

# Memorandum

November 2012

## The Revolving Door Deportations of Criminal Illegal Immigrants

By Peter A. Schulkin

**Summary:** *The Department of Homeland Security has been publicizing “the most ever” deportations of criminal illegal immigrants. Not publicized is the fact that a significant percentage of these criminals had been deported at least once before. A minimum of 46 percent of criminals deported in 2011 were previously deported and had illegally returned to the United States, which is a felony. The failure to better address this problem does not bode well for our ability to intercept terrorists who try to gain access to our country.*

The Obama administration has a two-pronged approach to enforcing our immigration laws with respect to the estimated total of 10.5 million illegal immigrants currently living in the United States:<sup>1</sup>

1. It is committed to *deporting*: a) illegal immigrants who have committed serious crimes, b) previously deported individuals who return to the United States illegally, and c) illegal immigrants it deems national security threats.
2. It is committed to *not* deporting all other illegal immigrants who have taken up residence in the United States despite the fact that their presence is contrary to existing law.<sup>2</sup> All crimes incidental to living and working illegally in the United States, such as identity theft, using false documentation, and driving without a license or insurance are not considered serious enough to qualify for deportation.<sup>3</sup>

So what are the serious crimes that qualify for deportation? For fiscal year 2011<sup>4</sup> the Office of Immigration Statistics reported that there were 188,382 deportations (“removals”) of criminal illegal immigrants (“aliens”).<sup>5</sup> Of these, 23 percent had committed drug-related offenses (manufacturing, distribution, sale, and possession of illegal drugs). Another 23 percent had committed criminal traffic offenses (primarily driving under the influence).<sup>6</sup> The next largest category, at 20 percent, was immigration offenses such as illegal reentry after deportation. The violent crime categories of assault, robbery, sexual assault, and family offenses totaled 12 percent. The non-violent crime categories of larceny, fraud, and burglary totaled 7 percent. All other categories, including unknown, totaled 15 percent.<sup>7</sup> The deportation of criminal immigrants usually takes place after the completion of any sentences associated with their criminal convictions.

Total deportations for 2011 were reported as 391,953.<sup>8</sup> As noted earlier, 188,382 of the total were identified as criminal aliens. Who were the 203,571 others deported, given that it is administration policy not to deport resident illegal immigrants who have not committed serious violations of our laws? Most of the 203,571 were recent arrivals who were not processed by the Border Patrol, but rather by a different branch of the Department of Homeland Security (DHS), Immigration and Customs Enforcement (ICE), which is charged with immigration

---

*Peter A. Schulkin received his PhD in economics from Harvard and is former Director of Research for the National Association of Real Estate Investor Trusts and former Senior Vice President of a real estate arm of Wells Fargo & Co. He has taught at several universities, including UCLA.*

## Center for Immigration Studies

enforcement in the interior of the country.<sup>9</sup> An ICE press release indicates that most of the 203,571 were “either recent border crossers or repeat immigration violators”.<sup>10</sup> There is some evidence that many border intercepts ordinarily in the Border Patrol’s domain were transferred to ICE in order to inflate the total number of deportations (and to make it seem like the administration is being tougher on illegal immigration than it is). This is because the individuals apprehended and returned by the Border Patrol after entering the country illegally are reported separately and *not* included in the deportation numbers.<sup>11</sup> Additionally, the inflated level of ICE deportations buttresses the administration’s case that there are not enough ICE resources available to pursue “law-abiding” illegal immigrants.<sup>12</sup>

As noted in a *Washington Times* article, “Napolitano: U.S. will set a record for deportations”, DHS has been reporting and publicizing its high levels of deportations of criminal illegal immigrants.<sup>13</sup> However, there is evidence that a significant percentage of these criminal deportees have been deported at least once before.

