



## Deportation Basics How Immigration Enforcement Works (Or Doesn't) in Real Life

By W.D. Reasoner

### Introduction

Many people, including, surprisingly, those whose occupations might bring them into contact with federal officers who enforce immigration laws,<sup>1</sup> don't seem to have a clear notion of how removal proceedings<sup>2</sup> against an alien take place, and exactly what "due process" means in that context.

For instance, state and local police and prosecutors often do not charge or will move to dismiss charges against an alien, once Immigration and Customs Enforcement (ICE) officers or agents express interest in removal, in the mistaken belief that once ICE takes custody of the individual, he (or she) will be forthwith whisked to a bus, plane, or train, and unceremoniously shoved across the border or dropped into the midst of his (or her) country of origin. Such notions are greatly mistaken.

This *Backgrounder* describes the enforcement actions that take place prior to, and that result in initiation of, removal proceedings, one form of which is a hearing before an immigration judge.<sup>3</sup>

It spells out the cumbersome and dysfunctional process and also includes a set of recommendations to improve the system, all of which can be accomplished with the agency's regulatory process, without the need for legislative action.

Here are some of the key observations of this report:

- A large percentage of aliens flee from removal proceedings — perhaps as many as 59 percent of all those released to await hearings. On a cost basis from the alien's perspective, this makes sense. If you are in proceedings and have little chance of relief, why not treat the bond money (if it's even required) as the cost of having been caught, and then flee, hoping to stay under the radar for as long as possible, perhaps until the next amnesty?
- Though fashionable in the Obama administration, the exercise of "prosecutorial discretion" is problematic for ICE field officers. If the alien that they decline to remove goes on to commit a heinous act, they could be subject to lawsuits from victims and will be held accountable by their own agency (even if agency leadership encourages them to use the tool).
- Even in today's technology-driven world, charging an alien with immigration violations is a paperwork-intensive, cumbersome process that requires agents to fill out nearly 20 different forms each time.
- ICE officers are supposed to consider two key factors in determining whether to detain or release an alien in proceedings — if the alien is a flight risk and if he is a risk to the community. The latter factor obviously is given serious consideration, but it is equally obvious from the large number of absconders that officers don't give the same weight to the likelihood of flight, especially considering the scarcity of funded detention space.
- The Immigration and Nationality Act (INA) provides for several types of due process for aliens, depending on their circumstances of arrival and stay. The law does not require that all removals be ordered by an immigration judge.

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- The option of Voluntary Return, where the alien requests to be returned home in lieu of removal proceedings, is not really “voluntary,” but is beneficial to the alien because it carries fewer consequences if the alien returns illegally. It also has become subject to overuse or misuse in recent years as a tool to increase the volume of removals, at the expense of more formal methods of removal that have more deterrent value.
- Immigration law provides for seven ways to remove an alien, which are explained in the report. Four of these options are relatively efficient, but used less frequently. If ICE chose to expand their use, the workload of the immigration court could be reduced and the immigration enforcement system would be less dysfunctional.
- The total number of apprehensions of illegal aliens by immigration enforcement agencies is less than half of what it was five years ago. For instance, the drop in apprehensions by Customs and Border Protection (CBP) is often explained by improvements in border security; however, this rationale is suspect, as has been pointed out by the Rand Corporation in a study of border metrics.<sup>4</sup> But ICE apprehensions also have dropped steeply, although there has been only a modest drop in the size of the illegal population inside the United States.

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## Background

The Supreme Court has said that, where expulsion proceedings are concerned, due process for aliens in the United States is whatever Congress chooses it to be — subject to certain constraints imposed by the Constitution, and as ultimately interpreted by the courts themselves, that is.<sup>5</sup>

Over time, by means of law, regulation, and binding precedent decisions, a kind of hierarchy of due process rights has evolved for aliens who are placed into removal proceedings:

- Aliens who have entered and remain in the United States illegally are, understandably, accorded the least amount of due process.
- Nonimmigrant aliens, who may have originally entered legally, but later overstayed or otherwise violated the conditions of their admission, have somewhat more due process.
- Lawful resident aliens who are alleged to have committed some act rendering them removable (by commission of a crime, for example) are entitled to the most due process under the law based on their status and “equities” in the United States. The term “equities” usually refers to close family members, especially U.S.-born children, but also refers to ties to the community, stable employment, and length of residence in the United States for purposes of seeking a cancellation of removal.

However, this hierarchy is not hard and fast, and a major factor that enters into how, and what kind

of, removal proceedings are commenced revolves around the legal charges filed against the alien: Certain removal charges carry with them the requirement, or at least the opportunity on the part of the government, to initiate certain kinds of proceedings that take place outside the parameters of the immigration court. What is more, it is at the discretion of the government to decide whether to lodge formal charges against an alien, to decide what charges to lodge, and such decisions are inevitably influenced by cost and economy. For example, the government may choose to permit a criminal alien to request “voluntary departure” in lieu of holding him in detention for an extended period of time while a removal hearing is conducted by an immigration judge.

Although removal proceedings are administrative-civil in nature, over the course of time they have taken on many of the trappings of a criminal proceeding — at least, those removal proceedings that are conducted by immigration judges have — albeit with differing standards for introduction of evidence and adjudication of removability (among other differences, the “beyond a reasonable doubt” standard doesn’t apply). Such trappings include, among other things:

- issuance of warrants of arrest,
- provision of an advice of rights to aliens taken into custody,
- setting of a bond or other form of pre-hearing conditional release, and
- the right to counsel (at no expense to the government).

As mentioned, many removal proceedings take place in front of an immigration judge, who is responsible for conducting an impartial hearing, listening to testimony, accepting evidence, reviewing and ruling on legal motions and briefs from both sides, and arriving ultimately at a decision as to whether the alien should be removed from the United States. Just as with other “judicial” proceedings,<sup>6</sup> such hearings can take a substantial amount of time (and money), may involve a number of continuances and adjournments, and, if the alien flees, result in an unenforceable order of removal until such time as he can be found and taken back into custody.

## Function and Dysfunction

Aliens who flee from proceedings are traditionally called “absconders” or, more recently, “alien fugitives.” The number of such individuals is high — perhaps as many as 5 percent of *the total number of aliens illegally in the United States*, according to past estimates.<sup>7</sup> Various sources put the number of aliens illegally in the United States between 10 and 12 million, meaning that there may be up to 500,000-600,000 alien fugitives at large, a significant number of whom are removable based on criminal convictions. Note that this percentage calculation is based on the number of fugitives compared with all aliens in the United States — *not* just those who were put into proceedings and fled. If couched solely in the context of the percentage of aliens who are put into proceedings and abscond, the percentage would be more relevant — and much, much higher — perhaps as high as 59 percent of all aliens arrested and then conditionally released to await their hearings.<sup>8</sup> That may be why the government has often chosen not to put it into that context; it becomes a stark reminder of the failure of the present system, and the softer number of 5 percent masks the level of dysfunction.

