



Justice on the Run

Immigration court evasions reveal weak authority and weak enforcement

By Mark H. Metcalf

A case now working its way to the U.S. Supreme Court, *Lopez-Valenzuela v. Maricopa County*, pits the American Civil Liberties Union (ACLU) against Arizona and its mandatory detention of accused felons who are also illegally present in the United States. This practice, claims the ACLU, is unconstitutional.

Intended to prevent flight from prosecution, the measure makes it more likely offenders will stand trial and, if convicted, will eventually be deported. Approved by Arizona voters in 2006, the law reflects a standard frustration with broken federal promises to secure borders and enforce removal orders. This same frustration mirrors both the aspiration and the gridlock in Congress over immigration reform.

Urging the Ninth U.S. Circuit Court of Appeals to overturn the measure, the ACLU asserted no empirical data show those illegally present are a greater flight risk than any other group. “It’s unfair,” it argued, “to subject [illegal immigrants] to rules that don’t apply to everyone else.” Some fact checking is appropriate.

Indeed, immigrant offenders often fail to follow the rules — that is, attend court like everyone else. Immigration court records from 1996 through 2012 show 76 percent of 1.1 million deportation orders were issued against those who evaded court.¹ These evasions compose the greatest source of unexecuted deportation orders in the immigration court system. Not even a quarter of those free pending trial — some 268,000 — actually came to court and finished their cases. By contrast, accused felons in America’s state courts — those also free pending trial — seldom missed; only 24 percent according to a 2007 Justice Department study.²

Notably, those persons detained pending trial produced wholly different results. Over the same 17-year period, immigration courts handed down 2.7 million removal orders — 60 percent of them, or 1.6 million — in detention facilities.³ Up to 96 percent of these removal orders, records say, were actually executed.⁴ With flight not an option, detainees were removed at their cases’ completion. When not detained, results were predictable.

Not only did many flee court, but seldom were they re-arrested. ICE reported its highest fugitive re-arrest numbers in 2008, when agents apprehended a total of 34,000 people, or 6 percent, from a fugitive population of 592,000. Since then, ICE has abandoned its immigration fugitive program and fugitives have increased 51 percent to just under 842,000.⁵ History provides context.

A 1989 GAO report found that “Aliens have nothing to lose by failing to appear for hearings and, in effect, ignoring the deportation process.”⁶ This disregard, the study concluded, stemmed from a “general lack of repercussions” because few ordered removed are ever deported. Numbers and narratives tell the story.⁷

A 2005 Justice Department investigation confirmed only 3 percent of the non-detained were actually removed after unfavorable court rulings.⁸ Laments Judge Edward Grant of the immigration appeals court: “All should be

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troubled by the fact that only a small fraction of final orders of deportation and removal ... are actually executed.⁹ DHS Secretary Jeh Johnson concedes the point, recently telling Congress that most deportations come from border arrests.¹⁰ The balance, records reflect, come from jails and prisons.¹¹ Despite the U.S. Code requiring deportation within 90 days of a final court order, such rulings are rarely enforced — and none of this dithering comes without cost.¹²

The government's failure to enforce the most elevating and redemptive cornerstone of federal law — the Immigration and Nationality Act — leaves a vacuum that invites more than porous borders, feeble courts, and frail enforcement. Relief for the deserving is inexcusably delayed — some litigants wait more than two years for hearings — and law-abiding neighborhoods are carelessly jeopardized. Last year, some 68,000 criminal aliens were released back onto the streets instead of being removed.¹³ Most importantly, public confidence wanes in the wake of federal retreat. Meanwhile, national and domestic security challenges persist and the price of non-enforcement goes up.

A 2006 DHS report found that 85 percent of aliens from nations that aid and sponsor terrorism disappeared upon release from detention.¹⁴ Others, like Algerian-born Ahmed Ferhani, pose threats well after entry. Detained by New York City police on robbery and narcotics charges in 2010, he was placed into deportation in early 2011 and remained free pending trial. He failed to appear in immigration court and was later arrested — but only after discovery of his plan to attack Manhattan synagogues and the Empire State Building.¹⁵

Common criminals do more than disturb the peace. Jose Alfaro, a Salvadoran national, was ordered removed in 2002. Never detained despite two later arrests, he remained at-large nine years before murdering three people in Manassas, Va., on February 10, 2011.¹⁶ Kesler Dufrene, a Haitian national and twice-convicted burglar, completed his Florida prison sentence in 2010 with a deportation order pending. Still, ICE released him and on January 2, 2011, he gunned down two adults and a 15-year-old in North Miami.¹⁷

The ACLU is entitled to its own opinions, but not its own facts. Those illegally present routinely evade court and are rarely seen again — and when they are, it is often too late. Those are facts. The American public, citizen and immigrant alike, expects the laws to be fairly and effectively enforced. Those are facts, too, and ones that Washington isn't getting.