Out of the 188,382 criminal aliens deported in 2011, at least 86,699, or 46 percent, had been deported earlier and had illegally returned to the United States. We know this because 86,699 is the number of criminal alien deportations resulting from “reinstatement of final removal orders” (“reinstatement” for short) for 2011.<sup>14</sup> A deportation by reinstatement can be initiated when an alien departed under order of removal and subsequently is found to have illegally reentered the United States. It cannot be ascertained from the available data how many of the 86,699 previously deported criminals committed new crimes other than their illegal return, but unless they were detained shortly after reentering the United States, it is likely that they came to the attention of the immigration authorities as a result of new crimes (committed after their illegal reentry) for which they were convicted or arraigned. And there may be other previously deported criminals who are not included in the 46 percent because they were not deported by reinstatement. The 46 percent may also be understated due to reclassification of criminal deportees.<sup>15</sup> Thus, existing data indicate that a *minimum* of 46 percent of the 2011 criminal deportees were previously deported and returned to the United States.

Moreover, the total number of deportees who were deported by reinstatement was 130,006 for 2011 and yet only 86,699 of the reinstatements were categorized as criminals.<sup>16</sup> This means that 43,307 of the 2011 deportees had been deported previously and were not categorized as criminals. Since illegal reentry to the United States by a deportee is a felony under federal law (Title 8 U.S.C. 1326), the 43,307 must have been deported again without being charged with the reentry felony because they were not considered “criminal” deportees in the 2011 data. Also, the 43,307 must have been previously deported with no prior criminal record or their earlier crimes were disregarded in arriving at the total of 188,382 criminal deportees for 2011. If the 43,307 “non-criminals” who were deported by reinstatement are counted as criminals, as they would have been if they had been charged and convicted of illegal reentry in federal court, then the number of criminal deportees would jump to 231,689 and the number of criminals who had been previously deported would rise to 130,006, or 56 percent of the total number of criminal deportees.

The high percentage of repeat deportees is due in part to the ease of reentry to the United States for earlier deportees and the knowledge that if apprehended there is only a small chance that they will serve any prison time for that illegal reentry. Prosecutions for illegal reentry fall into the domain of the U.S. Attorneys’ offices, which would probably argue that too much of their resources would be tied up in such prosecutions if they prosecuted everyone they could for illegal reentry. It is administratively convenient to just deport again without prosecution for reentry because this can be done without a court hearing. Besides, the total number of deportees who were apprehended after they reentered the country is so high — a minimum of 130,006 for 2011, that federal courts and federal prisons would be overburdened if all who could be were prosecuted and sentenced for illegal reentry.

It should be noted that once a deportee completes an illegal reentry to our country, in nearly all cases the deportee will go undetected unless charged with another crime or if the deportee returns to his old neighborhood and is recognized by local law enforcement officials. Thus, the number of deportees who make an illegal reentry is possibly much higher than indicated by the reinstatement data.

## Most Recent Data on Federal Prosecutions for Reentry

Data related to immigration offenders in the federal justice system for fiscal year 2010, the most recent year for which data are available,<sup>17</sup> reveal that only 23,862 individuals were charged with illegal reentry in federal court that year.<sup>18</sup> This highlights the fact that only a small percentage of the 125,034 deported by reinstatement for 2010 (all of whom could be charged with illegal reentry) were actually charged in federal court with the crime of reentry.<sup>19</sup> Nearly all who were charged pled guilty.<sup>20</sup> Most were sentenced to prison with the median sentence being 15 months.<sup>21</sup> For 2010, 29 percent of all those admitted to federal prisons were immigration offenders, primarily those convicted of illegal reentry.<sup>22</sup>

For 2010, another 11,779 cases of illegal reentry were disposed of by a U.S. magistrate judge.<sup>23</sup> These were “the least serious immigration cases”, which were processed quickly and could result in short jail sentences for misdemeanors. The wording in the source suggests that in none of these cases was the offender charged with felony reentry.<sup>24</sup>

Thus, due to various constraints such as the availability of personnel from the U.S. Attorneys’ offices, only a small fraction of illegal immigrants, both criminal and non-criminal, who were identified as having committed illegal reentry were actually prosecuted for illegal reentry and sentenced to prison time for this offense.