Considered logically, the large volume of alien fugitives should not be a surprise. If an alien absconds and is later captured, what is the worst he can expect? To be removed — the same thing that will happen if he sticks around. So on a cost-basis analysis from the alien’s perspective, absconding makes sense: If you are in proceedings, and have few equities and no reasonable basis to believe you will be permitted to stay, why not choose to treat the bond money you’ve posted more as a fine and accept its loss — the cost of having been caught — and flee, hoping to stay under the radar for as long as possible. Who knows? With luck, maybe you can even remain undetected until there is a new amnesty program under which you might qualify to stay in the United States.

The large number of absconders begs the question: Why does the government accept this state of affairs, being as it is *de facto* evidence of a system’s fundamental inadequacies? Why not, for instance, keep more aliens in detention? There are a number of answers to these questions, which run the gamut from legal, procedural, and fiscal realities on one hand, to policy, philosophy, and politics on the other hand.

But one probable reason for the high absconder rate, though it remains publicly unacknowledged, is the length of time it takes for a removal proceeding to begin for aliens falling into the “non-detained docket.” The perpetual logjam of cases within the immigration courts has become a cause of scrutiny by various organizations and legal groups that favor looser rules, including the American Bar Association (ABA) and the Migration Policy Institute (MPI).<sup>9</sup> In its report, the ABA’s Commission on Immigration found that 231 immigration judges nationwide hear more than 280,000 proceedings each year — an average of 1,243 per judge. Because detained cases constitute the priority docket for immigration judges, court backlogs for non-detained cases are often well over a year long before the hearing even commences. Many aliens, following the seasonal flow of jobs, or out of indifference, or with well-thought-out intent, choose to get on with their lives and disappear.

Perhaps not surprisingly, given their philosophical focus as migrant and defense advocacy groups, neither the ABA nor MPI advocate more streamlined or additional use of non-judicial forms of due process. Instead, they suggest a substantial increase in the number of judges and support staff; additional opportunities for the use of alien defense lawyers (“attorneys for the respondent” in the parlance of immigration removal proceedings); more, and increased grants of, types of relief from removal; expansion of the appellate rights of aliens in removal proceedings; and additional use of “prosecutorial discretion” in deciding whom to arrest versus whom to ignore among the illegal alien population of the United States.

ICE Director John Morton in fact issued a policy memorandum on March 2, 2011 — virtually at the same time that the MPI issued its report and within weeks after the ABA issued its report — that encourages the exercise of prosecutorial discretion by field officers in their daily enforcement activities, citing, among other documents, a memorandum from prior Immigration and Naturalization Service (INS) Commissioner Doris Meissner, who is now a Senior Fellow with MPI and co-author of its report.<sup>10</sup>

Although transparently simple on its face, the difficulty with the exercise of prosecutorial discretion,

from the perspective of field officers, is this: Should they release an individual who appears to meet the guidelines, but later commits a heinous act, there is no assurance that they will not be second-guessed as to whether the alien should have been released. Given the treacherous nature of immigration politics, and the fact that they are not immune to civil tort suits from survivor victims or family members subsequent to such an act committed by a released alien, this fear justifiably looms large in the minds of field officers and agents, who know full well that they are at risk on two fronts: from lawsuits and from “hindsight is 20-20” perspective of their own agency and department.

ICE has also chosen another tack in exercising prosecutorial discretion to deal with the burgeoning court backlogs. In recent months, media reports from various cities throughout the country have reported government trial attorneys filing hundreds of motions before immigration judges for case dismissals, based on loose criteria such as the alien having “no serious criminal history.”<sup>11</sup> It seems a rather curious solution to the problem, given the thousands of productive hours that must have already been invested by officers and agents in apprehending and processing the aliens whose cases were dismissed, insofar as it reflects a kind of organizational binge-and-purge mindset at work. What is more, there has been no public indicator that prior to moving for dismissal, any significant effort was invested by the government in determining whether the aliens had already absconded while waiting for their hearing to commence. This approach leads to three questions: (1) Why should persons who may have fled accrue the benefit of a dismissal? It seems fundamentally unfair. (2) Why should illegal aliens respect the established immigration removal hearing process when it becomes clear through wholesale dismissals that the government itself does not? (3) What valid strategic goal or public purpose is being served through these dismissals? The aliens whose cases have been dismissed don’t accrue any benefit or right to remain legally. To the contrary, they have not-so-subtly been encouraged to drift back into the sub-rosa community and economy of illegals living and working in the United States.

But before we go further, perhaps now would be a good time to walk through the arrest and processing of an alien to see how he gets into proceedings to begin with, and what direction those proceedings may take.

## Enforcement by the Numbers

### Arrest

Aliens who are subject to removal come to the attention of federal officers in a variety of ways. Border Patrol agents encounter them attempting illegal entry, primarily on the northern and southern land borders. Customs and Border Protection inspectors encounter them seeking entry at land, air, and sea ports of entry — sometimes with false papers, more often by means of a concocted story that masks their intent to enter and remain in order to work illegally.

ICE officers and agents who are responsible for immigration enforcement in the interior of the United States actively seek out illegal aliens as the consequence of leads, as the result of fugitive investigations, or in the conduct of cases against employers alleged to knowingly hire illegal workers,<sup>12</sup> and, often, in their liaison with police and correctional authorities through the Secure Communities and Institutional Removal programs, which are designed to identify aliens who have been arrested or are incarcerated for crimes committed in the United States. In these cases, ICE will place a detainer (a “hold” in everyday parlance) against the subject. If and when he is ready for release by the state/local criminal justice authorities, they notify ICE, which then has 48 business hours to honor its detainer by taking physical custody of the alien.

### Processing & Service of a Charging Document

Once an alien has been taken into custody by the Border Patrol, by CBP inspectors, or by ICE, he must be “processed,” that is, the equivalent of an arrest report must be prepared; fingerprints and photographs taken; and any prior file materials relating to this alien obtained in order to determine the nature and extent of his history in the United States, including prior removals, additional crimes for which he may have been charged/convicted, etc. It is not uncommon for “kickbacks” from fingerprint

Table 1. Apprehensions by DHS Agency, 2006-2010

	2006	2007	2008	2009	2010
CBP	1,089,136	876,787	723,840	556,032	463,382
ICE/HSI	101,854	53,562	33,573	21,877	17,836
ICE/ERO	15,467	30,407	34,155	35,094	35,774
<b>Total</b>	<b>1,206,457</b>	<b>960,756</b>	<b>791,568</b>	<b>613,003</b>	<b>516,992</b>

Source: DHS



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and/or photograph submissions to the two primary databases (IAFIS, belonging to the FBI; and IDENT, belonging to DHS) to reveal to the arresting DHS officers that the alien has been using an alias to conceal his past and his identity, which is unmasked once the database returns are received by the processing officers. (These returns are usually obtained quickly — within a couple of hours or less — because they are submitted digitally via electronic systems.) Once all information is compiled, two decisions must be made: What conditions of release or detention will be imposed and what specific removal charges will be levied against the individual?

