



## Budgeting for Immigration Enforcement: A Path to Better Performance

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# **Budgeting for Immigration Enforcement**

## **A Path to Better Performance**

Committee on Estimating Costs of Immigration  
Enforcement in the Department of Justice

Steve Redburn, Peter Reuter, and Malay Majumdar, *Editors*

Committee on Law and Justice

Division of Behavioral and Social Sciences and Education

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## Preface

**B**order enforcement to control illegal immigration has been a prominent U.S. public policy issue for 20 years. Over those two decades there has been a huge increase in the federal resources devoted to deterring, apprehending, and punishing illegal immigrants, predominantly at the border with Mexico. Most of the increased resources in recent years have gone to agencies in the U.S. Department of Homeland Security (DHS). The U.S. Department of Justice (DOJ) is often seen as playing catch-up in handling the numerous detainees apprehended by DHS.

This panel was formed in response to a congressional concern about how well DOJ was preparing its congressional requests for border enforcement resources. Budgeting is difficult under most circumstances, given that it is about projecting needs 18 to 24 months in advance. It is made even more complex when the agency has to anticipate not only the effects of actions by another agency in the future, but also the influence of changing labor market conditions in Mexico and the United States, which are important drivers of the number of immigrants trying to enter this country illegally. This report aims to provide a better understanding of the context in which budget decisions are made for DOJ's immigration enforcement functions and how that shapes the budgeting challenge.

On behalf of the committee, I thank the many individuals and organizations who assisted us in our work and without whom this study could not have been completed. The committee relied heavily on two key staff members: Steve Redburn both provided excellent guidance in our dealing



with agencies and contributed a great deal to drafting and redrafting the text. Malay Majmundar was responsible for much of the original research and legal analysis that was critical to our work, as well as drafting two chapters of the report. We also thank Danielle Johnson for her excellent management of our meetings, mailings, and all other administrative tasks. Alan B. Rhinesmith, a former deputy associate director of the U.S. Office of Management and Budget (OMB) and a former senior policy adviser to the Congressional Oversight Panel of Congress, was commissioned to write a paper on recent experience in budgeting that contributed significantly to Chapter 5. We also thank several other researchers for their commissioned contributions to the writing, data analysis, and case studies: Adam Boessen, in the Department of Criminology, Law, and Society at the University of California, Irvine; Micah Gell-Redman, in the Department of Political Science at the University of California, San Diego; Annie Miller, in the Department of Political Science at the University of Colorado; and Doralina Skidmore and Grant Wille, at the James E. Rodgers College of Law at the University of Arizona. We are grateful for the assistance of Professor Gabriel (Jack) Chin of the University of Arizona College of Law in connection with our field work in the Tucson area.

Others who provided valuable assistance to the committee at various stages of its work include Penny Fleming, Financial Liaison Office, Administrative Office of the U.S. Courts; the late Judge John M. Roll, Chief U.S. District Judge, Tucson, Arizona; Jolene Lauria-Sullens, DOJ Deputy Assistant Attorney General and Controller; Karin O'Leary, Budget Director; Sennen Salapare and others on the budget staff of the DOJ, Justice Management Division; Carl Caulk, U.S. Marshals Service, DOJ; Jim Boden and staff, OMB; Steve Mertens and staff, OMB; Juan Osuna, DOJ; Michael Hoefler and John Simanski, Office of Immigration Statistics, DHS; and John Schultz, Office of the Director, Immigration and Customs Enforcement, DHS.

Many individuals at the National Research Council (NRC) assisted the committee. We thank Kirsten Sampson Snyder, who shepherded the report through the NRC review process, Eugenia Grohman, who edited the draft report, and Yvonne Wise for processing the report through final production.

This report has been reviewed in draft form by individuals chosen for their diverse perspectives and technical expertise, in accordance with procedures approved by the NRC's Report Review Committee. The purpose of this independent review is to provide candid and critical comments that will assist the institution in making its published report as sound as possible and to ensure that the report meets institutional standards for objectivity, evidence, and responsiveness to the study charge. The review comments and draft manuscript remain confidential to protect the

integrity of the deliberative process. We thank the following individuals for their review of this report: Lenni B. Benson, professor of law, New York Law School; Asa Hutchinson, senior partner, The Asa Hutchinson Law Group, PLC, Rogers, Arizona; Daniel A. Nussbaum, Department of Operations Research, Naval Postgraduate School, Monterey, California; Anne Joseph O'Connell, professor of law, Boalt Hall, School of Law, University of California, Berkeley; Rosalie Liccardo Pacula, co-director, RAND Drug Policy Research Center, senior economist, RAND Corporation, and faculty research fellow, National Bureau of Economic Research; Anne Morrison Piehl, Department of Economics and director, Program in Criminal Justice, Rutgers University, and research associate, National Bureau of Economic Research; Irene Rubin, professor emerita, Division of Public Administration and Department of Political Science, Northern Illinois University; and Mary C. Waters, M.E. Zukerman professor of sociology, Department of Sociology, Harvard University.

Although the reviewers listed above have provided many constructive comments and suggestions, they were not asked to endorse the conclusions or recommendations nor did they see the final draft of the report before its release. Emmett Keeler of the RAND Graduate School and the University of California, Los Angeles, and John E. Rolph at the University of Southern California oversaw the review of this report. Appointed by the NRC, they were responsible for making certain that an independent examination of this report was carried out in accordance with institutional procedures and that all review comments were carefully considered. Responsibility for the final content of this report rests entirely with the authoring committee and the institution.

Finally, I thank my colleagues on the committee for their enthusiasm, hard work, and collaborative spirit in writing this report.

Peter Reuter, *Chair*  
Committee on Estimating Costs of  
Immigration Enforcement in the Department of Justice



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## Acronyms

ACAP	Alien Criminal Apprehension Program
ADAA	Anti-Drug Abuse Act
AEDPA	Antiterrorism and Effective Death Penalty Act
AFF	Asset Forfeiture Fund
ATF	Bureau of Alcohol, Tobacco, Firearms, and Explosives
BIA	Board of Immigration Appeals
BOP	Bureau of Prisons
CAP	Criminal Alien Program
CBP	U.S. Customs and Border Protection
DEA	Drug Enforcement Administration
DHS	U.S. Department of Homeland Security
DOJ	U.S. Department of Justice
ENOE	Encuesta Nacional de Ocupacion y Empleo
EOIR	Executive Office for Immigration Review
FBI	Federal Bureau of Investigation
FEDSIM	Federal Systems Integration and Management Center
GAO	U.S. Government Accountability Office (formerly U.S. General Accounting Office)
GDP	gross domestic product
GPRA	Government Performance and Results Act of 1993

GPRAMA	GPRAModernization Act of 2010
ICE	U.S. Immigration and Customs Enforcement
IIRIRA	Illegal Immigration Reform and Immigrant Responsibility Act
INA	Immigration and Nationality Act
INEGI	Instituto Nacional de Estadística y Geografía
INS	Immigration and Naturalization Service
IRCA	Immigration Reform and Control Act of 1986
IRP	Institutional Removal Program
MMFRP	Mexican Migration Field Research Program
MMP	Mexican Migration Project
NAFTA	North American Free Trade Agreement
NSEERS	National Security Entry-Exit Registration System
NTA	Notice to Appear
ODO	Office of Detention Oversight
ODPP	Office of Detention Policy and Planning
OFDT	Office of the Federal Detention Trustee
OFO	Office of Field Operations
OJJDP	Office of Juvenile Justice and Delinquency Prevention
OMB	U.S. Office of Management and Budget
OPA	Office of Pardon Attorney
OTMs	undocumented immigrants other than Mexicans
PTS	Prisoner Tracking System
SAUSA(s)	Special Assistant U.S. Attorney(s)
SAVE	Systematic Alien Verification for Entitlements
SERA	structured expedited removal advisement process
SEVIS	Student and Exchange Visitor Information System
SSA	Social Security Administration
TRAC	Transactional Records Access Clearinghouse
USAO	U.S. Attorney's Office
USCIS	U.S. Citizenship and Immigration Service
USMS	U.S. Marshals Service
US-VISIT	U.S. Visitor and Immigrant Status Indicator Technology
VCCLEA	Violent Crime Control and Law Enforcement Act

## Summary

Immigration enforcement is carried out by a complex legal and administrative system, operating under frequently changing legislative mandates and policy guidance, with authority and funding spread across several agencies in two executive departments and the courts. The U.S. Department of Homeland Security (DHS) is responsible for conducting immigration enforcement both at the border and in the United States; the U.S. Department of Justice (DOJ) is responsible for conducting immigration removal procedures and criminal trials and for prosecuting people charged with immigration-related crimes. In Congress, three separate appropriations subcommittees have jurisdiction for elements of the immigration enforcement system.

The House Appropriations Subcommittee for Commerce, Justice, and Science, concerned that budget requests for immigration enforcement had not been well supported in recent years, directed DOJ to enlist the National Academy of Sciences to recommend improved budgeting for immigration enforcement.

### FINDINGS AND CONCLUSIONS

Apprehensions by DHS and decisions about how apprehended individuals are handled largely drive the demand for DOJ's enforcement activities. These decisions include potential prosecutions by U.S. attorneys and status determinations and removal orders by immigration judges, as well as administrative decisions on the number subject to pretrial deten-



tion, incarceration, or requiring court security and transportation by U.S. marshals. Decisions by DHS to allow fewer apprehended immigrants to be returned to their countries of origin voluntarily without civil or criminal processes have increased the workload of DOJ's parts of the immigration enforcement system, despite a sharp decline in total apprehensions.

The flows of unauthorized entrants across the southern U.S. border have declined since 2000, most likely as a result of changes in U.S. economic conditions and Mexican demography, among other factors. The increased probability of or greater severity of sanctions for those apprehended has not been a major cause of the decline. Budget decision making is hampered by lack of analysis about the actual deterrent or other effects of specific sanctions or other DHS and DOJ actions.

In 2003-2010, only a few sizable adjustments were sought to the original appropriated amounts to DOJ, in spite of significant changes in workload demands. This lack of requests for changes appears to reflect in part the ability of administrators at both national and local levels to adjust their operations to whatever level of resources is available. That is, problems in estimating resources for immigration enforcement are more likely to manifest themselves as changes in operations (and possibly service quality and enforcement effectiveness) than as requests for supplemental appropriations or other spending adjustments.

The accuracy and timeliness of budget estimates—developed up to 2 years in advance of the fiscal year for which appropriations are made—are affected by all the usual limitations of any financial forecast and by some limitations specific to estimating resource needs for immigration enforcement. The complexity of the immigration enforcement system also limits the utility of standard modeling methods for predicting budget demand.

DOJ confronts at least five technical challenges to modeling its resource needs for immigration enforcement that are specific to the immigration enforcement system:

1. the nonlinearities arising from the nature of “queuing” for services at various points in the enforcement process;
2. adaptive behavior by both enforcement agencies and immigrants;
3. jurisdictional complexity and dispersal of decision-making responsibility;
4. uncertainty from sources out of DOJ's control such as DHS policy shifts and changing migration patterns; and
5. the limits of available data on costs and effectiveness.

Therefore, in responding to its charge to “develop a robust approach or model to predict future DOJ costs . . .” and having concluded that it is impractical now or in the foreseeable future to specify and estimate a

statistical model of the enforcement system useful for budgeting, the committee undertook to describe a new approach to budgeting for immigration enforcement, requiring new data and analyses and new institutional relationships and procedures. (See Box 1-1 in Chapter 1 for the complete Statement of Tasks.)

## RECOMMENDATIONS

Despite the inherent limitations, budgeting for immigration enforcement can be improved by changing the method for budgeting. Improvement should be measured not simply by whether estimates included in budget requests prove sufficient to support planned and proposed operations, but also by the contribution to better decisions about the cost-effective use of resources to achieve the stated objectives of immigration enforcement policies.

Both technical and institutional changes in budgeting procedures can improve budget estimates and contribute to better performance. Technically, further development and use of data on individual case histories of those subject to enforcement can shed light on relationships between current and alternative resource uses and system performance. Institutionally, as systems are integrated within DHS and if DHS and DOJ develop procedures for sharing case history information, system flows can be constructed and used for analysis by each department, or the two jointly, of the cost-effectiveness of different methods and strategies for immigration enforcement.

**RECOMMENDATION 1:** As a step toward collaborative planning and budgeting, the Department of Justice and the Department of Homeland Security should establish policy-level procedures to plan and coordinate policy planning and implementation to improve performance of the immigration enforcement system and to generate better information to improve estimates of resource requirements for system components.

**RECOMMENDATION 2:** On the basis of a recurring policy-level review and guidance, the Department of Justice and the Department of Homeland Security, in consultation with staff of the federal courts, should coordinate their preparation of annual budget submissions and estimates for presentation to the Office of Management and Budget.

**RECOMMENDATION 3:** The Department of Justice and the Department of Homeland Security should accelerate their design

of an integrated capacity to track cases and project immigration enforcement activity—including the volume and timing of major flows—based in part on frequently updated analyses that integrate case histories of people encountered as illegal entrants or residents and the progress and disposition of each case.

**RECOMMENDATION 4:** The Office of Management and Budget should direct the Department of Justice and the Department of Homeland Security to coordinate their policy development, planning, and budget development processes to ensure that resource requirements match policies and strategies chosen to achieve specified performance targets and to increase the productivity of resources dedicated to immigration enforcement.

**RECOMMENDATION 5:** The administration should consider using the requirements of the Government Performance and Results Modernization Act of 2010 to establish one or more cross-cutting federal priority objectives related to immigration enforcement and border security; to assign a lead person responsible for these objectives; and to develop strategies, plans, reporting, and budgeting requirements needed to support accomplishment of these objectives.

**RECOMMENDATION 6:** The staff of the congressional appropriations subcommittees with funding responsibility for the Department of Justice, the Department of Homeland Security, and the elements of the courts that are part of the enforcement system should consult with each other regularly as they develop their annual bills.

# 1

## Introduction

This report is about how to improve budgeting for the federal immigration enforcement system, specifically focusing on the parts of that system that are operated and funded by the U.S. Department of Justice (DOJ). Policy makers and others who are interested in how the nation's immigration enforcement system is organized and operates also will find it useful because understanding how to budget for that system requires a full description of how it operates and the environment in which it operates.

### ENFORCEMENT RESPONSIBILITIES: OVERVIEW

Immigration enforcement is carried out by a complex legal and administrative system, operating under frequently changing legislative mandates and policy guidance, with authority and funding spread across several agencies in two executive departments, DOJ and the U.S. Department of Homeland Security (DHS), and the courts.

Since establishment of DHS in 2003, enforcement responsibilities that were previously a responsibility of the Immigration and Naturalization Service in DOJ have been divided. At that time, the main responsibility for identifying and apprehending suspected illegal entrants or residents<sup>1</sup>

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<sup>1</sup>In this report, we use the terms "illegal," "unauthorized," and "undocumented" interchangeably to refer to noncitizens who are in the United States without legal authorization. The Immigration and Nationality Act uses the term "alien" to refer to all noncitizens, but in deference to sensibilities about that term, we follow Stephen Legomsky in minimizing its use (see Legomsky and Rodriguez, 2009).

was given to the new department: those functions were combined with the previously separate customs enforcement and border protection functions in the Customs and Border Protection (CBP) service. At the same time, investigative, detention, and other policing functions were placed in a new Immigration and Customs Enforcement (ICE) unit in DHS. DOJ retained responsibility for civil and criminal proceedings regarding the legal status of people apprehended and possibly subject to removal from the United States.

Five major DOJ components are responsible for enforcement activities:

1. The immigration judges who conduct civil proceedings and a separate appeals process are under the Executive Office for Immigration Review (EOIR).
2. Funding and financial oversight of pretrial detentions is the responsibility of the Office of the Federal Detention Trustee (OFDT).
3. The U.S. Marshals Service (USMS) provides transportation, housing, and court security for criminal proceedings involving illegal entrants; housing and transportation costs are reimbursed through annual agreements with OFDT.
4. The U.S. attorneys, as part of their broader responsibilities, may prosecute illegal immigration cases in their districts through the federal courts.
5. The Bureau of Prisons (BOP) houses those convicted of immigration offenses.

For fiscal 2011, the committee estimates that combined obligations for the immigration enforcement responsibilities of these five components totaled more than \$2 billion.<sup>2</sup> (A more detailed description of the roles and relationships among these five major DOJ components of the federal immigration enforcement system is provided in Chapter 4.)

Because of the scale of immigration activities and the need to respond to varied local conditions, operational units (e.g., individual U.S. attorney's offices and Border Patrol offices) are given substantial autonomy to set priorities, develop strategies, and coordinate with other units and other actors in their local jurisdiction. Both the character of illegal immigration and enforcement priorities have changed frequently and often with little warning. Budgeting for such a system is challenging. And in Congress, responsibility for funding is divided among three appropriations subcommittees in both the House and the Senate.

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<sup>2</sup>This estimate is derived from documentation and personal communication from DOJ's Justice Management Division; see Chapter 5 for detail.

## STUDY BACKGROUND AND COMMITTEE CHARGE

The origins of this study lie in the frustration of congressional appropriators for DOJ with the reliability of information on which they must base their decisions about annual spending amounts authorized and appropriated for immigration enforcement. Unexpected changes in the amounts requested, either after the initial request or after the year's appropriation has been made, require DOJ to either seek additional resources from Congress or to reprogram its funds (shift resources within the department's appropriation), often on short notice and possibly to the detriment of other DOJ missions. If these adjustments are not made, proper execution of the DOJ's enforcement mission may be hampered. Therefore, the appropriations committees wanted to determine whether better methods can be found to annually estimate and justify the resources needed by DOJ, thereby minimizing the need for subsequent adjustments.

The congressional complaint can be found in language of the report accompanying DOJ's fiscal 2009 appropriations that mandated this study (110th Congress; Commerce, Justice, Science, and Related Agencies Appropriations Bill, House Report 110-919, Department of Justice, Title II).

*Immigration workload*—DOJ's budget request fails to articulate, or account for, the increased resource requirements that result from other agencies' activities. This is particularly true with respect to immigration, where the Department has been repeatedly forced to redirect internal resources in order to provide necessary judicial support and basic care for aliens turned over to DOJ by DHS. The practical effect of these redirections has been cuts to non-immigration programs at DOJ. In order to accurately estimate the magnitude of these funding pressures, a methodology is required to create defensible fiscal linkages between DHS activities and DOJ costs. The Department is directed to contract with the National Academy of Sciences to develop, test, and select a budget model that accurately captures these fiscal linkages and leverages them into an estimate of DOJ's immigration-related costs.

The specific tasks in the charge for the committee's work are listed in Box 1-1. As it developed its work plan, the committee refined its understanding of what was required to fully respond to its charge and, as a result, carried out four additional major tasks.

1. First, because we discovered that basic information did not exist, we undertook to describe how the current enforcement system, including the DHS components that affect DOJ, is defined by law and how it actually operates.
2. Second, given this description, we identified limitations in the available data on DOJ immigration enforcement activity levels

- and costs and how those data are and have been used to develop estimates for the President's budget.
3. Third, in part because we could not fully address one element in our charge (see below), we undertook to develop an alternative approach to estimating DOJ resource requirements under varied assumptions about how policy and practice affect apprehension volumes and patterns, in different places and over time. This approach included possible ways that DOJ and DHS could work together to improve their capacity to achieve their stated policy objectives, thereby using budgeted resources in more cost-effective ways.
  4. Fourth, we assessed the potential value of the committee's recommended approach to improving estimates of resource requirements and providing cost-effective use of limited resources.

Consistent with our charge, the committee tried to understand the characteristics of the U.S. immigration enforcement system well enough to judge what can and cannot be done to improve budgeting for DOJ's immigration enforcement resource requirements. On the basis of that understanding, the committee has addressed congressional concerns by offering practical advice on how budget procedures can be improved.

**BOX 1-1**  
**Statement of Tasks**

- Describe the kinds of data that are needed to support a method to estimate increased/decreased budget costs and identify the sources, completeness, reliability, and accessibility of such data at the federal, state, and local levels.
- Develop a baseline of information on federal budgetary costs of current enforcement efforts for DHS and DOJ in selected jurisdictions.
- Develop a robust, flexible approach or model to predict future DOJ costs at different levels of prosecution and incarceration, under varied assumptions about the manner of implementation and the affected population in different places and over time.
- Assess the predictive capacity, reliability, and limitations of such estimation approach or model, identifying principal factors likely to affect its accuracy and utility for budgeting.
- Draw conclusions and make recommendations about the need for new or modified data collection and programs and further improvements in estimating methods to support improved estimates of the budgetary cost effects of changes in immigration enforcement policy and variations in administrative practice.

One element of our charge (the third listed task; see Box 1-1) was to provide a “robust, flexible approach or model to predict future DOJ costs at different levels of prosecution and incarceration, under varied assumptions” about the operation and environment of the immigration enforcement system, to be used for budget estimation. The committee began its work fully intending to carry out this task by specifying and estimating a quantitative statistical model of the federal immigration enforcement system. However, after gaining a solid understanding of how the immigration system operates and after much deliberation, we concluded that building a quantitative model of the system’s behavior that would be useful for budgeting was impractical, both now and in the foreseeable future. The committee’s findings and analysis that underlie this conclusion are detailed in Chapter 6. Instead, in response to that task, the committee provides a “robust model or approach” by outlining a new approach to budgeting for immigration enforcement, requiring new data and analyses and new institutional relationships and procedures. Its proposed budgeting approach and the evidence and reasoning that led to it are presented in Chapter 7.

The committee was also charged with assessing the predictive capacity, reliability, and limitations of its recommended estimation approach or model and noting factors likely to affect its accuracy and utility for budgeting. The committee was able to respond in part to this task. As explained in Chapter 7, the committee concludes that its recommended approach will lead over time to improved budget estimates, but it cannot quantify the expected outcomes. Moreover, the measure of improvement in budgeting approach is not simply whether estimates included in budget requests prove sufficient to support planned and proposed operations although that is always a primary concern of budgeters and appropriators. Budgeting is also a process designed to ensure that resources are provided and allocated in the ways most supportive of the public mission and policy objectives. Therefore, improvement also can be measured by more cost-effective use of resources to achieve the stated objectives of immigration enforcement policies, that is, by improved services quality and better results consistent with the aims of policy, which is better performance. Without itself conducting cost-effectiveness analyses of particular operations (which was outside the committee charge, time, and resources), the committee has tried to identify technical and institutional changes in budgeting procedures likely to improve both budget estimates and the enforcement system’s performance.

The committee’s efforts to understand the complexity of the budgeting challenge posed by both technical and institutional limitations, as well as characteristics of the immigration enforcement system, are presented in Chapters 2-6. Our approach is described below.



## STUDY APPROACH AND REPORT STRUCTURE

The committee began its work by reviewing the history of budgeting and appropriations for the immigration enforcement system. We reviewed the amounts provided to both DHS and DOJ for their functions and discussed the procedures used to develop and justify estimates with many of those involved, including budget officials at DOJ and each of the five major departmental components involved in immigration enforcement.

The committee began by researching possible reasons that initial estimates of resource needs, as measured by the Department of Justice's annual funding requests, were later seen as inadequate and revised. The answer proves to be less than straightforward, as explained in Chapter 2.

To gain insights into the particular challenges faced by DOJ in developing estimates of resources for immigration enforcement, the committee determined that it was necessary to understand and describe in some detail the operation of the entire federal immigration enforcement system. To this end, committee members and staff visited two border sectors: El Paso, Texas, and Tucson/Nogales, Arizona. In each case, they observed operations at the border and elsewhere in the system and talked at length with officials and staff of the federal agencies, as well as a variety of local officials and others, including people in local government and those who work with illegal immigrants during the enforcement process. In addition, committee members and staff reviewed research and the latest statistics on patterns of illegal immigration. The analysis of the dynamics of illegal immigration is presented in Chapter 3.

Building on initial visits, during a second set of visits to the two border sectors mentioned above and one to the San Diego, California, sector, committee members and staff engaged in further in-depth discussions with local officials and others to understand their roles, how they interact with the system, the degree of discretion they are able to exercise, and the resource and other constraints and incentives that affect their administrative decisions and operations. On these visits, they spoke with a broader range of local informants, including local public officials and those who work with and advocate for undocumented immigrants. Combining this information with a review of applicable laws and regulations, documents, and previous research characterizing the enforcement system or elements of it, a narrative and graphic description of the system and its operation was developed. Additional case material was developed by the committee members and staff on how important initiatives that affect demand for both DHS and DOJ resources, such as Operation Streamline and Secure Communities, are being administered in different locations. The aim of the resulting "case studies" is to further illuminate and illustrate concretely the characteristics of the enforcement system (especially in the

places that account for most current activity) that have to be addressed when developing a robust approach to budgeting for that system.

The product of this research and analysis is the description of the enforcement system that is provided in Chapter 4. We believe it to be the first comprehensive, if somewhat stylized, description of how that system operates, including estimates of the various ways those encountered by DHS and identified as illegally in the country have been processed in recent years. Although this description cannot be regarded as definitive, given the continually changing and geographically decentralized nature of the system and limitations of the committee's methods, it is nonetheless revealing and useful for the study purposes.

To understand in greater detail the history of budgeting that gave rise to the congressional complaint and the issues of limited information and institutional coordination that can affect the reliability of budget estimates, the committee and staff interviewed budget officials and documents for the DOJ components of the system, as well as staff of the U.S. Office of Management and Budget (OMB) and of the relevant congressional committees. The product of these interviews is the narrative in Chapter 5, a short history of revised and supplemental appropriations requests and justifications, reprogramming of resources within DOJ, and appropriators' subsequent actions since 2003. This history sheds light on both the technical and institutional problems that budgeters have faced and how they have coped with them. It also suggests ways the process can be improved.

Building on descriptions of the enforcement system and the budget process, the committee then attempted to specify all major sources of difficulty and uncertainty that face those making policy, budget, and operational choices for immigration enforcement. This analysis not only defines the limits of what can be expected of the budget process, but also the best opportunities to improve it. This work is presented in Chapter 6.

Analysis of the budget challenge provides insight into how to improve budget estimates for the enforcement system's components and how to improve planning and analysis of how resources and policies could be adjusted to improve policy outcomes. These analyses are the basis for the committee's conclusions and recommendations in Chapter 7. We have concluded that a new budgeting approach is needed. This new approach needs to recognize the complexity, dynamism, and adaptability of the enforcement system; properly relate the enforcement system's resource requirements to policy objectives and desired outcomes; and allow policy makers and planners in both departments to jointly assess how alternative resource levels and uses may improve resource use and ultimately contribute to better achievement of the aims of policy makers. The paths to improved budgeting recommended by the committee include ways

to improve data and analysis, to produce new information, to make better use of information and analysis for planning and budgeting, and to improve communication and coordination among those who share responsibility for providing resources and setting policies to improve the effectiveness of the U.S. immigration enforcement system.

## 2

# Exploring the Budgeting Problem

**A**s noted in Chapter 1, the committee's first task was to try to determine why annual funding requests from the U.S. Department of Justice (DOJ) have repeatedly turned out to be inadequate. The answer proved to be more complicated than many may suppose.

### BASES FOR BUDGET ESTIMATES

The accuracy and timeliness of budget estimates—originally prepared up to 2 years in advance of the fiscal year for which appropriations are made—are affected by all the usual limitations of any financial forecast and by some limitations specific to estimating resource needs for immigration enforcement.

Any budget estimation is subject to errors caused by imperfect information about the future. Already observable influences on resource requirements may have lagged effects that are hard to estimate. For partly demand-driven services, such as detaining and processing persons apprehended as alleged illegal immigrants, the services demanded may be subject to rapid, unpredictable changes. An example would be an unexpected surge of illegal immigration, leading to more apprehensions of persons identified as illegal entrants, leading to subsequent increases in demand for the services of U.S. marshals and U.S. attorneys, additional hearings before immigration judges, additional pretrial detention facilities for those charged with felonies, and more occupants of federal prisons. The factors determining fluctuations in illegal entry, such as changes in

economic conditions, are not fully understood and cannot be forecast. Other sources of demand may be predictable, such as the introduction of new technology to aid in detection and personal identification, changes in policy that increase the personal costs of apprehension, or new patrolling or other tactics that contribute to a higher number of apprehensions. All can contribute to increased demand for DOJ enforcement-related services.

### Workload Hypothesis

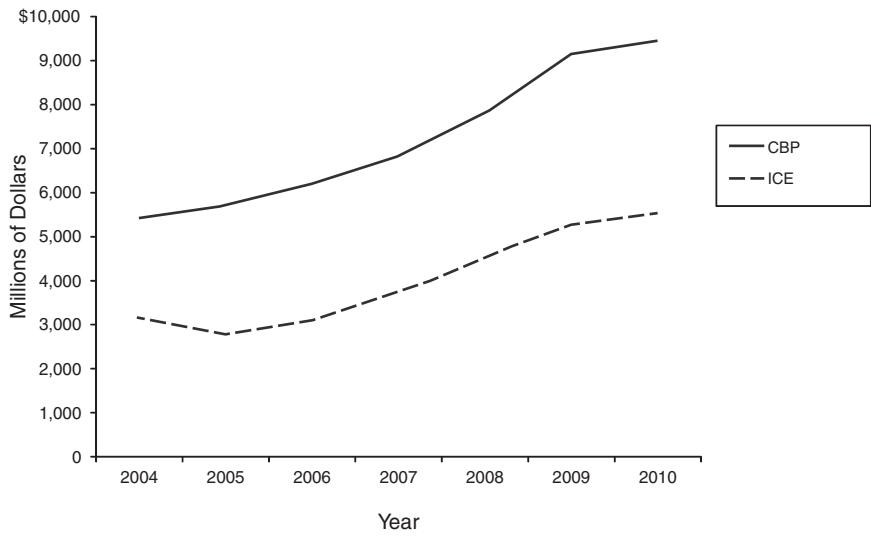
A reasonable hypothesis on which budget estimates might be based is that when resources are increased for efforts to detect and apprehend illegal immigrants—either as they enter the United States or through enforcement efforts such as checks on the status of workers or of people taken into custody for other reasons—the result will be, with some time lag, increased numbers of people who are subject to legal procedures. Those legal procedures range from review of status, to felony prosecution and pretrial detention and transport, to sentencing to federal prison. Higher volumes at the “front end,” when the U.S. Department of Homeland Security (DHS) has responsibility, may lead to higher volumes later at the “back end,” when DOJ has responsibility.

We can examine this hypothesis in light of recent trends. Since its establishment, DHS has received large increases in its immigration enforcement budgets, especially for the Customs and Border Protection (CPB) service; see Figure 2-1. CPB’s functions include not only immigration enforcement, but also other enforcement related to control of the movement of goods and of illicit products including illegal drugs. In addition to the near doubling of the agency’s budget between 2004 and 2010, the then-separate Customs and Border Patrol agencies had received substantial funding increases in the decade prior to DHS’s creation.

Contrary to the committee’s hypothesis, above, during the fiscal 2004-2010 period the budget increases for DHS enforcement were accompanied not by increases in the number of people apprehended as illegal entrants but by a sharp drop in those numbers; see Figure 2-2.<sup>1</sup> This trend might be partly a result of more effective interdiction that in turn resulted in fewer initial or repeated attempts to enter the United States illegally. Or it might reflect changes in economic and social conditions on either side of the border and other factors that led to fewer attempts to enter the country.

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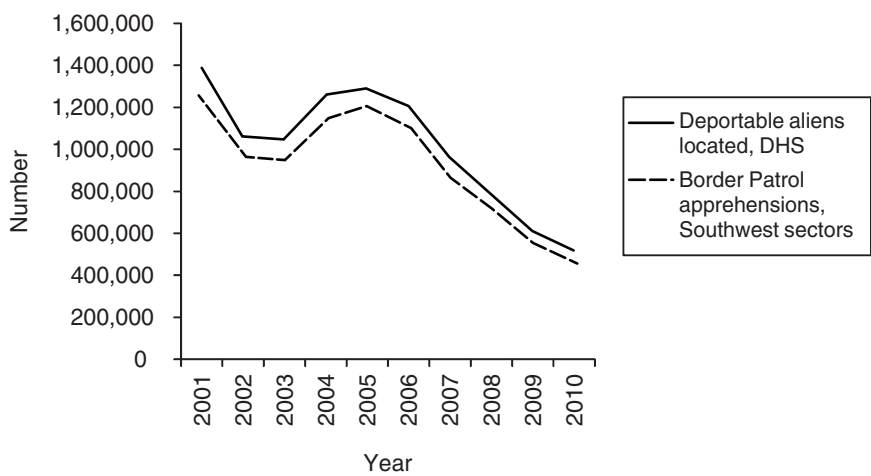
<sup>1</sup>The counts of deportable aliens located do not include significant numbers apprehended at ports of entry by U.S. Customs officials or apprehended by nonfederal law enforcement agencies and subsequently removed by DHS’s Immigration and Customs Enforcement (ICE) agency. The excluded numbers might make an important difference in the time trends shown; this data issue is discussed in Chapter 4.



**FIGURE 2-1** Net budget outlays for Customs and Border Protection and Immigration and Customs Enforcement agencies.

NOTES: CBP = Customs and Border Protection, ICE = Immigration and Customs Enforcement.

SOURCES: Data from U.S. Office of Management and Budget (2005, 2006, 2007, 2008, 2009, 2010, 2011).



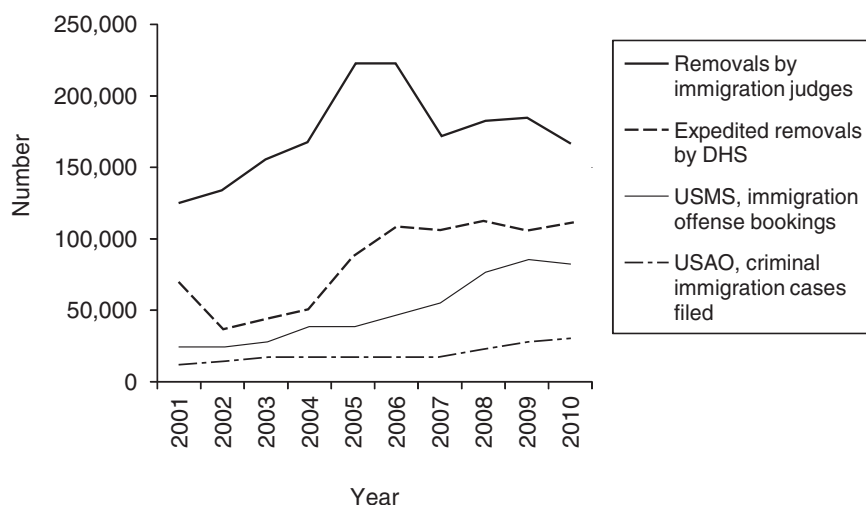
**FIGURE 2-2** Deportable aliens located and Border Patrol apprehensions.

NOTE: DHS = U.S. Department of Homeland Security.

SOURCE: Data from U.S. Department of Homeland Security (2011d).

A drop in apprehensions accompanied by more spending to interdict and arrest illegal residents will naturally cause the cost per apprehension to rise, even if it may increase deterrence. The combination of higher spending and fewer apprehensions after 2000 means that average DHS spending for each deportable alien located increased in just 5 years by more than 300 percent, from less than \$8,000 per apprehension to nearly \$28,000.

