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Assembly-Line Justice: 
A Review of Operation Streamline

Joanna Jacobbi Lydgate†

INTRODUCTION

Every day, up to eighty migrants appear before a magistrate judge in the federal district courthouse in the border town of Del Rio, Texas. Most are from Mexico, though a few have made the trip to the U.S.-Mexico border from Central America. Apprehended by the U.S. Border Patrol, these migrants have spent as long as two weeks waiting in the nearby county jail to see a judge. Two days a week, the Del Rio Federal Public Defender’s Office provides representation to the migrants. On the other three days, the court appoints one attorney in private practice to represent the entire group. That lawyer has generally visited the jail and conducted as many as eighty client interviews in one day.

The defendants enter the courtroom in handcuffs and leg irons. Through headphones, they listen to a court interpreter translate into Spanish a plea agreement and the criminal charges against them. The judge asks the migrants,
as a group, whether they understand those charges, whether they are satisfied with their legal representation, and whether their plea is voluntary. In unison, they respond, "Si." Then, one by one, the judge asks each defendant how he pleads. Almost invariably, the answer is "culpable"—guilty. After each defendant enters his guilty plea, an attorney for the U.S. Border Patrol reads the factual basis for that plea. "On August 15, 2009, Mr. Javier Garcia Hernandez, who is a native and citizen of Mexico, did enter the United States illegally near Eagle Pass, Texas, by wading across the Rio Grande River."¹ The entire process usually takes just one to two hours.

Five days a week, every week of the year, a version of this scene plays out in eight of the eleven federal district courthouses located along the U.S.-Mexico border.²

²

Between 2002 and 2008, magistrate judges along the U.S.-Mexico border saw their misdemeanor immigration caseloads more than quadruple. During that period, criminal prosecutions of petty immigration-related offenses³ increased by more than 330 percent in the federal district courts along the border, from 12,411 cases⁴ per year to 53,697.⁵ Those caseloads continue to rise.⁶ During the same six-year period in the border district courts, felony alien smuggling prosecutions grew at a comparatively sluggish rate,⁷ and drug

¹ I have used a fictitious name and date in this example.

² The federal districts along the U.S-Mexico border are the Southern District of California, the District of Arizona, the District of New Mexico, the Western District of Texas, and the Southern District of Texas. The courthouses are located in San Diego, California; El Centro, California; Yuma, Arizona; Tucson, Arizona; Las Cruces, New Mexico; El Paso, Texas; Alpine, Texas; Del Rio, Texas; Laredo, Texas; McAllen, Texas; and Brownsville, Texas.


⁷ Transactional Records Access Clearinghouse, Federal Criminal Enforcement: Going Deeper (2009), http://tracfed.syr.edu/index.cgi/cri/godeep_index_pros.html (search by fiscal year, district, lead charge (title and section), and prosecutions filed; pull annual 8 U.S.C. § 1324 prosecutions for 2002-2008 for each border district (Southern District of California, District of Arizona, District of New Mexico, Western District of Texas, and Southern District of Texas); add results together) (results on file with author). Alien smuggling prosecutions under 8 U.S.C. § 1324
prosecutions steadily declined.\footnote{8}

Skyrocketing petty immigration prosecutions would seem to suggest a recent surge of migrants attempting to cross the U.S.-Mexico border, but there has been no such surge. The U.S. Border Patrol reports that its apprehensions have been declining since 2005.\footnote{9} Rather, the increased misdemeanor caseload in the border district courts is largely the result of a set of zero-tolerance immigration enforcement programs that the Bush administration introduced. The first of these programs began in Del Rio, Texas, in 2005, and the Department of Homeland Security (DHS)\footnote{10} has since implemented similar programs in Yuma, Arizona; Tucson, Arizona; Las Cruces, New Mexico; El Paso, Texas; Laredo, Texas; Brownsville, Texas; and McAllen, Texas.\footnote{11} Zero-tolerance programs thus currently exist in some form in six of the nine Border Patrol sectors\footnote{12}—or four of the five federal judicial districts\footnote{13}—along the border district courts went from 2,208 cases in 2002 to 3,900 cases in 2008. \textit{Id.} The Transactional Records Access Clearinghouse obtains its data from the Executive Office for United States Attorneys under the Freedom of Information Act, 5 U.S.C. § 552 (2006).\footnote{8}