It's important to take a moment here for some important additional insights about removal proceedings generally. As was mentioned previously, these proceedings have many of the trappings of criminal judicial proceedings even though they are civil-administrative in nature. But there are also some key differences, which are quickly evident to anyone able to observe the processing of an alien from arrest to detention or release by DHS officers. For example, officers or agents in certain designated supervisory or managerial positions are authorized to act in the same way that prosecutors and magistrates are understood to act within the criminal justice system. They, not immigration judges:

- issue warrants of arrest (either pre- or post-apprehension, as will be discussed shortly);
- determine which legal causes for removal will be lodged on the charging document;
- decide the amount of bond or other conditions of release (subject to a redetermination hearing by an immigration judge if the alien appeals the bond or conditions as unreasonable); and
- sign, as the issuing officer, the legal documents that will be served on the alien notifying him of the removal charges being levied against him (usually, but not always, in the form of a Notice to Appear (“NTA”) which is also provided to the immigration court as the foundation on which the immigration judge will conduct his hearing).

Preparing the charging documents and other forms is more than a few mouse clicks or boxes to be checked off. Today, agents processing an alien for removal must fill out well over a dozen — often closer to two dozen — forms for even the simplest removal cases.

Here is a representative sampling of the forms that may be required, depending on the case circumstances:

- *Immigration Detainer*
- *Report of Removable Alien* (equivalent to a police arrest report)
- *Advice of Rights* (which includes advice of the right to notify consular officials from the alien's country of origin)
- *Sworn Statement*
- *Notice to Appear/Bond/Custody Processing Sheet* (used to obtain supervisory approval to move forward with a charging document and custody decision-making)
- *Notice to Appear* (or other charging document, such as Notice and Order of Expedited Removal)
- *Warrant of Arrest*
- *Notice of Custody Determination*
- *Immigration Bond Form* (for those who will be posting bond in lieu of detention)
- *Order to Detain* (or, alternately, Order of Release on Recognizance)
- *Alien Booking Record*
- *Property Receipt Form*
- *Notice of Action* (for voluntary return cases)
- *Notice of Visa Cancellation*
- *Information for Travel Document or Passport* (prepared for foreign consular officials for aliens who do not have the documents required by their countries of origin for repatriation)

In addition, of course, the alien must be fingerprinted and photographed as a part of the arrest and disposition process.

## *Conditions of Detention/Release*

The key factors that are supposed to be considered in determining matters of detention or release are (1) whether the alien constitutes a flight risk, and (2) whether he constitutes a risk to the community. While this latter factor is given serious consideration for obvious public safety reasons, it is equally obvious from the high volume of absconders discussed earlier that the flight-risk factor doesn't weigh so heavily in the minds of DHS officers. Why is this? Because of simple economics and the law of supply-and-demand at work.

There are only so many detention bed spaces available at any point in time, and the cost of maintaining an alien in detention on a daily basis over many weeks — sometimes many months — can be high, particularly where the bed space is rented from county sheriffs or contract corporations specializing in such matters (e.g. Wackenhut and Corrections Corporation of America). What is more, the profile of the detainee needs to meet the type of detention space available. Mixing of alien criminal and noncriminal detainee populations is a recipe for trouble, if not disaster, and has caused a great deal of criticism of the federal government's immigration detention policies in past years by extremely vocal immigrant protection and special interest groups. Thus, faced with tying up a detention bed at great cost, to hold an alien who has no criminal history, but may very well flee for lack of any substantial ties or equities, government officers often opt for release on a low bond or other conditions that prove to be inadequate to ensure the alien's future appearance at proceedings.

So exactly what options are available to those DHS officers making custody and release decisions about an alien?

**Notice to Appear in Removal Proceedings (NTA).** It is possible to issue the Notice to Appear charging document, without an accompanying Warrant of Arrest (WA). Think of the NTA in such a circumstance as the functional equivalent of a ticket or a summons — it notifies the alien that he will be obliged to appear in immigration court at a particular date, time, and place to answer the charges contained in the NTA, but it does not require a bond or other conditions of release. The alien is served the document, and a copy is provided to the court for docketing purposes. He may even be served such a document by mail to his address of record in lieu of personal service. If, however, he fails to appear at the hearing, he will be deemed a fugitive, and his case will be referred to ICE for follow-up investigation, to locate and arrest — what is more, the judge may proceed to

hear the case in absentia (once proper personal or mail service of the NTA is established by the government trial attorneys), and therefore order removal even in the absence of the alien's physical presence at the hearing. The problem here, of course, is to find the alien once he has fled, for the purpose of executing the order of removal — not an easy task in a country geographically and demographically as large as ours, with a community of 37 million other legal and illegal aliens into which he can disappear.

You may be wondering, given the strong possibility of flight, why aliens would be the happy beneficiaries of an NTA issued without strings attached. Well, in addition to the DHS agencies mentioned previously, adjudicating officers with U.S. Citizenship and Immigration Services (USCIS) are authorized under certain conditions to issue NTAs. Such officers are not generally conceived of as enforcement officers, insofar as their job is to examine and decide whether to grant or deny a variety of immigration benefits available under the law. Issuance of an NTA would happen in conjunction with a decision to deny an alien the status being requested — for instance, a denied request for asylum. Because the denial deprives the alien of a legal footing, when the denial is mailed it is accompanied by an NTA directing the individual to appear for a removal hearing before an immigration judge. At that hearing, the alien may renew his request for asylum before the judge. If it is again denied by the judge and there is no other form of relief available to him, the alien will be ordered to depart the United States.

But there are other circumstances in which NTAs are issued unaccompanied by a WA. Examples might include pregnant women; primary caregivers (usually mothers with small children); aliens with significant health issues; or individuals who are illegally in the United States, but present no significant adverse history — have no prior criminal record, have never been arrested or removed by federal officers previously, etc.

**Warrant of Arrest (WA).** From the discussion above, you have probably surmised that the Warrant of Arrest is the fundamental trigger for custody decisions. Issuance and service of a WA on an alien invokes his right to expect that conditions of confinement or release will be set that are appropriate to the circumstances of his case and the severity of the charges being lodged.

A WA may be issued by the proper officers in advance — for instance, in the case of absconders, where it will sit in the file awaiting execution, pending the ability to locate and apprehend the individual by ICE officers. But in many instances, it is not issued until after

the actual apprehension or assumption of custody takes place, for the obvious reason that the supervisory officers with authority to issue a WA had no reasonable means to know in advance that the individual would be found and arrested. This would be commonplace, for example, with illegal border crossers apprehended by Border Patrol agents in proximity to the border.

A host of release/detention possibilities available under the law and regulations flow from issuance of a WA on an apprehended alien, in conjunction with service of the charging document. (Note that I say “charging document” and not “NTA.” That is because, as you will recall from my earlier remarks, not all charging documents in removal proceedings are NTAs — more about that later.) Following is a quick summary of alternatives, from least to most onerous, from the alien’s point of view.

**Own Recognizance (OR).** Once having been served a WA and NTA, an alien may be released on his own recognizance. This means he is being trusted to appear at the removal hearing without the requirement of posting a bond. It implies, you will recall, that he has met the two-pronged test for release pending his hearing: that he is a minimal flight risk and that he doesn’t constitute a danger to the community. Such a mechanism might be used when charging a lawful permanent resident alien (LPRA) who has somehow fallen afoul of the immigration laws and is now believed to be removable as a result of his conduct — for example, after he has been convicted of a nonviolent misdemeanor offense that is not categorized as an “aggravated felony.”<sup>13</sup> A release on OR can also be accompanied by other conditions, such as periodic contact with local ICE ERO officials as a way of assuring them that the alien has not taken flight.