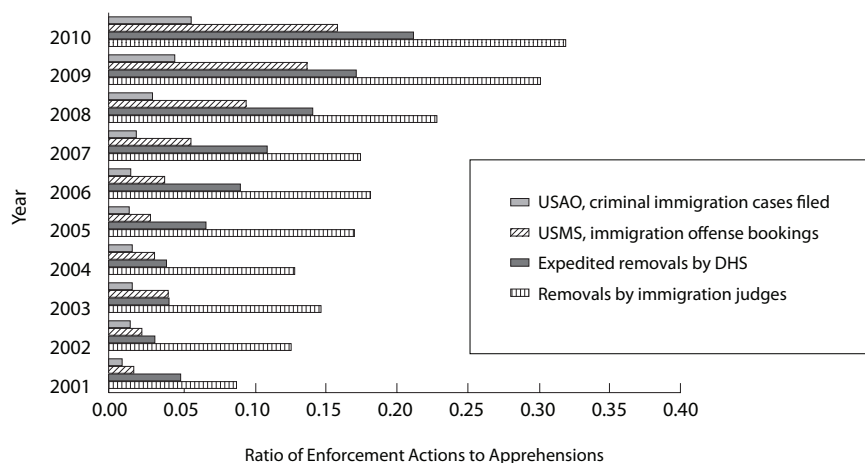
A lower volume of DHS apprehensions would seem to imply less demand for the enforcement-related functions performed by DOJ components such as the Office of Detention Trustee, U.S. marshals, immigration judges, U.S. attorneys, and the Bureau of Prisons. But, while apprehensions were declining, activity levels for other components of the enforcement system were either stable or rising; see Figure 2-3. These trends were largely the result of DHS-initiated emphasis on “enhanced consequences” for people who were apprehended. That is, a higher percentages of those apprehended were either brought before an immigration judge (a civil proceeding that leads in many cases to a removal order) or prosecuted in federal courts for immigration violations, which requires pretrial detention and involves more work for the U.S. marshals, U.S. attorneys, and



**FIGURE 2-3** Trends in immigration enforcement activity.

NOTES: DHS = U.S. Department of Homeland Security, USAO = U.S. Attorney’s Office, USMS = U.S. Marshals Service.

SOURCES: Data from U.S. Department of Homeland Security (2011b); U.S. Department of Justice (2011a, 2011c); and U.S. Department of Justice, Justice Management Division (personal communication).



**FIGURE 2-4** Ratios of enforcement activity to total suspected illegal aliens apprehended.

NOTES: The ratios are not exact measures of the proportions each year because there may be a significant time lag between apprehension and civil or criminal procedures and outcomes. As a result, enforcement activities may be recorded 1 or more years after apprehension. DHS = U.S. Department of Homeland Security, USAO = U.S. Attorney's Office, USMS = U.S. Marshals Service.

SOURCES: Data from U.S. Department of Homeland Security (2011b, 2011d); U.S. Department of Justice (2011a, 2011c); and U.S. Department of Justice, Justice Management Division (personal communication).

possibly the Bureau of Prisons. (See Chapter 4 for a more detailed description of the operation of the immigration enforcement system.)

The sharp rise since 2001 in the proportions of people apprehended as suspected illegal aliens subject to either civil or criminal processes is shown in Figure 2-4. Removals implemented administratively by DHS also have increased as a proportion of apprehensions from 5 percent or less prior to 2005 to more than 20 percent in 2010.<sup>2</sup> In prior years, many more people were simply released at the border without further consequences rather than being subjected to civil or criminal processes.

### Policy Effects

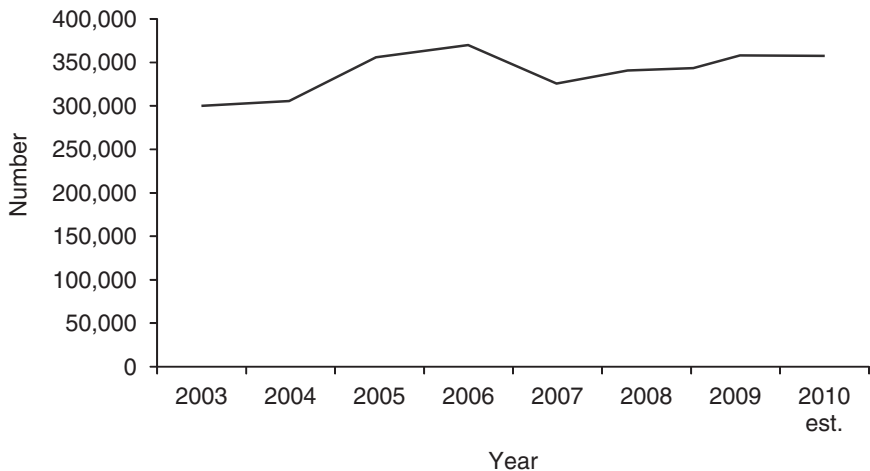
As detailed below, this recent change is part of a broader policy shift intended to increase the personal cost and sanctions for illegal entry,

<sup>2</sup>See note to Figure 2-4 on the possible effects of time lags on enforcements.



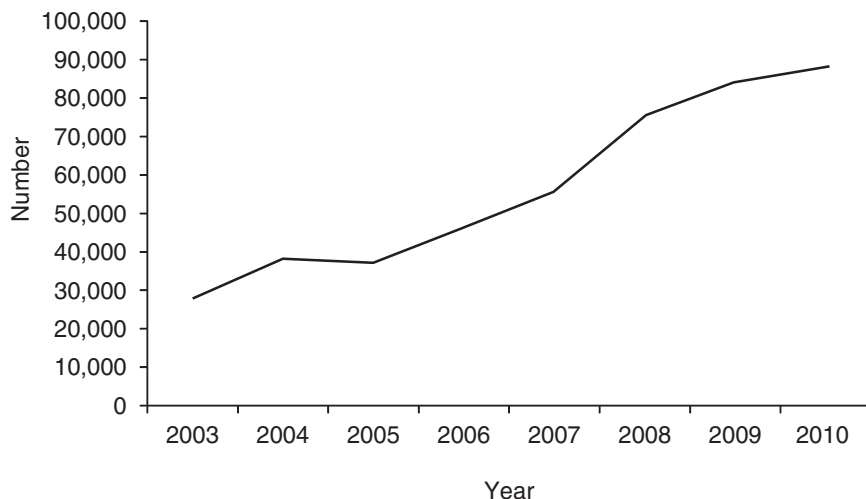
thus helping to deter future attempts. So, the potential demand for DOJ enforcement functions and resulting resource needs have not been a simple function of the number of apprehensions but, rather, a function of changes in policies and practices determining how those apprehended would be processed. So, for example, if policies to deter unauthorized immigration are effective, then the demand for DOJ services and budget resources may decline. Changes in policy and practice affecting DOJ's components of the enforcement system are largely the responsibility of DHS, which may or may not take into account their implications for DOJ's enforcement responsibilities.

The level of activity of the civil process to determine status of people charged as illegally in the United States can be measured by the number of cases completed annually by the immigration courts. This number increased from 2003 to 2010 by about 16 percent; see Figure 2-5. Criminal proceedings can be measured by the numbers of people booked by U.S. marshals for immigration offenses, including simple misdemeanor charges for border crossings and more serious felony charges. These bookings increased by more than 180 percent from 2003 to 2008 and remained at about that level for the following 2 years; see Figure 2-6.



**FIGURE 2-5** Immigration matters completed by the Executive Office for Immigration Review (EOIR).

SOURCES: Data from the U.S. Department of Justice (2011a) and U.S. Department of Justice, Justice Management Division (private communication).



**FIGURE 2-6** Persons booked by the U.S. Marshals Service for immigration offenses.

SOURCE: Data from the U.S. Department of Justice (2011c).

These data demonstrate that overall activity for the DOJ components of the immigration enforcement system—both civil and criminal—increased even as DHS apprehensions fell sharply. The increase in criminal immigration cases was most dramatic, imposing burdens not only on the Office of the Federal Detention Trustee (OFDT), U.S. marshals, and U.S. attorneys, but also on the federal courts, whose budget is separately appropriated.

Budgets for the DOJ components of the enforcement system were increasing over the same period as those for DHS, but not so dramatically. Annual budget authority provided for the Executive Office for Immigration Review (EOIR) increased almost 60 percent, from \$188 million in 2003 to \$298 million in 2010. For the same years, funds available for immigration-related expenses (based on the percentage of immigration-related detentions in the same years) of the OFDT (which also allocates funding for U.S. marshals) increased 250 percent, from \$152 million to \$541 million.

Agencies can respond to rising service demands not only by seeking budget increases, but also by adjusting how they use resources. In fact, we have observed that the administrative system responsible for immigration enforcement has flexibility at many points to adapt its administrative priorities and procedures to handle both surges in service demand and unexpected resource shortfalls. Often these decisions are made locally in

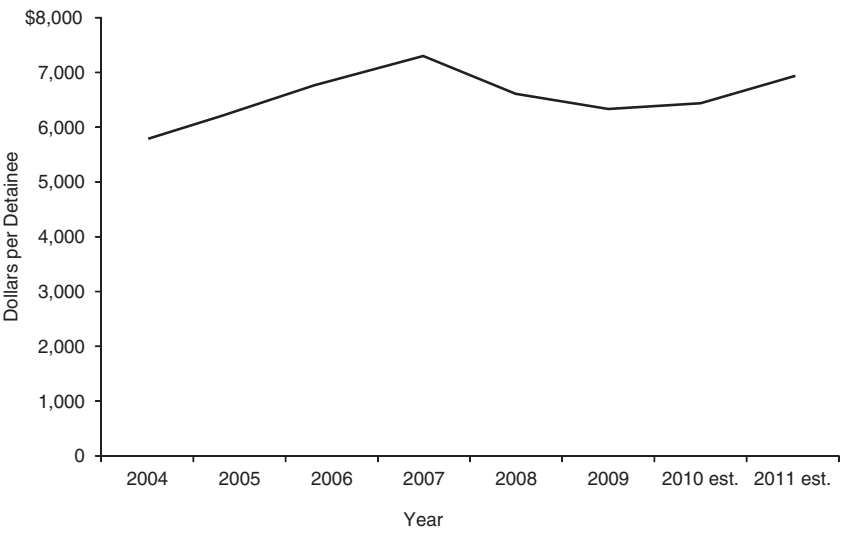
response to local conditions. Although this flexibility and adaptation make the system more resilient in the face of potential resource constraints, over time they complicate the task of estimating the “true” resource requirements to sustain operations. Thus, budget estimators have to predict not only demands generated by external factors and changes in national policies, but also how the components of the system in different regions will respond if resources are higher or lower than the demands seems to require. If they are interested also in performance, they also need to consider and estimate how differences in resources will affect enforcement.

Adjustments can affect cost per unit of service. For example, changes in the kinds of people referred for civil or criminal processing may affect the resources required if more detainees are charged with felony offenses rather than misdemeanor offenses. Such a change can result either from a change in the mix of people apprehended or changes in policies regarding how alleged offenses are handled. Changes in cost may result also from administrative changes, efficiencies arising from advances in technology or practice, or changes in staffing. As a result of these and other influences, the “efficiency” of the system as measured by average processing costs, may change over time.

### Adjusting to Workload Changes

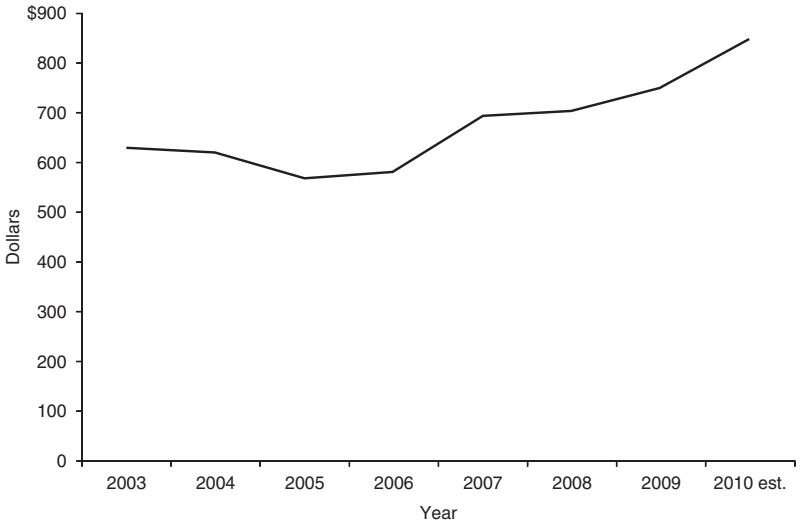
Up to a point, agencies can adjust to increased workload by finding ways to handle more cases with the same resources. In the face of higher demand for pretrial detention and related costs funded by OFDT, the average annual cost of those services remained about the same (adjusting for inflation), rising from less than \$6,000 per detainee in 2004 to about \$6,400 per detainee in 2009; see Figure 2-7. On the civil side, processing costs per case increased as EOIR’s spending per matter handled rose from slightly more than \$600 per matter in 2003 to more than \$800 in 2010; see Figure 2-8.

The adjustment for immigration judges was somewhat different. The ratio of immigration proceedings completed to the number of full-time equivalent immigration judges rose from fewer than 400 per judge in 2000-2003 to more than 600 per judge in 2008 and 2009. Even so, the number of cases pending before the immigration courts rose; see Figure 2-9. Further analysis might show in more detail how these and other components of the enforcement system have adjusted to increased demand by changing their methods of operation, mix of staffing, or use of technology. To appreciate the nature of the budgeting challenge, however, it is enough to recognize that many such adjustments occur.



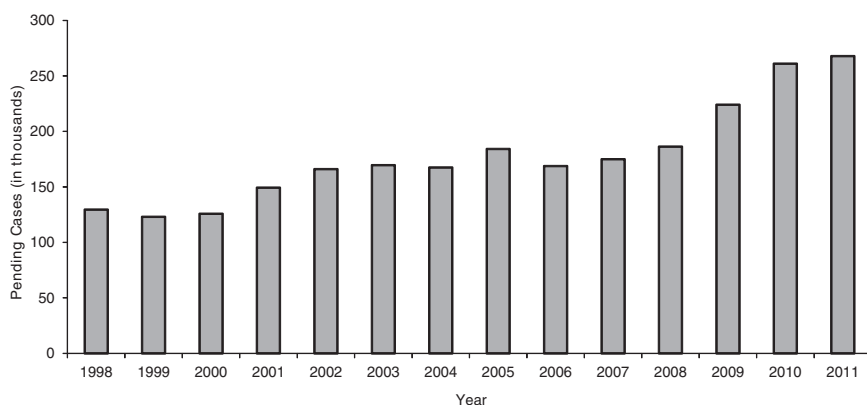
**FIGURE 2-7** Cost per immigration detainee by the Office of the Federal Detention Trustee.

SOURCE: Data from the U.S. Department of Justice, Justice Management Division (personal communication).



**FIGURE 2-8** Budget obligations per immigration matter completed by the Executive Office for Immigration Review.

SOURCE: Data from the U.S. Department of Justice, Justice Management Division (personal communication).



**FIGURE 2-9** Cases pending before immigration courts.

SOURCE: Data for the Executive Office for Immigration Review are from the Transactional Records Access Clearinghouse (TRAC) at Syracuse University, as reported in Kerwin et al. (2011).

### The Purpose of Budgeting

Taking a broader view of the purpose of budgeting, it is important to consider the combined effects of resource levels, policies, and system adjustments on what is accomplished, measured not just in terms of outputs (such as numbers of cases handled) but also in terms of the probable effectiveness of efforts to control illegal immigration. Although it is beyond the scope of this study to determine how best to measure effectiveness, policy makers need different measures of effectiveness both to set funding levels and to provide policy guidance to the operating components of the system about how they can best use their resources.

Properly understood, meeting the budgeting challenge means not merely improving the reliability of budget estimates, but also being able to relate changes in budgeted levels to changes in both outputs and effectiveness under specified policies. To measure effectiveness, policy makers must first specify their objectives in terms that will allow the results of their enforcement efforts to be measured. Currently, agreement and clarity are lacking regarding the goals of immigration enforcement policies or how these should be measured, posing a fundamental obstacle to realistic budgeting (see Alden and Roberts, 2011, pp. 19-26). If there were agreement on the policy goals and the measures to be used to achieve those goals, then budgeters would be in a better position to specify funding levels for the policies and activities needed to achieve a specified level of performance, based on their estimates of the effects that enforcement

programs and strategies would have on the outcomes of greatest interest, such as reducing or deterring illegal entry. Over time, estimates of resource requirements would reflect policy makers' assessments of the results of their policies and programs and their decisions about how resources could be best used to improve the outcomes they seek.

### BUDGET PREPARATION PROCESS

As noted above, budget estimates are made as much as 2 years before the time funds will be needed. They are naturally subject to initial error and may also need later revision on the basis of better or more recent information. Apart from changes in the operating environment and policies, the character of the budget process itself—both technical estimating procedures and its institutional aspects—may affect the accuracy of estimates of resource needs. Moreover, because of larger budget constraints and past decisions about priorities, currently budgeted amounts may not match estimates of resource needs derived from an estimating procedure that does not account for how administrators have adjusted their operations to past funding constraints or may adjust to future funding changes.

Institutional factors complicate budgeting for immigration enforcement. Budget requests are typically developed first by departmental components using a variety of statistical techniques and judgments and then reviewed at three separate levels, first within DOJ and DHS and later at the U.S. Office of Management and Budget (OMB). For the immigration enforcement system, estimates for major components are developed more or less separately and in parallel by the two departments.

The process increased in complexity when DHS was established in 2003. That action created divided responsibility for preparing and reviewing budget estimates between two cabinet agencies, posing a new potential barrier to communicating and to assessing how changes in policy or practice in one part of the enforcement system may affect others. And in Congress, separate appropriations subcommittees now review and authorize DHS and DOJ spending. The division of decision-making responsibility in both the executive and legislative branches makes it more difficult to coordinate budget preparation and review for components of the immigration enforcement system that were once housed together at DOJ (in the Immigration and Naturalization Service [INS]).

It is apparent from the language of the charge to the committee that Congress was concerned in 2008 about the possible effects of greatly increased funding for DHS functions on the demand for DOJ services. As already discussed, this effect is substantial; unfortunately, however, it is not straightforward. Moreover, it seems plausible that the challenge of coordinating budget requests as well as other coordinating challenges

may have been complicated by the split of immigration enforcement functions in 2003 between the two departments. Those charged with preparing budget estimates for DOJ enforcement programs may not have information available to DHS about immigration flows or about deployments, policies, or strategies that DHS is adopting that could change the numbers of those apprehended or the proportion who are arrested and charged rather than simply released or repatriated without formal charges: as discussed above, those DHS deployments, policies, and strategies would generate demand for DOJ-funded enforcement programs. If DHS policies and practices change, this can quickly change demand for DOJ services. If there is little advance notice of the change, this may make it impossible for those preparing or reviewing DOJ budget estimates to take the change into account. Thus, what may appear to be estimating errors may actually result from changes in resource needs that arise after budget or appropriations decisions have been made.

## 3

## Recent Patterns of Unauthorized Immigration

**B**udgeting is an effort to match resources to needs. A specific budgeting activity can only be understood in terms of the public policy issue that it is attempting to address. This chapter provides a brief analysis of the flows of unauthorized immigrants across the U.S. southwestern border,<sup>1</sup> the main path in recent decades for unauthorized migration, and assesses what is known about the determinants of those flows. Given the study's focus, emphasis is given to the role of more intense enforcement and its effects on both the flows unauthorized immigrants and the stock (population) of such immigrants living in the United States.

### STOCKS AND FLOWS OF UNAUTHORIZED IMMIGRANTS

The stock of unauthorized immigrants changes over time principally in response to shifts in the size of two flows: the number in-migrants and the number of outmigrants (either voluntary or forced). The stock is also affected by mortality, but that effect is trivial, largely because unauthorized migrants are mostly young, healthy adults, and few deaths occur (Oristian et al., 2009). Fertility is not a factor because births to undocumented migrants are, by definition, native-born citizens and do not contribute to the stock of unauthorized immigrants. Hence, the size of the stock is overwhelmingly determined by the volume of in- and outmigration flows.

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<sup>1</sup>We ignore the northern border because it has historically seen minimal flows of illegal immigrants: see U.S. Department of Homeland Security (2011d).



When in-migration is greater than outmigration, the stock is increased; when outmigration is greater than in-migration, the stock is reduced.

The number of unauthorized immigrants living in the country also can be affected by changes in the legal status of foreign-born people in the United States. For example, when a person admitted to the United States with a valid temporary visa—such as a tourist, a foreign student, or a temporary worker—violates the terms of admission by staying past the expiration date of the visa or working when not legally allowed to do so, the unauthorized immigrant population increases. Visa overstayers are thought to represent 40-50 percent of the country's stock of unauthorized immigrants (Pew Hispanic Center, 2006).

Conversely, a person's legal status can change in the other direction. For example, an unauthorized immigrant can acquire a green card or some valid temporary status that permits U.S. residency. This change decreases the stock of unauthorized immigrants. Many of the avenues for unauthorized immigrants to obtain legal status have been eliminated in the past 10-15 years (see the discussion of the 1996 laws in Appendix A), but a major reduction in the stock of unauthorized immigrants through legalization did occur following the passage of the Immigration Reform and Control Act of 1986, when 2.6 million formerly unauthorized immigrants obtained permanent resident status.<sup>2</sup>

The distinction between stocks and flows highlights the fact that immigration enforcement involves two distinct but interrelated objectives: limiting the number of unauthorized entries and reducing the size of the resident undocumented population.<sup>3</sup> The number of unauthorized entries depends most on the demand for labor, but it also reflects access to legal avenues for entry. When there are a relatively large number of visas for permanent residence or temporary labor relative to the demand, the number of undocumented entrants decreases. And, conversely, when the supply of visas is constricted relative to the demand for labor, undocumented migration becomes the only alternative for entry, and the volume increases. Under the latter circumstances, the number of unauthorized entries is determined, in theory, by how U.S. labor market conditions and enforcement policies affect the costs and benefits of undocumented migration. Since the mid-1980s, federal immigration enforcement policy has generally sought to reduce the benefits by imposing sanctions on

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<sup>2</sup>Many other people, mostly from South and Central America and Haiti, were legalized by statute in the late 1990s and early 2000s.

<sup>3</sup>As discussed in Chapter 4, the number of undocumented entries is limited through "prevention" and, potentially, "deterrence," while the size of the resident undocumented population is reduced through "removal."

employers who hire unauthorized workers and to increase the costs by dramatically increasing border enforcement.

Undocumented migrants who successfully evade the enforcement system at the border next face the decision to stay or return home. Perhaps paradoxically, increasing the costs of border crossing tends to lower the likelihood of migrants' returning (Massey et al., 2002). This happens because as the costs of entry rise, a migrant must work longer to pay off those up-front costs in order to make the trip economically justifiable. The unintended consequences of border enforcement have been counterbalanced in some ways by increased interior enforcement, away from the border.

Mexicans have been crossing the country's southwestern border to live and work in the United States for at least 150 years. Until recent decades, most of the movement was for relatively short periods of seasonal employment rather than for permanent settlement. By contrast, the past 40 years have seen very large numbers of Mexicans migrate to live in the United States, and a large component of that "settler" migration has been unauthorized. Although census and survey data from the United States provide measures of the Mexican-born population in the United States and of flows of Mexicans who are living in the country on a more or less permanent basis, it is more difficult to accurately assess the volume of temporary, seasonal, or circular migration.<sup>4</sup> These topics are explored further below.

The migration of Central Americans to the United States in large numbers has a shorter history. Moreover, because of the physical distances involved, the movement of Central Americans is less circular or seasonal and involves more longer-term settlement. The numbers of migrants are also much smaller. According to the most recent estimates, about 3 million Central American immigrants lived in the United States in 2010, compared with more than 12 million immigrants from Mexico. However, many Central Americans enter the United States illegally, and their movement generates enforcement actions at the southwestern U.S. border with Mexico and in the U.S. interior.

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<sup>4</sup>It is difficult to measure migration flows from Mexico (and Central America) into the United States. Much of the flow is unauthorized, and migrants may be reluctant to participate in surveys and other data collection activities. Furthermore, because of the transitory nature of some of the movement, it can be difficult to define the point in the migration process at which a migrant is "residing" in the United States. Because of these definitional issues and limited survey coverage, different sources in both the United States and Mexico yield different estimates of migration flows. Although the patterns of change over time have generally been consistent, the sizes of the flows have differed. The estimates presented in this report are based principally on current U.S. surveys and are consistent with measured changes in the numbers of immigrants residing in the United States over the past 20 years.

## DEMOGRAPHIC HISTORY AND PROFILES

Immigration from Mexico accounts for the vast majority of unauthorized entries across the southwestern U.S. border; a far smaller number come from Central America.

### Mexican Immigrants

#### *Early Period: Prior to 1970*

For more than a century until 1970, Mexicans moved relatively freely back and forth across the southwestern U.S. border. The numbers living in the United States increased through 1930, fell substantially during the Great Depression (partly as the result of mass deportations), and then grew again after 1940, reaching a total of 760,000 Mexicans living in the United States at the time of the 1970 census (Massey, Durand, and Malone, 2002). They represented about 8 percent of the immigrants living in the country, and they were only the fourth largest immigrant group—behind Italians, Germans, and Canadians. Virtually all of the Mexican immigrants were in the United States legally. In 1970, Mexico's census count was 48 million, so the Mexicans in the United States represented about 1.4 percent of the combined Mexican population of the two countries (see Instituto Nacional de Estadística y Geografía, 2005).

#### *Unauthorized Immigration: 1970s Through 2007*

The migration situation changed dramatically in the 1970s as Mexican immigrants began to settle in the United States in much larger numbers than previously. This shift reflected, in large part, the changing role of Mexican immigrants in the U.S. labor market, with an increasing proportion being employed in year-round, full-time, nonagricultural jobs. Moreover, most of the new settlers were undocumented. Undocumented migration rose in part because shifts in U.S. policy cut off the avenues for legal entry. In 1965, the United States unilaterally terminated the Bracero Program, a temporary labor program that at its peak allowed some 450,000 Mexican workers annually on temporary visas. In addition, amendments to the Immigration and Nationality Act in that year imposed the first-ever numerical limits on immigration from the Western Hemisphere. By the late 1970s, the temporary work visas had largely disappeared without any corresponding increase in the number of permanent visas available to Mexicans (Massey, Durand, and Pren, 2009).

By 1980, the Mexican-born population of the United States had tripled to 2.2 million, about half of whom were undocumented. The flow of Mexican settlers into the United States continued to increase, and the numbers

in the country continued to grow. The overall pattern was one of accelerated growth during economic booms and deceleration during periods of stagnation (Massey, 2011).

By 2007, there were 12.5 million Mexican immigrants in the United States, representing almost one-third of the country's foreign-born population and more than seven times as large as the immigrant population from the second largest source country—India at 1.7 million (Pew Hispanic Center, 2009). The absolute size of this immigrant group is almost unprecedented. There were more Mexican immigrants living in the United States than the total immigrant population in any other country.<sup>5</sup> With Mexico's 2010 census counting 112.3 million people, the Mexicans in the United States represented almost 10 percent of the combined Mexican population of the two countries. Moreover, if one considers the U.S.-born children of the Mexican immigrants as part of the worldwide Mexican population, then about one-sixth of the combined Mexican population of the two countries was in the United States.

About 7 million of the 12.5 million Mexicans in the United States in 2007 were undocumented immigrants (Passel and Cohn, 2011). The undocumented population had grown at a steady rate through the 1970s and early 1980s, but growth accelerated during the late 1980s and 1990s for a number of reasons, including faster economic growth, stronger migrant networks, and the continued transition of migrants out of seasonal labor and into year-round employment. Tougher border enforcement began to drive up the costs and risks of unauthorized entry, inducing further permanent settlement and driving down the rate of return migration (Massey, Durand, and Malone, 2002). The number and rapid growth of the unauthorized immigrant population is even more remarkable in light of the fact that about 2.7 million undocumented Mexican immigrants attained legal resident status around 1990 as a result of the Immigration Reform and Control Act of 1986 (IRCA) (Baker, 2010).

The unauthorized Mexican immigrants represented a majority (56 percent) of the Mexicans living in the country in 2007. The legal Mexican immigrant population of 5.6 million was by far the largest group of legal immigrants. They represented almost 21 percent of all legal foreign-born residents and were three-and-one-half times the size of the second largest group.

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<sup>5</sup>Russia has about 12 million immigrants, making it the country with the second largest immigrant population in the world (United Nations, 2009).

*Stagnation: 2007 to 2011*

The migration situation changed dramatically after 2007. After increasing steadily for more than three decades, the Mexican-born population stopped growing and remained essentially unchanged for the next 4 years, through early 2011 (the latest available data). The number of legal Mexican-born residents increased slightly to 5.9 million and, for the first time since at least the 1980s, the number of unauthorized Mexicans decreased, dropping from 7 million to 6.5 million in 2010 (Passel and Cohn, 2011). The stagnation appears to be due to a very large drop in the number of new immigrants arriving in the United States and not to increased departures from the country. In fact, the likelihood of return migration by undocumented residents is at a record low (Aguilar et al., 2010; Massey, 2010). Net immigration of Mexican settlers into the country dropped to almost zero as inflows and outflows were in rough balance.

**Central American Immigrants**

There are many parallels between the growth of the Mexican and the Central American immigrant populations, notwithstanding the much longer history of movement between Mexico and the United States. In 1970, there were only about 120,000 Central American immigrants living in the country. The number tripled in the 1970s and then tripled again in the 1980s, so that in 1990 there were 1.1 million Central American immigrants in the country, almost 10 times as many as there had been in 1970.

The rapid population growth continued as the numbers doubled by 2000 and reached almost 3 million in 2007. The share of immigrants who were unauthorized hovered around 50 percent, slightly less than for Mexican immigrants but far exceeding the share unauthorized from any other part of the world (Passel and Cohn, 2009). Central Americans have represented about 12.5 percent of total unauthorized immigrants, which is about 30 percent of the total excluding Mexicans. No single country dominates Central American migration to the United States: the largest numbers are from El Salvador, Guatemala, and Honduras.

The rapid growth of Central Americans in the United States has also recently stagnated. After 2006, growth virtually ceased so that the total number of Central American immigrants in the United States in 2010 (3 million) was the same as it had been in 2006. The drop in the flows of immigrants from Central America was not as dramatic as in the case of Mexico. Overall, Central American migration is significant to the home countries. The population of Central America is slightly more than one-third of Mexico's population, so the 3 million Central American immigrants in the United States represent almost 7 percent of the combined

population of Central America and Central Americans in the United States.

### Annual Flows of Migrants

Because of the unauthorized component of inflows, there is no official count of the annual number of new migrants to the United States. It is possible, however, to derive measures of annual flows from census and survey questions that ask immigrants when they arrived in the country and by combining these data across time with repeated measures of the stock of immigrants.<sup>6</sup>

#### *From Mexico*

The annual flow of Mexican settlers was about 400,000 in the early 1990s, and the vast majority of these new settlers were unauthorized immigrants. The total flow increased to almost 600,000 in 1995 and then dropped slightly for 2 years. After 1997, the flow grew dramatically, reaching more than 700,000 annually in 1999 and 2000. The changing flows were related to conditions in both Mexico and the United States (Pew Hispanic Center, 2009): the rapid economic expansion in the United States in those years and the very favorable employment situation.

After 2000, the annual flow of migrants from Mexico dropped by about 20 percent, to slightly less than 600,000 for 2001-2003. The initial drop is associated with the beginning of a U.S. recession in 2001 and higher unemployment rates. By 2004, the employment situation in the United States had begun to improve, and the flow from Mexico increased to more than 600,000. It then plummeted with the beginning of severe economic recession in the United States. Mexicans were affected by the contraction of the U.S. economy even earlier than the general U.S. population. With the collapse of the housing boom that began in 2006, the construction sector, which had employed large numbers of Mexican laborers, plunged into recession in early 2007 (before the rest of the economy).

In 2007, the flow was only one-half of what it had been 2 years earlier—320,000. The numbers continued to fall, to about 175,000 in 2009. In that year, Border Patrol apprehensions reached a 36-year low (U.S. Department of Homeland Security, 2011d). The flow remained virtually unchanged in 2010 (according to preliminary data), while apprehensions continued to fall. Overall, the flow of migrants from Mexico during the

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<sup>6</sup>Estimates of annual immigrant inflows from Mexico and Central America were prepared by the committee. A fuller description of the estimates, methods, and sources can be found in two forthcoming publications (Passel, 2011, 2012).

past 3 full years (2008-2010) has been well below that for any other time in the post-1990 period. It is worth noting that during the same 3 years, unemployment rates in the United States were the highest they had been in a long time.

#### *From Central America*

The flows of immigrants from Central America are much smaller than those from Mexico, usually one-sixth to one-fourth as large, but the general patterns of increases and decreases are quite similar to the Mexican flows. The gross number of Central Americans coming to the United States peaked in 2000 (at 136,000) and then dropped in 2001-2004 with the post-2000 U.S. economic slowdown. The Central American flow hit a larger peak in 2005, at almost 150,000. Since then, it has decreased steadily, reaching 60,000 in 2010 (Passel, 2012).

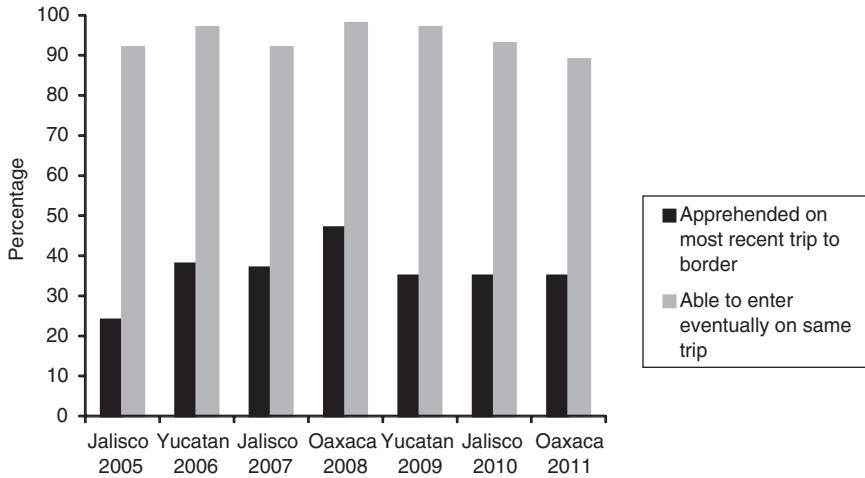
### CROSS-BORDER FLOWS OF MEXICAN MIGRANTS

Border Patrol apprehensions along the southwestern border are believed to be an *indicator* of changes in flows of unauthorized Mexican migrants to the United States. But apprehensions clearly are not an adequate *measure* of flows, because the same individual may be caught more than once or not at all. According to field research, more than 9 out of 10 of those who are apprehended on their first attempt and are then eventually released back to Mexico succeed in entering undetected on the second or third attempt, and more than half of all unauthorized entrants are not apprehended even once (Cornelius et al., 2010; Cornelius, 2011); see Figure 3-1. Moreover, the volume of apprehensions can be affected by a variety of factors other than the number of migrants attempting to cross the border, such as interdiction strategies, staffing levels, and migrant decisions. Nonetheless, the overall pattern of apprehensions in the 1990s and 2000s is similar to that of U.S. data on immigrant flows: both increased during the late 1990s and peaked around 2000, dropped somewhat with the 2001-2002 recession, increased in the middle of the decade, and then plummeted after 2006.