Certain sources that this Comment cites refer to DHS as the “Immigration and Naturalization Service” or “INS.” In 2002, Congress passed the Homeland Security Act, Pub. L. No. 107-296, 116 Stat. 2135 (2002), which abolished the INS and created DHS. The Act divided the former INS’s functions between three agencies within DHS: Customs and Border Protection (CBP), Immigration and Customs Enforcement (ICE), and Citizenship and Immigration Services (CIS). Very generally, CBP is responsible for border enforcement, ICE for the interior enforcement of customs and immigration laws, and CIS for adjudicating applications for immigration benefits.\footnote{10}


There are nine Border Patrol sectors along the U.S.-Mexico border: the San Diego and El Centro Sectors in California; the Yuma and Tucson Sectors in Arizona; the El Paso Sector, which spans New Mexico and part of western Texas; and the Marfa, Del Rio, Laredo, and Rio Grande Valley Sectors in Texas. Operation Streamline has yet to be implemented in San Diego, El Centro, or Marfa. A map of these sectors is available at \textit{http://www.cbp.gov/linkhandler/cgov/careers/customs_careers/border_careers/bp_agent/sectors_map.ctt/Sectors_Map.pdf; see also infra Figure 1.}\footnote{12}

The federal judicial districts along the U.S.-Mexico border do not correspond exactly with the Border Patrol sectors. The San Diego and El Centro sectors fall within the jurisdiction of
U.S.-Mexico border (see Figure 1). Though these zero-tolerance programs have various names, they are usually referred to in the aggregate as "Operation Streamline" (or "Streamline").

Operation Streamline has fundamentally transformed U.S. border enforcement practices. Before Streamline began, when DHS’s Border Patrol agents apprehended a migrant attempting to cross the border unlawfully for the first time, DHS either voluntarily returned that migrant to her home country or administratively detained her and processed her through the civil immigration system. The U.S. Attorney’s Office (USAO) usually saved prosecution for migrants with criminal records and for those who made repeated attempts to cross the border. Operation Streamline removed that prosecutorial discretion, requiring the criminal prosecution of all border crossers, regardless of their prior history.14

Most Operation Streamline defendants are migrants from Mexico or Central America who have no prior criminal convictions and who have attempted to cross the U.S.-Mexico border in search of work or to reunite with family in the United States. First-time offenders are prosecuted for misdemeanor illegal entry under 8 U.S.C. § 1325, which carries a maximum sentence of six months. Any migrant who has been deported in the past and attempts to reenter can be charged with felony reentry under 8 U.S.C. § 1326, which generally carries a two-year maximum penalty but can involve up to a twenty-year maximum if the migrant has a criminal record.15 Defense attorneys estimate that 99 percent of Streamline defendants plead guilty.16

the Southern District of California. The Yuma and Tucson sectors are under the jurisdiction of the District of Arizona. The portion of the El Paso sector that covers New Mexico falls within the District of New Mexico. The rest of the El Paso sector, as well as the Del Rio sector, fall within the Western District of Texas. The Laredo and Rio Grande Valley sectors are under the jurisdiction of the Southern District of Texas. See infra Figure 1. Operation Streamline currently exists in some form in every southwest border district except the Southern District of California. See id.

14. No Streamline jurisdiction actually prosecutes 100 percent of border apprehensions. The Border Patrol, as a matter of policy, does not refer for prosecution juveniles, parents traveling with minor children, persons with certain health conditions, and others who require prompt return to their country of origin for humanitarian reasons. See, e.g., Telephone Interview with Richard Durbin, Criminal Chief, U.S. Attorney’s Office, W. Dist. of Tex. (Apr. 10, 2009) (notes on file with author) [hereinafter Durbin Interview].

15. If the defendant’s prior removal occurred after a felony conviction, the maximum possible penalty under 8 U.S.C. § 1326 is ten years in prison. See 8 U.S.C. § 1326 (2006). If the prior removal occurred after an aggravated felony conviction as defined by 8 U.S.C. § 1101(a)(43), the penalty can be up to twenty years in prison. See id. §§ 1101(a)(43), 1326.

Figure 1: Operation Streamline Along the U.S.-Mexico Border
In some locations, Border Patrol attorneys are deputized as special assistant U.S. attorneys to prosecute Streamline cases, though the USAO has retained control elsewhere. While the criminal prosecution is pending, DHS processes the migrant for removal from the United States.