**Bond.** The law and regulations provide that an alien may post an appearance bond as a form of guarantee that he will appear when required — not only for the hearing, but also up to, and including, surrendering himself for physical removal if so ordered. Failure to comply with the conditions results in a breach of the bond, and the money posted with the government is forfeited. The regulations provide that an immigration bond may be set no lower than \$1,500. The actual amount of bond established in an alien’s case may be higher, depending on how his risk of flight and/or danger to the community has been assessed by government officers. This, however, is counterbalanced by the need to preserve detention space for serious offenders, and to ensure an alien with no criminal history is not intermingled in a population of aliens with serious criminal histories.

An alien who believes the amount is unreasonable may have a bond redetermination hearing before an immigration judge, who has the authority to reassess the conditions of release and lower the amount. It is not uncommon for judges to exercise this authority, notwithstanding the alien fugitive problem that confronts all entities involved in the immigration enforcement and expulsion system. Note that aliens (other than LPRA) convicted of aggravated felonies, are subject to mandatory detention under the law and are ineligible for bonds.

**Alternative to Detention (ATD).** Release of an alien on ATD after service of the WA and NTA might be thought of as equivalent to house arrest, combined with the means of determining his whereabouts — usually by way of an electronic ankle bracelet or other device that is monitored 24 hours a day, 365 days a year. The ATD program is expensive in that ICE uses contract services to obtain the devices and to conduct the requisite monitoring. (The FY 2012 budget proposed by the House of Representatives would provide over \$72 million in funding for ATD.<sup>14</sup>) It is not evident that undertaking ATD in-house, without use of a contract, would be any less expensive given officer salaries, overtime, and other costs. At present, there is no established immigration court docket specifically for aliens in the ATD program: Their cases are placed in the “non-detained” docket, and therefore are subject to the inordinate delays attendant to all non-detained cases before a hearing commences, as was described earlier in this paper. This of course ratchets up the cost of the ATD program substantially.

Some immigration advocates and private members of the immigration bar have argued that because ATD constitutes a form of confinement, it meets the definition of “mandatory detention,” and therefore aliens convicted of aggravated felonies should be entitled to consideration for inclusion in the program. Fortunately so far, this down-the-rabbit-hole argument has met with no success.

Use of ATD by the government is in its early stages, and the jury is out on its effectiveness. In fact, substantial evidence of its ineffectual use can be found in the case of Carlos Martinelly-Montano, a participant in the program who later went on to commit vehicular homicide by killing a nun while driving drunk in Prince William County, Va., in August 2010. The handling of Martinelly-Montano’s case is Exhibit 1 in any reasoning person’s assessment of what is wrong with the federal government’s present immigration enforcement-and-removal regimen. He had been arrested and charged more than once for driving under the influence, but faced almost no legal consequences from either the local crimi-

nal justice system or the federal immigration authorities, despite his status as an illegal alien and a man who routinely and cavalierly flouted the drunk driving laws.<sup>15</sup>

For all of the reasons enumerated, the future of ATD remains unclear, although the present ICE leadership remains committed to its expansion, at least in part as a consequence of their commitment to detention reform, which many observers construe to mean less detention of aliens despite the substantial and continuing problem with the high volume of aliens who abscond from proceedings.

**Detention.** No matter which DHS agency has initially arrested or taken custody of an alien, once a decision to detain has been reached — or if the alien does not or cannot post the bond that has been established — a transfer of custody to ICE occurs. This is because ICE, specifically the Office of Enforcement Removal Operations (ERO, formerly known as Detention and Removal Operations), acts as the immigration jailer for the federal government.

Actually, ERO conducts nearly all of the immigration functions of ICE, which has increasingly stove-piped its enforcement operations between ERO and its counterpart, Homeland Security Investigations (“HSI,” formerly known as Office of Investigations). HSI is staffed mainly by former Customs agents, some of whom have made immigration enforcement a lesser priority, even suggesting that they believe such work is unimportant or even demeaning. In a sense, the shotgun marriage of the enforcement and investigative components of the two legacy agencies — Customs and INS — that was brought about by creation of DHS, is a fiction. HSI and ERO live with one another only titularly under the same roof, and with a great deal of friction. The consequence is that only a part of the agency’s total resources can truly be said to be engaged in immigration enforcement in the interior of the United States — exactly how many officers or agents and support staff isn’t precisely known, as ICE deems such information to be law enforcement sensitive.

ICE maintains a relatively constant funded capacity of approximately 34,000 detention beds nationwide, and is required by Congress to maintain those beds at full capacity.<sup>16</sup> As mentioned before, the available detention space consists of a mix of government-owned facilities, facilities owned and run by private corporations via government contract, and space obtained from police and sheriff’s department jails via intergovernmental services agreements (IGSAs). The daily cost varies radically, depending on the locale and the contracted arrangements.

Obviously, the more quickly that aliens occupying detention space can be processed in, moved through their proceedings, and sent out of the country, the more effective the federal government will be in its obligation to police unlawful immigration to the United States, an obligation which, incredibly — given the estimated 10-12 million illegal aliens already here — it wishes to take on by itself, without help from the 50 state governments, especially the states immediately proximate to the border whose communities are most directly and adversely impacted by crime committed by aliens, and stress on their respective health and social service systems.<sup>17</sup>

Detention of aliens is one of the hotspots in immigration enforcement and, consequently, figures large in the target range of open borders advocates and pro-migrant organizations. Even the detention of alien criminals, once considered out-of-bounds by such groups, is now considered fair game. The logic appears to be this: (1) Don’t detain any aliens except the most serious offenders such as aggravated felons; (2) nullify past amendments to the aggravated felony provisions so that nearly no crime meets the definition; and then (3) expand the relief available under the law so that alien criminals may apply for cancellation of removal or other mechanisms to remain in the United States.

For its part, ICE has been undertaking a significant review and restructuring of its detention policy, procedures and facilities for nearly two years. As a part of this restructuring, many contracts have been canceled and ICE is “softening” its approach to alien confinement in many facilities. In some ways, this change appears ill-timed, given the agency’s avowed intent, as directed by Mr. Morton in his memorandum of March 2, to focus its immigration enforcement efforts on identifying and removing serious alien criminal offenders — who, logic would seem to dictate, should be housed in hardened, highly secure lockdown facilities.

## *Types of Removal*

The Immigration and Nationality Act (INA) provides for several types of due process to be accorded to an alien, depending on the facts and circumstances surrounding his entry into, and stay in, the United States — e.g. whether the initial entry was legal or not, whether he has been convicted of a crime, the type of crime committed, etc. Following is a description of the various types of proceedings. (At the end of this section, Table 2 provides a statistical breakdown of how often each of them was used in FYs 2006 through 2010, and Figure 1 provides a visual breakdown of their use in FY 2010 alone.)