Mexico's labor force survey,<sup>7</sup> redesigned in 2005, measures quarterly movement out of and into Mexico. The longitudinal design captures short-term as well as long-term movement and, thus, would seem to be able to show both permanent flows to live in the United States and circular labor migration flows. The volume of flow from Mexico shown in this survey is

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<sup>7</sup>Encuesta Nacional de Ocupacion y Empleo (ENOE), which is carried out by Instituto Nacional de Estadística y Geografía (INEGI).



**FIGURE 3-1** Apprehension and eventual success rates among unauthorized U.S.-Mexican border crossers from Jalisco, Oaxaca, and Yucatan: 2005-2011.  
 SOURCES: Data from Cornelius (2011), Hicken et al. (2011), Fitzgerald et al. (2012).

substantially larger than that measured in U.S. sources. For example, for the November 2005-November 2006 period, the Mexican survey shows about 1.1 million Mexicans leaving the country; the U.S.-based estimate of the flow, in contrast, is slightly more than 450,000 for the 2006 calendar year. The two numbers are not necessarily incompatible, however, as the former is an estimate of the gross flow from Mexico, including both permanent movers to the United States as well as temporary migrants, while the latter is an estimate of the flow of new permanent movers only. The Mexican data show a *net* movement of about 575,000, which is closer to the U.S. figure but still higher. For 2006, the United States recorded 226,000 legal entries by temporary workers, and they would be captured in the Mexican data. The overall picture presented from the Mexican side is very consistent with the U.S. data. Over the 2005-2010 period, migration to the United States dropped dramatically. Gross flows of new settlers to the United States at the middle of the decade were about 500,000 (or more) per year but had dropped by as much as 80 percent by the end of the decade. These patterns are consistent with an economic explanation for migration to the United States. Specifically, the availability of employment (as indicated by low unemployment rates) draws Mexicans to the U.S. labor market. With much higher unemployment by the end of the decade than earlier, fewer Mexicans are coming to the United States.

Field research conducted among potential migrants in Mexico from



2007 to 2009 reveals that the probability of migrating to the United States during the next 12 months dropped in tandem with the intensification of the economic recession (Massey, Durand, and Pren, 2009; Cornelius et al., 2010; Fitzgerald et al., 2011; Massey, 2011). The research over many years suggests that high wages and persistent labor demand in the United States are the principal drivers of undocumented migration (Jenkins, 1977; Blejer et al., 1978; Bean et al., 1990; Espenshade, 1990; Hanson and Spilembergo, 1999; Davila et al., 2002), with the precise number of migrants being conditioned strongly by the size of the worker cohorts who are entering the Mexican labor market (Hanson and McIntosh, 2009, 2010). Economic conditions in Mexico are significant but secondary in their effects on out-migration (Frisbie, 1975; Jenkins, 1977; Taylor, 1987; Massey and Espinosa, 1997; Davila et al., 2002).

As U.S. economic conditions have deteriorated in the past 5 years, enforcement activities have increased; but rising enforcement does not seem to have played a significant role in lowering the likelihood of undocumented migration. Although Amuedo-Dorantes and Bansak (2012) found that increased time spent patrolling the border (“linewatch” hours) decreased the willingness of experienced migrants to cross again and increased the waiting time before the next attempted crossing, their study focused on intentions rather than behavior.

Studies of behavior generally show that rising enforcement has little deterrent effect on undocumented migration. Davila et al. (2002) found that although increased linewatch hours reduced apprehensions initially, the effect was short-lived as migrants adapted their behavior to avoid capture. In her analysis of Mexican migration, Gathman (2008) found that linewatch hours had no effect on the probability of taking an undocumented trip once other factors were held constant. Massey and Riosmena (2010) similarly found no significant effect of linewatch hours on the likelihood of undocumented migration from several Latin American nations, including Mexico. When they measured the enforcement effort using the probability of apprehension at the border, Massey and Espinosa (1997) found a *positive* effect on the likelihood of initiating undocumented migration. Massey and Riosmena (2010) found that rising deportations from the United States likewise increased the odds of undocumented migration.

Rather than acting as a deterrent, increased enforcement appears to have other effects on migrant behavior: it increases the duration of trips and reduces the likelihood of return migration (Kossoudji, 1992; Massey, Durand, and Malone, 2002; Reyes, 2004; Riosmena, 2004); it shifts border crossing away from areas of concentrated enforcement (Massey, Durand, and Malone, 2002; Orrenius, 2004; Carrion-Flores and Sorenson, 2006; Massey, 2007; Massey, Durand, and Pren, 2009); and it increases the like-

likelihood of crossing with a border smuggler (Singer and Massey, 1998; Massey, Durand, and Malone, 2002; Massey, Durand, and Pren, 2010).

Field data show that the vast majority of would-be unauthorized Mexican migrants—roughly 9 of 10—hire such smugglers to reduce the physical risk of clandestine entry and improve their prospects for evading the Border Patrol. The percentage of migrants using paid guides has steadily risen from the early 1990s, from around 80 percent to nearly 100 percent today (Mexican Migration Project, 2010). Not surprisingly, increased border enforcement also increases the cost of hiring a border smuggler, commonly known as a coyote (Massey, Durand, and Malone, 2002; Gathman, 2008; Massey, Durand, and Pren, 2010).

There are several reasons that the deterrent effects of enforcement are small, as shown in most studies. The most obvious is that rising enforcement at particular locations on the border simply induces migrants to cross elsewhere (Orrenius, 2004). Another reason is that as crossing costs have increased, migrants' ability to finance crossings using their U.S.-based networks has also risen, resulting in little net effect of rising costs on the proclivity to migrate (McKenzie and Rapoport, 2007). A third reason is that, in the long term, the earnings gains from migration far outweigh border crossing costs, which also leads to little deterrent effect.

Finally, personal knowledge of border crossing and experience with worksite enforcement in the United States are positively correlated with intent to migrate, perhaps explaining the counterintuitive finding in some studies of a positive effect of enforcement on undocumented migration. Information about U.S. enforcement activities (both at the border and in the interior) continually flows from U.S.-based migrants to relatives and friends in migrant-sending communities. Having good information does not deter migration, and it may in fact increase the propensity to migrate by raising potential migrants' confidence about their ability to circumvent barriers to illegal entry, find a better coyote, and so on (Fuentes et al., 2007; Parks et al., 2009; Hicken et al., 2010).

Other research has also noted that migration and enforcement are endogenous,<sup>8</sup> making causal effects difficult to discern (Hanson and Spilimbergo, 1999). Field data gathered in 2007-2011 suggest that enforcement is a bigger deterrent of potential migrants when they also face a lack of jobs in the United States. This interactive effect reflects the changed calculus of expected economic returns to migration during a recessionary period. According to survey data, migrants' perceptions of the intensity of border enforcement were essentially stable during this period. During each year of the recession, 9 of 10 potential migrants believed that it was

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<sup>8</sup>Since the Border Patrol responds to increases in illegal crossings by ramping up enforcement, crossings and enforcement often appear to rise together.

not very difficult to evade the Border Patrol if one crossed clandestinely. The perceived difficulty of finding work in the United States, however, jumped sharply. Potential migrants are reluctant to borrow \$3,000-\$5,000 (depending on mode of entry), mostly from their U.S.-based relatives, to pay a coyote if the probability of employment is not high.

Among unauthorized Mexicans who have made it into the United States, increased border and interior enforcement have a strong negative effect on the likelihood of their returning to Mexico. Unauthorized migrants who are working are reluctant to return to Mexico, even for a short visit, because they risk losing their foothold in the U.S. economy—a fear exacerbated by the recession. Moreover, they would have to pay heavily to be smuggled back into the United States. This “caging effect” of tougher enforcement on return migration is one of the most notable consequences of the immigration enforcement build-up since 1993, accounting for a significant portion of the growth in the stock of undocumented Mexicans during this period.

Among migrants from Central America, the data show that enforcement also interacts with the state of the U.S. economy. When employment demand and wages are low, rising enforcement has a deterrent effect on the likelihood of making a first illegal trip to the United States. But when employment and wages are high, the effect is mitigated and works as it does for potential Mexican migrants, with rising enforcement correlated with more trips. The effect of enforcement on return migration is the same as among Mexicans: rising levels of both border and interior enforcement reduce the probability of return migration.

In sum, the recent drop in undocumented migration can be attributed more to the state of the U.S. economy than to stronger enforcement. Key contributing factors include a drop in employment demand and wages in the United States and expanded access to legal immigration (through temporary “H” visas and as a result of sponsorship by naturalized U.S. citizens of their relatives). Although existing studies suggest that rising enforcement has historically only played a small role in deterring migration, it has proven more potent during the economic downturn, perhaps due to migrants’ reduced ability to finance higher border crossing costs by borrowing against future earnings.

## DEMOGRAPHIC TRENDS IN MEXICO

Migration dynamics are also affected by changing demographic conditions in Mexico, particularly the fertility rate, which has declined by

more than 70 percent over the past 50 years.<sup>9</sup> These dramatic shifts in childbearing have sharply reduced the sizes of birth cohorts and lowered the numbers of new entrants into the Mexican labor force some 15 to 20 years later. For example, the average annual increases in the number of 10- to 14-year-old males in the population shrank from about 150,000 per year in the 1970s and 1980s to approximately 20,000 per year over the past 10 years.<sup>10</sup>

Such changes have encouraged some analysts to conclude cautiously that demographic pressures to migrate from Mexico to the United States may have begun to abate as a result of declining Mexican fertility (see, e.g., Binational Study on Migration (Project) [1997]). According to Hanson (2010), the changing size of cohorts entering the Mexican labor force explained about 40 percent of the temporal variation in total migration from Mexico over the past two decades of the 20th century, which suggests that the declining growth cohort size since 2000 has played some role in recent declines. Projections suggest the decline in cohort growth will continue into the future (Hanson and McIntosh, 2009) to help reduce the shortfall long noted between the number of new jobs becoming available each year in Mexico and the number of new potential labor force entrants (and thus the number of potential migrants). Of course, the likelihood of Mexicans' migrating to the United is affected by numerous factors besides population growth. For example, there was a rise in the volume of Mexican migration to the United States during the late 1990s and mid-2000s (Bean and Lowell, 2007; Passel and Cohn, 2011), which were periods when the cohorts of entrants into the Mexican labor force were smaller than in previous decades.

One important factor affecting migration from Mexico is the availability of jobs in Mexico. If young Mexicans think that their job prospects at home are grim and that their employment possibilities in the United States are much better, they are relatively likely to leave. This perspective may be prevalent even if the overall numbers of young Mexicans have become appreciably smaller and even if economic conditions in Mexico have changed sufficiently so that there are enough jobs becoming available for those who seek them.

Unfortunately, from the U.S. perspective, the available evidence about recent employment possibilities in Mexico is not encouraging. From the mid-1950s until 1982, economic growth in Mexico (measured as the annual percentage change in the real gross domestic product [GDP]) averaged about 6.8 percent per year (Weintraub, 2010). From 1983 until

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<sup>9</sup>For example, the Mexican total fertility rate (roughly the average number of children per woman) fell from more than 7.0 in 1965 to 2.4 in 2010 (González, 2008; Cave, 2011).

<sup>10</sup>Calculations carried out by the committee from Mexican census data.

1993, growth tapered off sharply, averaging barely more than 1.0 percent per year, which set the stage for the North American Free Trade Agreement (NAFTA) in 1994. Despite ensuing increases in U.S.-Mexico trade (Martin, 2009), growth in the Mexican economy did not notably increase, averaging only about 2.5 percent annually from 1995 through 2007—not enough to keep pace with population growth (Alba, 2008). In 2008-2009, labor market conditions worsened because of the U.S. recession and spill-over effects of the global financial crisis in Mexico, although economic expansion appears to have resumed in 2010 (Federal Reserve Bank of Dallas, 2011). On balance, despite fertility declines that would seem to have dampened the likelihood of migration, employment prospects in Mexico have stagnated over the past 15 years, and indeed probably have worsened in many of Mexico's high-emigration areas.

### CONCLUSION: IMPLICATIONS FOR BUDGETING

Insights into patterns of migration and the factors that drive them have potential implications for budgeting. For example, the importance of U.S. economic conditions for efforts by potential migrants from Mexico and Central America to enter the United States means that decisions about budgets must consider the possibility of increased migration attempts when the U.S. economy improves. With the resources of many components of the immigration enforcement system already stretched thin (see Chapter 4), it is unclear how the relevant agencies and the federal court system could handle higher migration volumes in the current system of "enforcement with consequences." The evidence that enforcement has been only minimally effective in reducing unauthorized immigration is another challenge to the immigration system and suggests that agencies need to pay attention not only to the level of resources required to maintain current enforcement efforts at the same or higher levels but also to consider whether alternative ways of using enforcement resources— affecting either risk of apprehension or severity of sanctions, or both— would be more effective in achieving the goals of U.S. immigration enforcement policy.

## 4

## The Immigration Enforcement System

This chapter describes the U.S. immigration enforcement system. Although its functions and activities are administered separately by various components of the U.S. Department of Homeland Security (DHS) and the U.S. Department Justice (DOJ), in conjunction with the federal courts, it is best understood as a single system, albeit one that is highly fragmented and disjointed. The committee recognized at the outset that it would need to understand and describe the system as a whole in order to address its charge of improving budgeting for DOJ's immigration enforcement functions.

Our description of U.S. immigration enforcement is intended to capture not only the way the enforcement system was designed to function, but also how it actually operates. In 2010 and 2011, committee members and staff visited the El Paso, Tucson, and San Diego border sectors, where they interviewed (among others) officials from DOJ, DHS, and state and local law enforcement; public defenders; federal district, magistrate, and immigration court judges; and immigration advocates. The information and insights from those interviews are reflected throughout this chapter. Although the resulting portrait is hardly definitive, it identifies the characteristics of the system most salient for budgeting.

The committee also sought to use data provided by two DHS components—the Office of Immigration Statistics and Immigration and Customs Enforcement (ICE) to create individual case histories for apprehended immigrants moving through different components of the immigration enforcement system; unfortunately, the available data did not

allow us to do this. In the course of working with these data, however, we discovered significant differences between the data that were given to the committee and official (and published and commonly used) data on apprehensions. Although this chapter makes extensive use of official data, their limitations (discussed below) should be kept in mind.

## OVERVIEW

The number of would-be migrants who seek entry to the United States (as to other wealthy destination countries), whether on a temporary or permanent basis, far exceeds the number of visas that Congress has authorized. This gap leads inevitably to unauthorized flows and visa overstays and necessitates an effective immigration enforcement system. Immigration enforcement activities, however, require agents not only to prevent and remove unauthorized immigrants, but also to admit and facilitate legal migration flows for tourism, education, business, and other activities in the United States.

The U.S. immigration system is highly complex. It involves scores of legal visa categories, dozens of grounds for removal, and various opportunities for unauthorized immigrants to seek discretionary relief from enforcement actions in administrative and judicial forums. At most points in the enforcement system, moreover, agency personnel and officials can exercise discretion in the use of their authority.

Today's immigration enforcement system reflects important policy innovations, decisions, institutional changes, and political events that have developed over almost one-half century, dating back to the Immigration and Nationality Act of 1965, which ushered in the modern era of immigration law and policy. Appendix A provides a timeline of the post-1965 statutory, policy, and administrative changes that are most relevant to current enforcement challenges and to the budget-relevant interactions between DOJ and (since 2003) DHS. More recently, the aftermath of the events of 9/11 and their interaction with changes in the 1996 immigration law have been of overarching importance in understanding today's immigration policy and operational landscape.

Because the 9/11 hijackers had entered the country with properly issued visas, immigration issues became irrevocably linked with anti-terrorism and national security. The calls for secure borders were widespread and urgent, and immigration enforcement became understood as a front-line measure that had to be strengthened to protect the country. Thus, immigration functions were largely incorporated in the new cabinet agency, DHS, border-related resources grew dramatically, and the interoperability of federal databases—including data collected and managed by immigration agencies—became broadly available for immigra-

tion enforcement purposes, including by state and local law enforcement agencies.

The substantial resources and new policy importance of immigration enforcement followed statutory changes in immigration law that date back to 1988. They culminated in new provisions in the 1996 legislation that significantly (and retroactively) broadened the grounds for removal of noncitizens who had committed crimes. Tougher laws, combined with record-high levels of unauthorized immigration until the beginning of the severe economic recession in 2008, have resulted in immigration enforcement mandates and needs that are far greater today than those historically characteristic of immigration law and policy.

### OPERATIONAL OBJECTIVES

Today's immigration enforcement system is commonly understood as having three primary objectives: prevention, removal, and deterrence.

#### Prevention

The enforcement system seeks, first, to *prevent* the entry of illegal immigrants. Noncitizens seeking admission to the United States are required to apply abroad for an immigrant or nonimmigrant visa or to obtain a waiver through the Visa Waiver Program: prevention begins during this initial, external application process. Visa applicants are required to visit a U.S. consulate, to be interviewed by a visa officer, and to provide biometric data (fingerprints and a digital photograph) that link the applicant to electronic records that are rechecked when the person arrives in the United States. Travelers from the 36 countries that participate in the Visa Waiver Program are typically exempted from prescreening at a U.S. consulate, but they must apply on-line for authorization to enter the United States, and they must obtain a visa if their planned visit to the United States will exceed 90 days.

An additional round of screening occurs at legal ports of entry, where field operations officers from DHS's Customs and Border Protection (CBP) agency review travelers' documents for compliance with regulatory criteria and, in certain cases, recheck travelers' biometric data, which is added to DHS's U.S. Visitor and Immigrant Status Indicator Technology (US-VISIT) system. This review at the port of entry may include more extensive "secondary" inspection of a traveler's eligibility to enter.

CBP's Border Patrol also prevents illegal entries between ports of entry by maintaining a mix of physical barriers (including pedestrian fences and vehicle barriers), surveillance technology (including visual and infrared cameras, motion detectors, underground sensors, aircraft, and



radar), and personnel at and near U.S. borders to detect and apprehend immigrants as they attempt to enter illegally or shortly after they have done so.

### Removal

The second major goal of immigration enforcement is to *remove* unauthorized residents and other deportable noncitizens from the country.<sup>1</sup> According to the DHS *Yearbook of Immigration Statistics* (U.S. Department of Homeland Security, 2011d), in fiscal 2009 and 2010 approximately 90 percent of deportable immigrants apprehended by DHS were located by the CBP Border Patrol, and the rest were located by ICE.<sup>2</sup> Around 97 percent of the deportable immigrants apprehended by the Border Patrol were located in the Southwest sectors of the United States.

Historically, interior enforcement relied primarily on a “task force” model, in which agents from ICE (or its predecessor the Immigration and Naturalization Service [INS]) apprehended suspected unauthorized immigrants through sweeps of agricultural areas and other business establishments suspected of hiring them. In addition to targeting unauthorized workers, ICE began in 2003 to deploy “Fugitive Operations Teams” to locate, arrest, and remove noncitizens who had been charged with immigration violations and then either failed to appear at an immigration hearing after being released on bail or failed to leave the country after being ordered to do so.

More recent efforts to strengthen interior enforcement have emphasized “filters” to screen for potentially removable aliens who come into contact with federal, state, or local criminal justice systems. ICE’s Criminal Alien Program (CAP),<sup>3</sup> which evolved out of two INS programs from

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<sup>1</sup>U.S. immigration law establishes several conditions that make aliens inadmissible and subject to exclusion at a port of entry, including because they are likely to become a public charge or because they have committed certain types of crimes, as well as conditions that make them deportable, including because they are in the country illegally. Several classes of noncitizens may be subject to deportation even though they entered the country legally, including students, temporary workers, and other legal immigrants who violate the terms of their visas and lawful permanent residents who commit “aggravated felonies” or other crimes that make them ineligible for U.S. residence. In 1996, the exclusion and deportation processes were combined into a single “removal” procedure (see discussion below).

<sup>2</sup>CBP apprehensions do not include apprehensions by CBP agents at ports of entry, and deportable aliens located by ICE do not include arrests under the 287(g) program (which deputizes local officials as federal immigration agents; see below) or other arrests of deportable aliens by federal, state, or local law enforcement agencies.

<sup>3</sup>CAP issued 164,296 charging documents as an initial step for formal removal in 2007, 221,085 in 2008, 232,796 in 2009, and 223,217 in 2010 (U.S. Department of Homeland Security, 2008, 2009, 2010b, 2011b).

the 1980s, operates in jails and prisons to check the immigration status of arrestees as they are booked into the facilities and to ensure that removable aliens are transferred to ICE custody for removal when they complete their sentences.<sup>4</sup>

The Bush and Obama Administrations have instituted two additional jail-screening programs: section 287(g) and Secure Communities. Under the section 287(g) program, established in 1996 but primarily implemented since 2005, state and local law enforcement agents receive ICE training and supervision to conduct CAP-type screening in jails. About 10 percent of 287(g) program activities consist of task force enforcement through traffic stops or other community interventions instead of, or in addition to, jail screening.<sup>5</sup> Under the Secure Communities Program, established in 2008 and slated to expand to every state and local jail in the country by 2013, arrestees' fingerprint data are automatically checked against national immigration databases as part of the booking process. Centralized ICE screeners forward information about potentially removable aliens to local ICE officials, who may contact local jails to take custody of and deport arrestees following completion of their jail sentences.<sup>6</sup> In 2011, DHS announced that it did not need the approval of state governors to operate the program in their states (Bennett, 2011).

Between 30 to 50 percent of the unauthorized immigrants in the United States are estimated to be visa overstayers (Pew Hispanic Center, 2006), although ICE has allocated only about 3 percent of its investigative work hours to this category of illegal residents. Approximately 8,100 overstayers were arrested from fiscal 2006 through 2010. In the absence of a comprehensive biometric entry and exit system for identifying overstays, DHS's efforts to identify and report on overstays have been hindered by unreliable data (U.S. Government Accountability Office, 2011). Even if a good entry-exit system were in place, however, the pursuit of individual overstayers may still be an inefficient use of ICE resources in comparison with, for example, denying unauthorized immigrants access to the labor

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<sup>4</sup>A federal statute generally requires undocumented residents to complete their criminal sentences prior to being deported (Schuck, 2011).

<sup>5</sup>As of October 2010, ICE had 287(g) agreements with 69 state and local law enforcement agencies (U.S. Department of Homeland Security, 2010a). Although this number represents a relatively small share of the more than 3,000 law enforcement jurisdictions in the country, it includes a number of large jurisdictions such as the city of Los Angeles and Harris County (Houston), Texas.

<sup>6</sup>In fiscal 2010, 49,432 aliens were removed based on matches made through Secure Communities, up from 14,353 in fiscal 2009. As of June 2011, the Secure Communities identification system covered 74.7 percent of the foreign-born noncitizen population in the United States, an increase from 31 percent in fiscal 2009 (U.S. Department of Homeland Security, 2011c).

market through a mandatory employer verification system (see discussion below).

### Deterrence

The goal of prevention and removal policies is to raise the cost of unauthorized migration and the probability of apprehension at the border or in the U.S. interior, in order to reduce the expected benefits (or increase the expected costs) of such migration. These policies thereby contribute to a third enforcement goal: deterrence of potential illegal entrants and overstays. The immigration system promotes deterrence through a “consequence delivery system” (see, e.g., Fisher, 2011). Rather than simply returning unauthorized immigrants to their countries of origin, this policy seeks to subject immigrants to additional immigration penalties, criminal charges, or even time in jail or an immigrant detention facility. In the case of unauthorized Mexican immigrants, the policy also may include taking them to remote locations in Mexico, making it more costly to make a new attempt at illegal entry. As noted in Chapter 3, although increased border enforcement has successfully increased border crossing costs, the deterrent effects have been small. The consensus appears to be that, as long as migrants can quickly find employment, they are able to finance more costly crossings by borrowing.

Hence, an additional strategy for deterring illegal migration has been to more effectively block unauthorized immigrants’ access to labor markets and federal and state welfare programs, further reducing the benefits of illegal migration. Employers are required to confirm the identity and eligibility of new workers by checking their driver’s licenses and Social Security cards or other documents and (in some cases) checking the information against federal databases of legal workers. ICE agents audit employer records to verify that employers have made a good-faith effort to comply with these requirements: employers who knowingly hire or employ unauthorized immigrants may be subject to civil fines, and employers accused of a pattern or practice of employing unauthorized workers may face criminal charges.

Worksite enforcement, by and large, does not play a major role in apprehensions. Most recently, under guidelines issued to ICE field offices in 2009, agents have been instructed to pursue evidence against the employers of illegal workers before going after the workers (Thompson, 2009). In addition, since 1996, officials who provide federal welfare benefits and certain state benefits must use DHS’s Systematic Alien Verification for Entitlements (SAVE) system to confirm the citizenship or lawful immigration status of recipients and to screen out unauthorized immigrants,

temporary migrants, and recent lawful permanent residents, all of whom are ineligible for most federal welfare benefits.

### ENFORCEMENT PIPELINES

The fundamental question for the immigration enforcement system is how to balance the goals of prevention, removal, and deterrence with procedural guarantees designed to produce fair and accurate decisions and minimize administrative costs. The U.S. system seeks to strike this balance by sorting aliens into one of three main enforcement “pipelines”: see Figure 4-1. These pipelines, in ascending order of seriousness of sanctions, are voluntary return, formal removal, and criminal charges.

1. Under voluntary return, unauthorized immigrants are permitted to return to their country of origin with minimal detention and judicial processing (usually without an appearance before a DOJ immigration judge; see discussion below) and no additional sanctions. The authority to grant voluntary returns rests with DHS and, under certain circumstances, with immigration judges.
2. Formal removal occurs through a removal order issued by an immigration judge (“standard removal”) or by a DHS supervisor (“accelerated removal”). Unauthorized immigrants under formal removal orders are required to leave the country immediately and are subject to additional sanctions related to future entry. Noncitizens may be detained during removal proceedings (at DHS expense<sup>7</sup>), and in accelerated removal proceedings they usually have to be detained while their removal is pending. Under standard removal proceedings, noncitizens may appear before an immigration judge (with cost implications for DOJ) to petition for relief from removal; under accelerated removal noncitizens typically do not appear before a judge. (For this reason, noncitizens in accelerated removal proceedings usually have short detention periods.) The decision to assign immigrants to standard and accelerated removal proceedings is made by DHS.
3. Immigration-related criminal charges may be brought against unauthorized immigrants, requiring an appearance before a magistrate or district court judge. Criminal charges involve prosecution and detention at DOJ expense. The authority to bring criminal charges rests with DOJ, although misdemeanor cases brought through Operation Streamline (see below) are typically initiated

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<sup>7</sup>See Schriro (2009) for a comprehensive review and evaluation of the ICE detention system.

by DHS. DHS attorneys also can be deputized by DOJ to prosecute Operation Streamline cases (in which case the costs of prosecution—but not detention—are borne by DHS). Although felony cases can only be prosecuted by DOJ (at DOJ expense), DHS may still play an important role in initiating these cases.

Immigrants apprehended by local law enforcement officials and through jail screening programs—such as CAP, Secure Communities, and 287(g)—will either be subject to some form of accelerated removal, appear in a standard removal hearing before an immigration judge, or be granted voluntary return. The decision about which approach will be taken depends on the nature of their offense and potential eligibility for legal relief.

The committee had hoped to provide a quantitative analysis of flows through the various pipelines. However, as is discussed in Chapter 6, further work is still needed for the production of complete case histories of unauthorized immigrants apprehended by and moving through the enforcement system.

The following sections describe these pipelines in greater detail: who may be placed in each pipeline; how people enter and move through each pipeline, including the type of process they receive; how many unauthorized immigrants fall into each of these categories; and the impact of each enforcement pipeline on DOJ’s resources. Figure 4-1 shows these pipelines

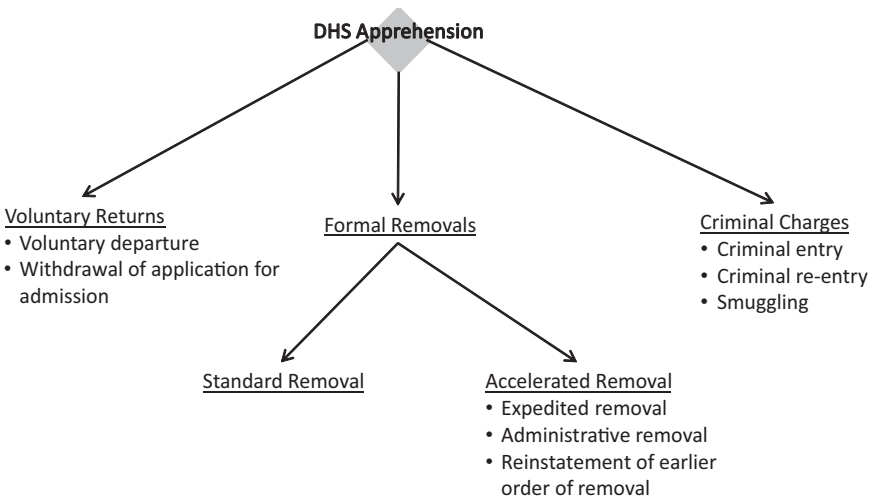


FIGURE 4-1 Enforcement pipelines. See text for discussion.

schematically. Some of the operational information comes from the committee's two site visits and interviews, discussed in Chapter 1.

### Voluntary Returns

Unauthorized immigrants and other potentially removable aliens may be eligible for one of two forms of voluntary return, by withdrawal of their application for admission or by acceptance of voluntary departure. Noncitizens who are denied admission at ports of entry may be granted a withdrawal of application for admission under §235(a)(4) of the Immigration and Nationality Act (INA). Withdrawal of application is granted at the discretion of the DHS sector supervisor: it is usually granted in cases in which a person's visa is invalid, but the person did not knowingly attempt to enter illegally or engage in visa fraud. People who are permitted to withdraw an application for admission in these cases are required to depart immediately, but are not placed in formal removal proceedings or subject to additional penalties.

Most undocumented immigrants who are potentially subject to removal also may be eligible to receive *voluntary departure* (commonly referred to as voluntary return) under §240B(a) of the INA, either in lieu of facing formal removal charges or at the conclusion of a removal proceeding and instead of receiving a final order of removal. In practice, voluntary returns are most frequently granted at the discretion of a CBP supervisor to Mexicans who are apprehended within 100 miles of the U.S.-Mexico border. They are returned to a port of entry under CBP supervision and at CBP expense on the same day as their apprehension.<sup>8</sup> Voluntary return also may be granted by an immigration judge or DHS sector chief during removal proceedings or after an unauthorized immigrant has been issued an order of removal. In these cases, the people who accept voluntary departure must agree to pay their own return expenses, may be required to post a bond to guarantee their exit, and, when they are in their home country, to visit a U.S. consulate to have their return certified.

To be eligible for voluntary return, immigrants must not have serious criminal records, must not be considered a threat to public safety, and must not already be facing immigration charges.<sup>9</sup> In the case of

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<sup>8</sup>Undocumented immigrants other than Mexicans ("OTMs" in ICE jargon) apprehended by CBP at or near the border are usually placed in formal removal proceedings (see below) and then transported by air to their country of origin.

<sup>9</sup>Specific requirements are that the person may not previously have been convicted of an aggravated felony; may not have engaged in terrorist activity or been associated with terrorist groups; may not previously have accepted voluntary departure and failed to depart; and, in the past 10 years, may not have failed to appear at a removal hearing after proper notice of removal charges.

withdrawal of application for admission, the unauthorized immigrants must demonstrate the intent and the means to depart immediately and must establish to the satisfaction of the apprehending agents that the withdrawal of application is in the interest of justice.

Voluntary return is akin to a plea bargain in criminal proceedings. An immigrant who is offered voluntary return may reject the offer in favor of formal removal proceedings and thereby have the opportunity to petition for relief from removal and the right to remain in the United States. For an undocumented immigrant, the main advantages of voluntary return are that it does not trigger pre- and post-order detention associated with formal removal, and it does not carry the added penalty of prohibitions on future immigration.

For DHS, voluntary return offers the most efficient mechanism for returning unauthorized immigrants because those who accept it minimize detention and administrative costs. Because those who accept voluntary return from the interior (i.e., not right along the border) agree to pay their own return expenses, they also minimize transportation costs. DHS must weigh these benefits against the risk that the people who accept voluntary return will not actually leave the country since undocumented immigrants who accept voluntary return are seldom supervised during the period allotted for their departure.<sup>10</sup> And because voluntary return does not carry additional penalties, it also has no additional deterrent effect beyond the cost to the immigrant of being returned.

About 90 percent of all of deportable immigrants located since 1980 have been allowed voluntary return: see Figure 4-2.<sup>11</sup> Although the absolute number of voluntary returns has fallen sharply from 1.2 million in 2004, more than 91 percent of those apprehended during the 2004-2010 period were still granted voluntary return.

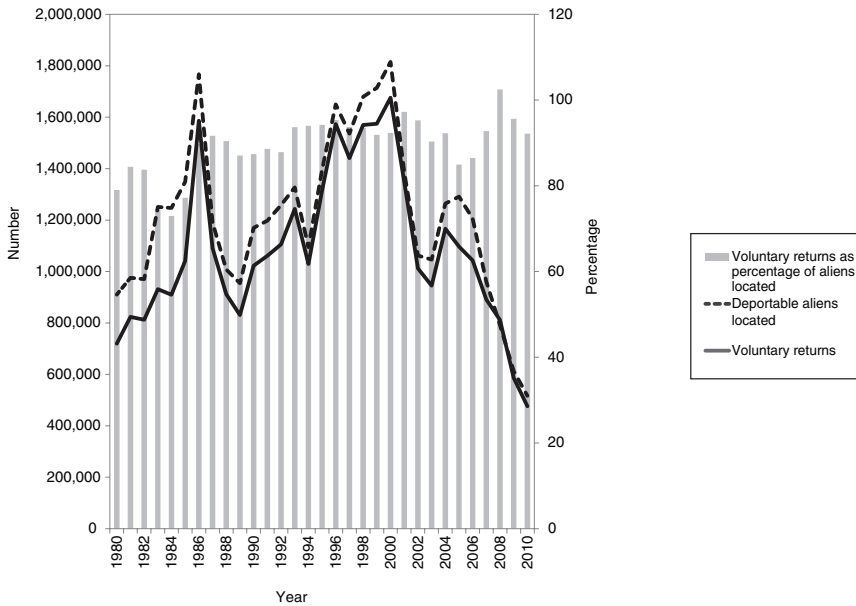
Note that it is possible for voluntary returns in a given year to exceed 100 percent of "aliens located" because DHS's count of "aliens located" excludes aliens apprehended at ports of entry and aliens apprehended by law enforcement agencies other than DHS, and also because of time lags between aliens' apprehensions and their formal removal: see Box 4-1.