So how have the courts hidden years of misses that amounted to nearly 900,000 failures to appear in court? How did the courts disguise this disorder? In plain terms, the courts diluted the numbers. They combined aliens in detention pending trial with aliens free pending trial. Since detained aliens always made their court dates while aliens free pending trial frequently missed theirs, failures to appear in court appeared much smaller than they actually were. Mixing different populations — the detained with the non-detained (apples vs. oranges) — and reporting their dynamics as if they were the same group created the very false impression that court evasion is fractional and rare when, in fact, it is both significant and standard.

This deceptive reporting carries with it all the attendant risk to national security and an effective court system seamlessly linked to enforcement — a risk, a linkage, and a mission the courts' own narratives have cited again and again in annual budget summaries to Congress right down to today:¹⁸

*The fight against terrorism is the first and overriding priority of the Department of Justice. ... A key component of this effort is the securing of our Nation's borders and the repair of the immigration system as a whole. More than ever, protecting America requires a multifaceted strategy which must include the effective coordination of investigative, enforcement, legal and adjudicative resources, both within the Department and in concert with other agencies. The application and enforcement of our immigration laws remain a critical element of this national effort.*¹⁹

Through 2013, the courts — using the same sweeping language — have justified themselves and their budgets to lawmakers.²⁰ But their actions have never matched their words. They said one thing and did another — all the while telling Congress that immigration courts are the “frontline presence” in immigration enforcement.²¹ Year after year, records show the courts filed misleading reports and shrank from the bold agency they promised Congress and the public. Brave language paired with phony numbers muted the alarms that should have sounded and terrorists, wannabe terrorists, drug traffickers, scamming visa holders, fraudulent asylum seekers, and the coyote-led poor²² made their way past U.S. borders — and some through U.S. immigration courts — without breaking a sweat.²³ The numbers don't lie.

In the five years following 9/11, 50.4 percent of all non-detained aliens — people the United States permitted to remain free pending trial—never showed for court. In real numbers, 360,199 people out of 713,974 never the saw the inside of a courtroom or, if they did, they soon vanished.²⁴ In 2005 and 2006, when just under 60 percent of those litigants free pending trial chose to skip court, the courts bleached their records and told Congress that only 39 percent missed their hearings.²⁵

Mixing apples with oranges — combining aliens detained before trial with aliens free before trial — drove failure-to-appear rates below 40 percent. The courts called this the “overall failure to appear rate” when, in fact, the only group that could choose to miss court was those free before trial. Never in the last 17 years have the courts compared apples with apples — those free before trial that made court with those free before trial that fled court. Never have the courts provided the public with an honest measure of evasion. Those detained before trial missed court because of transportation failures or illness. Their misses resulted in new court dates being scheduled, while those who fled their hearings received deportation orders. Fudged numbers from the one agency of the federal government charged with adjudicating immigrant claims continued unabated and neither Congress nor the public was the wiser.

This topsy-turvy failure shows that those who disobey court orders are treated remarkably better than the general public in other courts across the United States. In any other courts, defying court orders results in arrest, contempt, and incarceration. Not so in immigration courts. Rarely, if at all, are litigants held accountable for the same conduct that would land a citizen in jail. In immigration courts, upside down is routine — as routine as annual reports that game the numbers.

On two fronts then, one in federal courtrooms and the other on the ground, rule of law solutions are frustrated by those charged with enforcing the law and accurately reporting their efforts. Numbers from the courts have masked their disarray at a time in our history when the need for accurate reporting could not be greater and with results entirely predictable. No-show litigants, unenforced orders, listless caseloads, tardy relief for the worthy, and at-risk American neighborhoods for the law-abiding are now standard fare for a system that nurtures scandal.