Operation Streamline generates as many as eighty new prosecutions per day in some locations. Because most defendants are prosecuted under 8 U.S.C. § 1325, the misdemeanor statute, magistrate judges hear the bulk of Streamline cases. The sheer number of daily prosecutions requires nearly all judges to combine the initial appearance, arraignment, plea, and sentencing into one hearing. Many Streamline defendants complete the entire proceeding—meeting with counsel, making an initial appearance, pleading guilty, and being sentenced after waiving a presentence report—in a single day. Criminal Justice Act (CJA) Panel attorneys, lawyers in private practice who are assigned to represent indigent defendants in federal court in cases the Federal Public Defender (FPD) cannot handle, serve as counsel for the majority of Streamline defendants. In Del Rio, CJA attorneys are appointed to represent up to eighty clients in one hearing, which forecloses individualized representation. In December 2009, the U.S. Court of Appeals for the Ninth Circuit held that Streamline’s en masse plea hearings in Tucson, Arizona, violate federal law.

To understand how Operation Streamline is working, I visited four cities where DHS has implemented versions of the program: Del Rio, Texas; El Paso, Texas; Las Cruces, New Mexico; and Tucson, Arizona. In each city, I observed Streamline court proceedings and conducted interviews with judges, U.S. attorneys, defense attorneys, Border Patrol representatives, and immigration lawyers. This Comment is the product of that research.

Part I of this Comment provides an overview of the immigration enforcement practices used in these border jurisdictions before Operation Streamline began. Part II presents a detailed examination of Operation Streamline as it exists in the four cities I visited. Part III analyzes Operation Streamline’s legal and policy implications. Part IV discusses the Southern District of California’s

21. As discussed in Part II.A.2, infra, the city of El Paso is the exception to this rule.
23. United States v. Roblero-Solis, 588 F.3d 692 (9th Cir. 2009).
effective alternative to Operation Streamline. Part V argues for a reevaluation of Operation Streamline.

This Comment concludes that, while many localities have worked hard to protect defendants’ rights under Operation Streamline, the program raises significant concerns. From a policy perspective, there are reasons to question Streamline’s efficacy. Recent reductions in border apprehensions are likely attributable to factors other than Streamline, and the program diverts resources away from a critical objective of DHS and the Department of Justice (DOJ): prosecuting the crimes that are creating escalating violence along the U.S.-Mexico border.\footnote{See, e.g., Press Release, U.S. Dep’t of Homeland Sec., Obama Administration Announces National Strategy to Reduce Drug Trafficking and Flow of Bulk Cash and Weapons Across Southwest Border (June 5, 2009), available at http://www.dhs.gov/ynews/releases/pr_1244217118076.shtm.} Streamline also has troubling effects on the border district courts, the federal law enforcement agencies that run the program, and the migrants it targets. The program’s substantial cost to taxpayers is another cause for concern.

From a legal perspective, Streamline’s voluminous prosecutions have led to group proceedings that do not comport with due process; a caseload for defense attorneys that can result in ineffective assistance of counsel; a degree of coordination between the executive and the judiciary that may violate the separation of powers doctrine; and, in Del Rio at least, delayed probable cause determinations. When Border Patrol attorneys prosecute Streamline cases, prosecutorial independence may also be compromised. These consequences led one magistrate judge I interviewed to describe the program as “assembly-line justice,”\footnote{Interview with Honorable Norbert Gamey, Magistrate Judge, W. Dist. of Tex., El Paso, Tex. (Mar. 25, 2009) [hereinafter Gamey Interview].} and many others echoed that sentiment.

In the final accounting, Operation Streamline’s questionable effectiveness, the strain it has put on border district courts, and its constitutional problems add up to a wasteful expenditure of our law enforcement resources. The Obama administration should therefore eliminate Streamline, restore U.S. attorneys’ discretion to choose which border crossers to prosecute, and channel all other migrants through the civil immigration system. As the Southern District of California demonstrates, such a tailored approach to border enforcement can lead to impressive successes.

I

OPERATION STREAMLINE IN CONTEXT

In order to appreciate how Operation Streamline has changed U.S. enforcement practices along the southwest border, one must have a basic understanding of the apprehension and removal procedures that preceded
Streamline. A condensed overview is presented here as a backdrop against which to examine Streamline's legal and policy implications.

The U.S. Border Patrol (Border Patrol) is part of U.S. Customs and Border Protection (CBP) within DHS. When a Border Patrol agent observes a migrant\(^{26}\) attempting to enter the United States unlawfully, section 287(a)(2) of the Immigration and Nationality Act authorizes the agent to conduct an administrative arrest.\(^{27}\) The agent must have "reason to believe" (probable cause) that the particular alien is in the United States in violation of [a law or regulation] and is likely to escape before a warrant can be obtained for his or her arrest.\(^{28}\)