The high rates of voluntary return seen in Figure 4-2 appear to be at odds with the increased emphasis placed on formal removal and other forms of enhanced consequences for apprehended aliens (see discussion below). This apparent discrepancy is likely a function, in part, of the recentness of CBP's focus on "consequence delivery" (i.e., the voluntary

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<sup>10</sup>Unauthorized immigrants who accept voluntary return and fail to depart are subject to formal removal and a civil fine of up to \$500 per day, and they are ineligible to be granted voluntary return in the future.

<sup>11</sup>The voluntary return data include withdrawals of application for admission.



**FIGURE 4-2** Deportable aliens located and voluntary returns, 1980-2010.  
 SOURCE: Data from DHS *Yearbook of Immigration Statistics* (U.S. Department of Homeland Security, 2011d).

return rate may very well be lower in fiscal 2010 and fiscal 2011) and of the undercount of apprehensions in DHS data. However, the committee was unable to resolve its questions about the persistently high rate of voluntary returns.

### Formal Removals

Any immigrant who is inadmissible under INA §212(a) or deportable under INA §237(a) is subject to formal removal from the United States<sup>12</sup> (see Figure 4-1). Unauthorized immigrants under a final order of removal are ordered to leave the United States, and (at the discretion of an immigration judge or ICE administrator) may be detained until their departure.

<sup>12</sup>Removable individuals include, among others, aliens who have been convicted of serious crimes, aggravated felonies, drug offenses, or crimes of moral turpitude; aliens who have engaged in terrorist activities or otherwise threaten U.S. security interests; aliens present in the United States without having been legally admitted or paroled; and those with invalid or expired documents or who have violated the terms of their visas.



#### **BOX 4-1** **DHS Data Sources<sup>a</sup>**

Data in the DHS *Yearbook of Immigration Statistics* (*Yearbook*) for “deportable aliens located” are different from those derived from the DHS public-use files provided to the committee by ICE and CBP. The agency public-use files include an exhaustive record of all immigrants entering the DHS enforcement system in each fiscal year, as well as information about their subsequent release, return, or removal, regardless of whether that occurred in the same fiscal year or later.

A review of data from fiscal 2008 through fiscal 2010 shows that the total number of “deportable aliens located” reported in the *Yearbook* is about 500,000 less each year than the total number of potentially removable aliens passing through the DHS enforcement system: see the following table. Nearly one-half of this large difference—about 240,000 each year—is attributable to the omission from the *Yearbook* total of deportable aliens located of those apprehended by CBP Office of Field Operations (OFO). This omission reflects unresolved issues regarding definitions and methods of classification that stem from OFO’s history as the Customs Agency in the Department of the Treasury and the Border Patrol’s history as part of the INS in the DOJ. In addition, the *Yearbook* data exclude a large number of cases encountered by ICE through referrals from non-DHS sources, including other federal agencies and state and local law enforcement agencies.

In sum, the widely used *Yearbook* data on deportable aliens located appear to substantially understate the total number of potentially removable undocumented immigrants who are processed through DHS’ enforcement system each year. Given the nature of the omissions, differences in totals for some individual regions may be even larger.<sup>b</sup>

The differences between data provided to the committee by the DHS component agencies and the data published in the *Yearbook* raise questions about the completeness of information that government agencies and the public use to estimate immigration flows and, therefore, about the ability of congressional and other policy makers to accurately estimate resource requirements for components of the immigration enforcement system.

Certain people must be detained by DHS during removal proceedings or following a final order of removal prior to their departure.<sup>13</sup> Although removal is a civil proceeding and pre- and post-order detention are not explicitly designed as a form of punishment, the threat of detention during and after a removal proceeding may in principle serve as a deterrent to illegal migration. Undocumented immigrants under formal removal orders also face the additional penalty of being ineligible to receive a visa

<sup>13</sup>DHS detention is mandatory for most individuals removable on crime-related grounds, aggravated felons, individuals removable on terrorism grounds, arriving noncitizens subject to expedited removal, and individuals awaiting the execution of final removal orders.

DHS Apprehensions by Component Agencies and According to DHS *Yearbook*

	2008	2009	2010
Border Patrol	718,291	554,996	462,453
Office of Field Operations (OFO)	240,733	239,658	243,648
Immigration and Customs Enforcement (ICE)	360,365	315,223	324,841
Agency Totals (Border Patrol, OFO, and ICE)	1,319,389	1,109,877	1,030,942
DHS <i>Yearbook</i>	791,568	613,003	516,992
Agency Totals Minus <i>Yearbook</i> Figure	527,821	496,874	513,950

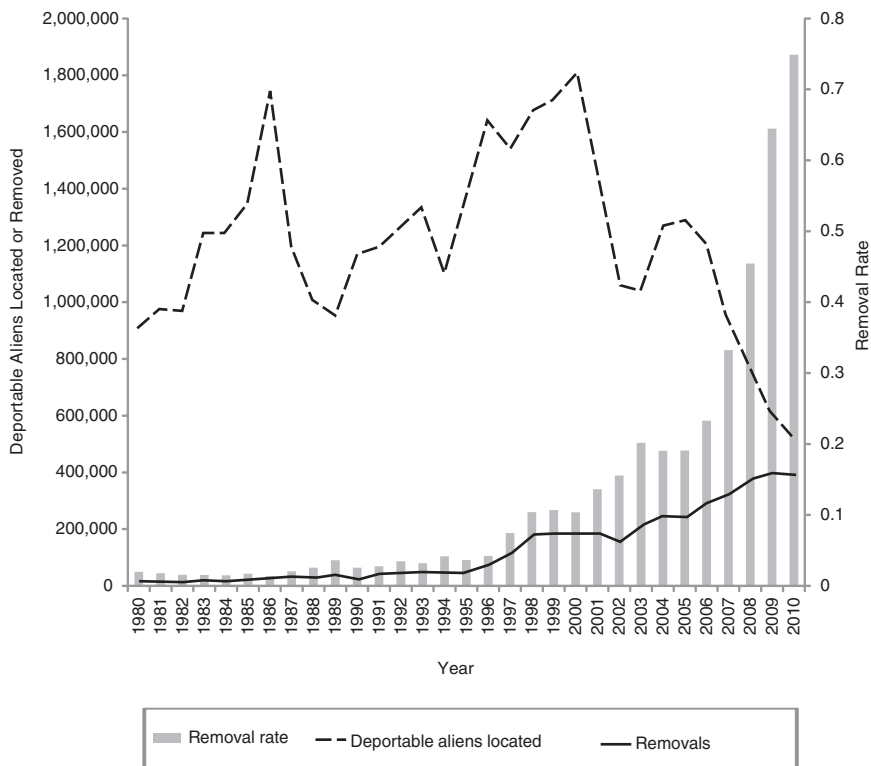
SOURCES: Data from Border Patrol, Office of Field Operations, and Immigration and Customs Enforcement public-use files provided by ICE and DHS Office of Immigration Statistics and DHS *Yearbook* (U.S. Department of Homeland Security [2011d]).

<sup>a</sup>This discussion is informed by conversations with experts at the DHS Office of Immigration Statistics concerning the reasons for the large observed differences between the numbers published in the *Yearbook* and the numbers provided to the committee by DHS for this study.

<sup>b</sup>In addition, all three of the key DHS figures considered here—apprehensions, voluntary returns, and removals—are based on event counts, not case histories, and so the data do not account for individuals who reenter the United States and are counted multiple times.

to return to the United States for 5 years, and they are ineligible for 20 years after a second or subsequent removal (INA §212(a)(9)(A)). Illegal reentry after such an order is a felony (INA §276).

The number of formal removals has increased over the past two decades from an average of 22,000 per year during the 1980s, to 79,000 per year during the 1990s, to 238,000 per year during the 2000s, and it continues to trend sharply upward: see Figure 4-3. As Figure 4-3 shows, removals increased sharply in 1997, the first year under the streamlined enforcement provisions passed in 1996, and they increased again in 2003, the first year after enhanced enforcement efforts implemented in the wake of 9/11. Removals averaged 380,000 per year in fiscal 2008 through fiscal



**FIGURE 4-3** Deportable aliens located and removed, 1980-2010.

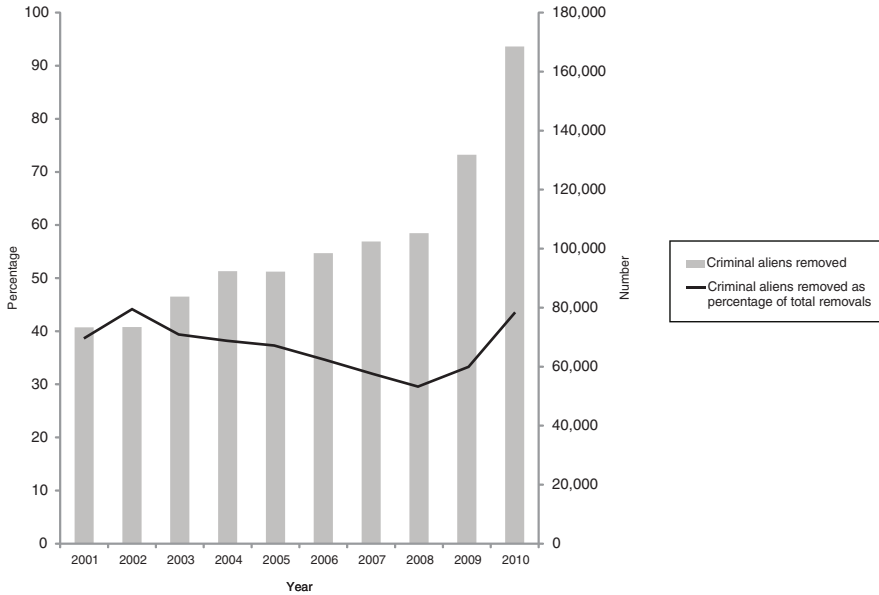
NOTE: Annual data, not seasonally adjusted.

SOURCE: Data from U.S. Department of Homeland Security (2011d).

2010. Removals in fiscal 2011 reached an all-time high of 396,906 (U.S. Immigration and Customs Enforcement, 2011). ICE officials have indicated that the agency’s current resources limit formal removals to about 400,000 per year (Morton, 2011a).

The bars in Figure 4-3 depict the number of removals in a given year as a proportion of the number of deportable aliens located, as reported in the *DHS Yearbook* (U.S. Department of Homeland Security, 2011d). Although this proportion does not precisely measure the percentage of undocumented immigrants apprehended in a given year who are removed, it may be roughly interpreted as DHS’s “removal rate.”<sup>14</sup> Defined this way,

<sup>14</sup>The “removal rate” as defined here is not exactly the percentage of aliens apprehended that is removed, because it is based on the number of deportable aliens located reported



**FIGURE 4-4** Criminal aliens removed, 2001-2010.  
 SOURCE: Data from U.S. Department of Homeland Security (2011d).

the removal rate never exceeded 10 percent prior to 1997: it then rose dramatically—to 20 percent in 2006 and to 75 percent by 2010.

The number of criminal removals has risen significantly over the past decade, more than doubling, from 73,298 in 2001 to 168,532 in 2010. Criminal alien removals as a share of total removals, however, declined from 45 percent in 2001 to 30 percent in 2008, and then rose back to 44 percent in 2010: see Figure 4-4. ICE reports a 55 percent rate for its 2011 removals (U.S. Immigration and Customs Enforcement, 2011).

Given the stakes, undocumented immigrants in formal removal proceedings are entitled to certain due process protections, which constitute the “standard removal process” (see Figure 4-1); certain categories of aliens are subject to an accelerated removal process (i.e., with more limited due process protections). The rest of this section describes various aspects of standard and accelerated removal (see also Legomsky and Rodriguez, 2009).

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in the *Yearbook of Immigration Statistics*—which is itself a subset of all potentially removable aliens apprehended (see Box 4-1). In addition, the “removal rate” does not account for the time lag between an alien’s apprehension and his or her removal, which causes some aliens to be removed in different fiscal years from the one in which they are apprehended.

*Standard Removal Process*

Under the standard removal process, DHS initiates a removal hearing before an immigration judge by serving a person with a Notice to Appear (NTA) and filing the NTA with the immigration court. At the subsequent hearings, attorneys from DHS represent the U.S. government; the immigrants, at their own expense, may also be represented by counsel. The work of more than 235 immigration judges in 59 immigration courts around the country is coordinated by the Executive Office for Immigration Review (EOIR) in DOJ.

If the immigrant is found to be deportable by the immigration judge, he or she may apply for one or more forms of affirmative relief, which include voluntary return, cancellation of removal, adjustment of status, and asylum. The immigration judge's written decision must contain findings as to deportability, and it must also include a formal order that either directs removal to a specified country, terminates proceedings, or grants voluntary return. If the immigration judge finds that the immigrant is removable and does not grant any affirmative relief, the immigrant may appeal to the Board of Immigration Appeals (BIA), which may conduct a *de novo* review of legal and discretionary determinations but is prohibited from reversing an immigration judge's findings of fact unless they are "clearly erroneous." If the BIA affirms the removal order, the immigrant may appeal the order to the appropriate federal circuit court of appeals. At each stage of this process, an immigrant who is not subject to mandatory detention may be ordered by an immigration judge to be detained by DHS while the removal proceeding is pending.<sup>15</sup>

*Accelerated Removal*

Congress has sought to reduce the costs and delays of formal removal by limiting due process protections in certain categories of cases in which removability is relatively clear. It has established three types of accelerated removal procedures: expedited removal, administrative removal, and reinstatement of an earlier removal order (see Figure 4-1). Aliens falling into one of these three categories face mandatory detention (at DHS expense) throughout the removal process and enjoy very limited

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<sup>15</sup>ICE estimates that about 85 percent of removable aliens released on bond (i.e., not held in detention) who have been issued a final order of removal abscond, meaning that they fail to appear at a subsequent removal hearing or to comply with the order of removal (U.S. Department of Homeland Security, 2006). The number of absconders has been estimated at 623,292 in August 2006 and 560,000 at the end of fiscal 2008 (U.S. Department of Homeland Security, 2007).

opportunities to petition for relief.<sup>16</sup> Even if they are placed in standard removal proceedings, immigration judges have limited discretion to offer relief from removal to immigrants in these categories (particularly aggravated felons).

**Expedited Removal.** Newly arriving aliens without valid travel documents may be subject to expedited removal under INA §235(b)(1). This DHS procedure is conducted primarily at the border.<sup>17</sup> Expedited removals are an important enforcement tool. (In the Tucson sector, more than 50 percent of removal proceedings initiated by the Border Patrol are expedited removals.) Without them, immigration court dockets would be even more backlogged than they are now. Expedited removal proceedings sometimes have formal trappings that are intended to emphasize the gravity and consequences of the removal.<sup>18</sup>

**Administrative Removal.** Aliens who are not legal permanent residents and who have been convicted of a criminal offense identified by the INA as an aggravated felony (§101(a)(43))<sup>19</sup> are subject to administrative

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<sup>16</sup>First, aliens may rebut the grounds for removal by making a factual claim that they do not meet the specific eligibility requirements described above (e.g., that they have been in the country longer than 14 days, that they are a legal permanent resident, that they have not been convicted of an aggravated felony, or that they are not subject to a previous removal order). Such claims are heard by the appropriate DHS official, who may either affirm the removal order, transfer the alien into the standard formal removal process before an immigration judge, or release the person if the official finds no grounds for removal. Second, aliens may claim political asylum if they fear persecution or torture in the country of origin. In such cases, a DHS asylum officer interviews the immigrant to determine whether the person has a “credible fear” of persecution or torture, in which case the immigrant is placed in a standard formal removal proceeding where he or she can seek political asylum before an immigration judge. A finding by a DHS asylum officer that “credible fear” does not exist is final.

<sup>17</sup>Under DHS regulations, an immigration agent at a port of entry may issue an expedited removal order to an alien lacking valid travel documents who is apprehended there; to an alien from a country other than Mexico who is encountered within 100 air miles of the U.S. international land border within 14 days of an illegal entry (i.e., one who cannot prove that he or she has been continuously present in the United States for longer than 14 days); and to an alien from a country other than Mexico who arrived illegally by sea and has been in the United States for less than 2 years (67 FR 68924, 69 FR 48877).

<sup>18</sup>In Tucson, for example, the Border Patrol has created a structured expedited removal advisement (SERA) process. Apprehended immigrants are shown a video in which a CBP agent wearing a suit and tie and sitting on a judge’s stand explains what is happening to them. The immigrants then stand up, and a field operations agent reading from a script asks them individually if they have understood exactly what they were told. Each immigrant then puts his or her fingerprint on the appropriate document.

<sup>19</sup>“Aggravated felonies” are a class of criminal violations, created by the INA (§101(a)(43)) in 1988 and frequently expanded since then, which includes a long and sometimes ambiguous list of criminal offenses, some of which may not constitute a felony under state or federal

removal under INA §238(b) after they have served their sentences. These proceedings are normally conducted by DHS on paper, without an interview or evidentiary hearing.

***Reinstatement of Earlier Order of Removal.*** Aliens who reenter the United States after having been removed or having departed voluntarily under an order of removal are subject to immediate removal under INA §241(a)(5); the prior removal order is reinstated by DHS from its original date and is not subject to reopening or review.

### **Immigration-Related Criminal Charges**

Certain immigration-related offenses carry criminal penalties under federal law (see Figure 4-1). Immigrants apprehended at or between ports of entry may be charged with illegal entry, a misdemeanor punishable with up to 6 months in federal prison (8 USC §1325). For second or subsequent violations, including reentry after a formal removal order, the immigrants may be charged with illegal reentry, a felony punishable by up to 2 years in federal prison (8 USC §1326); unauthorized immigrants with prior criminal records are more likely to be charged with felonies (Administrative Office of the United States Courts, 2008). Unauthorized immigrants also may be subject to felony charges associated with smuggling, visa fraud, and other forms of document and identity fraud.

The U.S. Marshals Service (USMS) in DOJ is responsible for the mandatory detention of immigrants subject to criminal immigration charges; USMS does not have facilities of its own, so it leases beds in existing facilities. Unauthorized immigrants subject to criminal prosecution are automatically placed in formal removal proceedings<sup>20</sup> at the conclusion of their criminal sentences,<sup>21</sup> and they are then transferred from USMS detention to DHS detention and remain in DHS detention until their deportation.

The increased penalties associated with immigration-related crimi-

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law. Aliens who have been convicted of an aggravated felony are subject to administrative removal regardless of when the offense was committed and the sentence that was imposed. They also are subject to a longer bar on future admission to the United States (20 years), and in most cases, they are permanently ineligible for U.S. citizenship.

<sup>20</sup>Depending on their individual circumstances and potential eligibility for discretionary relief, some immigrants may end up in a standard removal proceeding before an immigration judge. The committee was told in El Paso that the completion of much of the case processing work during the criminal prosecution phase can create cost savings for immigration courts.

<sup>21</sup>Generally, convicted criminal aliens must complete their criminal sentences prior to being deported (INA §241(a)(4)(A)).

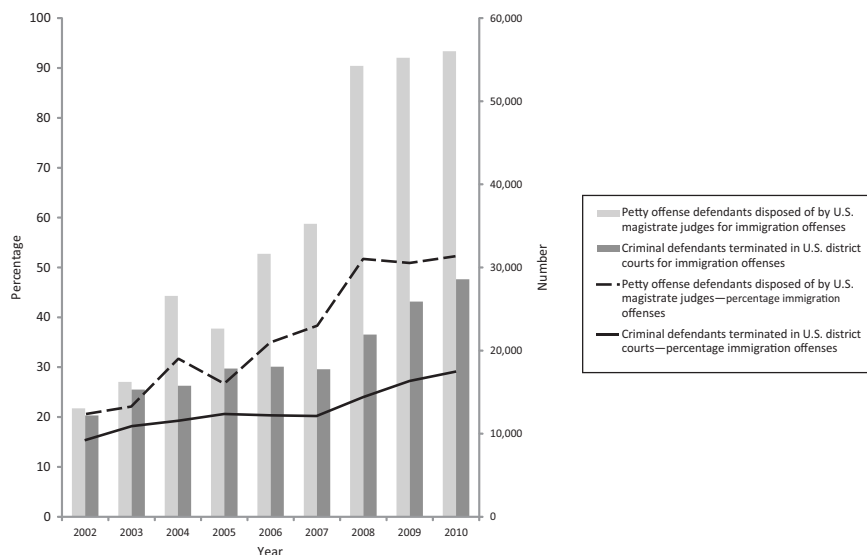
nal charges also bring additional due process protections: unauthorized immigrants who are facing criminal charges generally have the same legal protections in the criminal court system as U.S. citizens in other criminal proceedings, although in most Southwest border districts immigrants who are facing immigration-related criminal charges face accelerated criminal processing through Operation Streamline (see below). Misdemeanor cases may be heard and disposed of by federal magistrate judges. Felony cases, in which defendants are entitled to appointed counsel, must be tried by federal district court judges, though they may be assisted by magistrate judges, who conduct various pretrial proceedings. Immigrants who are convicted of federal criminal offenses can appeal their convictions to a circuit court of appeals and then, possibly, to the U.S. Supreme Court.

Because of the costs of detention and lawyers, limited prison space, and the emphasis on returning immigrants to their home countries, a lower priority has traditionally been assigned to the prosecution of immigration-related crimes (except in cases involving smuggling or drug operations or other unusual factors). Recently, however, the priority of such cases has been raised: see Figure 4-5. In 2010, approximately 85,000 immigration-related criminal cases were processed in federal magistrate or district courts, an increase from about 25,000 in 2002. Immigration-related cases represented 52 percent of the magistrate court caseload and 29 percent of the district court caseload in 2010, increasing from 21 percent and 15 percent, respectively, in 2002.

These changes, in large part, coincide with the launch of Operation Streamline by the U.S. Attorney's Office (USAO) in DOJ, federal district court judges, and Border Patrol supervisors in the Del Rio Border Patrol sector of the western District of Texas in December 2005. Under this program, which has since expanded to eight Border Patrol sectors in four federal court districts, USAO files criminal charges against as many immigrants as possible who cross the Southwest border illegally. Arrangements are made in these sectors to permit groups of defendants to have their cases heard at the same time, and federal prosecutors routinely seek plea bargains under which unauthorized immigrants who are subject to felony reentry charges are permitted to plead guilty to misdemeanor charges before magistrate judges (cases which are colloquially known as "flip flops"). In order to increase the likelihood of guilty pleas in illegal reentry cases, DOJ can also authorize federal prosecutors to offer "fast track" sentences that are significantly below the federal guidelines (see Chacon, 2009).

Illegal entry misdemeanors usually carry a sentence of "time served," which means that the length of the sentence will be determined by how long it takes to process the case. Sentences for flip-flops usually result in 1-6 months' incarceration under the authority of USMS; longer sentences





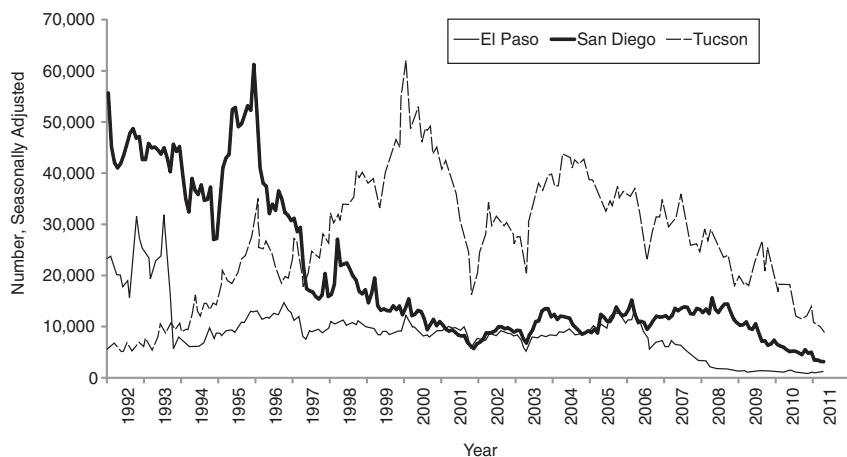
**FIGURE 4-5** Immigration-related misdemeanors and felonies, 2002-2010.  
 NOTE: Bars show the total number of immigration cases handled by magistrate judges and district courts, and lines show immigration cases as a percentage of the total cases handled by magistrate judges and district courts.  
 SOURCE: Data from Administrative Office of the United States Courts (2010).

for felony convictions are handled by the Bureau of the Prisons (BOP) in DOJ.<sup>22</sup>

### IMMIGRATION-RELATED CRIMINAL CHARGES— REGIONAL VARIATIONS IN ENFORCEMENT

The U.S. immigration enforcement system in the United States is characterized by substantial geographic and regional variation. Modes of border crossing and volumes of apprehension vary significantly by location, as does infrastructure capacity: see Figure 4-6. Long-term trends in apprehensions are down significantly in the El Paso, San Diego, and Tucson sectors. Over the past 10 years, however, Tucson has seen a far higher volume of apprehensions than the other sectors. The operation of the immigration enforcement system and the level of local participation

<sup>22</sup>As a result of BOP backlogs, however, transfers out of USMS custody can often be delayed many months, and prisoners can end up serving their sentences in county jails.



**FIGURE 4-6** Apprehensions in the El Paso, San Diego, and Tucson sectors.  
SOURCE: Unpublished data from Border Patrol with seasonal adjustment by the Federal Reserve Bank of Dallas.

in enforcement programs can also differ dramatically, depending on local conditions, resources, and context. Although such regional variations are to be expected in the United States' decentralized, federal system of government, they can complicate national policy efforts to assess immigration enforcement budget needs.

The “criminal pipeline” is a good example of the flexibility of the immigration enforcement system and the regional variation that characterizes it. The implementation of Operation Streamline varies considerably across federal court districts—and it has not been implemented at all in the federal court district that includes San Diego. Figures 4-7a, 4-7b, and 4-7c show the very different levels and trends in immigration misdemeanors and felonies in the El Paso, San Diego, and Tucson sectors.<sup>23</sup> In El Paso, the number of immigration misdemeanor cases (indicated by “petty offense defendants disposed of by U.S. magistrate judges”) rose sharply between 2005 and 2007, from about 5,300 to about 16,300, but then fell to approximately 9,700 by 2010. In Tucson, in contrast, the number of immigration misdemeanors has risen steadily between 2005 and 2010, from around 5,500 to around 25,400. In San Diego, meanwhile, the number of immigration misdemeanors has remained consistently negligible.

<sup>23</sup>The El Paso, San Diego, and Tucson CBP sectors roughly correspond with the Western Texas, Southern California, and Arizona federal judicial districts, respectively.



However, the three sectors also share certain characteristics. In both El Paso and San Diego, for example, the number of immigration felony cases (indicated in Figure 4-7 by “Criminal defendants terminated in U.S. district courts for immigration offenses”) has increased significantly between 2005 and 2010—from about 2,500 to about 5,000 in El Paso and from 1,600 to 3,800 in San Diego. The sectors are also all characterized by elements of bureaucratic discretion, institutional constraints and bottlenecks, organizational adaptation, and policy communication and coordination. The committee discovered many of these differences and similarities during its site visits to the El Paso, San Diego, and Tucson sectors, as discussed below.

### Tucson

In general, Border Patrol agents have considerable discretion over how Operation Streamline is implemented, and their criteria for enforcement may change frequently. For example, enforcement may be geographically targeted, so that all apprehended aliens along a particular segment of the border are sent into the program. Alternatively, the agents may pick out the “worst” offenders (in terms of previous illegal entries, for example). Juveniles, parents traveling with minor children, persons with certain health conditions, and others who require prompt return to their country of origin are usually not subjected to criminal prosecution under Operation Streamline (see Lydgate, 2010).

In Tucson, Operation Streamline tends to be regarded as a Border Patrol initiative, and program prosecutions are generally handled by CBP attorneys who have been deputized by DOJ as Special Assistant U.S. Attorneys, known as “SAUSAs.” The assignment of SAUSAs goes a long way towards reducing the budgetary burden of Operation Streamline for USAO.

The dynamics of felony prosecutions, however, are a bit more complex. Although only USAO can prosecute immigration felonies along the Southwest border, a significant number of those cases are initiated by DHS agents who put together the charging documents and do much of the preliminary paperwork. Although USAO has the authority to decline those cases, the committee was told that political pressures and expectations can make it difficult for USAO to do so without compelling justification. To the extent that many of these immigration cases are less complex and resource intensive than other felony prosecutions, they also might serve as a relatively cost-efficient way of boosting USAO’s prosecution numbers. In addition, one of the most important reasons that USAO in Tucson has been able to prosecute as many felonies as it has is that it was given the resources to enhance its prosecution capacity by hiring additional attor-

neys. Still, staffing levels for legal assistants are regarded as inadequate, even though the supporting role that they play is critical; it was suggested to the committee that allocating additional resources for legal assistants might be politically less “sexy” than hiring more attorneys.

USMS, which does not have discretion over the volume or composition of its workload, is one of the DOJ components that has been especially pressured by the surge in prosecutions. Detention is costly from a budget perspective, and detention facilities are almost always at or near capacity; the committee was also informed that the health care costs of detainees are of significant concern. An equally great (if not greater) challenge for USMS has to do with the personnel required to transport prisoners to and from the federal courthouse. Not only can detention facilities be located several hours away, but the physical infrastructure of the courthouse can also make it challenging for USMS to process detainees.<sup>24</sup> For example, detention cells (which are usually at capacity) are located far away from the courtrooms, and there is only a single small elevator that can be used to move the prisoners. Felony prosecutions, which can require multiple trips for prisoners between the detention facility and the courthouse, are more burdensome for USMS than misdemeanor prosecutions under Operation Streamline, which entail fewer procedural steps.

Even though USMS is under considerable stress and strain, the situation does not yet seem to have become unmanageable. The number of Operation Streamline misdemeanor prosecutions in Tucson has been capped at 70 a day, a number that was the product of negotiations between the late Chief Judge Roll and local officials from USAO and DHS. The constraints and bottlenecks faced by the various actors in the immigration enforcement system were taken into account in negotiating that number. Although some would like to increase the number of program prosecutions to 100 a day, many others believe that moving from 70 to 100 cases would destabilize the system. Short of that, USMS, working in concert with the judicial system, appears to have routinized its misdemeanor caseload—the operations at the Tucson courthouse were described to the committee as a “well-oiled machine.” Felony prosecutions, however, are significantly more cumbersome and do not appear to be the object of systemwide negotiation: it was even suggested that the Border Patrol may be responding to the cap on Operation Streamline misdemeanor prosecutions by bringing more immigration cases to USAO as felonies. Continued increases in the number of felony prosecutions may prove correspondingly burdensome for USMS.

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<sup>24</sup>The committee was also told that the situation in El Paso was similar.

### El Paso

In El Paso, Operation Streamline is referred to as being part of a “zero tolerance policy,” with apprehended immigrants being prosecuted at very high rates. According to local officials, about two-thirds of apprehended immigrants were prosecuted in fiscal 2010. USMS in El Paso faces many of the same challenges as USMS in Tucson, and, as in Tucson, cooperative relationships among judges and between attorneys play an important role in helping the system to operate smoothly.

In contrast to Tucson, Border Patrol counsel in El Paso do not assist USAO in handling Operation Streamline misdemeanor prosecutions, even though USAO accepts essentially all of the cases presented by the Border Patrol. Moreover, court proceedings for these cases tend to be completed more quickly than in Tucson (resulting in shorter “time served” for defendants), and USAO operates without the benefit of “fast track” procedures for felony cases. It was suggested that the relatively low level of apprehensions in the El Paso sector (see Figure 4-6) help account for many of these differences.<sup>25</sup>

And perhaps even more so than in Tucson, the resources and prosecution capacity of USAO in El Paso have managed to keep pace with the volume of cases that it has committed to pursue. Its capacity is such, in fact, that at one point it allegedly sought to charge all first-time illegal reentry cases as felonies, but backtracked from doing so when the public defender’s office responded by counseling defendants to ask for trial, which would have overloaded the system. Now, only repeat offenders with criminal backgrounds are charged with felonies, the overwhelming majority of whom plead guilty.

### San Diego

In contrast to El Paso and Tucson, Operation Streamline has not been implemented in San Diego. The resource constraint that is cited most often is the number of beds available to hold undocumented immigrants for criminal prosecution. Because of high real estate prices, the cost of incarceration is said to be significantly higher in San Diego than in other districts. It was suggested to the committee that the number of available beds would have to be doubled in order to accommodate all of the cases that could be prosecuted under the current set of criteria used by USAO. As a result of this constraint, the number of prosecutions is dictated by

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<sup>25</sup>Given the simple nature of routine immigration cases, USAO in El Paso has also adopted a “horizontal” organizational structure rather than the “vertical specialization” structure that would be typical in offices that did not have such high-immigration workloads.

the beds available for detention rather than by changes in patterns of immigration.

There are differing views as to why the San Diego sector has not participated in Operation Streamline. Some people told the committee that federal authorities, aware that resource constraints would prevent the program from being fully implemented, have chosen not to impose an unworkable program. Other people told the committee that the fact that San Diego has not officially adopted the program has little practical importance, because the basic Operation Streamline principle of privileging criminal prosecution has long been the norm in San Diego, a principle is now reinforced by the “consequence delivery system” being implemented in the sector by DHS. USAO prosecutes cases up to the number of available beds in federal detention facilities, and shuffling prisoners among those facilities is one of USMS’s main challenges. As in Tucson and El Paso, USAO also accommodates the priorities of DHS. For example, in recognition of the importance that CBP has placed on document fraud (in particular, the fraudulent use of U.S. passports), USAO will take those cases even though the crimes involved are less severe than those that are typically prosecuted in San Diego.<sup>26</sup>

### DISCRETION, CONSTRAINTS, ADAPTATION, AND COORDINATION

As indicated in the discussion above, bureaucratic discretion, institutional constraints and bottlenecks, organizational adaptation, and policy communication and coordination are important features of Operation Streamline and immigration-related criminal prosecutions. However, these features also loom large in other parts of the immigration enforcement system, potentially complicating efforts to effectively estimate budget needs for immigration enforcement.

#### Discretion

Given the decentralized federal structure in which immigration enforcement operates and the nature of the tasks performed, there are many points of discretionary decision making within the enforcement system. As a result, the system can appear to be less coherent and consistent in implementation than it is in design.

In the Tucson sector, for example, ICE appears to be focused on appre-

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<sup>26</sup>In order to prosecute beyond the capacity of USAO, CBP also works with the California Department of Motor Vehicles to identify types of document fraud that can be prosecuted under state law.

hending as many immigrants as possible, regardless of their “priority” level. It was suggested to the committee that ICE was subject to political pressure to “keep the numbers up” despite declining levels of immigration, causing it to “dig deeper” into prison populations to look for removable noncitizens. However, according to a policy that has been known variously as “prosecutorial discretion,” “nonpriority status,” and “deferred action,” ICE is not actually obligated to put all undocumented immigrants who are suspected of being deportable into removal proceedings (Legomsky and Rodriguez, 2009). In 2011, the assistant secretary of DHS for ICE, issued three memoranda that sought to clarify the role of ICE agents, investigators, and attorneys in exercising prosecutorial discretion on a case-by-case basis with regard to the apprehension, detention, and removal of aliens (Morton, 2011a, 2011b, 2011c). The guidelines in these memoranda encourage deportation efforts to remain focused on high-priority cases and to take account of various mitigating factors. However, the memoranda may not actually materially diminish or constrain the discretion of ICE agents at the local level.