The goal of immigration done right is diminished by courts that have not squared with the American public. More precisely, court executives — who have sanitized yearly reports to Congress and standardized dysfunction — have failed, and America’s entire immigration structure struggles with their deceit. They have, in effect, created courts that are built to fail those they were originally intended to dignify: the foreign-born and the American citizen.

What can hasten, if not assure, America’s decline, is that what the federal government repeatedly tells us about important national dynamics simply isn’t true. Scrutiny shows that immigration statistics are not immune to sleights of hand that tell a distinctly different story than honest numbers actually reveal. And without accurate numbers it becomes impossible to get our bearings on any policy issue. The National Research Council (a research arm of the federal government) gets it right and lays down the standard that America’s immigration courts ignore:

*Statistics that are publicly available from government agencies are essential for a nation to advance the economic well-being and quality of life of its people. ... [T]he operation of a democratic system of government depends on the unhindered flow of statistical information that citizens can use to assess government actions.*²⁶

Mark Twain, American humorist and wry observer of the human condition, said it better: “There are three kinds of lies: lies, damned lies, and statistics.”²⁷ Court executives could stand to read a little Mark Twain and a lot more guidance from the National Research Council right now.

End Notes

¹ From 1996 through 2012, trial courts issued removal orders in 2,738,642 cases. Of this total, 1,629,062 (60 percent) of all orders were issued against aliens in detention facilities. The balance of removal orders (1,109,580) were issued against aliens free pending trial. Removal orders were issued against 841,391 aliens who failed to appear in court. Put another way, 76 percent of all removal orders against those the United States allowed to remain free pending trial come from those who failed to keep their court dates. See *EOIR 2000 Year Book*, p. I3, Table 12; p. L1-L2, Figures 15-17; and p. T1, Figure 23; *EOIR 2004 Year Book*, p. D2, Figure 5, p. H1-H4, Figures 10-12, and p. O1, Figure 20; *EOIR 2008 Year Book*, p. D2, Figure 5, p. H1-H4, Figures 10-12, and p. O1, Figure 23; *EOIR 2009 Year Book*, p. D2, Figure 5, p. H1-H4, Figures 10-12, and p. O1, Figure 23; *EOIR 2012 Year Book*, p. D2, Figure 5, p. H1-H4, Figures 10-12, and p. O1, Figure 23.

² Thomas H. Cohen and Brian A. Reaves, “[Pretrial Release of Felony Defendants in State Courts](#)”, BJS Special Report, Department of Justice, Office of Justice Programs, November 2007, pp.1, 8, and 10. Write the authors: “For failure to appear, the range was from 21 percent to 24 percent [of accused felons who were released pending trial]... Overall rearrest rates ranged from 13 percent to 21 percent;” and “[b]etween 1990 and 2004, 62 percent of felony defendants in State courts in the 75 largest counties were released prior to the disposition of their case.” When determining failure to appear rates, the authors compared those accused felons released prior to trial who failed to appear in court out of the total population of accused felons who were released pending trial. The number-crunchers at the immigration courts could learn a thing or two from these researchers.

³ From 1996 through 2012, trial courts issued removal orders in 2,738,642 cases. Of this total, 1,629,062 or 60 percent of all orders were issued against aliens in detention facilities. The balance of removal orders — 1,109,580 — were issued against aliens free pending trial. Removal orders were issued against 841,391 aliens who failed to appear in court. Put another way, 76 percent of all removal orders against those the United States allowed to remain free pending trial come from those who failed to keep their court dates. See *EOIR 2000 Year Book*, p. I3, Table 12, p. L1-L2, Figures 15-17, and p. T1, Figure 23; *EOIR 2004 Year Book*, p. D2, Figure 5, p. H1-H4, Figures 10-12, and p. O1, Figure 20; *EOIR 2008 Year Book*, p. D2, Figure 5, p. H1-H4, Figures 10-12, and p. O1, Figure 23; *EOIR 2009 Year Book*, p. D2, Figure 5, p. H1-H4, Figures 10-12, and p. O1, Figure 23; *EOIR 2012 Year Book*, p. D2, Figure 5, p. H1-H4, Figures 10-12, and p. O1, Figure 23.

