional knowledge and effective triage systems to process Operation Streamline cases, CJA Panel attorneys represent the majority of Operation Streamline defendants. Each day, one CJA attorney might be assigned to represent as few as six defendants (in Tucson), or as many as 80 (in Del Rio).⁹⁹ Given these case-loads, CJA attorneys – who often lack the staff and institutional resources of the FPD – do not always have the capacity to interview clients individually.¹⁰⁰ Some Operation Streamline defendants are called into attorney-client meetings in groups, and attorneys may not be able to adequately investigate defenses or negotiate dismissals or reduced charges. As a result, local practitioners worry that cases are not receiving individualized attention.

94. Fed. R. Crim. P. 11(b).

95. Operation Streamline defendants enter pleas in groups of up to 70 in Tucson and up to 80 in Del Rio. In El Paso, the groups are much smaller – generally seven or eight at a time. E-mail from Hon. Richard Mesa, United States Magistrate Judge, Western District of Texas, El Paso, TX to Joanna Lydgate (September 17, 2009, 11:25:29 AM PST) (on file with author).

96. *United States v. Roblero-Solis*, 588 F.3d at 693.

97. Telephone Interview with Hon. Bernardo Velasco, United States Magistrate Judge, District of Arizona, Tucson, AZ (December 14, 2009).

98. The Las Cruces Federal Defender, for example, represented a legal permanent resident prosecuted through Operation Streamline who had lost his green card and could not afford the renewal fee. The client traveled to Mexico and, upon return to the United States, was told at a border inspection station that he

could not enter until he paid the renewal fee. Unable to pay, he attempted to cross the border unlawfully. When he spotted a Border Patrol truck, the client walked up to the truck and asked the agents inside to help him get his green card back. The client was arrested and prosecuted under 8 U.S.C. § 1325. Kinney interview, *supra* note 38.

99. Bacal interview, *supra* note 99; Telephone Interview with William D. Fry, Supervisory Assistant Federal Public Defender, Del Rio, Texas (April 1, 2009) (hereinafter Fry telephone interview).

100. See, e.g., Fry telephone interview, *supra* note 99; Holguin interview, *supra* note 38.

Group attorney-client meetings are also incompatible with an attorney’s duty to engage in confidential conversations with her clients.¹⁰¹ As the Administrative Office of the U.S. Courts has recognized with respect to the rising immigration caseload in the border district courts, “[a]ttorneys representing a large number of defendants may be unable to speak to them individually or privately before rendering advice, especially if they do not have sufficient time or space to consult with them.”¹⁰² In such an atmosphere, attorney-client confidentiality concerns abound.

Even in Tucson, where attorney-client ratios are relatively low and defense attorneys are provided individual desks in the courtroom to conduct client interviews, the head of the Federal Defender’s office, when asked if she has concerns about Operation Streamline defendants receiving effective assistance, responded, “always.”¹⁰³ “The lawyers try their hardest,” she explained, “but they have a limited amount of time.”¹⁰⁴

Prosecutorial independence

Border Patrol attorneys work for DHS. In jurisdictions where they are deputized as special assistant U.S. attorneys

to prosecute the Operation Streamline docket, including Tucson and Del Rio, prosecutorial independence may not be adequately preserved, nor potential conflicts of interest sufficiently considered. While 28 U.S.C. § 543 authorizes the Attorney General to appoint special assistant U.S. attorneys “when the public interest so requires,” the United States Attorneys’ Manual makes clear that “[s]uch appointments raise ethics and conflict of interest issues that must be addressed.”¹⁰⁵

Some defense attorneys observed that Border Patrol attorneys can be more difficult to negotiate with than U.S. attorneys and that they do not function, in practice, as part of the U.S. Attorney’s Office, working largely out of the Border Patrol office and receiving little oversight from the USAO. Jon Sands, Federal Defender of Arizona, also noted that Operation Streamline clients sometimes complain to their lawyers about misconduct on the part of a Border Patrol agent who arrested or processed them, and it can be difficult for lawyers in his office to bring such complaints to the Border Patrol attorney, who is a co-worker (and often also a friend) of the agent in question.¹⁰⁶

Operation Streamline jurisdictions do not appear to be taking affirmative steps to address such ethical and conflict-of-interest issues and to ensure that Border Patrol attorneys can perform their duties with an adequate level of independence from DHS and with adequate supervision by DOJ.

Delayed initial appearances

In Del Rio, Texas, there is an additional problem: Operation Streamline defendants are not receiving probable cause determinations within 48 hours of their warrantless arrests, as the Fourth Amendment requires.¹⁰⁷ On the days the Warren Institute visited the Del Rio district court, some defendants had waited as many as 12 days for a probable cause determination and 14 days for an initial appearance.¹⁰⁸

This delay likely also violates Federal Rule of Criminal Procedure 5, which mandates that a defendant be brought “*without unnecessary delay* before a magistrate judge, or before a state or local judicial officer”¹⁰⁹ and that “a complaint meeting Rule 4(a)’s requirement of probable cause . . . be *promptly* filed in the district where the offense was allegedly committed.”¹¹⁰ A two-week delay may not satisfy either provision.