Similarly, Border Patrol and CPB agents have considerable discretion in granting voluntary return (with their decisions reviewed by second-line supervisors) and, more generally, in determining how apprehended immigrants will be processed. The nature of this discretionary decision making is nicely illustrated by a laminated card that is handed out to Border Patrol agents in the Tucson sector. One side of the card lays out the various steps of the “Evaluation Process” for apprehended immigrants, which include checking the appropriate records, reviewing the person’s criminal and immigration history, reviewing the “nexus” of the person,<sup>27</sup> classifying the person,<sup>28</sup> and reviewing “consequence delivery.”<sup>29</sup> The other side of the card is a “Consequence Delivery System Guide,” which consists of a chart that attempts to rank a variety of enforcement options according to the classification of the apprehended alien.<sup>30</sup> Like the ICE memoranda discussed above, the guide appears to be advisory rather than obligatory.

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<sup>27</sup>Nexus options include “Criminal Organization,” “Target/Focus Area,” and “Targeted Demographic.”

<sup>28</sup>Entrant classification options include “First Apprehension,” “Family Unit,” “Second/Third Apprehension,” “Persistent Alien,” “Suspected Guide/Mule,” “Targeted Guides,” and “Criminal Alien.”

<sup>29</sup>Reviewing consequence delivery includes evaluating “Previous Actions,” “Expected Outcomes,” and “Possible Path Forward.”

<sup>30</sup>The guide also notes that “[t]he combination of any of the above consequences is encouraged, especially when the best/most effective consequence cannot be applied. . . . This chart is *Not* meant to be inclusive of every illegal alien arrested or consequence available, as there will be special cases in each category.”



Discretionary decision making by DHS agents takes place in, and can be influenced by, a framework of incentives and performance measures. For example, although voluntary returns are systematically recorded by DHS and leave a “paper trail,” they are still less administratively demanding than other enforcement pipeline options. The committee was told in Tucson that, all else being equal, Border Patrol agents may find voluntary returns to be relatively more appealing than other options.

Nevertheless, DHS has made a conscious and concerted effort across sectors to reduce the relative frequency of voluntary returns. In Tucson, the committee was told that CBP has issued a directive to grant fewer voluntary returns; in San Diego, that one metric of success for CBP is the ratio of expedited removals to voluntary returns, with a strong preference for the former; and in El Paso, that officers need to justify their use of voluntary returns. The committee was also told in El Paso that ICE counsel are rewarded according to the number of formal removals that they affect, and the dangerousness of those removed. It may be operationally easier to move away from voluntary returns in a context of declining apprehensions, which may be one reason why voluntary returns are still more common in the Tucson sector than in El Paso (where voluntary returns are limited to “humanitarian cases,” such as family reunifications involving minors).

Immigration judges also have substantial authority and discretion over how removal hearings are conducted and the outcomes of those hearings. In El Paso, the committee was told that the performance of immigration judges is measured by professionalism (i.e., the number of complaints), timely adjudication, and not being overturned on appeal. Nevertheless, in Tucson the decisions of immigration judges on such issues as cancellation of removal were criticized for being highly variable, and the committee also heard criticisms about the bonding process being highly discretionary and inconsistent.<sup>31</sup> It was also suggested to the committee in El Paso that immigration judges with prosecutorial backgrounds are more likely to side with the government.

In August 2011, DHS announced that it would form an interagency working group with DOJ to review the cases of about 300,000 people currently in deportation proceedings. Under this policy, deportations would be suspended on a case-by-case basis in “low-priority” cases, such as those involving immigrants who do not have criminal backgrounds and were brought to the United States as young children. The working group will initiate a similar case-by-case review for new cases placed in removal proceedings, and it will also issue guidance on exercising prosecutorial

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<sup>31</sup>For a discussion and empirical analysis of adjudicatory inconsistencies and variability in the immigration enforcement system, see Ramji-Nogales et al. (2007).

discretion for compelling cases (Napolitano, 2011; Pear, 2011; Preston, 2011). Although this policy initiative is based on similar principles of prosecutorial discretion outlined in the ICE memoranda discussed above, it is broader in jurisdictional scope, going beyond ICE. It also has a retrospective dimension that is more than just exhortatory and may systematically affect the ways in which front-line agents exercise discretion. Much will depend on how the policy is implemented and how it informs and influences the choices made by agents and officials across the various sectors.

### **Institutional Constraints and Bottlenecks**

Although DOJ is not responsible for the detention costs of aliens who are brought before immigration judges, it is nevertheless affected by the availability of DHS detention bed space because it can affect the volume of cases heard by immigration judges. In El Paso, for example, DHS detention capacity has been greatly expanded, but there has not been a corresponding increase in resources for immigration courts. Because of the availability of detention space in El Paso, immigration judges are hearing the cases of detainees who have been brought in from other parts of the country, including from California and New York. Referrals from the Secure Communities Program and local law enforcement have also been growing rapidly, which has resulted in higher workloads and growing backlogs for immigration judges.

In El Paso, the committee was told that an initial appearance before an immigration judge can take more than 30 days, cases are taking longer to resolve, and that there is a growing discrepancy between the time to resolution of cases in the detained and nondetained dockets: detained offenders are seeing their cases resolved in 4-8 months while nondetained cases are taking 2-4 years. In El Paso and Tucson, asylum cases were noted to be especially difficult and time consuming.<sup>32</sup>

Immigration adjudications may be affected by case processing constraints in other agencies. In San Diego, for example, the committee was told that immigration judges cannot act until DHS has taken fingerprints and done background checks, which can take weeks or months. Similarly, the committee was told in Tucson that the division of the bonding process among CBP, ICE, and the immigration courts may produce gaps in needed information and that, more generally, the information systems and technology that DHS has in place in its detention facilities may not always be adequate for processing cases expeditiously.

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<sup>32</sup>In San Diego, the committee was told that the most rapidly growing category of cases consists of migrants who crossed the border without documents at a port of entry and then asked for asylum.

With regard to interior enforcement (i.e., enforcement that does not take place at the border), the decision to seek 287(g) agreements with ICE may be influenced by not only local political pressures (Capps et al., 2011), but also by logistical considerations. El Paso and San Diego, for example, have chosen not to seek 287(g) agreements because the federal government does not reimburse for costs, and local officials instead find it more cost-effective to allow ICE agents to have access to jails as they do under the Secure Communities Program (El Paso and San Diego Site Visits). In the absence of 287(g) agreements, local law enforcement can still exercise their discretion to call Border Patrol or ICE agents if a person's undocumented status comes to light during initial questioning. However, the downside of not participating in programs like 287(g) is that in rural areas away from the border, federal agents may not be available to pick up apprehended immigrants, who are then often released.

### **Institutional Adaptation and Innovation**

There is considerable potential for institutional adaptation and innovation in the face of resource constraints and other bottlenecks. It should also be noted, however, that these organizational responses can have (sometimes adverse) administrative and legal implications for immigrants being processed by the enforcement system.

"Quick courts" in the Tucson sector are a good example of institutional adaptation by immigration courts. There are about 30 quick court cases a day, and they tend to be relatively uncomplicated. Immigration judges receive charging documents for newly apprehended immigrants in the morning and hold hearings in the afternoon; the immigrants are advised of their rights en masse and then come to immigration court two at a time. Getting the paperwork ready for these cases is a very labor-intensive and time-sensitive process, and it requires a very close working relationship with the Border Patrol (which perceives quick court as a supplement to Operation Streamline). Judges can determine the time allotted for trials and have the discretion to set the limit, process, and criteria for quick courts.

Aside from quick courts, some judges take the initiative to provide detainees with a printed list of the things that they need to bring with them the next time they come to court. Failure on the part of the detainees to provide this information can delay the hearing process and extend the time spent in detention; immigration attorneys claim to see a difference in the court calendars of immigration judges who do and do not use these forms. The committee was also told about a more systematic adaptation, known as the Institutional Hearing Program, which enables DHS to save

on detention costs by allowing immigration judges to hold hearings in prisons while deportable criminal aliens are still in state custody.

In order to minimize DHS detention costs and unnecessary restrictions on liberty, immigration judges may also order individuals who are removable to participate in an electronic monitoring program or some other alternative-to-detention program while awaiting a final adjudication. Under such programs, ICE uses technology (electronic monitoring) and case managers to track aliens in removal proceedings. As many as 94 percent of the people in alternative-to-detention programs appear at their removal proceedings, and the cost of monitoring aliens in these programs is about one-fourth the cost of traditional detention (U.S. House of Representatives, 2006).

### **Communication and Coordination**

The decentralized and discretionary nature of the immigration enforcement system, with adaptive responses that are often piecemeal and ad hoc, can make it difficult for system actors to communicate and (even more importantly), to coordinate their work. The fact that DHS's own information systems may often be inadequate (as mentioned above) can make coordination with DOJ that much more difficult. These problems are only exacerbated by different lines of bureaucratic accountability and the divergent incentives faced by various actors. The committee was told in Tucson and San Diego that even within DHS, there can be a lack of coordination and cooperation between ICE and Border Patrol, and the different data-gathering and reporting systems in DHS may also be inadequately harmonized (see Box 4-1). These intraagency incongruities can make interagency collaboration that much more daunting.

Even though there are few formal incentives for coordination and cooperation, informal cooperation among multiple agencies has been essential to the operation of programs such as Operation Streamline. However, the existence of cooperation and trust often stems from long-term working relationships on the ground and may be predicated on the orientation of individual leaders; these ties can all too easily be disrupted by (among other things) the rapid turnover of personnel, which is not uncommon in the immigration enforcement system. Existing levels of cooperation and coordination may be sufficient to keep the system from "crashing," but more may be required to achieve higher standards of performance and better outcomes.

## CONCLUSION

The description of the U.S. immigration enforcement system in this chapter highlights certain system characteristics that are relevant to the problem of estimating the resources required for its effective performance. First, it is a decentralized system in which important decisions are delegated to the regional level and, then, to operating, front-line personnel who in many cases have to exercise discretion in real time and in difficult situations. The ways in which system actors exercise discretion may be influenced—although not necessarily entirely determined—by an array of formal incentives and guidelines and informal administrative and political pressures.

Second, the immigration enforcement system is generally “stove-piped,” both at headquarters and (perhaps to a lesser extent) at the local, district, and sector levels. That is, separate agencies tend to make separate policies, sometimes but not usually in systematic coordination with one another. It is also important to distinguish between informal and ad hoc cooperation between DHS and DOJ personnel at the field level, and coordination between DHS and DOJ as a whole.

Third, many operational priorities and, sometimes, general policies are shaped by practical resource limits and localized bottlenecks, such as limited courthouse space or bed space. To some extent, the decentralized and discretionary nature of the system allows local administrators—to some extent—to adapt to those constraints given current resources rather than simply waiting for more budgeted resources to arrive.

Fourth, the ability to quantify the flows of apprehended immigrants through the enforcement system and, therefore, to understand more fully the basis for those flows is limited by incomplete data on the subsequent handling and disposition of individual cases. Without such case histories, it is very difficult to determine—let alone anticipate—the specific pipeline implications of, for example, increased apprehensions through the Secure Communities Program, technical innovations that make it easier to efficiently identify and locate visa overstayers, or systematic changes in the exercise of prosecutorial discretion by front-line agents. Moreover, there are marked discrepancies between published (and widely used) statistics on apprehensions and the data on apprehensions that were supplied to the committee, and these national-level discrepancies may be even more pronounced at the regional/sector level. All of this suggests that many of the planning and budgeting decisions with regard to immigration enforcement might be based on information that is inadequate and incomplete.

Finally, the system’s policies and operations are continually evolving, both in response to changing external conditions and in response to changing political judgments. External factors, such as changing flows of

undocumented immigrants, can interact with the complex system in ways that are difficult to predict. For example, even though apprehensions have fallen during recent years, the demands on other system components have still generally risen, largely because of efforts to impose greater personal consequences on illegal immigrants and to thereby deter their efforts to enter or reenter. So far, the effects on the enforcement system of this strategic policy shift have been mitigated by the decline in apprehensions. Conversely, a future surge in apprehensions might quickly strain the capacity of many agencies and create pressures to either increase resources rapidly or abandon the policy of enhanced consequences.

As explored in the following chapters, all of these system characteristics have implications for budgeting. Taken together, they pose a great challenge to those who would use simple rules of thumb or standard statistical techniques to forecast activity levels and resource needs even 1 or 2 years in advance. A different approach may help, and that is the focus of the rest of this report.



## 5

# Budgeting for DOJ Immigration Enforcement

This chapter examines the process used to budget for the U.S. Department of Justice (DOJ) components of the immigration enforcement system and its outcomes to answer the following questions<sup>1</sup>:

- What is the observed pattern of budget estimates in the past decade?
- Is there a pattern of large changes, requiring adjustments in the amounts requested or appropriated, or reprogramming within appropriated totals, after the initial budget request?
- How have the department and congressional decision makers dealt with changes arising from reestimates of resource needs?
- What explanations are offered by those who were involved?

We then analyze this information to address the following sets of questions:

- Recognizing that there is no readily available objective standard or benchmark that can be applied to compare budget outcomes for the immigration enforcement system to those for other government functions, is there any identifiable pattern of rees-

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<sup>1</sup>This discussion excludes the budget of the federal court system (i.e., the Judiciary), which is administered as a separate branch of government. In recent years, appropriations for the federal judiciary have not been under the jurisdiction of the same appropriations subcommittees of Congress as those responsible for the DOJ.



timation and changes from the initial budget request to final appropriations?

- What are the major sources of reestimates or changes? Do these mainly arise from uncertainties inherent in the budgeting process, from technical problems such as inadequate information or inappropriate bases for developing and justifying amounts, or from institutional factors affecting coordination and communication?
- Is there evidence to suggest that the split of responsibilities for immigration enforcement after 2003 (with establishment of the Department of Homeland Security [DHS]) is associated with the pattern of reestimates or changes from the initial request to subsequent use or actual obligation of appropriated funds?

## RECENT HISTORY: OVERVIEW

### DOJ Structure and Responsibilities

At the start of the administration of George W. Bush, the immigration enforcement functions of the federal government were largely housed in DOJ, with roles for multiple agencies. Coordination of the department's activity was traditionally handled at the senior levels in the department, by either the associate or deputy attorney general. A Detention Planning Committee, for example, chaired by the deputy attorney general, met regularly during this period. The creation of the Office of the Federal Detention Trustee (OFDT) in September 2001 was aimed in part at performing this type of coordination, particularly for the bed space and other needs for people detained by federal authorities for immigration as well as other federal offenses.

The DOJ's internal coordinating process faded away as OFDT ramped up its activities. Then, less than 2 years later, the major reorganization of the domestic law enforcement functions of the federal government resulted in the creation of DHS. DOJ was then left with only certain pieces of the federal immigration enforcement function—those relating to civil legal proceedings, criminal prosecutions, detention, and long-term incarceration. Hence, since the creation of DHS in March 2003, DOJ has had responsibility for managing the resource needs of the “downstream” immigration enforcement agencies. At a headquarters level, coordination of the resource needs of these DOJ immigration enforcement components both in the department and with DHS agencies has most often been on an *ad hoc* basis, and at times it has been close to nonexistent.

### Overall Budgets

As previously noted, the past decade saw a surge in immigration enforcement activity, with bookings for immigration-related offenses by the U.S. Marshals Service (USMS), for example, growing by 241 percent from 2001 to 2009. This rapid growth in enforcement has had widely varying effects on the five DOJ agencies that are the focus of this review. In addition to USMS, OFDT has been buffeted by the ebb and flow of immigration enforcement initiatives and surges in immigration offenders processed by the system. In contrast, the Executive Office of Immigration Review (EOIR) has seen a steady growth in resources but without the swings in budget levels that have characterized OFDT.

Although they have an important role in immigration enforcement, the U.S. Attorney's Office (USAO) and the Bureau of Prisons (BOP) deal with a much broader range of law enforcement and administration responsibilities. Although their budgets have occasionally benefited from funding initiatives related to immigration and border protection, they, like EOIR, have managed their immigration enforcement functions without special budget actions (supplementals, reprogramings, transfers) to adjust resource levels.

As shown in Table 5-1, the five DOJ agencies with immigration enforcement responsibilities will spend (i.e., obligate) an estimated nearly \$2.1 billion in fiscal 2011.<sup>2</sup> Spending by the two DHS agencies with immigration enforcement responsibilities, the U.S. Customs and Border Protection (CBP) agency and the U.S. Immigration and Customs Enforcement (ICE) agency, will total an estimated \$15.4 billion in the same year; However, an estimate of what portion of that total amount will be used for immigration enforcement is not available.<sup>3</sup> These two DHS agencies and their DOJ immigration predecessor agency, the Immigration and Naturalization Service (INS), have dramatically stepped up immigration

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<sup>2</sup>Because the agency budgets primarily involve funding for personnel and support and contracts for detention and medical services from nonfederal sources, nearly all of these obligations would result in outlays (cash disbursements) in the same fiscal year or the next (typically estimated at 90 percent in year 1 and 10 percent in year 2).

<sup>3</sup>Using data supplied by the U.S. Office of Management and Budget, the committee estimates that 73 percent of ICE's \$5.5 billion appropriation (excluding fee and trust funded activities) for fiscal 2011 will be allocated to immigration enforcement. However, for CBP, because immigration enforcement is integrated with customs and other law enforcement responsibilities at the ports of entry, the committee was unable to determine what portion of the agency's personnel and other resources is devoted exclusively to immigration enforcement. CBP's total appropriation for fiscal 2011 was \$9.9 billion.

**TABLE 5-1** DOJ Immigration Enforcement, Budgets and Obligations, 2011

DOJ Agency	Budget (\$ in millions)
Detention Trustee (budget authority)	1,518.7
Estimated Immigration Enforcement (obligations)	607.5
Salaries and Expenses, U.S. Marshals Service (budget authority)	1,125.8
Estimated Immigration Enforcement (obligations)	450.3
Administrative Review and Appeals (EOIR and OPA) (budget authority)	300.7
Estimated Immigration Enforcement (obligations)	298.0
Salaries and Expenses, U.S. Attorneys (budget authority)	1934.0
Estimated Immigration Enforcement (obligations)	75.4
Federal Prison System, Salaries and Expenses (budget authority)	6,295.0
Estimated Immigration Enforcement (obligations)	638.9
<b>Total Estimated Immigration Enforcement Obligations, DOJ</b>	<b>2,070.1</b>

NOTES: Estimates based on share of workload attributable to immigration enforcement related activities of these five DOJ agencies. Excludes construction activities of the U.S. Marshals and Bureau of Prisons.

DOJ = U.S. Department of Justice, EOIR = Executive Office of Immigration Review, OPA = Office of Public Affairs.

SOURCES: Data from the 2011 U.S. Department of Defense and Full-Year Continuing Appropriations Act (P.L. 112-10) and U.S. Department of Justice, Justice Management Division (personal communication).

enforcement over the past 10 years.<sup>4</sup> Increasing enforcement at DHS has had significant effects on the five DOJ agencies with important immigration responsibilities.

Table 5-2 below tracks the budgets for the DOJ agencies with border security responsibilities. It shows the amounts initially requested by the department (in the President's budget) and the amounts initially provided by Congress (regular appropriation), typically in the annual appropriations bills (formerly, for the Departments of Commerce, Justice, State, and related agencies and, more recently, for the Departments of Justice,

<sup>4</sup>The number of Border Patrol agents, for example, has more than doubled, from around 10,000 in fiscal 2004 to more than 20,500 in fiscal 2010 (U.S. Department of Homeland Security, 2011a, p. 66).

Commerce, and science agencies), although in several years that bill was consolidated with other appropriations bills in an omnibus appropriation bill. Also shown are any further actions taken by Congress to make added (supplemental) appropriations, approve of internal reprogrammings or transfers of funds across DOJ agencies, or reduce the amounts already appropriated by enacting rescissions of appropriated funds.<sup>5</sup> The rest of this section examines each of the five DOJ agencies in more detail.

### U.S. Attorney's Office

USAO spends only 3-4 percent of DOJ's total immigration enforcement resources (i.e., the \$2 billion noted above). Its role begins once DHS personnel have detained or arrested a person for an immigration offense. U.S. attorneys must make determinations about whether to prosecute the person criminally, although civil actions can be brought as well. Although the 94 U.S. attorneys offices account for only a very small portion of DOJ's immigration enforcement budget, the number of criminal proceedings involving immigration offenses has been rising sharply, particularly in offices located along the Southwest border. Immigration cases, for example, accounted for 30 percent of the new flow of criminal cases into U.S. attorneys offices nationwide in 2006 and 2007, 36 percent in 2008, 40 percent in 2009, and 44 percent in 2010. Over the 10-year period 2001-2010, criminal immigration case filings by U.S. attorneys increased by 138 percent nationwide. In contrast, civil immigration cases and proceedings have absorbed a much smaller share of their caseload. Although the number of civil proceedings grew briefly in 2008, it has recently fallen back to levels below those in 2001 (Justice Management Division, DOJ, personal communication).<sup>6</sup>

Appropriations for the U.S. attorneys grew steadily over the 2001-2010 period (see Table 5-2), with rapid growth in criminal proceedings serving as an important component of the department's justification for supporting growth in that appropriation account, which is funded at \$1.9 billion for 2011. Budget justifications over the period note that the criminal immigration case workload of the U.S. attorneys is very sensitive to increases in DHS Border Patrol agents, requiring coordination with DHS, U.S. marshals, the Office of the Federal Detention Trustee, and the Bureau of Prisons. The particularly rapid growth in the number of Border

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<sup>5</sup>Generally, small rescission amounts reflect "across the board" reductions to the amounts initially specified for each program, the method the appropriations committees often use to make a final small cut to most of the accounts in the bill to get the bill's overall total figure to meet a particular ceiling.

<sup>6</sup>See Figure 4-1 (in Chapter 4) and accompanying text for a discussion of the civil and criminal case pipelines.

**TABLE 5-2** Budgets for DOJ Immigration Enforcement-Related Agencies, 2001-2011 (\$ in millions)

DOJ Agency Budgets	Fiscal Years			
	2001	2002	2003	2004
Detention Trustee				
President's budget	26.0	1.7	1,388.6	810.1
Regular appropriation	1.0	1.0	775.6	814.1
Supplemental			40.0	
Reprogramming (AFF)				77.7
Transfer				31.3
Rescission				-8.6
Federal Prisoner Detention, United States				
Marshal Service				
President's budget	597.4	724.7		
Regular appropriation	597.4	706.2		
Salaries and Expenses, United States				
Marshals Service				
President's budget	586.5	619.8	722.2	720.8
Budget authority (regular appropriation)	572.7	619.4	680.5	719.8
Supplemental	0.0	10.2	8.0	0.0
Construction, U.S. Marshals Service				
President's budget	6.4	6.6	15.2	0.0
Regular appropriation	18.1	15.0	15.2	14.1
Supplemental	0.0	9.1	0.0	0.0
Administrative Review and Appeals (EOIR and OPA)				
President's budget	164.5	178.5	198.9	197.4
Regular appropriation	161.1	173.6	188.0	193.5
Supplemental		3.5		
Salaries and Expenses, United States				
Attorneys				
President's budget	1,291.0	1,346.3	1,550.9	1,556.8
Regular appropriation	1,250.4	1,354.0	1,503.8	1,526.3
Supplemental		56.4		
Rescission	-3.0			
Federal Prison System, Salaries and Expenses				
President's budget	3,545.8	3,829.4	4,208.5	4,677.2
Regular appropriation	3,476.9	3,808.6	4,071.3	4,461.3
Supplemental				
Reprogramming				
Rescission				

2005	2006	2007	2008	2009	2010	2011
938.8	1,222.0	1,332.3	1,294.3	1,295.3	1,438.7	1,533.9
886.0	1,222.0	1,225.8	1,225.9	1,295.3	1,438.7	1,518.7
184.0				60.0	7.0	0.0
			20.0			
-11.8	-15.0		-145.0			3.0
742.1	790.3	825.9	899.9	933.1	1,138.4	1,180.5
752.0	793.0	808.0	864.2	950.0	1,125.8	1,125.8
12.0	9.0	0.0	28.6	10.0	29.7	0.0
1.4	0.0	0.0		0.0	14.0	26.6
5.7	8.9	6.8	2.3	4.0	26.6	16.6
0.0	0.0	0.0	8.0	0.0	0.0	0.0
202.5	216.3	229.2	247.5	263.8	300.7	319.2
204.0	215.7	228.1	232.6	270.0	300.7	300.7
					2.1	
1,547.5	1,626.2	1,664.4	1,747.8	1,831.3	1,926.0	2,041.3
1,547.5	1,600.0	1,645.6	1,754.8	1,836.3	1,934.0	1,934.0
	9.0		5.0		9.2	
4,706.2	4,895.6	4,987.1	5,151.4	5,435.8	5,979.8	6,533.8
4,628.0	4,892.6	4,974.3	5,050.4	5,595.8	6,086.2	6,295.0
5.5		17.0	187.1		20.0	
			109.2			
						12.6

*continued*

TABLE 5-2 Continued

DOJ Agency Budgets	Fiscal Years			
	2001	2002	2003	2004
Federal Prison System, Buildings and Facilities				
President's budget	835.7	833.3	396.6	187.9
Regular appropriation	835.7	813.6	399.3	0.0
Supplemental				

NOTES: AFF = Asset Forfeiture Fund, EOIR = Executive Office for Immigration Review, OPA = Office of Pardon Attorney.

Patrol agents that occurred in the 2006-2008 period, with a 50 percent increase in the number funded (roughly 6,000 additional agents) over those 3 years (U.S. Government Accountability Office, 2007, p. 7), was a recurring source of DOJ's justification for increased resources for U.S. attorneys during those years. The last Bush budget (2009) and first Obama budget (2010) included the U.S. attorneys in a larger "Southwest Border" enforcement initiative in their budget requests to Congress, although the increased funding received was to be targeted at a range of law enforcement problems, not just immigration.

U.S. attorneys' offices enjoy "complete to near-complete" autonomy, the committee was told by DOJ staff in Washington. The budget process is one way to try to exert some influence over these otherwise autonomous offices. Congress has typically made small reductions to the amounts requested for U.S. attorneys (see Table 5-2), often the outcome of a sequence in which the House initially provided the amount requested in the President's budget, and the Senate reduced the amount, expressing concern about the need for the U.S. attorneys offices to set priorities in the use of their resources. The Senate often specified the particular priorities of the subcommittee with responsibility for the DOJ budget, such as cybercrime, intellectual property, and child sexual exploitation cases. The final appropriation usually reflected something at or near the Senate's amount.<sup>7</sup>

The only notable ad hoc budget action taken outside the regular annual appropriation process during this period to augment the resources

<sup>7</sup>See, for example, the history of the 2007 Science/State/Justice/Commerce bill as reflected in House Report 109-520 and Senate Report 109-280 (available: <http://thomas.loc.gov/home/approp/app07> [September 2011]).

2005	2006	2007	2008	2009	2010	2011
0.0	170.1	117.1	210.0	95.8	96.7	269.7
189.0	90.1	432.3	372.7	575.8	99.2	99.2
18.6	11.0			5.0		

SOURCES: Data from U.S. Office of Management and Budget (2001, 2002), House and Senate appropriations bills, reports from the Library of Congress (available: <http://thomas.loc.gov/home/approp> [October 2011]), and documentation received from staff of the U.S. Department of Justice, Justice Management Division.

of the U.S. attorneys came when USAO received a \$9.2 million supplemental appropriation as part of the 2010 supplemental appropriation for border security. The extra funding in this case was for a broad range of heightened law enforcement in the region—including drugs and human and weapons trafficking—as well as immigration enforcement. Otherwise, informal supplementation of the level of professional staffing of the U.S. attorneys offices in pursuing immigration enforcement is sometimes obtained in those jurisdictions most affected by detailing DHS legal staff on a temporary basis. Use of such “SAUSAs” (Special Assistant U.S. Attorneys), while it augments resources directly, nevertheless has follow-on resource implications for DOJ’s adjudication and detention roles, which may require additional resources for those functions.

### Executive Office for Immigration Review

The Executive Office for Immigration Review (EOIR) is focused entirely on an immigration enforcement related mission—primarily civil proceedings in immigration courts that lead to removal of illegal residents. As shown in Table 5-2, EOIR’s budget grew steadily over the 11-year period from 2001 through 2011, although with pauses in 2004 and again in 2011. EOIR processes the cases it has the resources to handle. Immigration judges routinely have substantial pending proceedings, i.e., case backlogs, as noted in Chapter 2. From 2003 through 2010, EOIR’s budget grew steadily, by about 7 percent per year on average and by 58 percent over the 7 years (see Table 5-2). Cases completed grew by nearly 14 percent during the same period. DOJ staff told the committee that there is consensus both in the department and in Congress that EOIR would need substantially more resources to handle its pipeline of cases and



appeals more expeditiously. The increasing volume of cases was absorbed in substantial part by increasing the number of cases pending, which grew by 54 percent during the same 7-year period, from 169,447 cases at the end of fiscal 2003 to 261,426 at the end of fiscal 2010 (data from EOIR, personal communication).

There is little evidence that EOIR's funding levels were set in response to short-run increases or decreases in workload. EOIR's workload rose sharply in 2005, as the immigration courts felt the impact of reduced DHS use of voluntary returns. Court proceedings and matters completed grew by 21 and 17 percent, respectively, that year and remained elevated in 2006, only to fall back by 16 and 10 percent, respectively, in 2007 (data from EOIR, personal communication). But, as noted above, these swings in case completions were not accompanied by noticeable changes to the agency's budget. EOIR received two small supplemental appropriations in 2002 and 2010, but its budget was not the subject of rescissions or reprogramming actions during this period.

DOJ routinely cited ongoing initiatives undertaken by DHS and its two lead immigration enforcement agencies, CBP and ICE, as support for the continuous growth in the budget for immigration judges. EOIR's congressional justifications repeatedly emphasized the impact of DHS initiatives on EOIR's workload. As described in its 2007 budget justification, for example: "[T]he immigration court's caseload increases resulting from DHS' heightened enforcement efforts will remain the key challenge for EOIR . . . DHS enforcement strategies, coupled with resource increases received in FY 2003 through FY 2006 . . . have and will dramatically increase the immigrations court's caseload" (U.S. Department of Justice, 2011a, p. 5).

### **Office of the Federal Detention Trustee**

The recent history of budgeting for the immigration detention function of the federal government is more complicated than that of the U.S. attorneys and EOIR. At least four agencies have responsibilities in this area:

- ICE at DHS, which detains noncitizens undergoing expedited removal procedures;
- USMS, which takes custody of immigration offenders not retained by ICE but subject to further legal proceedings in the United States;
- OFDT, which pays for detention expenses incurred by USMS and otherwise provides or contracts for the transportation and housing of detainees, except those in the custody of ICE and BOP; and

- BOP, which operates 11 detention centers at selected high-volume locations (as well as other facilities that house people convicted of criminal immigration and other offenses).

Prior to 2003, the costs of detaining immigration offenders were borne by the INS and by the U.S. marshals through the Federal Prisoner Detention Program. That program (in particular) was plagued with what the House Appropriations Committee, in its report accompanying the fiscal 2000 appropriations bill, characterized as “wide fluctuations in the projected and actual requirements of this account” (U.S. House of Representatives, 1999), most recently demonstrated by a \$70 million shortfall in a program spending roughly \$425 million per year. Likewise, the House Appropriations Committee noted that there had been “severe funding shortfalls” in the detention and deportation account of INS in both 1999 and 2000. After expressing its “growing concerns about the problem of inadequate planning and management of detention space in the Department of Justice” the House Appropriations Committee (Subcommittee on Commerce, Justice, State, and Related Agencies) directed in 2000 “that the Attorney General submit recommendations on a Department-wide strategy to plan for and manage its detention needs” (U.S. House of Representatives, 2000a).

In response, the Administration’s 2001 budget proposed the creation of a detention trustee to be responsible for “oversight of detention management, as well as improvement and coordination of detention issues Department-wide.” The House Appropriations Subcommittee report complained that the proposal did not go far enough in centralizing all detention funding under a management official, but considered the proposal to be an important first step, and \$1 million was subsequently included in DOJ’s appropriation for 2001 and again for 2002 to prepare the way for this new office. Interestingly, the 2001 committee report envisioned an office that would do for detention “what the Wireless Management Office has done to remedy the problems with law enforcement communications systems.” The committee noted the similarity between detention and law enforcement communications in terms of “regional hot spots” and directed the new trustee to set up two pilot projects on the Southwest border and in the Midwest to test and demonstrate the improved coordination that the trustee could bring to the detention function (U.S. House of Representatives, 2000b).

The Office of the Federal Detention Trustee received its first full-scale appropriation in 2003 (as shown in Table 5-2), and the separate appropriation to USMS (under the federal prisoner detention account) was eliminated. However, the initiation of OFDT operations did not work out entirely as originally envisioned. The initial appropriation of \$1.37

billion for fiscal 2003 was premised on this new DOJ office being “given authority to direct the use of INS and USMS detention resources” (U.S. House of Representatives, 2002). OFDT took over responsibility for housing and related detention functions of detainees in the custody of the U.S. marshals for immigration and other offenses. But for reasons that are not entirely clear, INS retained its separate detention function, and OFDT actually spent (obligated) only \$774 million in its first full year of operations. It may be that officials were more concerned about immigration enforcement and the creation of DHS at that time than implementation of the plans for OFDT.

In the years that followed, that arrangement was maintained, with INS and, subsequently, DHS/ICE continuing to handle its detainees, effectively foregoing the improved coordination and management of the detention function under OFDT as originally contemplated. After this dramatic beginning, funding for OFDT continued to be volatile. Immigration enforcement resource needs have played a major role in driving budget changes. OFDT received two supplemental appropriations (\$40 million in 2003 and \$184 million in 2005) and a reprogramming from resources of the FBI and the department’s Asset Forfeiture Fund (for a total of \$109 million) in 2004 to augment its initially appropriated resource levels (see Table 5-2).

In 2004, the number of persons booked for immigration offenses by the USMS surged by 42 percent over its 2003 level, requiring DOJ to scramble to reprogram existing department resources to meet this need. As the department subsequently explained to Congress what had happened to the budget for OFDT that year, “[W]hile records show that increases occurred in every offense category, arrests/bookings for criminal immigration offenses increased by the largest amount (43% of new growth), reflecting increased emphasis—and success—in identifying convicted felons attempting to enter the United States” (U.S. Department of Justice, 2011a, p. 5).

Although the level of immigration-related bookings remained relatively constant in 2005, OFDT was still feeling the impact of the surge in 2004, and it initially requested a 17 percent increase in its budget for 2005. Congress declined to approve that request, providing OFDT with only an 8.8 percent increase. But Congress then found it necessary to provide OFDT with an enormous \$185 million supplemental appropriation for that year. OFDT’s total appropriation subsequently jumped again in 2006 by \$336 million, or 38 percent, while immigration-related bookings grew by 23 percent.

The total appropriation for OFDT leveled off at roughly \$1.2 billion per year for 2006, 2007, and 2008. A further surge in immigration-related bookings by USMS of 63 percent occurred over that 2-year period, and

actual budget obligations again rose in line with the rapid growth in bookings before leveling off in 2008. Nevertheless, despite this extraordinary growth in the immigration offender population it was required to serve during this period, OFDT had built up \$137 million in unused funds at the outset of 2008; not surprisingly, in the 2008 appropriation bill, Congress rescinded \$145 million.