⁴ Office of the Inspector General, U.S. Department of Justice, “[The Immigration and Naturalization Service’s Removal of Aliens Issued Final Orders](#)”, Report Number I-2003-004, February 2003. Said the report: We found that the INS removed 92 percent (46 of 50) of the detained aliens from the United States. See also *EOIR 2008 Year Book*, p. P2, Table 13. Decisions by judges in penal institutions in 2008 resulted in 95.7 percent (5372 out of 5613) of aliens ordered removed at completion of their sentences. States the annual report: “The goal of the IHP (Institutional Hearing Program) is to complete proceedings for incarcerated criminal aliens serving federal or state sentences prior to their release from prison or jail. This allows DHS to remove aliens with final removal orders expeditiously at the time of their release from incarceration.”

⁵ *ICE Fiscal Year 2008 Annual Report*, p.4. “At the end of 2008, there were 557,762 such [open fugitive] cases remaining.” ICE has not reported its removal records for fugitive aliens since 2008. Its August 17, 2009 announcement that it would not remove aliens who skipped court or disobeyed orders to depart the United States has caused an increase in unexecuted removal orders that builds on the 557,762 orders disclosed in 2008. (Fugitive aliens now equal 841,391; See footnote 1.) See Anna Gorman, “[Immigration Official Says Agents Will No Longer Have To Meet Quotas](#)”, *Los Angeles Times*, August 18, 2009.

⁶ “Immigration Control: Deporting and Excluding Aliens from the United States”, pp. 1, 22, and 31, U.S. General Accounting Office, GAO/GGD-90-18, October 1989. States the GAO: “[T]heir [aliens] non-appearance may also be due partly to the general lack of repercussions ... for failing to appear.”

⁷ *Ibid.*

⁸ Office of the Inspector General, U.S. Department of Justice, “The Immigration and Naturalization Service’s Removal of Aliens Issued Final Orders”, Rep. No. I-2003-004, February 2003. States the report: “[W]e examined three important subgroups of nondetained aliens and found that the INS was also ineffective at removing potential high-risk groups of nondetained aliens. The subgroups we examined were aliens: from countries that the U.S. Department of State identified as

sponsors of terrorism — only 6 percent removed [those] with criminal records — only 35 percent removed, and [those] who were denied asylum — only 3 percent removed.” See also, Office of the Inspector General, Department of Homeland Security, “Detention and Removal of Illegal Aliens”, Audit Report OIG-06-33, p. 2, April 2006. States the report: “DRO’s (Office of Detention and Removal) ability to detain and remove illegal aliens with final orders of removal is impacted by (1) the propensity of illegal aliens to disobey orders to appear in immigration court [and] (2) the penchant of released illegal aliens with final orders to abscond.”

⁹ Edward R. Grant, “Symposium on Immigration Appeals and Judicial Review”, *Catholic University Law Review*, 55 Cath. U.L. Rev. 923, p. 2, Summer 2006. A 2003 DoJ Inspector General’s Report, the report to which Judge Grant referred at the symposium, found that only 3 percent of failed asylum seekers were actually deported. In full, Judge Grant stated: All should be troubled by the fact that only a small fraction of final orders of deportation and removal — entered after a hearing before an immigration judge, with right of appeal to the Board of Immigration Appeals — are actually executed.

¹⁰ Stephen Dinan, “[Deportations Come Mostly From Border, DHS Chief Says](#)”, the *Washington Times*, March 12, 2014: “Homeland Security Secretary Jeh Johnson acknowledged Tuesday that his department’s deportation numbers are now mostly made up of illegal immigrants caught at the border, not just those from the interior, which means they can’t be compared one-to-one with deportations under President Bush or other prior administrations.

¹¹ John F. Simanski and Leslie M. Sapp, “[Annual Report, Immigration Enforcement Actions 2012](#)”, Department of Homeland Security, Office of Immigration Statistics. The report found the number of aliens removed in 2012 totaled 419,384 in 2012. Nearly half of these removals (199,000) came from criminal aliens.

¹² 8 U.S. Code § 1231(a)(1)(A) — Detention and removal of aliens ordered removed. Except as otherwise provided in this section, when an alien is ordered removed, the Attorney General shall remove the alien from the United States within a period of 90 days.

¹³ Alexander Bolton, “[DHS Document: 68,000 Illegal Immigrants With Criminal Convictions Released In 2013](#)”, *The Hill*, March 31, 2014.