The reentry of previously deported criminals is a source of frustration for local law enforcement officials in metropolitan areas with significant illegal immigrant populations. This is reflected in the testimony of Leroy D. Baca, Sheriff of Los Angeles County, which he identified as having the “largest illegal immigrant population in America”.<sup>25</sup> When he testified before Congress in 2006, he estimated that 40 percent of inmates in the custody of the Los Angeles County Sheriff’s Department were illegal immigrants.<sup>26</sup> Of these, he estimated that 70 percent were repeat offenders and that more than half were multiple repeat offenders.<sup>27</sup> Sheriff Baca further mentioned that, in a study of criminals who were incarcerated by the Los Angeles County Sheriff’s Department, it was found that over a five-year period “70 percent of those deported after serving time reentered the country and were rearrested again”.<sup>28</sup>

Sheriff Baca further noted that there were only 200 prosecutions per year for illegal reentry by U.S. Attorneys in Los Angeles County, which he said is a very small number compared to other jurisdictions such as San Diego (about 3,000) and Phoenix (2,000). He attributed this to “a disparate policy in the U.S. Attorney’s office and an understaffing of U.S. Attorneys to go after people who have reentered”.<sup>29</sup>

## Refusal of Some Countries to Take Back Criminal Illegal Immigrants

The revolving door is, in effect, sped up in the case of those criminal illegal immigrants whose native countries do not cooperate with our deportation efforts. While being processed for deportation, illegal immigrants can generally be held in detention in the United States for only six months when not serving jail time for a crime. The six-month limitation is due to two Supreme Court cases in 2001 and 2005.<sup>30</sup> After six-months, nearly all illegal immigrants, including convicted criminals who may have served time for their crimes, must be released onto the streets of America.

ICE reports that, since 2008, about 4,000 illegal immigrants with criminal records have been released into our country each year due to reluctant receiving countries and the Supreme Court limitations on detention.<sup>31</sup>

ICE has listed 23 countries that are very slow to cooperate, if they cooperate at all, with our deportations.<sup>32</sup> The 23 countries include China, India, Cuba, Pakistan, Vietnam, and a number of island nations in the West Indies.<sup>33</sup>

## Possible Government Actions to Slow the Revolving Door

There are several areas in which federal government action, usually in combination with increased federal spending, could slow the revolving door for criminal illegal immigrants.

With regard to countries refusing our deportations of criminal illegal immigrants, there exists proposed legislation to fix this problem.<sup>34</sup> Beyond legislative assistance, increased diplomatic pressure would probably help obtain better results from the uncooperative countries.<sup>35</sup>

With regard to prosecution for the illegal reentry of criminal illegal immigrants who have been previously deported, at present most who are apprehended after they reenter suffer no negative consequences for their reentry. It could only be an added deterrent to illegal reentry if more of the offenders received prison sentences, and perhaps longer sentences. This would require increased federal expenditures for more manpower in the U.S. Attorneys' offices and an increased capacity of the federal prison system. It is difficult to judge to what extent such policy changes would be cost effective and how far to go in this direction.

Given that those who are charged with illegal reentry are more than 96 percent Hispanic and 85 percent Mexican, it is likely that most are reentering via clandestine crossings of our southern border.<sup>36</sup> Thus, anything that we could do to upgrade our border security would be helpful in slowing the revolving door for criminal deportees as well as curtailing illegal immigration and the smuggling of drugs into our country.

The US-VISIT identity verification program, which obtains international visitor fingerprints, has been helpful in preventing illegal reentry at our international airports and other points of legal entry to the United States. However, a recent report by the DHS Office of the Inspector General is critical of some US-VISIT procedures and makes suggestions to increase the effectiveness of the program.<sup>37</sup>

## Conclusion

The extent of our revolving door for deported criminal illegal immigrants points to failures in securing our nation's borders. In addition to resulting in many additional crimes being committed here, these failures do not bode well for our future ability to intercept known and unknown terrorists who try to gain access to our country.

## End Notes

<sup>1</sup> For one 10.5 million estimate, see Steven A. Camarota, “[Immigrants in the United States: A Profile of America’s Foreign-Born Population](#)”, Center for Immigration Studies, June 2012, in section entitled “Illegal Immigrants by State”.