**Voluntary Departure/Voluntary Return (VR).** Voluntary Return may be granted by federal officers in lieu of presenting an alien to an immigration judge for a removal hearing.<sup>18</sup> Technically, VR constitutes a request by an alien to be permitted to return to his country of citizenship or nativity on a voluntary basis. Aliens who are removable as aggravated felons, or under the national security-terrorism grounds laid out in the INA, are not eligible for VR. The statute provides that an alien must pay his own fare to be eligible for VR, but the reality is that almost no alien reimburses the government the funds for his repatriation.

In the course of a hearing, a judge may also grant an alien the opportunity to voluntarily depart in lieu of a formal order of removal. If, however, the request for VR is made by the alien (or his counsel) at the conclusion of the hearing, then in addition to the requirements mentioned above, he must show physical presence in the United States for at least a year prior to issuance of the NTA, prove good moral character for the past five years, and not have been convicted of criminal offenses evincing moral turpitude.

It needs to be understood that voluntary removal isn't particularly "voluntary," at least as a layman might conceive of it. This is because in most instances, the alien will be held in detention pending his departure; and the departure, when it occurs, will be under safeguards — that is to say, he will be escorted by armed, uniformed ICE officers to ensure that he in fact leaves the United States.

Why, then, would an alien opt for such an arrangement? The first has to do with a desire on the part of the alien not to spend inordinate amounts of time in detention when he knows he has no basis to remain. The second reason has to do with an understanding that, by departing voluntarily instead of being formally removed, he escapes the possibility of being criminally charged with a federal felony for reentry after removal, should he choose to return illegally in the future, and again get caught — aliens are often highly aware of the nuances and complexities of immigration law, given its impact on their lives.

Given the reduced penalties an alien incurs should he illegally reenter, why would federal officers opt to grant Voluntary Removal to an alien instead of pursuing a formal order of removal? Sheer volume. Granting voluntary departure aids the government in getting aliens out of the country quickly and economically. Mexican nationals are often recipients of VR.

The problem with VR is that it is subject to overuse or misuse — including in cases where prudence (or, occasionally, even the law) dictate that it should not

be granted. For instance, on October 6, 2010, the *Los Angeles Times* reported that the administration had removed a record 392,862 aliens — nearly half of whom were criminals — in FY 2009.<sup>19</sup> Director Morton was quoted as saying, "ICE is committed to tough law enforcement."

But by December 5, the *Washington Post* was reporting that to achieve those numbers, ICE officials had "quietly directed immigration officers to bypass backlogged immigration courts and time-consuming deportation hearings whenever possible, internal e-mails and interviews show. Instead, officials told immigration officers to encourage eligible foreign nationals to accept a quick pass to their countries without a negative mark on their immigration record, ICE employees said. The option, known as voluntary return, may have allowed hundreds of immigrants — who typically would have gone before an immigration judge to contest deportation for offenses such as drunken driving, domestic violence, and misdemeanor assault — to leave the country..." without formally being ordered removed.<sup>20</sup> Morton was obliged to respond publicly in order to deny that the agency had "cooked the books" to meet its own goals.

### **Removal Proceedings Before an Immigration Judge.**

Removal proceedings before an immigration judge, which are initiated by issuance of an NTA, already have been discussed at length in this paper, so there is little to add here.<sup>21</sup> This type of proceeding constitutes the bulk of all removal proceedings initiated by the government. Even though other, more streamlined forms of due process are provided for by statute and do not require a hearing before the immigration court, the government is not obliged to use them and may opt to present its case to the judge instead. Inexplicably, it often does exactly that, despite the ever-present, ever-growing immigration court backlogs.

### **Stipulated Orders of Removal.**

Stipulated Orders of Removal are not actually a separate form of removal proceeding: They take place within the context of the immigration judge hearings described above. They may be thought of as the removal hearing equivalent of a "guilty plea" in which the alien signs a document stipulating to the charges of removability lodged against him and waives his right to appeal, in return for which the government holds him in detention for as short a period of time as possible while arranging his removal from the United States. The stipulation is presented by the government trial attorney to the immigration judge for review, approval, and issuance of the order.

One may wonder why an alien would agree to such a stipulation. Quite often, an alien who has been incarcerated in federal or state prisons for criminal offenses, and who has no equities under the law, is anxious to cut short any additional — and quite possibly attenuated — period of additional detention while waiting for the inevitable. Faced with the realities of his situation, he is often desirous only of being repatriated as quickly as possible.

This process has come under fire from members of the private immigration bar, and drawn appellate court scrutiny and censure (e.g. in the Ninth Circuit Court of Appeals), because not all aliens who sign such stipulations are represented by counsel and questions have been raised as to the whether these aliens have been fully cognizant of either their rights or the consequences of agreeing to such a stipulation. As a result, ICE has increasingly evidenced an unwillingness to use stipulated orders even outside the Ninth Circuit.

**Expedited Removal Proceedings.** In 1996 Congress, recognizing the need for reform in the due process being provided to illegal alien border crossers — and in an attempt to unburden immigration courts of case backlogs existing even then — passed the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), which was quickly signed into law by the President. IIRIRA amended the INA to establish a non-judicial expedited removal provision permitting the Attorney General<sup>22</sup> to designate, by promulgation in the Federal Register, those classes of aliens to whom this type of proceeding would apply provided, at minimum, that they:

- are applicants for admission to the United States; or
- have entered the United States without admission or parole, and have been continuously physically present in the United States for less than two years (in which case they are to be treated as applicants for admission);
- are inadmissible under certain statutory grounds primarily due to failure to comply with visa or other entry document requirements, and/or fraud or misrepresentation;
- make no claim to lawful resident alien status; and
- do not seek asylum or express a fear of persecution.<sup>23</sup>

The law and regulations provide that immigration inspectors or examining immigration officers (which include the apprehending officers or agents of

the Border Patrol, ICE or other DHS agencies) may issue an order of removal against an alien who falls within the parameters of this section. However, before the order becomes final, it must be reviewed and approved by a supervisory officer. Further, if an alien is charged in expedited removal proceedings, no other removal charges may be lodged. Most aliens removed under this provision of law are barred from reentry for five years, although for certain categories of aliens, the bar is for life.<sup>24</sup>

Unfortunately, in the 15 years since this provision was enacted into law, the federal government has been extraordinarily cautious in expanding it by regulation to its fullest potential reach. At the present time, it is applied only to applicants for admission at ports of entry, or to aliens encountered within 100 miles of the land or maritime borders who have entered the United States without inspection *less than 14 days* before the time they are encountered. In other words, it is a tool of some utility for border officers, but of little or no use to those federal officers charged with immigration enforcement in the interior of the United States where the lion's share of the population of 10 to 12 million aliens live.

**Expedited Removal Proceedings Against Aggravated Felons.** There is a second kind of non-judicial expedited removal proceeding provided for in the INA, specifically for use against aliens (other than LPRAs) convicted of aggravated felonies.<sup>25</sup> Despite the similarity of names, this form of removal should not be confused with the “regular” expedited proceedings previously described. They do, however, have this in common: Because the proceedings do not invoke a hearing before an immigration judge, they are ordinarily very quick.