101. See, e.g., MODEL RULES OF PROF’L CONDUCT R. 1.6.

102. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, REPORT ON THE IMPACT ON THE JUDICIARY OF LAW ENFORCEMENT ACTIVITIES ALONG THE SOUTHWEST BORDER, *supra* note 36, at 16.

103. Williams interview, *supra* note 13.

104. *Id.*

105. United States Attorneys’ Manual § 3-2.300.

106. Sands interview, *supra* note 63.

107. See *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991).

108. In Del Rio, a magistrate judge makes the probable cause determination in the defendant’s absence, two days before the defendant appears in court for the first and only time, enters a plea, and is sentenced. E-mail from Hon. Alia Ludlum, U.S. District Judge, Western District of Texas, Del Rio, TX to Joanna Lydgate (September 8, 2009, 11:02:55 AM PST) (on file with author).

109. Fed. R. Crim. P. 5(a)(1)(A) (emphasis added).

110. Fed. R. Crim. P. 5(b) (emphasis added).

FINDINGS

In the final accounting, Operation Streamline’s questionable effectiveness, the strain it has put on border district courts, and its constitutional problems add up to a wasteful expenditure of our law enforcement resources along the border.

Operation Streamline does not target drug traffickers and human smugglers but rather migrants who are coming to this country in search of employment or to reunite with family. As Judge Brack has observed, “We’re spending a lot of time catching these folks when we could concentrate on those penetrating our border to do us harm.”¹¹¹ T.J. Bonner, president of the National Border Patrol Council, shares the view that Operation Streamline uses resources unwisely. “This strategy pretty much has it backwards,” he told the *Washington Post*

in 2008.¹¹² “It’s going after desperate people who are crossing the border in search of a better way of life, instead of going after employers who are hiring people who have no right to work in this country.”¹¹³

Operation Streamline is overwhelming the border district courts and channeling law enforcement resources away from prosecuting the crimes that create border violence. Operation Streamline also burdens state court systems, which are left to handle the overflow of cases that federal prosecutors must decline as a result of their petty immigration caseloads.

Operation Streamline violates the Constitution and threatens the rule of law in this country. The program’s accelerated, *en masse* hearings result in “assembly-line justice” that deprives migrants of procedural due

process. Operation Streamline also jeopardizes the constitutional rights of U.S. citizens. If border district courts are allowed to cut procedural corners, that sets a precedent that will apply equally to U.S. citizens and non-citizens, nationwide – a precedent the Ninth Circuit recently described as “subversive.”¹¹⁴ In the words of Fifth Circuit Court of Appeals Judge Carolyn King, we “can’t have a rule of law for the southwest border that is different from the rule of law that obtains elsewhere in the country.”¹¹⁵

Operation Streamline has not been proven to reduce border crossings. Though border apprehension rates have decreased in recent years, that reduction is likely attributable to a variety of factors, including the downturn in the U.S. economy and the proliferation of other enforcement strategies along the border.

RECOMMENDATIONS

The administration should replace Operation Streamline with a comprehensive and effective approach to border enforcement. The administration should revert to the longstanding practice of leaving unlawful border crossings to the civil immigration system. Treating first-time unlawful entry as a purely administrative violation allows DHS to detain a migrant for a brief period of time, enter a formal order of removal on the migrant’s record, and deport the migrant without draining the resources of the district courts, the U.S. Attorney’s Office, the Federal Public Defender, or the U.S. Marshals Service.

The administration should also restore U.S. attorneys’ discretion to initiate prosecutions as they see fit to combat crime along the border. Such discretion allows prosecutors to focus on dangerous criminal enterprises and on those border crossers who are apprehended with drugs or weapons, rather than expending scarce resources on migrants with no prior criminal history who are coming to this country to work or reunite with family.

111. Russell Goldman, *What’s Clogging the Courts? Ask America’s Busiest Judge*, *supra* note 55.

112. Hsu, *Immigration Prosecutions Hit New High*, *supra* note 5.

113. *Id.*

114. *United States v. Roblero-Solis*, 588 F.3d at 693.

115. CRISIS ON THE BORDER: CASE OVERLOAD 2006 (Administrative Office of the U.S. Courts 2006) (*available at* <http://www.uscourts.gov/ttb/2008-07/images/CrisisOnTheBorder2006.wmv>).

116. It is important to note, however, that expedited removal is far from a perfect solution. Indeed, as it currently exists, the procedure has received widespread criticism and entails potential constitutional violations of its own.