<sup>2</sup> The second prong means that all who came or *will come* to the United States legally as temporary visitors, and all who came or *will come* to the United States illegally (and not stopped in the attempt to enter) are allowed to remain in the United States *indefinitely* as long as they do not commit serious crimes and are not considered national security threats. The Department of Homeland Security, which supervises the government entities charged with enforcing our immigration laws, justifies *not* enforcing the nation’s immigration laws for illegal immigrants living in the United States who do not commit serious crimes by saying it is “prioritizing” enforcement since it “only has resources to remove approximately 400,000 aliens per year, less than 4 percent of the estimated illegal alien population in the United States”. The preceding is from a March 2, 2011 U.S. Immigration and Customs Enforcement [policy memorandum](#) to all ICE employees from ICE Director John Morton. ICE is the part of DHS charged with immigration enforcement in the interior of the country.

<sup>3</sup> For a discussion of the typical crimes of illegal immigrants related to living and working in the United States, see Ronald W. Mortensen, “[Illegal, but Not Undocumented: Identity Theft, Document Fraud, and Illegal Employment](#)”, Center for Immigration Studies, June, 2009.

<sup>4</sup> October 1, 2010, to September 30, 2011. All time-period data referred to in this *Memorandum* are for fiscal years.

<sup>5</sup> John Simanski and Lesley Sapp, “[Immigration Enforcement Actions: 2011](#)”, Department of Homeland Security, Office of Immigration Statistics, September 2012, Table 7, p.6. Since the total of the different crime categories equals the total number of criminal aliens removed, criminals who have committed crimes in more than one category are somehow put into only one category.

<sup>6</sup> U.S. Immigration and Customs Enforcement reported in a [press release](#) dated October 18, 2011, that in 2011 it deported 35,927 aliens who had been convicted of driving under the influence.

<sup>7</sup> Simanski and Sapp include homicides in the category “all other”. For fiscal year 2011, U.S. Immigration and Customs Enforcement reported in an October 18, 2011, [press release](#) that it deported 1,119 aliens who had been convicted of homicide.

<sup>8</sup> *Ibid.*, Table 5, p.5. This number does not include those who were apprehended and returned to their home countries by the Border Patrol. The total apprehended by the Border Patrol for 2011 was reported as 340,252, Table 2, p.4.

<sup>9</sup> The Border Patrol is part of U.S. Customs and Border Protection, which is part of DHS.

<sup>10</sup> U.S. Immigration and Customs Enforcement [press release](#) dated October 18, 2011. The data reported in this press release must have been preliminary as it shows total deportations for fiscal year 2011 at 396,906 and criminal deportations at 216,698, consisting of those who were “convicted of felonies or misdemeanors”. This conflicts with the Simanski and Sapp data, which were not available to the public until about one year later. There must have been some reclassification of criminal deportees to account for the 28,316 decline in criminal deportees while total deportees declined by only 4,953.

# Center for Immigration Studies

<sup>11</sup> Inflation of the deportation numbers is suggested in a confusing statement by President Obama included in Stephen Dinan, [“Napolitano: U.S. will set a record for deportations”](#), *The Washington Times*, October 5, 2011. A quotation from this article follows without paragraphing: “Many in Mr. Obama’s political base want less enforcement that targets those living here already, and cite record deportations as evidence this administration is moving in the wrong direction. Facing that charge, Mr. Obama last week, in a round table with Hispanic reporters said the deportation numbers were artificially high because they include those caught at the border, thanks to enhanced border enforcement. ‘The statistics are actually a little deceptive because what we’ve been doing is, with stronger border enforcement, we’ve been apprehending folks at the borders and sending them back. That is counted as a deportation, even though they may have only been held for a day or 48 hours, sent back — that’s counted as a deportation,’ he [the president] said.” Also see Jessica Vaughan, [“Obama: Deportation Numbers ‘Actually a Little Deceptive’”](#), Center for Immigration Studies blog, October 19, 2011. For commentary related to fiscal year 2010 data manipulation by ICE, see Jessica Vaughan, [“Potemkin ICE”](#), Center for Immigration Studies blog, December 6, 2010.