First, an officer authorized under law to issue an NTA in this case issues instead a Notice of Intent to Issue a Final Administrative Deportation Order (“Notice of Intent” or “NOI”). The charge alleges that the alien is removable for having been convicted of an aggravated felony as defined in the law. The alien is entitled to counsel at no expense to the government, and given a period of time after service of the NOI to rebut or otherwise answer or contest it. He may also request a copy of the evidence being used to support the NOI charges.

Second, another designated officer — it must be someone other than the one who issued the NOI — reviews the evidence file and the charging documents, and any response that has been received from the alien. His job is to confirm that the identity of the charged individual the same as the person convicted, that he is an alien, that he is not a resident alien, and that the conviction is final and does in fact constitute an aggravated felony. The second officer's confirmation of these facts, followed

by an affirmation of the NOI, constitutes the order to remove. After a wait of 14 days as required by law, and absent an appeal by the alien, the order becomes final and the removal may go forward.

**Reinstatement of Final Order of Removal.** The law provides that an alien who illegally reenters the United States after having been removed, or having departed on his own while under an order of removal, shall be removed from the United States by reinstating the prior order.<sup>26</sup>

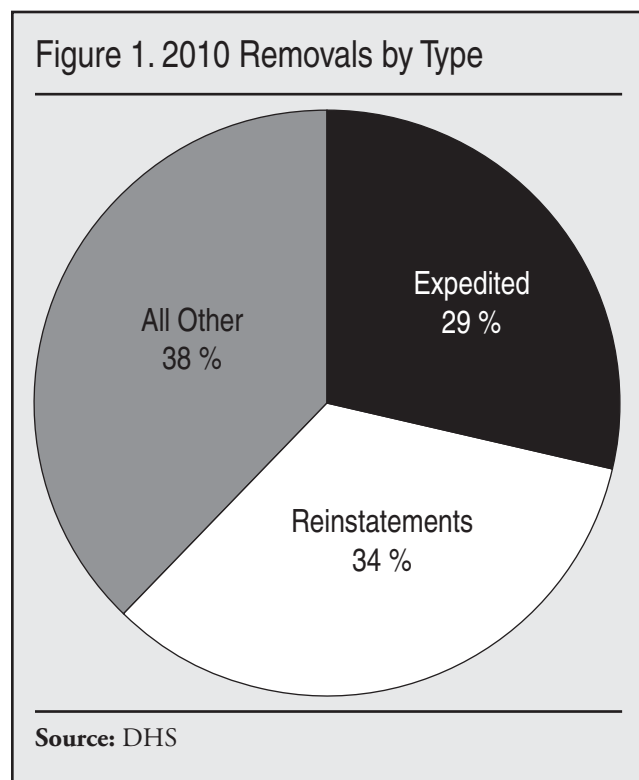
Note that aliens who illegally reenter the United States after having been formally removed are also subject to prosecution for the federal felony offense of reentry after removal — the penalties for which vary, depending on the grounds for which the alien was previ-

ously removed. Where the case is accepted for prosecution by the U.S. Attorney’s Office, and the alien convicted, initiation of removal proceedings under this or other sections of the INA will not commence until after he serves any sentence of incarceration.<sup>27</sup>

The method by which reinstatement occurs somewhat mirrors that described for aggravated felons, above, in that the officer must confirm the identity of the individual, his alienage, and the existence of a previously executed final order of removal. However, there is no statutory requirement that a second officer review the decision of the examining officer who makes the reinstatement determination.

While the law is quite clear in use of the imperative phrase, “shall be removed” using the final order reinstatement process, it is not at all clear that removals by reinstatement are always used when available to the government. One instance in which it would not likely be used is where the original order of removal is not available, e.g. when alien files (“A-files”) have been retired to the National Record Center, or misplaced, and cannot be readily located and retrieved. Situations like this happen more often than one might think, and are perhaps an inevitability given the millions upon millions of A-files floating in, through, and out of daily use by the various DHS agencies at any point in time.

**Judicial Order of Removal.** There is one final method of removal permitted by the INA. Under this provision, a U.S. District Court judge may, if requested by the prosecuting U.S. Attorney at the time of sentencing an alien convicted of a federal offense, direct that alien’s removal upon completion of any portion of the sentence requiring incarceration.<sup>28</sup> Once such an order has been entered, there is no further need for proceedings under any other provision of the INA. ICE officers are free to effect the alien’s removal as soon as practicable, once he is in their custody after service of any period of incarceration required by the sentencing judge.



**Table 2. Number of Removals, 2006-2010**

	Total	Expedited	Reinstatements	All Other
2006	280,974	110,663	49,539	120,772
2007	319,382	106,196	77,696	135,490
2008	359,795	112,716	91,318	155,761
2009	395,165	106,025	116,903	172,237
2010	387,242	111,116	130,840	145,286

Source: DHS

## Conclusions & Recommendations

The well-documented problems plaguing the immigration removal process have raised the attention of the Senate Judiciary Committee, whose Subcommittee on Immigration, Refugees, and Border Security held a hearing on May 18, 2011, entitled “Improving Efficiency and Ensuring Justice in the Immigration Court System.” Testifying at that hearing were Juan Osuna, Acting Director of the Justice Department’s Executive Office for Immigration Review (EOIR); former ICE Assistant Secretary Julie Myers Wood; and Karen Grisez on behalf of the ABA.

The recommendations below echo some — but by no means all — of those provided by the witnesses. These recommendations focus entirely on those things that can be done by regulatory or policy amendments, not because statutory change is undesirable, but because such changes seem remote given the present political climate, and doing the possible is far preferable to not acting at all, given the depth and breadth of the problem.

**Restrict the Use of Voluntary Return.** There are two fundamental reasons for restricting the unbridled use of voluntary return. First, no alien convicted of a crime should be granted the privilege of voluntary return. Doing so undermines the stated DHS and ICE priorities of focusing immigration enforcement efforts on alien criminals. ICE Director Morton should issue a policy directive requiring the use of formal proceedings against alien criminals so that orders of removal, with the attendant criminal sanctions for reentry after removal, are obtained. Second, VR encourages recidivists to illegally return to the United States with little or no credible fear of consequences because it eliminates the possibility of a criminal prosecution for reentry after removal. Consider: in FY 2010, DHS officers apprehended a total of 516,992 aliens for immigration violations. Of these, 476,405 — fully 92 percent — were permitted to voluntarily return to their home country in lieu of proceedings. And yet, most of these aliens (463,382 — 89.6 percent of the total apprehensions) were taken into custody by the Border Patrol agents in proximity to America’s physical frontiers and most could have been formally removed by use of expedited removal, which is discussed below.<sup>29</sup>

**Encourage the Use of Judicial Orders of Removal.** At a time when one part of the Justice Department (EOIR) is so overburdened, it seems logical that other parts of the Justice Department should aid in alleviating that burden. The Justice Department’s Executive Office of

U.S. Attorneys should amend the United States Attorneys Manual to require prosecutors to seek judicial orders of removal from federal judges in all criminal cases in which the defendant is an alien. In those instances in which the alien’s presence may be further required as a witness or defendant in future trials, the order of removal can be accompanied by a directive to stay the removal until conclusion of all criminal proceedings.