¹⁴ Office of the Inspector General, Department of Homeland Security, “[Detention and Removal of Illegal Aliens](#)”, Audit Report OIG-06-33, p. 9, April 2006. States the report: “From FY 2001 through the first half of FY 2005, 91,516 SIC (special interest countries regarding terrorism) and SST (state sponsors of terrorism) aliens were apprehended, of which 45,000 (49 percent) were later released. It is not known exactly how many of these SIC and SST aliens were ultimately issued final orders of removal and were actually removed since such data is not tracked by DRO. However, assuming SIC and SST aliens are being removed at the same rate as other apprehended and released aliens, 85 percent of the SIC and SST aliens released who eventually receive final orders of removal will abscond.”

¹⁵ Bob Hennelly and Stephen Nessen, “[Lone Wolves’ Arrested in Alleged NYC Terror Plot](#)”, WNYC News, May 12, 2011.

¹⁶ Matthew Barakat, “[Man Charged With 3 Counts of Murder In Va. Attacks](#)”, Associated Press, February 11, 2011.

¹⁷ “[South Florida Murder Case Closed Because Suspect Died](#)”, Associated Press, January 11, 2012.

¹⁸ See Department of Justice, “[FY 2014 Congressional Budget Submission](#)”, Administrative Review and Appeals. The submission of the Obama Justice Department uses the same language of the Bush Justice Department: The fight against terrorism remains the top enforcement priority of the Department of Justice and the administration. A key component of this effort is the securing of our nation’s borders. More than ever, protecting America requires a multifaceted strategy that must include the effective coordination of investigative, enforcement, legal and adjudicative resources, both within the department and in concert with other agencies. The application and enforcement of our immigration laws remain a critical element of this national effort.

¹⁹ See Department of Justice, “FY 2008 Congressional Budget Submission”, Administrative Review and Appeals.

²⁰ See Department of Justice, FY 2010 Congressional Budget Submission, [“Overview for Administrative Review and Appeals”](#). See also FY 2009 Congressional Budget Submission, [“Overview for Administrative Review and Appeals”](#); FY 2008 Congressional Budget Submission, “Overview for Administrative Review and Appeals”; FY 2007 Congressional Budget Submission, “Overview for Administrative Review and Appeals”; FY 2006 Congressional Budget Submission, “Overview for Administrative Review and Appeals.”

²¹ See Department of Justice, *FY 2011 Budget and Performance Summary*, [“Overview”](#), p. 3. States the summary: “The department maintains substantial responsibilities with respect to immigration, including enforcement, detention, judicial functions, administrative hearings, and litigation, among others. The department’s Executive Office for Immigration Review (EOIR, the agency that manages the courts) serves as the frontline presence nationwide in immigration matters.”

²² Coyotes are persons who guide foreign nationals across the U.S. border with Mexico. Those guided are referred to in Spanish as *pollos* (chickens).

²³ Steven A. Camarota, [“The Open Door: How Islamic Terrorists Entered and Remained in the United States, 1993-2001”](#), Center for Immigration Studies Background, 2002, p. 59.

²⁴ Between 2002 and 2006, 360,199 out of 713,974 non-detained aliens failed to keep their court dates, a total of 50.4 percent. See [EOIR 2006 Year Book](#), pp. H1-H4, Figures 10-12 and p. O1, Figure 20.

²⁵ See [EOIR 2008 Year Book](#), pp. H1- H4, Figures 10-12, and p. O1, Figure 23. Using the five-year composite in the 2008 year book shows EOIR repeated its earlier finding that 39 percent of aliens failed to appear in court 2005. In fact, 59 percent were no-shows. In 2006, EOIR once more reported 39 percent of aliens made no court appearance. The real number was, again, 59 percent.

²⁶ Margaret E. Martin, Miron L. Straf, and Constance F. Citro, eds., [Principles and Practices for A Federal Statistical Agency](#), 3rd ed., National Academies Press, 2005, p.3.

²⁷ In *Chapters from My Autobiography*, Mark Twain confessed confusion: “Figures often beguile me, particularly when I have the arranging of them myself; in which case the remark attributed to [British Prime Minister Benjamin] Disraeli would often apply with justice and force: There are three kinds of lies: lies, damned lies, and statistics.”