OFDT's experience during 2008 appears to have been particularly stressful. In its 2010 congressional justification to Congress (U.S. Department of Justice, 2009), the agency noted that it had experienced "funding shortfalls" in 2008 and 2009 that it attributed to "increased unfunded immigration enforcement activity by the Department of Homeland Security at the Southwest Border, which began in FY 2008 and continues through FY 2009." The initial 2008 appropriation for OFDT was itself unusual, as the statutory language first provides \$1,225 million—below the administration's request but virtually the same amount as 2007—and then, in the next paragraph, rescinds or takes away \$145 million of that appropriation.<sup>8</sup> Congress subsequently found it necessary to approve the department's request for a \$20 million reprogramming from its Asset Forfeiture Fund for OFDT in 2008. Thus, although OFDT had managed to keep growth in actual spending (obligations) relatively smooth at 9.5-10.0 percent a year over the 2004-2007 period, the agency seemingly "hit a wall" in 2008, with obligations growing by only slightly more than 1 percent.

Congress resumed funding growth in the OFDT budgets for 2009, 2010, and 2011. For 2009 and 2010, DOJ sought and received increases of 5.6 percent and 11.1 percent, respectively, for OFDT. The major justification for these increases was the Southwest Border Enforcement Initiative undertaken by the Bush Administration and continued with the first budget of the new Obama Administration. In both years, this initiative was justified on the basis that funding would be used "to accommodate an anticipated increase in the number of detainees placed in non-federal facilities along the Southwest Border. . . . This program increase will support detention housing for an additional 7,000 immigration offenders apprehended by the Department of Homeland Security and processed by the U.S. Marshals Service" (U.S. Department of Justice, 2009, p. 35).

OFDT not only received the full appropriation it had requested for both 2009 and 2010, but was also the beneficiary of supplemental appropriations in both years, receiving an additional \$60 million in 2009 and a \$7 million supplemental appropriation as part of a larger Emergency Bor-

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<sup>8</sup>DOJ staff suggested to the committee that this rescission did not have an analytical basis but rather reflected the larger dynamics of the budget process in Congress in 2008: "the Hill just needed the money."

der Security supplemental appropriation in 2010. Nevertheless, the fact that Congress ratified the OFDT increases requested in 2009 and 2010—and even augmented the initial appropriation with supplemental funding later in the year—may have had as much to do with the continuing growth in the immediately prior year (that is the fiscal year in which the annual appropriation request was made to Congress) in USMS bookings of immigration-related offenders as it did with the persuasiveness of the administration’s case for focusing on the Southwest border. Those bookings increased by nearly 40 percent in 2008 and another 11 percent in 2009.

In 2011, DOJ sought a \$1,534 million appropriation for OFDT, an increase of \$95 million or 6.6 percent. Although bookings for immigration-related offenses actually declined slightly in 2010, when OFDT’s full-year appropriation came through in April 2011, the agency received an \$80 million (5.6 percent) increase to a total level of \$1,516 million, despite a general governmentwide congressional policy to freeze 2011 spending at the 2010 enacted level for most agencies.

As noted above, the creation of OFDT had its origins in the congressional desire for better planning and management of the detention function. According to a letter of the U.S. Government Accountability Office (2010, pp. 40, 41), DOJ did improve its ability to forecast the average daily population it will need to house in state, local, and private detention facilities and “OFDT’s average housing and subsistence rate projections have been accurate within 3 percent each year” over the period 2005-2009. Yet despite both the creation of OFDT and the improved forecasting ability that this office has brought to budgeting for the detention function, the budget process for this program has, as described above, been characterized by a series of upward and downward swings in actual resources available to the agency.

### U.S. Marshals Service

With a major program expense offloaded to the new OFDT in 2003, the budget of USMS grew rather smoothly over the 2001-2010 period (see Table 5-1). As discussed above in conjunction with the funding needs of OFDT, immigration-related bookings by USMS grew dramatically although unevenly over this 10-year period. DOJ staff noted to the committee that although only 10 percent of the illegal entrants picked up by DHS personnel subsequently go through the criminal prosecution process for which DOJ is largely responsible, these offenders can at times overwhelm department agencies, including USMS.<sup>9</sup> Yet, ironically, this volatile

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<sup>9</sup>The other 90 percent of persons detained by ICE/DHS are subject to detention or release decisions made administratively by DHS officials (see discussion in Chapter 3).

growth in bookings of illegal immigrants has had less apparent impact on the budget of USMS than on other DOJ components, particularly the detention function. As with the U.S. attorneys and the immigration judges, DOJ staff told the committee, there is some ability to use backlogs of other workload as a buffer to adjust the amount of work that can be completed within the resources available—by not pursuing as many fugitives, for example—when there is an upsurge in bookings of immigration offenders (or in another higher priority activity).

USMS did receive small supplemental appropriations in 6 of the 10 years from 2001 to 2010. However, only in the case of the most recent \$37.7 million—included in the Southwest Border Enforcement Initiative supplemental appropriation for 2010—was funding provided specifically to cover immigration-related expenses, and even in that instance the supplemental resources were targeted more heavily to wartime and anti-terrorism objectives (such as witness security in Afghanistan).

### Bureau of Prisons

Although roughly one-quarter of the BOP inmate population is composed of non-U.S. citizens, only about 40 percent of that group, or 10 percent of the total prison population, is reported as incarcerated for immigration offenses.<sup>10</sup> This population grew proportionally with the annual average growth rate of 2.6 percent for the overall BOP population during the 2004-2010 period. For this small fraction of the inmate population, BOP is estimated to spend approximately \$640 million annually (excluding prison construction costs, which vary widely from year to year). The amount spent on incarceration of convicted immigration offenders constitutes more than 30 percent of all the resources that DOJ is estimated to spend on immigration enforcement.

BOP received both a \$187 million supplemental appropriation and approval for a \$109 million reprogramming in 2008. Otherwise, BOP received only a few small supplemental appropriations over the 2001-2010 period. Although BOP's initial 2008 appropriation of \$5,050, a 1.5 percent increase over 2007, proved inadequate in 2008, this shortfall was not tied specifically to costs attributable to immigration offenders.

With respect to DOJ's immigration detention responsibilities, BOP operates a number of detention centers and units that confine pretrial and presentenced offenders. As was true during the INS era, this portion of federal spending on detention of immigration offenders is not

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<sup>10</sup>According to BOP staff, for individuals charged with multiple offenses, BOP designates the offense with the longest sentence as the primary offense; thus, there are doubtless many more individuals charged with or convicted of immigration offenses in the BOP system.

under the jurisdiction of OFDT. Moreover, BOP cells (beds) are used to handle overflow needs for beds and jail cells during the presentence detention process, and these costs are paid out of BOP's budget, not that of USMS or OFDT, illustrating the department's flexibility in using its resources to manage the ebb and flow of detention space needs (discussed in Chapter 4). DOJ staff noted to the committee that "there is adequate detention space in the U.S. as a whole," but "space is not necessarily available where it is needed." BOP allocates approximately 12,300 beds in 25 of its facilities to detainees of USMS.

BOP has undertaken one initiative to curtail immigration-related expenses. In recent years, the agency has been able to reduce its funding needs by working with ICE and EOIR to expedite removal orders for non-U.S. citizens. The three agencies work together at roughly 30 BOP facilities to process and complete orders so that inmates can be removed promptly at the end of their sentences (U.S. Department of Justice, 2011d, p. 48).<sup>11</sup>

### General Observations

Overall, most of the DOJ agencies with enforcement roles have enjoyed relatively smooth growth in their budgets over the past 10 years (see Table 5-2) with the exception of OFDT. Although Congress has often provided for expected growth in detention activities in response to administration budget requests, OFDT has experienced episodes of "catch-up" when it had to scramble to obtain the resources (in the form of supplemental appropriations and approval for reprogramming) needed to handle surges in bookings and subsequent detention requirements, as well as cases of excess resources at the start of the year reflected in carryover balances and, in one instance, a major rescission.

Viewed from a broader perspective, perhaps the biggest challenges in immigration enforcement policy that affected the budgets of DOJ agencies—particularly OFDT, USMS, and the immigration judges—in the past decade were a product of increases in enforcement efforts and changes in enforcement policies by the Immigration and Customs Enforcement and Customs and Border Protection agencies in DHS. Over the course of the period from 2001 to 2010, front-line immigration enforcement was reorganized in a new department; the number of border patrol agents more than doubled; and a series of initiatives was implemented to promote stricter enforcement, including the Secure Border Enforcement Initiative and Operation Streamline in 2005 and the Secure Communities Program in 2008. As these efforts took hold, the effects on DOJ agencies were

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<sup>11</sup>The committee was unable to obtain resource measures for this expedited removal program.

uneven. Bookings by the U.S. marshals and the associated demand for detention services were noticeably affected by these increased enforcement efforts, while there was a smoother upward trend for criminal cases processed by U.S. attorneys and BOP incarcerations of criminal immigration offenders. The immigration judges increased their output, but their pending caseload grew sharply.

### THE BUDGET DEVELOPMENT PROCESS

Initial development of budget estimates for presentation to Congress involves a lengthy process in all executive branch departments. At DOJ, for example, the process usually begins in the winter or spring of the year prior to the beginning (on October 1) of the federal fiscal year, that is, 18 to 24 months before the beginning of a particular fiscal year. Component agencies and offices in the department develop budget requests that are reviewed by the department's leaders in a process managed by the budget office in the Justice Management Division. Once departmental requests are submitted in early fall to the U.S. Office of Management and Budget (OMB), that agency has the responsibility to review and coordinate policy and budget proposals and to produce an integrated set of recommendations to the President for his budget and legislative agenda for the coming year.

In making their budget projections, DOJ staff have made increasing use of sophisticated analytical techniques, particularly for detention. The projection of detention resource needs for both USMS and OFDT has improved in recent years as OFDT staff have been able to develop and refine a statistical model to project future detention populations. However, as discussed above, the internal coordination of detention budget estimates among immigration enforcement agencies that was overseen by the Deputy Attorney General prior to 2002 fell away after the creation, first, of the Office of the Federal Detention Trustee and then the Department of Homeland Security. The lack of such a coordinating body in the executive branch, and the apparent failure of OMB to completely fill this void (see below), has meant that sharing of information and analyses by the cognizant agencies has been only suboptimal at best.

Although overall inflation (although perhaps not food and energy prices) and regulatory changes can be anticipated, the long lead time involved in the budget development process is an inevitable source of uncertainty in budget estimates. For DOJ agencies with responsibilities for immigration enforcement, intervening changes in administration policies, particularly the shifting priorities and strategies of DHS, can have a significant impact. This situation suggests an important coordination role for OMB. And the cases of the Southwest border and emergency bor-



der security initiatives in 2009-2010 reflect some improved coordination within the executive branch in recent years. In those instances, OMB did the work to create a consistent budget request for enhanced immigration enforcement by both DHS and DOJ. However, this experience reflects an exception in recent years. Part of the reason for the situation may be that OMB is operating in an environment of continuous severe budget restraint for domestic discretionary programs. Consequently, it is difficult to promote more spending for certain programs even if rational coordination of the overall government immigration enforcement effort would suggest the value of such coordination, particularly when an enforcement initiative has been approved for DHS, for example.

Effective, timely coordination and communication among the various personnel and agencies involved in the budget process can improve information used as a basis for decision. During development of the President's budget, OMB is responsible for coordinating separate agency requests to ensure consistency of decisions regarding shared functions such as this one. During the congressional process, sharing of information among the subcommittees responsible for funding different agencies can serve a similar purpose. Staff of all three responsible bodies—the agencies, OMB, and the congressional committees—cited examples of poor coordination of immigration enforcement resource needs over the past 10-11 years (usually by the other two parties). From a broader perspective, such funding inequities can result from the current budget process for several reasons:

- At the agency level, leadership groups make decisions on different schedules, even if their budget processes are similar, and in differing contexts. With multiple different missions and facing inevitable resource constraints, for example, DHS and DOJ may have different priorities for particular immigration enforcement functions.
- Similarly, different OMB offices have to respond to differing and sometimes conflicting policy guidance. Recognition of inconsistencies, let alone the sorting out of such conflicts, may not fully occur for any given budget.
- Likewise, the different appropriations subcommittees in Congress face their own limited suballocations and may not be fully aware of the “downstream” effects of the legislation they put forward on the agencies whose budgets are funded in another subcommittee's bill.

The two departments have at times attempted to coordinate their policies and plans at higher levels, but their cooperation does not extend

to joint efforts to develop a common enforcement strategy, targets, or estimates of resource needs. Given administrative inefficiencies that result from the current approach to budgeting and planning for immigration enforcement, the committee believes a new jointly executed planning and budgeting approach consistent with requirements of the new Government Performance and Results Act Modernization Act of 2010 (discussed in Chapters 6 and 7) could yield gains in the productivity of budgeted resources and more success in achieving the goals of immigration enforcement policy.

There is little evidence that budget choices have been guided by analysis of how alternatives to current resource uses would affect such outcomes as fair, prompt adjudication of status or of criminal charges or would contribute to broader aims of enforcement, especially to reducing unauthorized immigration. DOJ and other departments have developed an array of performance measures that have been or could be useful in assessing how performance varies with both the level and use of budgeted resources, but strong measures of outcomes such as those mentioned above is generally lacking.<sup>12</sup> Requirements of the Government Performance and Results Act of 2010 provide a set of new opportunities for federal agencies, including those sharing responsibility for a common mission or set of objectives, to plan and budget to improve their performance. The requirement for OMB to identify, in consultation with Congress, a set of crosscutting, long-term, outcome-focused “federal government priority goals” and use them to improve performance could be a spur to DOJ and DHS to plan and budget together for their shared enforcement responsibilities.

### THE BROADER BUDGET CONTEXT

To the outside observer, the budget history over the 2001-2010 period of the five DOJ agencies with immigration enforcement responsibilities does not seem particularly dramatic or unusual. Immigration enforcement was a growing priority of successive administrations and Congress, which created continuing pressure for more resources to address the effects of heightened enforcement activity, especially by DHS agencies, on the five DOJ agencies. Initiatives to address particularly critical functions, such as the housing and medical needs of detainees, were undertaken

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<sup>12</sup>For more information on DOJ’s performance measures, including those for immigration enforcement, see the budget and performance page of the department’s website (see <http://www.justice.gov/02organizations/bpp.htm> [September 2011]). The fiscal 2010 Annual Performance Report includes two targets for immigration enforcement: reducing the average cost of detentions and increasing the percentage of immigration review priority cases handled within specified time frames.

periodically, but a major reorganization of the appropriation accounts and budget treatment of this function did not bring an end to the periodic swings in resource needs that had characterized the enforcement activities prior to the change in budget structure.

What is most perhaps striking about the pattern of budgeting for the DOJ immigration enforcement agencies is the relatively small number of instances when sizable adjustments were sought or made to appropriations provided initially through the regular budget process. This could be interpreted as indicating that initial resource levels were generally adequate, reflecting an ability to anticipate and budget for growth in service demands. Or, more likely, it could be a reflection of the ability of administrators at both national and local levels to adjust their operations to whatever level of resources is provided. There is evidence for this in the growing backlog of pending cases in EOIR, as one example. And the committee's observations of such adjustments in the regions we visited reinforced this explanation.

Creation of the Department of Homeland Security may have complicated coordination of the resource needs of the immigration enforcement agencies, although it is difficult to point to a specific pattern of inaccurate or reestimated requests that is correlated with that creation. The existence of senior-level coordinating groups at DOJ prior to the creation of DHS suggests that there was recognition of the particular difficulties in budgeting for this function. The years after the creation of DHS have seen the introduction of some *ad hoc* communication arrangements to anticipate and adjust resources to address the impact on DOJ component offices and bureaus of policy initiatives undertaken by the main DHS operating agencies (ICE and CBP).

The lack of more overt, formal coordination here may not reflect a failing of management and oversight functions so much as the inherent complexity involved in bringing agencies together, each of which is subject to differing policy priorities and competing demands for resources. Planning with the long lead times involved in the federal budget process inevitably leads to unanticipated changes driven by both external developments and internal reassessments of resource allocation decisions.

A natural question is whether a more formal coordinating process and set of budget estimating procedures would have affected the outcomes observed over the past 11 years or the likely course of future budget allocations for federal immigration enforcement functions. Heightened emphasis on homeland security during the years after 2001 caused the planning and budgeting for immigration enforcement to be particularly difficult. And it is possible that after these initial years of adjustment to new operating arrangements in the relevant agencies at both DHS and DOJ there will be greater payoff to the introduction of more formal coor-

dinating mechanisms among the immigration enforcement agencies. In the current stringent budgeting environment for domestic discretionary federal agencies, heightened competition for resources among the agencies and continuing demands to meet multiple priorities may make such coordination more important, although also more challenging. The two departments face an array of other challenges in budgeting for immigration enforcement, which is the focus of Chapter 6.



## 6

## Budgeting Challenges

A primary task of budgeting is to estimate the level of resources that will be needed in the future to support the work of established agencies, programs, and activities. Another important task of budgeting is to identify and assess alternative ways that resources could be used more effectively to accomplish a given set of policy goals. The people who are responsible for budgeting and appropriating funds for immigration enforcement will never have an easy time with either of these tasks.

Budgeting for the U.S. Department of Justice (DOJ) components of the immigration enforcement system will always be hampered by the system's complexity, dynamism, and uncertainty. But steps can be taken to help meet those challenges. For example, it might be possible to narrow the range of budgeting surprises—unanticipated service demands that seem to require additional budget resources for one or more DOJ components, or if that is not possible at least to mitigate their effects. And, it may be possible to inform budget choices with better information and analysis of the possible effects of alternative resource uses, so analysts can help policy makers better apply resources to meet the policy goals of immigration enforcement and not merely meet current program needs.

We begin this chapter by recognizing the generic challenges that face analysts and policy makers for any complex, dynamic administrative system. We then draw on the committee's field observations of the immigration enforcement system and its recent evolution to describe additional obstacles specific to the immigration enforcement system. The complexity of that system makes it unrealistic to look for technical solutions in

the form of sophisticated modeling methods, but budgeting could be improved through improved data collection and new analyses that relate resource levels and uses to results.

### WHY ALL BUDGETING IS HARD

Federal departments and agencies develop budgets by first estimating what level and mix of resources they will need to execute authorized or proposed activities, consistent with legal mandates and policy objectives. Resource estimates therefore reflect both cost information and policy choices about program objectives and means. As described in Chapter 5, the budget process requires that agencies develop estimates well in advance—typically 18 to 24 months—of the period for which funding is sought, adding to the challenge. Because the budget process is lengthy and spending demands are characterized by uncertainty, agencies find it challenging to accurately estimate their resource needs when budgets are drafted.

Agencies may take one of two broad approaches to developing budget estimates. The first and most straightforward is a high-level incremental approach.<sup>1</sup> Starting from the recent pattern of budget requests and variances (e.g., supplemental requests, reprogramming, and rescissions), budget planners account for overall spending trends and adjust for any new information expected to affect future resource requirements. To caricature: “If in the past you believe evidence suggests the U.S. Marshals Service was underbudgeted by 2 percent, then in the future bump up the budget request for the U.S. Marshals Service by 2 percent, all else equal,” or “If in the past, the U.S. Marshals Service has made do with a flat budget, then in the future provide the U.S. Marshals Service with a flat budget unless and until new information justifies an increase or decrease.”

For policy and program areas in which the processes underlying budget demands are understandable and relatively stable, incremental methods often suffice to produce reasonably accurate estimates of future resource requirements. For many annually appropriated programs, this approach works quite well. For low-income housing subsidies, for example, the funding needed to sustain a given level of service is readily

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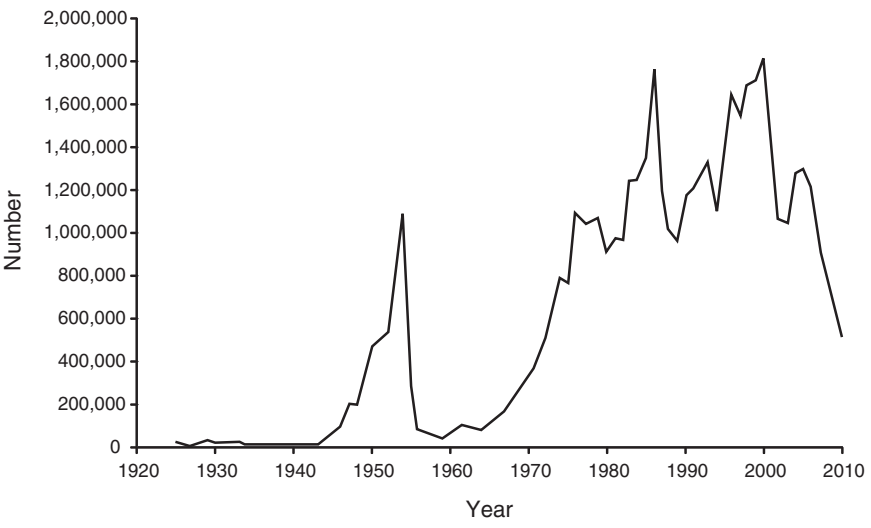
<sup>1</sup>Incremental budgeting is the oldest and simplest approach to developing budget estimates for public programs (see, e.g., Schick, 2007, Chapter 1). The distinction made here between incremental and other technical approaches is highly stylized, and it does not address the institutional and political determinants of budget and appropriations decisions that often modify or supersede technical judgments. Moreover, empirical research on budgeting decision making has thrown doubt on whether incrementalism or any other decision-making model can explain trends in funding for agencies, programs, or budget accounts; for a convenient summary of this research, see Meyers (1994), pp. 1-18.

calculated by applying an inflation factor to rents and utility payments and a growth factor to average incomes of the eligible population. Or, for the air traffic control system statistical regression and other more sophisticated statistical methods can be used to supplement or improve on simple incremental adjustments. For other government programs, estimation challenges are even greater. At the extreme, some needs are nearly impossible to accurately estimate in advance on the basis of trend analysis or actuarial modeling or even with more elaborate multivariate statistical models. A prime example is the problem of budgeting for emergencies, such as natural disasters and other large, unpredictable, high-impact phenomena, such as terrorist attacks or financial crises. For these situations, budget planners often appropriate reserves or “rainy day” funds to meet some portion of emergency needs and are prepared to seek supplemental funds after an event to meet additional needs.

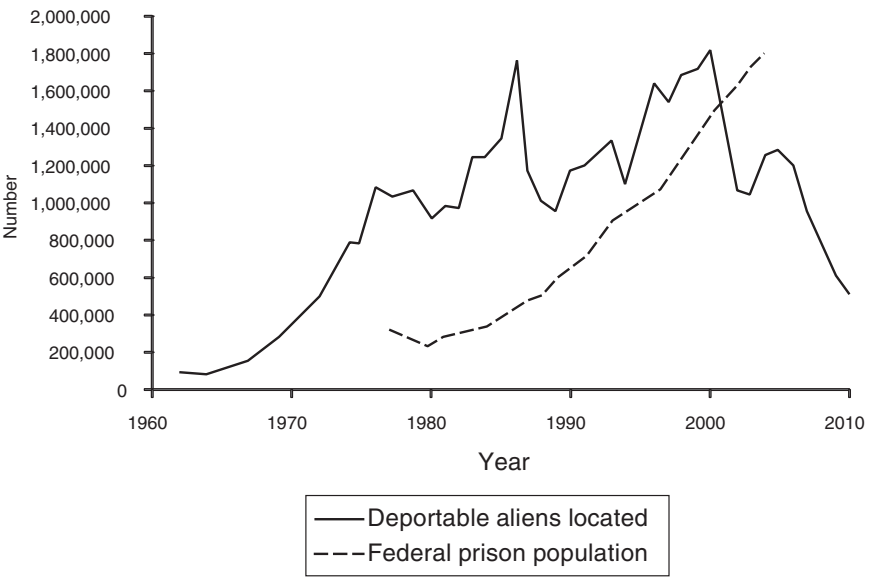
So what method of estimation should DOJ use to develop initial estimates of resource needs for the immigration enforcement budget? A primary driver of service demand for DOJ immigration enforcement is the number of people apprehended as unauthorized immigrants each year. As described in the preceding chapters, the number of people who reach DOJ depends in part on policies of the Department of Homeland Security (DHS), e.g., the proportion prosecuted and the proportion offered voluntary return. To illustrate the degree of variability over time, we focus here on the total number of deportable aliens located as reported in the *DHS Yearbook* (U.S. Department of Homeland Security, 2011d), though we note that it understates the numbers apprehended (see Chapter 4). As shown in Figure 6-1, DOJ immigration enforcement case volume or services demand from apprehensions has been quite variable over time, not just recently, but over the past 80 years. For comparison, this demand is radically more variable than is, say, the provision of “imprisonment services” provided by federal prisons, as shown in Figure 6-2.

Another broad approach to producing budget estimates considers the likely behavior of various individuals and organizations in the system under likely future conditions to try to forecast actual resources needed (number of staff, processing facilities, detention beds, etc.) on the basis of those anticipated behaviors. Such structural modeling approaches can be applied to estimate dollar requirements for a given level and quality of service. Organizations can budget for either a specified quantity of service provision or a specified level of service quality. The former approach (a





**FIGURE 6-1** Deportable aliens located, 1925-2010.  
SOURCE: Data from U.S. Department of Homeland Security (2011d).



**FIGURE 6-2** Comparison of federal prison population and deportable aliens located, 1962-2010.  
SOURCES: Data from U.S. Department of Homeland Security (2011d) and U.S. Department of Justice (2005).

specified quantity of service) is much easier when demand is volatile and uncertain, as is the case for immigration enforcement.<sup>2</sup>

A budgeting approach that begins by modeling the structure of the services system is much more demanding of information and analysis than incremental approaches, but for complex and dynamic systems like the one encompassing migration flows and immigration enforcement, extrapolation-based methods are unlikely to produce consistent and accurate estimates of resources needed to meet service demands.<sup>3</sup> Indeed, although DOJ's recent budget history includes few major reprogramming or supplemental funding requests, the appearance of stability in the budget process largely reflects DOJ's capacity to "make do" or adjust its operations to variable service demands within fairly broad limits though with effects on quality (see Chapters 4 and 5). Developing estimates of resource requirements for such a system may depend on understanding how actors in the system (and those outside the system, such as other governments and potential undocumented immigrants) are likely to behave in the future. Is such a modeling approach possible for DOJ's parts of the immigration enforcement system? To answer this question, the committee examines both challenges posed by the nature of the immigration system and the social environment in which it operates and from the limits of information available to budget planners.

### THE PARTICULAR CHALLENGES OF BUDGETING FOR IMMIGRATION ENFORCEMENT

In addition to the usual challenges of budgeting, DOJ confronts at least five additional challenges to projecting its resource needs for immigration enforcement that are specific, to varying degrees, to the immigration system:

1. the nonlinear nature of relationships within the administrative system responsible for executing immigration enforcement policy;

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<sup>2</sup>Apprehended unauthorized immigrants can be seen as "customers" generating demand on DOJ's parts of the enforcement system. Service quality (however defined) is a function of service capacity and demand. When demand is too high for a given service capacity, then service quality suffers. In standard business applications, for example, poor service quality often manifests in long customer waits. Defining service quality for public services, such as immigration enforcement, is typically more complex than for many other services, but it includes assurance of due process, just treatment of those apprehended, and that the personal cost of violating immigration laws is not so low that it undermines the effectiveness of enforcement in reducing or deterring illegal immigration.

<sup>3</sup>See Appendix B for a review of major efforts to model workload and resource requirements for federal immigration enforcement and similar criminal justice processes.

2. adaptive behavior by both enforcement agents and immigrants;
3. jurisdictional complexity and dispersal of authority;
4. policy shifts and shocks to the migration system that are outside the DOJ budgeting process; and
5. current limitations on data on costs and performance.

As discussed below, the immigration enforcement system presents challenges akin to those of a queuing system, which, in turn, implies nonlinearity, adaptive behavior, and noncorresponding jurisdictions. Not only does DOJ—its staff and the organization, writ large and small—adapt to changes in its operating environment, but also so do those who might interact with DOJ, including representatives of other agencies and potential unauthorized immigrants. As a consequence, only some of the challenges in this category are under DOJ’s control.

### Queuing and Nonlinearity

DOJ’s processing of cases (people apprehended as possible unauthorized immigrants) involves taking them through various stages of legal review, during which they may be detained and at the end of which they may be incarcerated or, in most cases, removed from the country. The movement or flow of cases through this administrative system, as described in Chapter 4, is limited by constraints at various points—notably by the number of available detention beds and by the limited capacity of immigration courts and federal courts and their facilities. Cases in excess of capacity at one or more points of resource constraint must either be held before further processing or diverted to other administrative channels—for example, released rather than detained pending review of their status or returned without formal processing or with administrative processing by DHS only—rather than passing through formal proceedings and then ordered removed.<sup>4</sup> The cost of delays in processing—including costs of detention and related transportation, food, and health care—make waiting a direct driver of one of DOJ’s largest and least predictable cost elements and therefore an important source of administrative inefficiency.

A fundamental observation of the study of such queuing is that sys-

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<sup>4</sup>In technical terms, DOJ’s processing of immigration cases is a queuing problem, that is, a problem in which a group of “customers” wait in line to obtain a service, a service provider makes decisions about how it will allocate resources to various “servers,” and the customers’ wait time depends on those decisions. Unauthorized immigrants and their associated cases are “customers”; DOJ is the service provider; DOJ assets (e.g., U.S. marshals, lawyers, immigration judges, and facilities) are “servers.” Managing queues involves striking a balance between the cost of the “system” (the cost of paying for the servers) and the cost of poor service quality—generally and, most obviously, of waiting.

tem performance metrics, such as the average number of cases or customers waiting in the system, are a highly nonlinear function of system utilization. Utilization means, roughly, how busy the providers of service (servers) are or the ratio of customer demand to the number of servers and their service rates. In particular, these curves have an “elbow”: increasing demand always increases waiting times, but initially that increase is fairly slow and almost linear; then, rather suddenly, the system moves from functioning well to becoming dysfunctional, and, absent any other changes, waiting times shoot up: see Box 6-1.

The immigration enforcement system involves not just one queue, of course, but a system or “network” of interrelated queues. If increased case volume at one “node” (i.e., for one particular queue) hits a limit of service capacity and is not met immediately with an increase in capacity, then back-ups at that point in the system can spill over and affect demand at other points in various ways, creating additional nonlinearities.

A recent surge in illegal immigration in the Border Patrol’s Tucson sector shows at least two such spillover effects. First, the increased illegal flows into Arizona reflected a behavioral response by immigrants, as migration flows shifted to Arizona in the wake of new enforcement resources put in place in Texas and California beginning in the 1990s. Second, within the Tucson sector, the rising number of unauthorized immigrants facing formal removal and criminal charges produced nonlinear spillovers at various nodes in the DOJ enforcement process, most notably at choke points in holding cells, court rooms, and transportation capacity. In this queuing network, as in many others, departures from the previous period’s operating conditions rippled through the network, making it impossible to estimate volume or service provision at other nodes in the system on the basis of linear extrapolations of their own recent pasts.

Even in a single location that is providing what from the outside looks like a single service, there can actually be parallel issues when the location’s service rate is determined by the most restricted of several complementary assets. A highly memorable example is the reported problem in one border location with a slow, small courthouse elevator that is the only way that defendants can get to or from the courtroom.<sup>5</sup> In such circumstances, hiring more judges or marshals may not increase service capacity. A budget analyst without local knowledge might project no change in average waiting time of defendants in the system if DOJ personnel budgets were expanded in parallel with anticipated increases in workload; but if the elevator is the bottleneck, negating the benefits of

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<sup>5</sup>An interesting example of this phenomenon comes from how police response to the crack epidemic of the 1980s put services pressures on other law enforcement “downstream” of the arresting agency: see Press (1987, pp. 541-569).

**BOX 6-1**  
**An Illustration of Queuing Effects**

If the waiting time per customer were linear in utilization, forecasting would be fairly easy. For example, if demand (the number of unauthorized immigrants fed into the DOJ system by DHS) were going to go up by 20 percent with no change in DOJ's service capacity, then the wait time per person would go up by 20 percent, and the total time waiting would go up by 44 percent (20 percent more customers each waiting 20 percent longer, plus a 4 percent "interaction" effect). If server costs remain the same, customers must bear the cost of the additional resource demands in the form of longer wait times. Alternatively, if server capacity (and associated costs) also were allowed to increase by 20 percent, then the total amount of waiting would increase by 20 percent (20 percent more customers, each waiting the same amount of time), and so would server costs: see table below.

Unfortunately it is not that easy. Depending on the actual operation of the system and its prior state, a 20 percent increase in demand can increase waiting per person by 20 percent, less than 20 percent, or more than 20 percent, with no real upper bound. The simplest example of a nonlinear queuing response function is the so-called M/M/1 queue, for which the average time users spend in the system in steady state equals the reciprocal of the difference between the service rate and the customer arrival rate.\* In this case, if utilization was originally 80 percent and demand increased by 20 percent, then waiting time would increase by 400 percent. Linear estimation, and therefore linear budgeting, just does not work in such circumstances.

Scenario	Number of People	Wait Time per Person	Total Wait Time for People	Server Cost
Baseline	100	1 hour	100 hours	\$1,000
20% increase in people with no increase in capacity	120	1.2 hours	144 hours	\$1,000
20% increase in people with 20% increase in capacity	120	1 hour	120 hours	\$1,200

\* In mathematical terms,  $W = 1 / (\mu - \lambda)$ , where  $W$  is wait time,  $\mu$  is the service rate, and  $\lambda$  is the rate at which people arrive. Thus,  $W$  explodes toward infinity as  $\lambda$  approaches  $\mu$ .

more staff, then queues of defendants waiting for their day in court could still explode, with follow-on costs from increased detention numbers and spillover effects on other parts of the system. To generalize, there can be ripple effects when infrastructure (capital) investments are not in sync with increases in personnel.<sup>6</sup>

### Adaptive Behavior and Instability

Standard statistical techniques used to model social systems assume that the way the parts of those systems interact with each other and their environment is stable over time. Yet in the case of the immigration system, resource demands change over time because of two forms of adaptive behavior:

1. adaptations by service providers, such as prosecutors or immigration judges, who change the amount of time and resources invested in each “customer” by developing more efficient mechanisms to place immigrants in formal removal and subject them to criminal charges; and
2. adaptation by potential unauthorized immigrants, who respond to new enforcement procedures by adjusting, for example, their efforts to enter and evade apprehension, which mean that resource demands for a given level of illegal immigration change over time, and they are a barrier to statistical estimation or modeling based on past behavior and therefore to prediction for budgeting.