<sup>12</sup> March 2, 2011 U.S. Immigration and Customs Enforcement [policy memorandum](#) to all ICE employees from ICE Director John Morton.

<sup>13</sup> Stephen Dinan, [“Napolitano: U.S. will set a record for deportations”](#), *The Washington Times*, October 5, 2011. Also see, [“Readout of Secretary Napolitano’s Remarks on Border Security at the University of Texas at El Paso”](#).

<sup>14</sup> As far as the author knows, the 86,699 is an unpublished number. The author obtained it in response to an information request made to the Office of Immigration Statistics. Similarly, it was found that 78,388, or 47 percent of the total criminal deportations of 168,532 for 2010, were ordered as a result of reinstatements. Since the Border Patrol does not separately report their returned aliens as criminals and since these returns are not counted as deportations, none of their numbers are included in the deportation or criminal deportation data in Simanski and Sapp and the data of this report. Consequently, all deportations and criminal deportations reported herein originate with ICE. A deportation by reinstatement can be implemented without a hearing before an immigration court.

<sup>15</sup> See end note 10.

<sup>16</sup> For the 130,006 figure, see Simanski and Sapp, Table 5, p.5.

<sup>17</sup> Mark Motivans, [“Immigration Offenders in the Federal Justice System, 2010”](#), Department of Justice, Bureau of Justice Statistics, July 2012, NCJ 238581.

<sup>18</sup> *Ibid.*, p. 18, Table on p.18 shows 23,862 were prosecuted in federal court for illegal reentry.

<sup>19</sup> Simanski and Sapp, Table 4, p. 5, gives reinstatement totals of 130,006 for 2011 and 125,034 for 2010. Mysteriously, the 2010 number (125,034) from Simanski and Sapp was reported as 130,840 in [“Immigration Enforcement Actions: 2010”](#), Table 2, p.4. As noted in end note 13, in 2010 there were 78,388 criminals deported by reinstatement.

<sup>20</sup> Motivans, p.9.

<sup>21</sup> *Ibid.*, p.6. It is uncertain how many of those convicted in 2010 were actually deported in 2010, since deportation usually occurs on completion of time served for any sentence and the prison sentence carried over into 2011 in some cases.

<sup>22</sup> *Ibid.*, p. 10.

<sup>23</sup> *Ibid.*, p.8 and table on p.18.

# Center for Immigration Studies

<sup>24</sup> *Ibid.*, last two paragraphs on p.8.

<sup>25</sup> U.S. House of Representatives, Committee on Internal Relations, Subcommittee on International Terrorism, [“Border Vulnerabilities and International Terrorism: Hearings before the Subcommittee on International Terrorism”](#), July 5 and 7, 2006, p.154.

<sup>26</sup> *Ibid.*, p. 122.

<sup>27</sup> *Ibid.*, p.156.

<sup>28</sup> *Ibid.*, p. 139.

<sup>29</sup> *Ibid.*

<sup>30</sup> Jon Feere discusses the legal issues involved and proposed new legislation to improve the situation in [“Reining in Zadvydas v. Davis”](#), Center for Immigration Studies, May 2011.

<sup>31</sup> U.S. House of Representatives, Committee on the Judiciary, Subcommittee on Immigration Policy and Enforcement, [“Keep Our Communities Safe Act \(H.R. 1932\): Hearings before the Subcommittee on Immigration Policy and Enforcement”](#), May 24, 2011, testimony of Gary Mead, ICE executive associate director of enforcement and removal operations. Mr. Mead's statement can be found in a May 24, 2011, [DHS press release](#).

<sup>32</sup> *Ibid.*

<sup>33</sup> *Ibid.*

<sup>34</sup> See end note 30.

<sup>35</sup> See end note 30.

<sup>36</sup> Data are from Motivans, p.22.

<sup>37</sup> Department of Homeland Security, Office of Inspector General, [“US-VISIT Faces Challenges in Identifying and Reporting Multiple Biographic Identities \(Redacted\)”](#), OIG-12-111, August 2012, p.6.