**Expand the Use of “Regular” Expedited Removal Proceedings.** Using the regulatory rulemaking process, ICE should expand the cases in which non-judicial expedited removal may be used against aliens illegally in the United States.

Ideally, this should be done by eliminating the 100-mile limitation as well as the within-14-days-of-entry provisos presently in effect — although this is probably unlikely to occur during the tenure of this administration. But expedited removal proceedings should *at minimum* be expanded to those meeting the statutory requirements (no admission or parole; physically present less than two years; not seeking asylum) and who have also been convicted of misdemeanor crimes — especially convictions involving driving under the influence of alcohol or drugs. Note that this recommendation is not intended to deprive officers of the latitude to use alternate due process mechanisms where circumstances dictate and additional removal charges exist — it is intended solely to ensure that lesser alien offenders are not given the opportunity to depart voluntarily, and yet at the same time do not tie up finite court resources and detention space while trying to obtain a formal order of removal. Expanding expedited removal proceedings for lesser offenders would be consistent with the administration’s avowed priorities to focus on criminal aliens (more serious offenders should be handled as described below).

**Require the Use of Administrative Expedited Removal Proceedings Against Aggravated Felons.** A substantial amount of officer and judicial energy and time is spent in the litigation of cases against aliens convicted of, and serving time for, aggravated felonies. This flies in the face of logic and judicial economy. ICE Director Morton should issue a policy directive requiring the use of non-judicial administrative final orders in all cases involving aggravated felons who are not LPRAs.



## **Resuscitate the Use of Stipulated Orders of Removal.**

There seems to be adequate room to establish sufficient due process to satisfy appellate judges, if not the private bar, that aliens who sign stipulations have done so knowingly and of their own volition. The Office of the Professional Legal Advisor should develop operating procedures to guide its attorneys and ICE officer corps staff in their appropriate use.

## **Strengthen Sanctions Against Frivolous Filings and Representation Abuse.**

EOIR should promptly complete, and tender for the rulemaking process, its regulatory amendments to disbar, sanction, and otherwise penalize fraud, contumelious behavior, or dilatory tactics on the part of attorney practitioners who abuse immigration proceedings, whether at the trial or appellate level.

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## End Notes

<sup>1</sup> Federal officers with primary responsibility for enforcing immigration laws belong to the Department of Homeland Security (DHS). They consist of:

- officers from the bureau of Customs and Border Protection (CBP), which is in turn divided into CBP inspectors who staff U.S. ports of entry and Border Patrol agents who patrol between the ports and at some of the inland waterways such as the Great Lakes;
- officers and agents from Immigration and Customs Enforcement (ICE), which is the investigative arm charged with “interior enforcement” efforts; and, to some extent
- U.S. Coast Guard members who conduct maritime interdiction of aliens, for instance in the Florida Straits.

<sup>2</sup> The phrase “removal proceedings” refers to what used to be called under the law, respectively, exclusion proceedings (to prevent an alien from entering the United States) and deportation proceedings (to expel an alien after his entry).

<sup>3</sup> The Center for Immigration Studies recently published a *Background* by former immigration judge Mark Metcalf on the workings — and failings — of the immigration system generally and, more specifically, the immigration court system (see “Built to Fail: Deception and Disorder in America’s Immigration Courts,” at [www.cis.org/immigration-Courts](http://www.cis.org/immigration-Courts)). It is a powerful indictment of a broken system, and merits little additional comment other than to encourage those who have not yet read the document to do so as soon as possible.

<sup>4</sup> For a quick synopsis, see my blog, “It’s the Metrics, Stupid!”, Center for Immigration Studies, March 2011, <http://www.cis.org/reasoner/have-your-cake-and-eat-it-too>.

<sup>5</sup> For instance, an alien who has been arrested by federal officers, and placed into removal proceedings under provisions of the Immigration and Nationality Act (“INA”), may avail himself of the right to petition a U.S. District Court for a writ of habeas corpus, in the hope of being released from de-

tion or having the conditions of his release modified, e.g. by means of a substantially lower bond than was imposed by the immigration authorities. District Court habeas proceedings exist separate and apart from the removal hearing itself (which also provides a concomitant right to challenge detention conditions in a distinct redetermination hearing before an immigration judge).

<sup>6</sup> The word “judicial” is used in quotations since immigration judges are in fact a kind of administrative law judge and employees of the U.S. Justice Department, neither Article I nor Article III members of the judiciary. However, from here forward the word will be used as shorthand, without the quotations, as a means of distinguishing those immigration removal hearings held before an immigration judge from those which take another form and format.

<sup>7</sup> See, e.g. N.C. Aizenman and Spencer Shu, “U.S. Targeting Immigrant ‘Absconders’”, *The Washington Post*, May 5, 2007, [www.washingtonpost.com/wp-dyn/content/article/2007/05/04/AR2007050402369\\_3.html](http://www.washingtonpost.com/wp-dyn/content/article/2007/05/04/AR2007050402369_3.html).

<sup>8</sup> Metcalf, *op. cit.*

<sup>9</sup> “Reforming the Immigration System: Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases,” Arnold and Porter, LLP, on behalf of the American Bar Association Commission on Immigration, February 2010, [http://www.americanbar.org/groups/public\\_services/immigration/publications.html](http://www.americanbar.org/groups/public_services/immigration/publications.html) (an abbreviated version of the ABA report can be found via its Executive Summary, at [www.americanbar.org/content/dam/aba/administrative/immigration/coi\\_executive\\_summary\\_authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/immigration/coi_executive_summary_authcheckdam.pdf)); and Donald Kerwin, Doris Meissner, and Margie McHugh, “Executive Action on Immigration: Six Ways to Make the System Work Better,” Migration Policy Institute, Mar. 2011, [www.migrationpolicy.org/pubs/administrativefixes.pdf](http://www.migrationpolicy.org/pubs/administrativefixes.pdf).

<sup>10</sup> ICE Policy Memorandum “Civil Immigration Enforcement: Priorities for the Apprehension, Detention and Removal of Aliens,” Director John Morton, Mar. 2, 2011, <http://www.ice.gov/doclib/news/releases/2011/110302washingtondc.pdf>.

<sup>11</sup> See, e.g. Susan Carroll, “Immigration Cases Being Tossed by the Hundreds: Docket Review Pulls Back Curtain on Procedure by Homeland Security,” *Houston Chronicle*, October 17, 2010, [www.chron.com/disp/story.mpl/metropolitan/7249505.html](http://www.chron.com/disp/story.mpl/metropolitan/7249505.html).

<sup>12</sup> It should be noted that the number of aliens taken into custody as the consequence of employer investigations has been substantially reduced — almost down to nothing, as compared with past efforts — by the policies of ICE Director Morton, who has emphasized audits in lieu of arrests. This has led to criticism in some quarters for a policy of “virtual arrests” instead of the real thing, and the concurrent observation that a policy of worksite audits unconnected with arrests simply results in fired illegal workers drifting onward to another place of employment, and a further proliferation of document fraud and identity theft as those illegal workers procure replacement sets of bogus papers to use in their search for a new job.