#### *Adaptive Behavior by DOJ Decision Makers and Administrators*

DOJ’s resource requirements depend on the number of individuals entering the immigration enforcement system and on how the system

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<sup>6</sup>Private industry faces structurally similar problems (i.e., networks of queues facing volatile demand and, in some instances, strategic interdependencies both within and across firms). However, it is not as clear that businesses face a similar budgeting problem. For example, a manufacturing operation can be modeled as a network of queues, but a manufacturer does not have to budget for individual server capacity a year or more in advance. Moreover, when a plant faces an overall surge in demand, it can call in workers from other plants, hire temporary workers, pay overtime, or outsource work to contractors. Those actions might break budget forecasts, but manufacturers do not mind when costs go up if the reason is unexpectedly strong demand, since that demand brings an associated increase in revenue. Although DOJ can take at least some analogous actions (e.g., by outsourcing), there is no sense in which unexpected surges of demand that occur at a particular time automatically bring an associated increase in revenue. Moreover, the agency would not be permitted to use any increased revenue for its own operations, but would have to initially return it to Treasury.

treats those individuals. Decisions about “treatment,” many of which are discretionary, begin from the moment that an unauthorized immigrant enters the system. As described in Chapter 4, DHS and other enforcement agents place each person apprehended in one of three main enforcement “pipelines”—administrative return, formal removal, or criminal charges—each option having different implications for the use of DOJ’s marshals, lawyers, judges, courtrooms, and detention facilities. At any stage thereafter, DOJ decisions makers and staff can adapt their procedures and actions to meet the ebb and flow of traffic along any pipeline or route and across geographic regions. In DOJ’s case, the budgeting challenge is magnified by its “downstream” position relative to DHS policies and administrative decisions. These external changes may alter service demands for local DOJ components of the enforcement system quickly, well before the deliberative processes of budgeting and appropriating can be used to adjust resources. In the meantime, adaptive behavior by DOJ policy makers and administrators, at national or local levels, may be the only tool DOJ administrators have to cope with changes in service demand.

In a rigid system, the nonlinearity described above would yield tremendously volatile system behavior. But DOJ personnel and others—lawyers, judges—can adapt and adjust to pressures, at least to some extent. Those in positions of authority (e.g., U.S. attorneys, immigration judges) may have considerable latitude to change operating priorities or practices to respond to otherwise unmanageable queues; others (e.g., U.S. marshals and detention services) have less but still some flexibility. Activity may be shifted from one sector to another to balance workload with resources in various locations. Changes in adjudication methods—decisions to release or detain or application of technology (such as remote televised court proceedings)—can expand capacity. Some adjustments are at the discretion of individual personnel: just as store cashiers, for example, work faster when faced with a long line of impatient customers but are chattier when there is no one behind the current customer. Thus, the average rate at which customers are served (cases are processed) depends on the length of the queue (as well as other aspects of the system).

Components of DOJ that process unauthorized immigrants have been extraordinarily adaptive in this regard. For example, some U.S. attorneys have expanded their capacity to pursue immigration felony cases by deputizing attorneys in DHS’s Customs and Border Protection (CBP) as Special Assistant U.S. Attorneys dedicated to these cases, and in Tucson, the district court, as part of Operation Streamline, tries five defendants at once in a collective proceeding rather than hear cases individually (see Chapter 4). These changes are not evidence of global improvements in productivity. Rather, they are local adaptations made under pressure in

jurisdictions where such adaptation was needed to cope with resource limits.

In addition to such local adaptations and suggesting additional “flex” in the overarching system, DOJ has made increasing use of information and communications technology, such as deploying immigration judges remotely using video conference facilities, to address fluctuations in workloads across regions and increased demands over time.<sup>7</sup> Whereas typical service and manufacturing systems might have service rates that flex by  $\pm 25$  percent, it appears the immigrant enforcement system may have service rates that flex by larger percentages.

This commonsense adaptation to pressure is generally a good thing; without it, the system may have imploded at times of surging service demand. But what may better serve public policy aims can be a headache for budgeters, because it is hard to anticipate how much service rates will adapt to pressure or how incomplete adaptation will shift the burden around in the queuing network, altering which components of the network have been pushed beyond the “elbow” in the system performance curve described in the preceding section. Simply put, it may be difficult to anticipate the spillover effects of adaptation in one component on another.

#### *Behavioral Adaptation by Potential Unauthorized Immigrants*

One obvious example of adaptive behavior by potential unauthorized immigrants is deterrence. The first-order effect of tougher treatment of unauthorized immigrants by either DHS or DOJ is to increase DOJ costs, as a function of more arrests and higher rates of detentions and prosecutions per arrest. In theory though, if increased enforcement successfully deterred illegal immigration, then “demand” would drop as a result, and net costs might go down, not up. But, as noted in Chapter 3, the evidence on deterrence suggests there has been only a small effect of tougher enforcement on the volume of unauthorized immigration.<sup>8</sup> Moreover, the recent volume of unauthorized immigration has been large enough that even with a sharp drop in flow and a related drop in apprehensions, the potential decline in DOJ enforcement services demand has been more than offset by the increasing proportion of people appre-

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<sup>7</sup>For brief descriptions of the joint automated booking system and law enforcement sharing program that contribute to greater productivity for the immigration enforcement function as well as other law enforcement functions of DOJ, see U.S. Department of Justice (2011b).

<sup>8</sup>We note, however, that empirical findings may not fully capture the deterrent effect of recent enforcement efforts, which coincided with the post-2007 economic downturn, making the effects of deterrence difficult to isolate; and research may underestimate the deterrent effect on some foreign nationals who never decide to migrate, in part, as a result of the high costs of unauthorized migration associated with robust enforcement efforts.



hended who are referred for adjudication. As a result, DOJ's caseloads have risen rather than fallen with the fall in apprehensions, and at many points the caseloads exceed processing capacity. Thus, the demand for DOJ services is a complicated result of adaptation not only by potential unauthorized immigrants, but also by DHS and DOJ decision makers and administrators, including policies that involve increased "consequences" for violation of immigration laws. Apart from any deterrent effect, adaptive behavior by unauthorized immigrants could affect the amount and distribution of DOJ's workload costs in several ways, including a "caging effect," a "balloon effect," and reactive changes in the mix of immigrants.

**Caging Effect.** An unintended consequence of tougher border enforcement appears to have been that it has replaced traditional patterns of circular migration with long-term settlement by unauthorized immigrants in the United States (see Chapter 3). Given the number of unauthorized immigrants already in the United States of about 10 million, suppose the number of people seeking to enter for the first time is on the order of 1 million per year. A plausible change in home visitation rates, say, from once every 2 years to once every 4 years, would yield a commensurate decline in attempted reentries from 5 million to 2.5 million each year. This decline would more than offset any increase from other sources in the number of attempted new entries. The effect, other things equal, would be to reduce those subject to enforcement and thus potentially reduce resource requirements.

**Balloon Effect.** Researchers have long described the effects of immigration enforcement as being similar to squeezing a balloon in one place only to see the air flow to a different location. Would-be border crossers gather information in Mexico about variation along the border in U.S. enforcement efforts and are strategic about where they attempt entry. These shifts are particularly important from a budgeting perspective because the cost to DOJ of an additional crossing varies substantially by sector and because there is a cost to shift personnel and other resources from one sector to another.

For example, the federal district court in Tucson has established a capacity limit of 70 illegal entry felony prosecutions cases per day. So when 10 more people cross in Tucson, their crossing has no effect on the part of DOJ's costs related to criminal prosecution, even if all 10 are apprehended. In contrast, in El Paso, where there is at least the intent of applying "consequential enforcement" to everyone who is apprehended and the apparent capacity to do so, when 10 more or 10 fewer unauthorized immigrants seek to cross it has direct DOJ budget implications. In this situation, when toughness drives entrants to sectors where average

enforcement costs are lower and where capacities have been “swamped” so they cannot apply additional sanctions, DOJ’s costs can actually go down (see Kleiman, 1993). Of course, if the capacity is merely stressed and not swamped, the opposite can occur because of nonlinearities (as discussed above).<sup>9</sup> Regardless of the overall effect on resource requirements, needs may change dramatically in short periods in one or many geographic locations.

***Reactive Changes in the Mix of Unauthorized Immigrants.*** Changes in the kinds of people apprehended also affect DOJ’s costs. For example, if tougher border enforcement makes crossing physically more demanding, it could increase the proportion of unauthorized immigrants who are young males, who are more likely to commit felonies than are other demographic groups. Or if a higher percentage of those apprehended are reentrants or have been previously convicted of other crimes and are therefore more likely to be prosecuted as felons, it would increase DOJ’s cost per immigrant. Also, the mix of Mexicans and non-Mexicans apprehended at the border makes a difference to the workload of immigration courts because non-Mexicans are more likely to appear before immigration judges. So costs may rise even as case volumes fall and vice versa.

### **Jurisdictional Complexity and Dispersal of Authority**

A third challenge to effective DOJ budgeting for immigration enforcement is jurisdictional complexity on at least two levels: by agency and by geography. By agency, complexity derives from the division of responsibility for enforcement between two executive departments, with an additional important role for the federal courts. DHS is the agency primarily responsible for conducting immigration enforcement at the border and in the United States, but DOJ is the agency responsible for conducting immigration removal procedures and criminal trials and for prosecuting people charged with immigration-related crimes. In addition, even within DHS, three separate enforcement agencies (ICE, CBP’s Border Patrol, and CBP’s Office of Field Operations) conduct separate enforcement actions, and all have much discretion in how they enforce immigration policy. As a result, the flow of people to DOJ’s portions of the immigration enforcement system is almost entirely beyond the agency’s control: in addition to

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<sup>9</sup>Shifting sector-specific demand in a way that shifts demand from a sector with lower utilization to one with higher utilization will generally increase overall waiting and system congestion, because queuing performance curves are convex—at least up to the point at which customers are simply dumped out of the system, which could be one way to characterize what has happened in Tucson.

strictly exogenous factors in the broader immigration system, it depends on policy choices and policy implementation by multiple actors in DHS.

The immigration enforcement system is also geographically complex, as described in Chapter 4. In particular, while DOJ enforcement practices and resource demands are set by federal court districts, DHS practices and spending decisions are made by Border Patrol sectors and ICE field offices, and local law enforcement agencies operate at city, county, and state levels. These various jurisdictional boundaries do not either coincide or nest within each other: for example, there are federal court districts that span multiple field offices' jurisdictions and vice versa. The Texas border, for example, is split among five Border Patrol sectors and three ICE field offices, with the westernmost sector and field office also encompassing parts of New Mexico.

The lack of one-to-one correspondence between DOJ, DHS, and state and local jurisdictions creates two distinct challenges. First, it greatly complicates the exercise of combining data from DOJ, DHS, state, and local information systems. This complication might be addressed by adding some additional identifier fields to the data records: for example, DHS could label each individual not just by DHS sector but also by DOJ district, state, county, zip code, and other geographic identifiers. Second, beyond the practical issues of data collection and integration, it complicates administration. For example, DHS implemented Operation Streamline first in its Del Rio sector and only later in its El Paso sector, which is also part of its Western District. Indeed, El Paso immigration courts process people from entirely different parts of the country, whose cases are adjudicated in Texas because of the availability of detention spaces there or for other reasons.

To help deal with the system's complexity and geographic variation, both across the borders and internally, decision-making responsibility is delegated to officials and to field personnel. The U.S. attorneys have broad discretion to set priorities for criminal prosecution, for example. And individual CBP agents working along the border have, for practical reasons, wide latitude in determining how they handle individuals they encounter. These and many other examples of the delegation of decision making result in considerable geographic variation in the way cases are processed (see Chapter 4). This delegation of decision-making authority is a strength of the administrative system, allowing it to adapt to local conditions and learn through experimentation at particular locations and the adoption of innovative practices by other locations. It may also be a necessity. However, for budgeting, such variation and change further complicates the problem of understanding or modeling the system accurately enough to estimate the effects of possible changes in resource levels or uses on its performance.

*Exogenous Influences*

The budgeting challenges discussed above derive from characteristics of the immigration enforcement system, but many important factors that affect the flow of unauthorized immigrants into and through the system, and thus affect resource requirements, are external to DOJ (and often to DHS). Indeed, as described in Chapter 3, immigration decisions are primarily explained by the opportunities in the potential immigrants' countries of origin and their destination—the economic “pushes” and “pulls” that include the labor markets at both ends of the migration chain—and by social networks connecting transnational immigrant communities. As the recent U.S. economic downturn and slow recovery illustrates, governments have limited capacity to influence labor markets. And at the macro level, many of the most important factors that affect migration flows are not only external to the immigration enforcement system, but beyond the control of any government action in the United States or abroad. For the United States, for example, the pace of immigration over the last several decades has been driven by the end of the Vietnam War and refugee outflows from Southeast Asia, the Mexican debt crises and peso devaluations in 1982, 1986, and 1994, four U.S. recessions, Cuba's decision to open the port of Mariel and other exit ports in 1981 and 1994, and a series of civil wars and natural disasters in Central America and the Caribbean, among other factors. Exogenous changes continue to shape immigration flows; many of the more recent influences are discussed in Chapter 3.

In addition to these completely exogenous impacts on the immigration system, demand for enforcement resources also reflects policy changes at the federal, state, and local levels that occur outside of DOJ. Major, or even moderate, shifts in policy—such as increased apprehensions of visa overstayers or systematic changes in the exercise of prosecutorial discretion—can have striking implications for resource needs throughout the immigration enforcement system. Indeed, if the recent downward trend in migration attempts changes and is accompanied by a continued upward trend in “consequences,” the combined effect could be a dramatic surge in demands on DOJ's components of the enforcement system.

Given the system's decentralized administration and a degree of autonomy of each “node” in the system, imitative adoption of an initial policy change in one location by those in other locations may at times lead to a cascade of ad hoc, “adaptive” changes throughout the system. Such learning and imitation might occur within DOJ, across its components or sectors, between DOJ and DHS, or across DOJ and DHS components, sectors, and districts.

Although some might hold budget analysts and planners accountable for anticipating such policy shifts, they are treated here as unforesee-

able exogenous events that can create large variances between budgeted and actual costs. That is, they are another reason that budgeting for this system is harder than for many others. Moreover, as documented in Chapter 4 and Appendix A, immigration policy has been volatile, and it is likely to continue changing in light of public expressions of dissatisfaction with the status quo and the lack of a national consensus about the desired results, much less what policies would best achieve them. Indeed, there is sharp conflict between federal and state governments over many aspects of immigration enforcement. Abrupt shifts, uncoordinated actions, and different entities working at cross purposes are very common in this policy area, as in many others.

Budget analysts and planners would need to anticipate the effects of a policy shift not only for DOJ's activities, but also for those of DHS and even state and local governments to the extent that the latter would affect DOJ's resource requirements. As discussed in Chapter 4, the need for coordination across entities is widely appreciated in the field, but our discussions with DOJ analysts based in Washington, DC, suggest they do not closely coordinate their budget preparation with DHS or always receive timely information about DHS plans and new initiatives.

Even if there was timely sharing of information about DHS plans and new initiatives, budgets do not emerge from spreadsheets alone; rather, they emerge from a political process that must weigh and measure the sometimes competing needs of components within and across agencies. If providing funds for the work of highly visible border patrols is somehow more politically attractive than funding the work of customs agents or immigration judges, U.S. marshals, or construction of new courtrooms, then temporary or chronic resource imbalances may arise in the system.

Given the difficulty of anticipating change, timing can be important in defining surprises. Analysts must not only anticipate the effects of policy changes, but they also have to have sufficient time to assess the budget implications of those changes. Whether a change in policy—or any other external event—constitutes a true “surprise” could depend on when the change is announced in relation to the budget process and when the change is expected to take effect, as well as whether the budgetary implications of the change are estimable. The likelihood of a budgetary “surprise” rises as the time remaining in the relevant planning cycle diminishes; moreover, the potential for discrepancies between budget estimates and actual needs increases as the quality of information and analytical tools declines. The discussion of data limitations that follows seriously calls into question whether the budgetary effect of a substantial policy change would, in fact, be estimable, given any amount of advance warning.

### Limitations in the Available Data

As is true for most public programs, limitations in the available data affect the reliability and accuracy of budget estimates for DOJ immigration enforcement. The data limitations in this area fall into three general categories: poor information about previous and planned inputs, poor information about the cost of activities, and poor information about (or poor understanding of) how changes in inputs and policies affect costs, outputs, and important outcomes.

*Poor Information About Previous and Planned Input.* Budgeting for an open system in which demand is driven at least partly by external factors is challenging when the environment is dynamic. Certainly, this has been and will be the case for immigration enforcement. Flows and patterns of illegal immigration, changing economic conditions in the United States and elsewhere, and many other factors affect demand. As documented in Chapters 3 and 4, these factors have changed dramatically in relatively short periods in the past; the nature of the environment suggests they will continue to do so. From DOJ's administrative and operating perspective, "external" factors also include the policies and behavior of the enforcement components overseen by DHS. Information about planned changes in DHS's policies and practices is often unavailable when DOJ is developing budget estimates, as noted above, and when the Office of Management and Budget and then Congress are reviewing those estimates.

*Poor Information About the Cost of Activities.* Budgeting requires estimates of average and marginal costs for the activities that will be funded. In some instances, these can be estimated reliably and accurately on the basis of recent history, adjusted for changes in planned inputs where these are known. But costs for some major activities—such as detention or processing of apprehended persons—are also a function of changes in policies and practices that affect the proportions of people released or detained, criminally prosecuted or not, and so on. If facilities reach the limits of their capacity, the marginal costs of housing or transporting an additional unauthorized immigrant may rise rapidly. Thus, cost estimation becomes a major challenge.

*Poor Information About the Effects of Changes.* It is common in budgeting to look to the history of changes as a simple set of benchmarks for estimating the resource needs of the system: this is the basis for the incremental approach to budgeting described above. For a system whose fundamental character evolves rapidly, such estimates may be unavailable or not useful as benchmarks. In this context, incremental budgeting might

produce a consistent set of estimates over time, but they are unlikely to be accurate as estimates of needed resources.

Information reported by DOJ on enforcement outputs or the outcomes of DOJ's enforcement activity is very limited. Desired outcomes are, for the most part, either not specified or not measured. The 2007-2012 DOJ strategic plan (U.S. Department of Justice, 2007) includes only two long-term performance targets related to immigration enforcement: a 2012 target for the Office of the Federal Detention Trustee (OFDT) to hold the increase in average per-day jail cost for federal detention at or below inflation and a 2012 target for the Executive Office for Immigration Review (EOIR) to complete 90 percent of priority cases within established time frames. In addition, one of the high-priority goals set in 2010 by the Obama Administration for DOJ was to increase immigration judges by 19 percent by the end of fiscal 2011 so that as DHS criminal alien enforcement activity increased, not less than 85 percent of the immigration court detained cases would be completed within 60 days.

Without meaningful measures of performance relative to the policy objectives of immigration enforcement—such as measures of success in reducing successful illegal entry, or length of stay, or prompt and fair adjudication of status—it is not possible to relate specific activities or resource uses to such enforcement outcomes. DOJ has not attempted to estimate or account for variations in its contribution to the success of policies aimed at reducing efforts of illegal immigration to the United States or to prompt and fair adjudication of cases. Moreover, because these outcomes are a joint product of the activities of two departments and the federal courts, it would be difficult to isolate the effects of DOJ's activities on the achievement of policy goals from those of other system elements. Development and use of such performance information for planning and budgeting therefore may appropriately be considered a joint or shared responsibility of the two departments, given that each has a major responsibility for the enforcement system's administration.

### **Lack of Data on Case Histories**

Further confounding even elementary attempts to estimate resource requirements—for DOJ or any other parts of the immigration enforcement system—are notable weaknesses of the data on case histories and, hence, on processing flows rather than events. Counting events is often sufficient for retrospective analysis, e.g., to explain what the costs were last year. ("Where did the money go?" or "How much did these activities cost last year, on average?") Forecasting future costs when policy or exogenous changes are anticipated requires a different kind of thinking. Answering those "what if?" questions requires some understanding of causal link-

ages (“If this quantity changes, how will that affect other quantities”): those kinds of questions require data systems that are oriented to people and their “careers” of interactions with the system.

At present, analysts lack credible, complete information on the numbers of individuals who enter and exit the system, as well as the numbers of individuals who enter each pipeline in the system and the amount of time they spend in the system, either in total or at any point in the system. At present, a budget analyst would lack sufficient information to track the progress of any individual—or cohort of individuals—through the immigration enforcement system. Given this paucity of useful data, the most rudimentary indicators of the cost of handling additional cases are well beyond reach, let alone any more sophisticated behavioral assessments.

The committee received and analyzed some partial case history data from DHS for individuals apprehended by the agency in (fiscal) 2008-2010. The files were created by combining administrative records for the same person: with some gaps, they show the progress of the case and its final disposition, if that occurred during the period covered by the file, which ended with the first quarter of fiscal 2011. On the basis of our work, we believe that there could soon be the capacity to produce and analyze complete case histories of people moving through the enforcement system. The committee believes this can be accomplished without new data collection: rather, we believe it can be accomplished by the continued progress in integrating DHS information systems and further data sharing with DOJ. The files prepared at the committee’s request demonstrate that complete case histories can be constructed from the existing administrative databases maintained for operating purposes by both departments.

Although the data needed are available now, to produce case history data and analysis useful to inform policy and budget choices will require further work. First, the case histories would have to be completed so that all critical events in administrative databases, and their dates, are included: this task will require combining the new case histories data maintained by DHS with matched administrative records for the same cases in DOJ. Second, personal histories—including basic demographic characteristics and other background information (such as previously recorded apprehensions and encounters with federal immigration officials or other law enforcement and criminal backgrounds) would have to be integrated with the case histories data by matching on personal identifiers.<sup>10</sup> On the basis of its examination of the data provided by DHS and discussions with DHS and DOJ staff, the committee believes that it would be feasible—and not a major investment—to combine administra-

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<sup>10</sup>Over time, those case histories could be extended to include future apprehensions of the same individual and subsequent handling of those cases.



tive records with information on unique individuals, but it would require additional work on the data systems of both departments.

Once such a base of information is available, analysis could reveal, much more clearly than previously available aggregate statistics, how people with different personal characteristics and histories are treated at different points in the system over time and with what outcome (such as removal, return, or relief to stay). As a step to measuring the effects of specific enforcement methods or broader enforcement strategies, planners and budgeters could conduct “what if” analyses to study the probable effects of possible changes in local or national policy and practice through various parts of the enforcement system. For example, an analyst could ask: “If funding for this particular component of the immigration enforcement system—(e.g., immigration judges in specified sectors) is increased, how would it affect: (1) the number of people in detention waiting for proceedings and, hence, the associated numbers and costs for detention; (2) the proportion of undocumented immigrants who are apprehended who will not be detained at all because of a lack of detention capacity; and (3) incentives for those trying to cross in one border sector or another?” Or, an analyst might ask: “What would be the effects on various system components and associated resource requirements of applying the same ‘consequences’ in the San Diego sector that have been applied to similar cases in the Tucson sector?”

If the nonlinearities and interactions of the system can be properly modeled, such “what if” analyses can help analysts, budget planners, and policy makers better understand the probable effects of different methods and strategies, taking account both of their budgetary costs and their marginal or joint contributions to changes in outputs and perhaps, ultimately, to achieving the outcomes sought for immigration enforcement. At a minimum, by highlighting potential “choke points” and other constraints, such analyses can help policy makers identify more cost-effective ways to use limited resources to achieve their policy objectives for immigration enforcement. The value for budgeting of potential future use of case histories data depends on other steps, including improving measures of the aggregate effects of enforcement and decisions about which measures are best to use in assessing the system’s performance.

## CONCLUSION

We began this chapter by distinguishing two basic tasks of budgeting. One task is to estimate future resource requirements to carry out established programs and activities. A second task is to identify and assess alternative ways to use resources that may be more effective in achieving policy goals.

In this chapter, we have suggested why even the first of these tasks will always be difficult for the immigration enforcement system. Budget estimates for this system are subject to substantial error regardless of the approach taken, with implications for the quality of enforcement services and the effectiveness of the system in achieving its legislated purpose. Improvements can be made, however, through better data and analysis. These should reduce errors in estimation. The addition of information about performance and expanded use of case histories may increase the ability to conduct a “what if” analysis of how changes in resource uses may affect other system components and could contribute to changes in performance. This analysis could inform budget choices, improve decisions about where to use budgeted resources, and possibly improve performance.



## 7

## Conclusions and Recommendations

**D**espite the challenges of producing reliable estimates of resource needs for the components of the immigration enforcement system for which the U.S. Department of Justice (DOJ) is responsible, the committee has identified specific opportunities to improve estimates of resource needs. In addition, we see opportunities to improve the use of available resources through analysis of the relative effectiveness of alternative ways of applying budget resources. A new approach to budgeting may allow those resources to be applied more effectively to limit illegal immigration and achieve other policy goals.

To improve budget estimates and to support better decisions about the use of budget resources, the committee proposes elements of a new model of budgeting for DOJ immigration enforcement, including changes in the procedures used to develop budgets. The committee's recommended approach relies on new data and analysis, focuses on improving the effectiveness of enforcement efforts, and offers DOJ more flexibility in deploying whatever level of resources is available (through appropriations) as an alternative to either seeking supplemental resources or adapting procedures in ways that may degrade performance. Given the shared responsibility of DOJ and the U.S. Department of Homeland Security (DHS) for the enforcement system, greater collaboration across DOJ components and between DOJ and DHS—beginning with early discussion of pending changes in policy or practice and including greater sharing of information during the budget process—can be expected to improve bud-

get decisions for both departments and may lead to more cost-effective use of the funds expended by each.

### CONCLUSIONS: WHAT HAS BEEN LEARNED

Budgeting for immigration enforcement in DOJ involves several unusual and challenging issues.

Over the past 10 years or so, apprehensions of unauthorized entrants and residents have fallen substantially. Rates of net illegal entry are now near zero. This downward trend would be expected to reduce demand for the immigration enforcement functions that DOJ administers, but that has not occurred. As detailed in the previous chapters, the demand for those immigration enforcement-related functions has increased, as has the cost per apprehension and removal.

The increases in costs reflect policy changes aimed at imposing increased consequences on illegal entrants and more aggressive internal efforts to identify and remove illegal residents. Those policies have resulted in higher proportions of those apprehended being subject to civil or criminal prosecution, detention, incarceration, and/or administrative removal. These historically specific factors, however, may give little indication of the trend in future demand for DOJ enforcement when, for instance, U.S. economic conditions improve.

#### Nature of the Budgeting Challenge

Although Congress, in its request for this study, indicated that the Department of Justice has had unusual difficulty in formulating its budget requests for immigration enforcement, only in a few instances in the past 10 years has an apparent underestimate of funding requirements led to significant requests for supplemental funding or other sizable adjustments. Only on two occasions, both associated with reorganization of immigration enforcement responsibilities in DOJ, were major adjustments made to its original funding request. Rather, DOJ has adjusted its operations to meet the changing demands on its parts of the enforcement system.

Nonetheless, a distinct budgeting problem complicates DOJ immigration enforcement efforts. Surges in DHS resources and changes in federal enforcement policies, strategy, and tactics—usually at DHS initiative—are major sources of unanticipated demands, with consequences for DOJ's responsibilities. The volatility of apprehensions and policies that drive the demand for DOJ enforcement services is often greater at a local or regional level than at a national level.

Unanticipated demands for DOJ's services have immediate and direct

consequences for how enforcement is conducted, commonly leading to adjustments in operations to ensure that funding limits are not exceeded. Changes in operations resulting from unanticipated resource constraints have, on occasion, degraded the quality of operations and may have impeded the effectiveness of enforcement efforts in limiting or reducing illegal immigration.

**CONCLUSION: Problems in estimating resources for immigration enforcement are more often likely to manifest themselves as changes in the level or character of enforcement activity than as requests for supplemental appropriations or other adjustments to initial spending authority. Such adjustments have implications for enforcement effectiveness.**

The inherent characteristics of the immigration enforcement system documented in this report, as well as the long lead times inherent in budgeting, cast doubt on whether it is possible to rely on the projection of past trends in activity or to use more complex statistical models to improve estimates of the system's future resource needs. The immigration enforcement system will continue to evolve in unpredictable ways that can change resource requirements substantially over periods as short as 1 or 2 years.

Moreover, the system is complex and pervaded by discretion at regional and local levels. Discretion allows administrators and decision makers to adapt to limits on local resource limits and changes in demand for their services in varied and hard-to-anticipate ways by handling fewer cases or handling them differently. These adaptations have consequences for the system. Adapting to fixed resources by increasing backlogs or minimizing consequences for violations of immigration law may actually reduce effectiveness in achieving the aims of enforcement. Bottlenecks and case backlogs arising from mismatches between mandates and resources may impede or alter enforcement. The likely effects include at least temporary local reductions in the effectiveness of enforcement efforts unless there are compensating efficiency gains. Yet whether or not adaptation helps to maintain system performance, such adjustments make it hard to define, much less to estimate, the proper level of funding to provide to each system component.

DOJ's budget history shows a striking capacity to adapt or "make do" with the available resources. Making do, while admirable, can affect the system in perverse ways as noted throughout this report. Ad hoc adaptations in one arena may impinge elsewhere and generate inefficiencies.

The committee had neither the time nor resources to directly measure the effect of budget stresses and subsequent adjustments on the effective-

ness of the system or its components in contributing to goals of immigration enforcement policy—such as reducing illegal entry or ensuring fair and prompt adjudication of charges and status. In fact, as discussed in Chapter 6 and below, the information on outcomes of enforcement activity needed for such analysis is not yet available in a form suitable for analysis. Nor, has improved performance been a major focus of budgeting for immigration enforcement. Because the enforcement process involves important sets of activities in two departments, isolating the effects on enforcement outcomes of changes in policy or activity in one or more components will be challenging even when better information on the determinants of variations in performance becomes available.

**CONCLUSION: The enforcement system’s capacity to adjust operations is useful for dealing with changing and varied conditions, but it impedes the ability of budget analysts and planners to assess future resource requirements.**

**CONCLUSION: Because resource requirements cannot be reliably estimated 18 to 24 months in advance of when they will be used on the basis of past trends or using a formally specified statistical model, better data and other approaches are needed to improve estimates.**

### **Opportunities to Improve Estimates and Mitigate Surprises**

Despite the difficulties of budgeting for immigration enforcement, the committee sees opportunities to reduce the number of surprises in the system and to mitigate the effects of those that remain. DOJ’s estimates of future resource needs might be “good” or “bad”—that is, more or less accurate—given the information at hand, but even a “good” estimate can result in an eventual discrepancy because external forces, such as changes in policy or exogenous factors, might yield surprises. The U.S. Office of Management and Budget (OMB), in weighing tradeoffs across agencies, might request more—or less—funding; or Congress might appropriate a different amount. The story, however, does not end there. The ways in which DOJ and its constituent parts respond to shortfalls—or carry-overs—can feed back into the system to make the gap larger or smaller.

Two kinds of responses are possible: ad hoc and coordinated. And such responses can occur at various points in the process. Initially, at least, one way to improve the system is through improved collection, organization, and use of data, particularly for case histories of people encountered or apprehended as illegal entrants. Another way is through improved coordination and communication among those who set policy

direction; those who budget for component activities; and, at a local level, between the people who implement policies for the system's components. Improvements in all three domains—information, coordination, and communication—could be mutually reinforcing, with the potential to create a “virtuous cycle”: better information can contribute to better coordination and communication and better coordination and communication can yield better information. Together, these improvements could reduce the number of surprises that affect the system's operation and contribute to better responses to further surprises when there are local shortfalls or carryovers.

On a more technical level, improved estimates can be obtained at the outset—when budget estimates are first developed—by a deeper understanding of how exogenous factors, policy, and administrative practices play out over time at different activity levels. Such understanding requires careful attention to bottlenecks and other constraints in each locality and insight into the various ways that both unauthorized immigrants and enforcement agencies and staff may adapt; the former adapting to changes in policy and on-the-ground conditions and the latter adapting to changes in demands for their services. For this purpose, a well-elaborated model of flows through the system—also requiring better data—can be especially helpful.

Budget and policy planners, armed with a simple flow model informed by estimates of how people with specified characteristics have been or will be treated at various points in the process, could conduct such analyses (although not fully quantifiable and ever evolving) to simulate how specific changes—such as a surge of unauthorized immigrants, changes in enforcement targets, or a new enforcement initiative—will ramify through the system. Such analyses could improve resource planning and allocation whenever there are changes in immigrant flows. In initial estimation, gains can be made both by improving analysis and redefining “surprises” as “information” to feed into analysis; at the operating level, gains can be made by helping to identify circumstances when independent responses (by one agency or in one area) will be problematic.

Our analysis suggests that reported statistics on enforcement activity may understate the level and misrepresent the relative components of that activity, which would make them misleading indicators of demand for both DHS and DOJ services. We compared summary data for fiscal 2008-2010 case histories provided by DHS with published DHS statistics on “deportable aliens located” and other activity measures: that comparison suggests that the published data exclude a substantial number of cases. For example, the published data apparently exclude people apprehended by the Office of Field Operations (OFO) of the Immigration and Customs Enforcement (ICE) agency, which adds more than 200,000 to the approxi-



mately 1 million annual totals for each of those years. Such discrepancies from the omission of OFO/ICE and some ICE apprehensions from the numbers would likely distort activity estimates at a regional or local level, which in turn would distort the profile of geographic distribution, activity trends, and overall volumes for purposes of estimating the potential flow of cases to DOJ's agencies.

Improved data on case histories and analysis with those data to relate policies, strategies, and resource use to achievement of specific policy outcomes would help policy officials and planners better predict how their policy and budget decisions are likely to play out through the system in terms of increased backlogs, changes in marginal costs, and other needed policy or budget adjustments.

As discussed in Chapter 6, the committee's examination of case history data obtained from DHS suggests it may be possible with more work to construct complete histories of how those with particular characteristics and personal histories are handled by the enforcement system and their various outcomes. Moreover, DHS is now able to establish with some confidence the unique personal identity of each person apprehended, based on electronic fingerprints and iris scans. The DHS case histories data provided to the committee lack important information about certain processing steps and still are in need of further validation. Even so, they suggest the current feasibility of producing a base of information about case flows and outcomes that can illuminate system dynamics. More work is needed to integrate case records pulled from both departments' administrative records and to combine these with personal histories of each person's previous encounters with law enforcement.

In the near future, a variety of analyses can be conducted of the ways people move through the system, based on current or alternative policies and given workload constraints of the system at various procedural steps. Such analyses may eventually include, for example, "what if" analyses of the effects of different enforcement procedures and strategies—such as the imposition of increased "consequences"—on resource needs of system components and, eventually, on outcomes. Such analyses would help policy makers and budget planners understand how and why the process treats differently immigrants with various characteristics, (i.e., age, country of origin, previous encounters with U.S. immigration or law enforcement) across time and within and across jurisdictions, and how those treatment differences affect their incentives, for example, to attempt another illegal entry. Such analysis can also show how differences in enforcement methods and strategies affect the achievement of enforcement policy objectives, including reduction in unauthorized immigration, apprehension, and fair and prompt adjudication of charges and

status. Estimating the separate effects of specific policies and practices is challenging, of course, but more such “what if” analyses will be possible once the existing case histories are completed and made available for this purpose.

**CONCLUSION:** As the Department of Homeland Security (DHS) systems become more integrated and if DHS and the Department of Justice can develop procedures for timely recording and sharing of information about the movement of people through the system, a richer picture of immigrant flows through the enforcement system can be constructed.

**CONCLUSION:** A new, fuller picture of system flows can be used as a starting point for “what if” analyses and estimation of how prospective changes in policy or practice may affect resource requirements.

### Opportunities to Identify Better Resource Uses

As discussed in Chapter 6, an important budgeting task is to identify alternatives for more effective use of limited budget resources. And as discussed in Chapter 3, the available evidence casts doubt on the effectiveness of existing approaches to limiting unauthorized immigration.