<sup>13</sup> A full list of aggravated felonies can be found at Section 101(a)(43) of the Immigration and Nationality Act (the “INA”), 8 U.S.C. § 1101(a)(43). Aliens convicted of aggravated felonies as defined in immigration law are subject to particularly stringent treatment — for instance, they are subject to mandatory detention; they are precluded from receiving various forms of relief, including asylum; significant criminal penalties attach should they attempt to reenter the United States after removal; and they can be removed from the United States by means of processes that do not invoke the right to a hearing before an immigration judge. Crimes considered to be aggravated felonies under the law include many obvious categories such as murder, rape, sexual abuse of minors, drug trafficking, weapons trafficking, and the like. But — to the ire and consternation of many NGOs and the private immigration bar that represents aliens — they also include less obvious offenses that have been added by a series of legislative amendments over the years, crimes such as “an offense relating to a failure to appear before a court pursuant to a court order to answer to or dispose of a charge of a felony for which a sentence of two years imprisonment or more may be imposed.” INA §101(a)(43)(T).

<sup>14</sup> Draft House Report of the Committee on Appropriations, Department of Homeland Security Appropriations Bill 2012, at p. 53, [http://www.micevhill.com/attachments/immigration\\_documents/hosted\\_documents/112th\\_congress/DraftCommitteeReportOnHouseFY2012HomelandSecurityAppropriationsBill.pdf](http://www.micevhill.com/attachments/immigration_documents/hosted_documents/112th_congress/DraftCommitteeReportOnHouseFY2012HomelandSecurityAppropriationsBill.pdf).

<sup>15</sup> See, for example, the redacted version of the DHS Office of Inspector General inquiry report, as obtained by the organization Judicial Watch, at [www.judicialwatch.org/files/documents/2011/dhs-montano-report-11242010.pdf](http://www.judicialwatch.org/files/documents/2011/dhs-montano-report-11242010.pdf), and the organization’s accompanying press release, at [www.judicialwatch.org/news/2011/apr/cover-judicial-watch-sues-dhs-documents-detailing-investigation-illegal-alien-who-kill](http://www.judicialwatch.org/news/2011/apr/cover-judicial-watch-sues-dhs-documents-detailing-investigation-illegal-alien-who-kill).

<sup>16</sup> The required maximum use of all funded detention space is the result of language inserted into ICE appropriations funding bills, and is a fallout of the notoriety which attended a now-discredited practice described as “catch-and-release,” whereby aliens would be apprehended, served NTAs with no WA, and no bond or other conditions designed to ensure their appearance, and of course as a consequence failed to appear for hearings at the date, time, and place directed. However, a recent colloquy between Director Morton and Rep. David Price that took place in the course of a congressional appropriations hearing on March 11 of this year, seems to suggest that Morton would be happy to forego that level of funding. At that hearing, Morton stated, “[T]he committee has appropriated more money to us in the detention world than we can spend, for reasons that we mentioned before the agency didn’t provide the committee with a particularly honest assessment of what it cost.” (Mr. Morton’s allusion to the agency’s prior lack of honesty is ironic in light of its apparent manipulation of statistics under his own leadership. See the subsection of this report on use of voluntary return, and end notes 19 and 20.) It is a surprise that an agency director would assert that Congress has given him more money than he can spend on detention, in a country with an out-of-control illegal alien population. But his remarks seem to be consistent with other indicators that under this administration, the agency would just as soon minimize its role as the nation’s immigration jailer. For a full transcript of the hearing, go to [http://findarticles.com/p/news-articles/political-transcript-wire/mi\\_8167/is\\_20110313/rep-robert-aderholt-holds-hearing/ai\\_n57080628/pg\\_14/?tag=mantle\\_skin;content](http://findarticles.com/p/news-articles/political-transcript-wire/mi_8167/is_20110313/rep-robert-aderholt-holds-hearing/ai_n57080628/pg_14/?tag=mantle_skin;content).

<sup>17</sup> This “go it alone” approach became manifest when in July 2010 the federal government filed suit against the state of Arizona, which had earlier in the year enacted a statute authorizing state peace officers to inquire into the alien status of arrestees; to enforce certain provisions of the INA, and to undertake other actions to ensure the public safety.

<sup>18</sup> Voluntary departure is authorized by Section 240B of the INA, 8 U.S.C. 1229c.

<sup>19</sup> Brian Bennett, “U.S. Deported Record Number of Immigrants,” *Los Angeles Times*, October 6, 2010, <http://articles.latimes.com/2010/oct/06/nation/la-na-illegal-immigration-20101007>.

<sup>20</sup> Andrew Becker, Center for Investigative Reporting, “Unusual Methods Helped ICE Break Deportation Record, E-mails and Interviews Show,” *The Washington Post*, December 5, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/12/05/AR2010120503230.html>.

<sup>21</sup> Removal proceedings before an immigration judge are authorized by Sections 239 and 240 of the INA, 8 U.S.C. 1229 and 1229a.

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<sup>22</sup> The Attorney General's powers in this regard have been transferred to the Secretary of DHS.

<sup>23</sup> Expedited removal proceedings are authorized by Section 235 of the INA, 8 U.S.C. 1225.

<sup>24</sup> The lifetime bar only applies if the underlying basis of the expedited removal is for INA Section 212(a)(6)(C).

<sup>25</sup> These proceedings are authorized by Section 238(b) of the INA, 8 U.S.C. 1228(b).

<sup>26</sup> Reinstatement of final orders is authorized by Section 241(a)(5) of the INA, 8 U.S.C. 1231(a)(5).

<sup>27</sup> For specifics about the crime of reentry after removal, refer to Section 276 of the INA, 8 U.S.C. 1326.

<sup>28</sup> This method of ordering removal is authorized by Section 238(c) of the INA, 8 U.S.C. 1228(c). Note that by happenstance, there are two very different Sections 238(c) of the INA — both enacted at different times, and not yet

reconciled by a recodification and re-numeration of the entire section. That Section 238(c) relating to judicial orders of removal is usually listed subordinate to the other Section 238(c).

<sup>29</sup> Immigration Enforcement Actions: 2010, DHS Office of Immigration Statistics Annual Report, Jun. 2011, <http://www.dhs.gov/xlibrary/assets/statistics/publications/enforcement-ar-2010.pdf>



## Deportation Basics How Immigration Enforcement Works (Or Doesn't) in Real Life

By W.D. Reasoner

Many people, including, surprisingly, those whose occupations might bring them into contact with federal officers who enforce immigration laws, don't seem to have a clear notion of how removal proceedings against an alien take place, and exactly what "due process" means in that context.

For instance, state and local police and prosecutors often do not arrest, or they move to dismiss charges against, an alien once Immigration and Customs Enforcement (ICE) officers or agents express interest in removal, in the mistaken belief that once ICE takes custody of the individual, he (or she) will be forthwith whisked to a bus, plane, or train, and unceremoniously shoved across the border or dropped into the midst of his (or her) country of origin. Such notions are greatly mistaken.

This *Backgrounder* describes the enforcement actions that take place prior to, and that result in initiation of, removal proceedings, one form of which is a hearing before an immigration judge.

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