The absence of information to link resource uses with performance indicators makes it impossible to assess the effectiveness of enforcement policies. Without the ability to relate costs to performance, it is not possible to determine whether resources are being used effectively or, more importantly, how they could be used more effectively to achieve the legislated goals of immigration enforcement. The first step to improve this situation would be for policy makers to identify a set of appropriate goals and measured outcomes for government policies to control immigration. For any given set of specified enforcement goals, DOJ can develop a range of performance and efficiency metrics to assess how effectively it is achieving those goals.

With the minor exceptions noted in Chapter 6, DOJ has not set explicit near- or long-term outcome goals for its own enforcement efforts, nor have DHS and DOJ collaborated to establish policy goals and performance measures for their combined efforts. (DOJ is developing a new strategic plan for the fiscal 2013 budget.) Recently, DHS Secretary Napolitano dismissed the current measures used to assess the effectiveness of DHS border security efforts as inadequate for that purpose; that action may help set the stage for interdepartmental agreement on new goals and targets.

**CONCLUSION:** Absent a clear statement of what federal immigration enforcement policies seek to accomplish and adoption of appropriate measures to assess whether those policies are being met, policy makers and budget planners lack a firm basis for estimating the effects of varying resource levels and uses on the performance of both the Department of Homeland Security and the Department of Justice components of the immigration enforcement system.

Although the DHS and DOJ components of the enforcement system are separately administered and funded, they are meant to function as a single system. Thus, better coordination and communication within DOJ and between DHS and DOJ is necessary to improve both the accuracy of budget estimates and the probability that program resources will be used effectively and appropriately to meet policy objectives.

Eight years after the transfer of the former Immigration and Naturalization Service responsibilities to DHS, DOJ's planning and budgeting for immigration enforcement programs continues to be hampered by limited coordination between the two departments. There is an absence of formal procedures for timely sharing of information about policy shifts, budget requests, and changing conditions affecting resource needs and limited capacity to build, maintain, and apply a complete, integrated database of how individual cases are handled in the enforcement process.

The two departments have sometimes attempted to coordinate their policies and plans at higher levels, but they have not developed a common enforcement strategy, targets, or estimates of resource needs. A more systematic collaborative approach to planning and budgeting for the immigration enforcement system could yield large gains in resource effectiveness in immigration enforcement policy.

New opportunities are available to improve cooperation and institute new procedures to plan and budget for the entire immigration enforcement system. The Government Performance and Results Act Modernization Act of 2010 provides a set of new tools for use by agencies sharing responsibility for a common mission or set of objectives to jointly plan and budget to improve their performance.<sup>1</sup> The act requires OMB to identify,

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<sup>1</sup>P.L. 111-352, passed in December 2010 and signed by President Obama on January 4, 2011, makes significant changes to the Government Performance and Results Act of 2003 (P.L. 103-62), which requires executive agencies to prepare strategic plans and to develop and publish annual performance plans and annual reports on their performance. The new act modifies these requirements and codifies structures established to implement the 1993 act in an effort to strengthen the use of performance information for budgeting and managing. One new element is the emphasis on planning by multiple agencies around missions and objectives that cut across organizational boundaries.

in consultation with Congress, a set of cross-cutting, outcome-focused “federal priority goals” that will be the focus of cross-cutting analysis and joint planning, budgeting, and reporting on progress. This new set of procedures will be used selectively beginning with development of the fiscal 2013 budget. Linked to the budget process, these requirements provide an opportunity to formalize interdepartmental collaboration to improve performance, as appropriate: this could be a spur for DHS and DOJ to plan and budget together for their shared immigration enforcement responsibilities.

**CONCLUSION: Given the division of administrative responsibilities for immigration enforcement between the Department of Homeland Security and the Department of Justice and given that the effectiveness of enforcement efforts is a combined result of their separate activities, performance is likely to be improved by coordination of planning and budgeting between the two departments.**

Even with technical improvements in budgeting and better coordination in the preparation of estimates and prospective analysis of the effects of changes in policy or practice, there will still be budget surprises, but their effects can be mitigated in other ways. For example, Congress could grant administrators more flexibility in the use of budget authority to shift resources among alternative uses through broadening the range of permissible uses of some budget accounts. This approach was the basis for establishing the DOJ Office of Detention Trustee Program and account to centralize responsibility for detention administration and spending. Appropriations language could balance any increase in discretion over use of funds with limits on the range of eligible uses, reporting requirements, or other controls.

## RECOMMENDATIONS

Improved budgeting for DOJ immigration enforcement can improve performance of the larger enforcement system shared with DHS. In brief, an improved budgeting process would include

- reliable and accurate data on how cases are handled in the enforcement system and how their handling is affected by national and local resource constraints and decisions;
- clearer specification of the expected results of national immigration enforcement policies and how achievement will be measured;
- better information about policy performance and more timely sharing of that information between DHS and DOJ;

- closer policy coordination between DHS and DOJ, in consultation with the federal courts on issues related to court capacity and procedure; and
- collaborative planning and budgeting around selected cross-cutting priority objectives for border security and immigration enforcement.

The committee offers six recommendations for an improved approach.

**RECOMMENDATION 1: As a step toward collaborative planning and budgeting, the Department of Justice and the Department of Homeland Security should establish policy-level procedures to plan and coordinate policy planning and implementation to improve performance of the immigration enforcement system and to generate better information to improve estimates of resource requirements for system components.**

The policy-level group responsible for coordination would receive regular, consolidated reports from senior administrative personnel for each border sector and other regions on performance, resource constraints, and other operational obstacles in order to improve operational results. The policy group would request “what if” analyses to estimate the effects of planned or potential changes in policy, practice, or exogenous factors on the volume and character of immigration enforcement activity and flows of cases, using these analyses as a basis for resource estimation.

**RECOMMENDATION 2: On the basis of a recurring policy-level review and guidance, the Department of Justice and the Department of Homeland Security, in consultation with staff of the federal courts, should coordinate their preparation of annual budget submissions and estimates for presentation to the Office of Management and Budget.**

This approach can be supported by specific technical changes in the way budgets are developed.

**RECOMMENDATION 3: The Department of Justice and the Department of Homeland Security should accelerate their design of an integrated capacity to track cases and project immigration enforcement activity—including the volume and timing of major flows—based in part on frequently updated analyses that integrate case histories of people encountered as illegal entrants or residents and the progress and disposition of each case.**

Using this shared analytical capacity, the two departments should jointly develop and maintain a quantified flow model representing immigration enforcement activity—including the volume and timing of the major sequences of activity. Policy officials of the two departments could jointly develop “what if” scenarios to estimate the effects of planned or hypothesized changes in policy, practice, or exogenous factors, as discussed above. And the two departments could jointly report on performance, resource constraints, and other operational obstacles to improved results by DHS and DOJ personnel in each border sector and other regions with high immigration enforcement activity.

In addition to the above recommendations to the Department of Justice and the Department of Homeland Security, we offer recommendations for other agencies that contribute to the budget for immigration enforcement.

**RECOMMENDATION 4: The U.S. Office of Management and Budget should direct the Department of Justice and the Department of Homeland Security to coordinate their policy development, planning, and budget development processes to ensure that resource requirements match policies and strategies chosen to achieve specified performance targets and to increase the productivity of resources dedicated to immigration enforcement.**

The OMB elements that are responsible for budgeting and management of the two departments should consider conducting combined reviews of their budget submissions that pertain to their shared responsibility for immigration enforcement.

**RECOMMENDATION 5: The administration should consider using the requirements of the Government Performance and Results Modernization Act of 2010 to establish one or more cross-cutting federal priority objectives related to immigration enforcement and border security; to assign a lead person responsible for these objectives; and to develop strategies, plans, reporting, and budgeting requirements needed to support accomplishment of these objectives.**

**RECOMMENDATION 6: The staff of the congressional appropriations subcommittees with funding responsibility for the Department of Justice, the Department of Homeland Security, and the elements of the courts that are part of the enforcement system should consult with each other regularly as they develop their annual bills.**

The recommended institutional and technical improvements to the budget process can reduce—but not eliminate—the uncertainties that cause estimating errors and needs for revised budgets or at least temporary operational adjustments for major components of the immigration enforcement system. While they cannot be eliminated, the effects of estimating errors on system performance could be mitigated if the congressional appropriations committees provide greater administrative flexibility to the departments to reallocate resources while increasing accountability for achievement of specified performance targets.

A range of mechanisms balancing greater flexibility with accountability for results could be considered. The committee suggests the administration and the appropriations subcommittees assess, for example, whether a broadening of the authorized uses of funds appropriated to the Office of the Federal Detention Trustee would provide greater flexibility to reallocate resources in response to unanticipated needs and would further consolidate accountability for resource allocations. Such a change in account structure can be expected to reduce the number of requests for supplemental or adjusted appropriations.

In sum, the committee recommends a set of actions—both technical and institutional—to contribute to better budget estimates and resource application, contributing to better performance of the immigration enforcement responsibilities shared by DOJ and DHS.

## Appendix A

### Immigration Policy Timeline

**T**his appendix lists the key legislative, administrative, and judicial actions from 1980 through the time this report was completed, in late 2011.

#### 1980

- The Refugee Act established a new statutory scheme for processing and admitting refugees from overseas as well as asylum seekers physically at U.S. borders or in the country.

#### 1986

- The Immigration Marriage Fraud Amendments sought to prevent aliens from using sham marriages to gain admission to the United States by barring immigration based on marriages taking place while deportation proceedings were pending. [The resulting unintended consequences led to changes in 1990 (as part of the Immigration Act of 1990) requiring individualized consideration of the genuineness of the marriages in question.] The amendments also increased administrative demands on the Immigration and Naturalization Service (INS) by creating a new category of “conditional” permanent residents, with the condition removable only after 2 years in the United States, certain factual proofs, and hearings.



- The Immigration Reform and Control Act (IRCA) imposed sanctions on employers who knowingly hired or recruited unauthorized aliens. The law also created two legalization programs. One allowed current unauthorized aliens who had lived in the United States since 1982 to regularize their status; the other permitted people who had worked for at least 90 days in certain agricultural jobs to apply for permanent resident status. Under these programs, roughly 2.7 million people who were then illegally residing in the United States eventually became lawful permanent residents. IRCA also set the stage for the Institutional Removal Program (IRP) and the Alien Criminal Apprehension Program (ACAP), established in 1988 (see below), and prohibited certain forms of employment discrimination on the basis of national origin and citizenship status.

### 1988

- The Anti-Drug Abuse Act (ADAA) added “aggravated felony” as a new but limited ground for deportation. Initially, this category was limited to serious crimes (e.g., murder and drug and weapons trafficking), regardless of the sentence imposed and the longevity of the alien’s residence in the United States. In subsequent years, Congress and new court decisions greatly expanded the aggravated felony category and the legal penalties of those so categorized. ADAA also cut back on the procedural protection and discretionary relief available to such aliens.
- As a result of the IRCA (see above)—which required INS to initiate deportation proceedings for all criminal aliens at federal, state, and local prisons as expeditiously as possible after the date of conviction—INS established the Institutional Removal Program (IRP) and the Alien Criminal Apprehension Program (ACAP). IRP covered about 30 federal institutions and a limited number of state institutions. ACAP was responsible for the identification, processing, prosecution, and removal of all criminal aliens in institutions not participating in the IRP. [In 2007, IRP and ACAP were combined into the Criminal Alien Program (see below)].

### 1990

- The Immigration Act raised legal admissions to 50 percent above the pre-IRCA level (mainly in the category of employment-based immigrants), eased controls on temporary workers, and limited the government’s power to deport immigrants for ideological rea-

sons. It also expanded the scope of aggravated felony to include nonpolitical crimes of violence for which a prison sentence of at least 5 years was imposed, while eliminating important discretionary relief for certain aggravated felons. The act also abolished judicial recommendations against deportation, thus terminating the discretion of sentencing judges to grant relief from deportation for criminal offenders.

### 1994

- The Violent Crime Control and Law Enforcement Act (VCCLEA) gave the U.S. Attorney General the option to bypass deportation proceedings for certain alien aggravated felons, enhanced penalties for alien smuggling and reentry after deportation, and increased appropriations for the Border Patrol.
- Operation Gatekeeper was introduced in the San Ysidro sector (near San Diego, California) of the U.S.-Mexico border. Along with VCCLEA, it ushered in an era of sustained resource build-ups for border enforcement and detention that has won continuing support from both Democratic and Republican administrations and Congresses. It also introduced the IDENT system to capture the fingerprints of border crossers, along with other technologies intended to modernize border operations.
- Proposition 187 passed in California, prohibiting the use by unauthorized immigrants of all public services, including education, not mandated by the U.S. Supreme Court's *Plyler v. Doe* (1982) decision. Although court decisions enjoined its implementation, the politics surrounding Proposition 187 contributed to growing public antipathy toward such immigration and helped lead to the 1996 laws (see below).
- The INS overhauled the asylum process and system. Most importantly, it created a new, independent corps of asylum adjudicators within INS. The new regulations created a cadre of asylum officers and required that unsuccessful applicants be referred to immigration judges for removal hearings. The regulations also deferred claimants' eligibility for employment authorization for 6 months.
- Detention capacity began a steady expansion that has continued to the present day, with greater emphasis on removal and deportation, especially of criminals. Many of these policies were embedded in appropriations increases and mandates spelled out in the congressional committees' accompanying reports. These changes were reinforced and accelerated in 1996 (see below).

**1996**

- The Antiterrorism and Effective Death Penalty Act (AEDPA) added new crimes to the definition of aggravated felony. AEDPA also established the “expedited removal” procedure for arriving noncitizens whom border officials suspect of lacking proper entry documents or being engaged in fraud; the procedure was amended later that year by the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) (see below).
- IIRIRA added new grounds of inadmissibility and deportability, expanded the list of crimes constituting an aggravated felony, created expedited removal procedures, and reduced the scope of judicial review of immigration decisions. The act expanded the mandatory detention of immigrants in standard removal proceedings if they have previously been convicted of certain criminal offenses. It also increased the number of Border Patrol agents, introduced new border control measures, reduced government benefits available to immigrants (as did the welfare reform measures enacted the same year), increased penalties for illegal immigrants, toughened procedural requirements for asylum seekers and other immigrants, mandated a system to monitor both arrivals and departures of immigrants (now US-VISIT), and established a pilot program in which employers and social service agencies could check by telephone or electronically to verify the eligibility of immigrants. IIRIRA established a statutory framework for subsequent actions by states and localities, known as 287(g) programs (see below), to take on immigration law enforcement roles that had traditionally been exercised solely by federal immigration enforcement agencies.

**1997**

- The Basic Pilot Program was a test program for what subsequently became the E-Verify system. Today, E-Verify permits employers to electronically check the work eligibility of new hires by verifying the immigration status information they provide against Social Security Administration, U.S. Citizenship and Immigration Service (USCIS), and other federal databases.

**1999**

- INS adopted regulations for processing individual claims under the Convention Against Torture. These regulations expanded the remedies available in asylum-related cases.

**2000**

- The INS commissioner issued a memorandum describing the principles through which INS could exercise prosecutorial discretion under the changes brought about by the 1996 laws and processes for making and monitoring discretionary decisions.

**2001**

- The USA Patriot Act broadened the terrorism grounds for excluding aliens from entering the United States and increased monitoring of foreign students.
- The Department of Justice (DOJ) mandated closing removal hearings to the public in certain cases for reasons of national security.
- In *Zadvydas v. Davis* (2001), the U.S. Supreme Court imposed time limits on INS's power to detain noncitizens pending execution of their removal orders. This decision, along with subsequent Supreme Court rulings, such as *Demore v. Kim* (2003) and *Clark v. Martinez* (2005), expanded the scope and duration of detentions permitted by law.

**2002**

- The Enhanced Border Control and Visa Reform Act required the development of an interoperable electronic data system to be used to share information relevant to alien admissibility and removability. It also required the implementation of an integrated entry-exit data system: the US-VISIT program (see above) was established to implement this system.
- The Homeland Security Act created the Department of Homeland Security (DHS). In 2003, nearly all of the functions of INS—the DOJ agency responsible for immigration services, border enforcement, and border inspection—were transferred to DHS and restructured to become three new agencies: Customs and Border Protection (CBP), Immigration and Customs Enforcement (ICE), and USCIS. In addition, US-VISIT became a separate, new entity in DHS. CBP, US-VISIT, and, to a lesser extent, ICE have been the beneficiaries of significant resource increases as part of the aftermath of 9/11 and of the growth in the size of the illegal immigrant population. The Executive Office of Immigration Review (EOIR) was left in DOJ.
- The work of the Board of Immigration Appeals (BIA) was streamlined to expand the category of cases eligible for affirmances

without opinion and single-member review; eliminate BIA's authority to conduct de novo fact finding; limit review of fact and credibility determinations to a "clearly erroneous" standard; and impose time limits for rendering decisions; and reduce the number of BIA members.

- The U.S. Attorney General initiated the National Security Entry-Exit Registration System (NSEERS), requiring the registration of nationals of countries designated as harboring terrorists.

### 2003

- The SEVIS (Student and Exchange Visitor Information System) automated program for collecting information on foreign students—mandated by the 1996 IIRIRA—became fully operational.

### 2004

- The National Intelligence Reform Act expanded the grounds of inadmissibility and deportability, accelerated the deployment of the entry/exit system, and increased criminal penalties for alien smuggling.
- The US-VISIT system required that all travelers to the United States, with the exception of most Mexicans and Canadian temporary visitors crossing the land borders, be fingerprinted and photographed on their arrival at ports of entry.

### 2005

- The REAL ID Act established statutory guidelines for removal cases, expanded the terrorism-related grounds for inadmissibility and deportation, included measures to improve border infrastructure, and required states to verify an applicant's legal status before issuing a driver's license or personal identification card that may be accepted for any federal purpose. [States' protests persuaded Congress to delay implementation of the drivers' license provisions of the law.] It also barred the use of habeas corpus as a vehicle for challenging removal orders, thus virtually completing the concentration of judicial review in the courts of appeals.
- The Secure Border Initiative was launched. It included SBInet, which was intended to create a "virtual border" by helping the Border Patrol target enforcement efforts through a network of

cameras and sensors to assist in identifying unauthorized border crossings. The initiative was abandoned in 2010 (see below).

- Operation Streamline was launched in the Del Rio sector of the border in the Western District of Texas and later expanded to other areas. Its goal was a “zero tolerance” policy, with the government attempting to file criminal charges (mostly for misdemeanors) against virtually all persons apprehended for entering the country without authorization.

## 2006

- The Senate failed to pass the immigration reform legislation that had passed the House in 2005; in its place Congress adopted the Secure Fence Act. The act called for more than 700 miles of double-reinforced fence to be built along the border with Mexico, through the U.S. states of California, Arizona, New Mexico, and Texas in areas that had experienced illegal drug trafficking and illegal immigration. It authorized more lighting, vehicle barriers, and border checkpoints and put in place more advanced equipment, such as sensors, cameras, satellites and unmanned aerial vehicles, in an attempt to increase control of illegal immigration into the United States.

## 2007

- The Institutional Removal Program (IRP) and the Alien Criminal Apprehension Program (ACAP) were combined into the Criminal Alien Program (CAP). CAP screens inmates in all 114 federal prison facilities for aliens convicted of crimes. CAP set the stage for the creation of the Secure Communities Program in 2008 (see below).
- Section 287(g) of the 1996 IIRIRA was implemented, providing for the federal government to enter into agreements with state and local law enforcement agencies; to train designated state and local officers to perform selected functions of immigration officers, including searching specific federal databases and conducting interviews to assist in the identification of those individuals in the country illegally; and to carry out these activities under the supervision of ICE officers. The first such agreement was signed in 2002; however, most of the state and local law enforcement agencies that decided to join the program did so after 2007.

**2008**

- Although ICE was screening 100 percent of federal and state prisons through CAP for aliens convicted of crimes (see above), it had full coverage of only about 10 percent of the approximately 3,100 local jails throughout the United States. Accordingly, ICE built on CAP by introducing the Secure Communities Program, which assists local communities in identifying and removing deportable aliens for removal by integrating federal databases on criminal and immigration statuses.
- The U.S. Attorney General required immigration judges, under certain circumstances, to look beyond the record of conviction and review external evidence to determine whether a prior conviction was of a crime involving “moral turpitude,” thereby making it easier for legal resident aliens to be potentially deportable. This altered the immigration consequences of criminal convictions and added to the workloads of immigration courts.

**2009**

- As part of an effort to move away from a convicted-criminal approach to detention, ICE created an Office of Detention Policy and Planning (ODPP) to design and plan a civil detention system, as well as an Office of Detention Oversight (ODO) to investigate detainees’ grievances in a neutral manner.
- ICE issued new guidelines to field offices regarding workplace raids, instructing agents to pursue evidence against employers of illegal workers before pursuing actions against the workers.

**2010**

- DHS announced that the Secure Communities Program had been deployed to all 25 U.S. counties along the Southwest border; it planned to expand the program to every law enforcement jurisdiction in the country by 2013.
- Work ceased on the SBInet “virtual fence” (launched in 2005; see above) along the U.S.-Mexico border.
- In *Padilla v. Kentucky* (2010), the U.S. Supreme Court allowed the lower courts to find that the failure of criminal defense lawyers to advise their immigrant clients of the possible deportation consequences of guilty pleas could constitute ineffective assistance of counsel. The decision affects not only future criminal proceedings, but also removal proceedings based on criminal convictions, and it is likely to encourage immigrants who are facing removal

to file motions to reopen their cases on this ground. Resolving such cases will entail additional delays, detention pending decision on these claims, and other demands on the administrative and judicial resources of the immigration enforcement system.

- In *Kucana v. Holder* (2010), the U.S. Supreme Court held that the denial of an alien's motion to reopen an immigration proceeding was subject to judicial review. This decision overruled an amendment to the 1996 immigration laws that said that certain immigration orders were not subject to judicial review.
- ICE issued an administrative directive outlining its prosecutorial discretion goals for ICE field offices and emphasizing that priority attention for removal action should be directed at criminal aliens.

### 2011

- ICE provided additional guidance on deportation priorities, focusing on criminal aliens and responding to some criticisms of the Secure Communities Program for deporting low-level offenders and traffic violators. Secure Communities continued to expand to approximately 1,800 jurisdictions in 43 states and territories.
- In *Chamber of Commerce of U.S. v. Whiting* (2011), the U.S. Supreme Court rejected a preemption challenge to Arizona's statute prohibiting employment of undocumented aliens and requiring employers to use the federal E-Verify data system.
- In *Brown v. Plata* (2011), the U.S. Supreme Court upheld a court order mandating a substantial reduction in prison overcrowding, which may increase the pressure on states to deport immigrant inmates before they have completed their sentences.
- ICE issued additional prosecutorial discretion guidelines, providing greater detail regarding circumstances (such as pursuing education) that should be taken into account in determining whether to defer action on removal. The guidelines also highlighted the role that ICE attorneys are authorized to play in determining when to bring and drop cases in process for immigration court consideration.





## Appendix B

### Efforts to Model Workload and Resource Requirements

**T**his appendix reviews major efforts to model workload and resource requirements for federal immigration enforcement and similar criminal justice processes.

#### CHANGES IN THE WORKLOADS OF IMMIGRATION COURTS

In fiscal 2007, staff of the U.S. Department of Justice's (DOJ's) Office of Planning, Analysis, and Technology (OPAT) worked with a statistician to complete an analysis of immigration court workload. OPAT used data from the Executive Office for Immigration Review (EOIR) and the U.S. Department of Homeland Security (DHS).

The analysis (U.S. Department of Justice, 2008) indicated that EOIR has limited tools available for predicting its future workload. The bulk of the workload comes from "notice to appear" issued by DHS, and complete information on the number, issuing agency, and place of issuance is not available to EOIR in time for the predictions. Even if these data could be obtained, the relatively short time lag for 80 percent of the cases of less than 3 months between the issuance of a notice and intake by EOIR is not enough to provide for meaningful advance planning or budgeting.

A more useful indicator of EOIR's potential workload would be the trend in apprehensions of non-Mexicans by the Border Patrol. Most non-Mexicans cannot be returned directly to their native countries, and they are likely to appear before immigration courts. Attempted unlawful entries by non-Mexicans respond to a variety of causal factors, but for

most countries, abrupt increases or decreases in the level of those apprehended and issued notices are unusual and can often be traced to specific events. During the study period, EOIR's case intake tracked the number of apprehensions of non-Mexicans along the southern border with a time lag of several months. Again, this time lag does not permit long-range planning. EOIR's Mexican and non-Mexican caseloads are significantly different. Mexicans who appear before EOIR generally do so because they have records of previous immigration violations or criminal charges are being brought against them. They are likely to be detained, and their cases reach EOIR faster than those of others. They are somewhat less likely to file for relief from removal than non-Mexicans, and even less likely to file for asylum, which leads to swifter resolution of their cases. Finally, the Mexican caseload that reaches EOIR has been growing since fiscal 2004, while the trend for the other major nationalities was down for fiscal 2006 and 2007. If EOIR is able in the future to obtain data on apprehensions from the Border Patrol by month, nationality, and location in a time-sensitive manner, it would be beneficial for short-term workload planning.

#### EFFECTS OF HIRING INVESTIGATORS ON THE WORKLOAD OF NONINVESTIGATIVE SYSTEM COMPONENTS

In 2005, the House Appropriations Committee expressed concern that the budget request submitted by DOJ, whose highest priority was the prevention of terrorism, did not fully support the budgetary needs of the criminal justice components. DOJ was directed to submit a report "describing how the hiring of an investigator impacts the workload of the U.S. Attorneys, the U.S. Marshals Service, the Office of the Federal Detention Trustee, and the Federal Prison System." DOJ contracted with BearingPoint, Inc., which built a prototype workflow model (based on readily available data) to test the feasibility of the concept that mathematical relationships can be established and determine what areas should be pursued to build a functional model (U.S. Department of Justice, 2005). The prototype model illustrates the effects of hiring agents in the front end of the criminal justice system on the workloads of downstream agencies, such as the U.S. Marshals Service (USMS), the Office of the U.S. Attorneys (USAO), and the Bureau of Prisons (BOP). It uses data on the resources that were historically required to process the number of criminals received—explicitly assuming that the historical trends in these ratios will continue into the future with little fluctuation.

The model consists of inputs (agents added to the Federal Bureau of Investigation [FBI]; the Bureau of Alcohol, Tobacco, Firearms, and Explosives [ATF]; and the Drug Enforcement Agency [DEA]), which will create

the following outputs: number of U.S. attorneys; number of U.S. marshals; number of correctional officers; number of criminals arrested; number of arrestees detained; number of defendants prosecuted; and number of defendants sentenced to prison.

The first test of the model determined how many data points had predictive value for each component of the model. In this analysis, BearingPoint used trends observed from 1999 to 2001 (with current initiatives and trends being more heavily weighted) and predicted a value for 2002 on the basis of these trends. To evaluate the quality of the reliability of the predicted values, BearingPoint calculated the standard deviation of data for 1999-2002. (The higher the standard deviation, the more difficult it is to produce accurate predictive values in the future.) The prototype model produced 19 of 32 data points within the standard deviation, or approximately 60 percent.

Limitations of the model include the following:

- The assumption that historical case procedures used by DOJ components and historical trends in types of criminal activity will continue into the future with little fluctuation may not be realistic. Account should be taken of changes in underlying trends in criminal and law enforcement priorities and changing levels of productivities over time.
- The model is based on comparisons of total personnel to total outputs, rather than focusing on marginal, or year-to-year, increases in criminal processing due to the addition of investigative agents.
- Each district can focus on specific crimes and thus have statistics that are different from the national average. A district/regional approach would be needed, at least for some of the larger districts whose statistics differ substantially from the national level. However, understanding the historical workloads associated with these district statistics would require going directly to the agencies and gathering this information on a district level.

## PROJECTING FEDERAL DETENTION POPULATIONS

Projecting future detention trends and estimating budgetary resource requirements for the criminal detention program has historically been a difficult task, at both macro and micro levels.

At the macro level, impediments to accurately projecting the detention population include the dynamic nature of the federal criminal justice process; on-going changes in federal criminal law and policy; changes in federal law enforcement priorities; and events external to the criminal justice process, such as unforeseen events that might cause mass ille-

gal migration to the United States. At the micro-level, these macro-level impediments translate to volatility in (1) the number of federal arrests and bookings reported to the USMS, (2) prosecutorial priorities and declination criteria, (3) offender or offense characteristics necessitating pretrial detention, and (4) case processing time that results from overburdened criminal justice resources. Accordingly, projecting the impact of systemic or short-term events or initiatives that will affect arrests and bookings is the greatest challenge in projecting the detention population.

The Office of the Federal Detention Trustee (OFDT) documented the challenge of doing such projections almost 10 years ago, and their basic approach for projecting the detention population is still used (see Scalia, 2004). The primary source of data for the OFDT detention population projection model is the USMS Prisoner Tracking System (PTS). OFDT receives extracts of PTS that include individual records of each prisoner processed by the USMS.

Time-series models lie at the heart of the population projection. These atheoretical models are based on the assumption that historic trends—and the factors that influenced those trends—are useful predictors of future events and that the observed relationships will continue into the near future. The time-series analysis produces weights that are used in a micro-simulation model that generates future booking replicates.

Recognizing that simple time-series models may not produce reliable results in an environment in which the underlying trend of a series can be substantially affected by exogenous factors, OFDT incorporated law enforcement and U.S. attorney staffing data into its process for estimating future detention. The staffing model has been described (by those familiar with it) as useful for incremental changes, but not for levels; it has also been characterized as informative but not definitive. The staffing model uses aggregate staffing data for the U.S. Customs and Border Patrol (CBP) and the U.S. Immigration and Customs Enforcement (ICE). In the context of “modeling the past,” the staffing model also contains indicator variables for things such as changes in administration.

At the tail end, OFDT tries to make adjustments for policy initiatives and changes (i.e., they are not built into the model itself and do not necessarily have “data support”). With regard to the validity of predictions, the model does best when the policy environment is relatively stable. Time in detention, which is another model component, tends to be more stable and predictable than how many people come into the system. However, in the period immediately following the implementation of Operation Streamline, the length of detention fell in a way that was not foreseen by the existing model (although those predictions have since stabilized).

With regard to regional projections in the staffing model, OFDT can link staffing data to specific duty stations. The OFDT model does account

for district- and regional-level variations in law enforcement and prosecutorial productivity. Statistically, the accuracy of projections depends on the size of the base population, the variability of the data series trends, and the length of the forecast interval. One method for evaluating the validity of the projection methodology and the resulting projections is to monitor the individual components of future detention populations and identify which component is the primary source of the observed error.

The reliability of the OFDT model is evaluated on a monthly basis by using simple time-series methods to re-calibrate the original projections with real-time population statistics.

### ESTIMATING WORKLOADS FOR THE FEDERAL CRIMINAL JUSTICE SYSTEM

The U.S. General Accounting Office (GAO) developed a model designed to provide Congress and federal agencies with estimates of the potential effect that budgetary changes for part of the federal criminal justice system may have on the system as a whole (U.S. General Accounting Office, 1991). The work was undertaken after GAO evaluated the existing criminal justice models and determined that they did not meet the needs mandated by Congress: they were either designed to address only a single part of the system or required data not routinely available at the federal level.

The model developed by GAO is based on ordinary least squares regression analysis with a zero intercept and no lag times. It assumes that historic trends are useful predictors of future events and that the historic relationships observed will continue into the near future. The accuracy of the model's estimates of future workload may be limited by a significant change from the past budget and workload trends on which the model relies.

Limitations of the model include the following:

- General crime categories were used to make the estimates reliable (since specific crime types account for such a small portion of the total). The use of broad crime categories is a drawback if the user wants to estimate the impact of changes in resources for a particular crime type that has been combined with others to form a generic classification.
- The model provides only national estimates, which obscures differences among individual judicial districts.
- The model can only provide reliable estimates of the impact of resource changes within reasonable limits. For example, if

resources were increased by 50 percent in a single year, the estimates produced by the model would be unreliable.

- In order to provide useful results over time, the model will require annual updating of the mathematical formula on which it is based. This is necessary to reflect changes in the criminal justice system that may affect the relationships between resources and outputs.

### **PROJECTING SPACE NEEDS IN JUVENILE DETENTION AND CORRECTIONAL FACILITIES**

The Office of Juvenile Justice and Delinquency Prevention (OJJDP) projects juvenile commitment populations by using a mathematical flow model (Butts and Adams, 2001). The model requires explicit assumptions about the case processing factors that might influence the size of confinement populations. The complexity of juvenile justice decision making virtually guarantees that detention and corrections populations will not closely follow arrest trends in the Violent Crime Index.

Analysts can produce more useful projections when they include juvenile court processing data in projection models, and projection models are more useful if they can account for changing patterns in court processing. Projection models are also likely to perform better when they include more than a single source of information and when they analyze more than a single point in the juvenile justice process.

The value of different projection scenarios is limited by the lack of more detailed data. For example, the models used in this analysis divided the population into only four categories of offenders, and projections would be more useful if offenses could be divided into additional categories.

### **SIMULATING THE IMPACT OF SENTENCING GUIDELINES ON PRISON POPULATIONS**

In response to a congressional mandate that the U.S. Sentencing Commission evaluate the impact of its sentencing guidelines on the future prison population, the Bureau of Prisons adopted a simulation model (Gaes et al., 1993), FEDSIM, in 1987 as its primary source for projecting future inmate populations. The model overestimated (with a fairly high margin of error) the percentages of cases receiving straight probation. The explanations for this inaccuracy have to do with changes made to the guidelines after the initial modeling efforts. The model also greatly overestimated the number of split sentences; this may have had something to do with the modelers' lack of prior experience with federal guideline

sentencing that would have informed them about judges' behavior. However, the 3-, 4-, and 5-year projections for the federal prison population (the primary goal of the modeling effort) were quite accurate.

The overestimations reflect the fact that a simulation task is complicated when people affected by modifications in the system behave differently than they did prior to the changes. (This problem can be approached as an exercise as sensitivity analysis, which refers to the degree to which the outputs of a model are affected by changes in assumptions about the model's inputs and its parameters.) The greatest error occurred in projecting future conviction rates trends for some of the offense categories. The reason the model was relatively accurate, despite the errors in conviction trends, was that the structural change in sentencing was so dramatic that it dwarfed the impact of changes associated with conviction trends. However, as time served stabilizes, it will become more important to accurately predict future conviction trends. It will also be important to separate out projections for certain groups of prisoners who have distinct causes for changes in admission rates and length of stay than the typical federal inmate.





## Appendix C

### Biographical Sketches of Committee Members and Staff

**Peter Reuter** (*Chair*) is professor in the School of Public Policy and the Department of Criminology at the University of Maryland. Previously, he was a senior economist at RAND Corporation, where he founded and directed RAND's Drug Policy Research Center. His research is focused on the control of illegal markets and on drug policy. He has served as a consultant to numerous government agencies, including the U.S. Government Accountability Office, the White House Office of National Drug Control Policy, the National Institute of Justice, and the Substance Abuse and Mental Health Services Administration, and to foreign organizations, including the United Nations Drug Control Program and the British Department of Health. He has a Ph.D. in economics from Yale University.

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