An agent must then examine the apprehended migrant to "decide if there is sufficient evidence to determine whether the individual is an alien who is excludable or deportable."\(^{29}\) As part of that examination, the agent reads the migrant a set of administrative rights contained in Form I-826 (Notice of Rights and Request for Disposition) and records the migrant's name, date and place of birth, and country of citizenship.\(^{30}\) Form I-826 gives migrants the choice between "requesting a hearing before an immigration judge, seeking asylum because they have a credible fear of being harmed if they are returned to their home country, or admitting to being in the United States illegally and requesting a voluntary departure."\(^{31}\) The migrant is then brought to a local Border Patrol station for processing and fingerprinting. Her fingerprints are entered into DHS's Automated Biometric Fingerprint Identification System and checked against the FBI's Integrated Automated Fingerprint Identification System (IAFIS).\(^{32}\)

**A. Before Operation Streamline**

Before Operation Streamline began, the next step depended upon the migrant's country of origin. The vast majority of migrants the Border Patrol apprehends along the U.S.-Mexico border are from Mexico.\(^{33}\) For many years, any Mexican migrant who did not express a fear of returning to her country, had not committed a felony, had not been previously deported from the

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\(^{26}\) While this Comment uses the term "migrant" to refer to the undocumented immigrants whom Operation Streamline targets, federal immigration law employs the term "alien."


\(^{29}\) See id. at 2–3.

\(^{30}\) See id. at 2–3.

\(^{31}\) See id. at 2–3.

\(^{32}\) See RYTINA & SIMANSKI, supra note 9, at 2. In 2008, for example, the Border Patrol made 97 percent of its nationwide apprehensions along the southwest border, and 91 percent of the migrants it apprehended were from Mexico. See id.
United States, and did not have an outstanding warrant in the IAFIS system was "voluntarily returned" to her home country.\(^{34}\) This was a quick process. As the Congressional Research Service explains, "Along the Southwest border, processing Mexicans who can be voluntarily returned takes only 10–15 minutes. After they are processed, the aliens are briefly held at the [U.S. Border Patrol] station while they await the buses or vans that are used to return them to a nearby Mexican port of entry."\(^{35}\)

If the migrant was not a citizen of Mexico,\(^{36}\) however, she was subjected to a different procedure. Assuming she was not found to be from a "special interest country,"\(^{37}\) did not have a criminal history, and did not express a fear of returning to her country of origin, DHS designated her for removal from the United States.\(^{38}\) For many years, that removal occurred through a formal proceeding before an immigration judge. The migrant received a Notice to Appear\(^{39}\) and a hearing in immigration court, at which she was entitled to representation, but at her own expense.\(^{40}\) Most migrants were detained while their removal proceedings were pending, subject to release on parole or bond at DHS’s discretion.\(^{41}\) Only if the government proved the migrant’s deportability by "clear and convincing evidence"\(^{42}\) would the immigration judge issue a formal order of removal.

In 1996, however, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA),\(^{43}\) which implemented an accelerated administrative procedure called "expedited removal."\(^{44}\) Expedited removal allows DHS to formally remove a migrant from the United States without a hearing before an immigration judge when the migrant has arrived at the border without documents, has arrived with fraudulent or invalid documents, or has previously committed immigration fraud.\(^{45}\) Under expedited removal, an

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34. Nuñez-Neto et al., supra note 30, at 3.
35. Id.
36. Canadian nationals can also be voluntarily returned. Id.
37. "Special interest country" is a term DHS uses to denote nations "known to harbor terrorists or foment terrorism." Id.
38. Id. at 2–3.
40. See id. § 1229a(b)(4)(A); id. § 1362.
41. See id. § 1225(b)(2)(A).
42. Id. § 1229a(c)(3)(A).
43. Pub. L. No. 104-208, 110 Stat. 3009-546 (1996). The 1996 Act, among other things, vastly expanded the categories of criminal offenses that can make an individual eligible for deportation; created three- and ten-year bars to reentry for certain aliens found to be "unlawfully present" in the United States; and, in section 287(g), allowed DHS to deputize state and local law enforcement officials as federal immigration agents. Id.
45. Id. Expedited removal applies only to individuals arriving at U.S. ports of entry (by land or sea) and to those apprehended within one hundred miles of the border who cannot establish that they have been physically present in the United States for at least fourteen days. Notice Designating Aliens Subject to Expedited Removal Under Section 235(b)(1)(A)(iii) of the Immigration and Nationality Act, 67 Fed. Reg. 68,924 (Nov. 13, 2002); Designating Aliens For
immigration officer, rather than a judge, makes the determination of admissibility and signs the order of removal. The officer can order any migrant "removed from the United States without further hearing or review" unless the migrant indicates a fear of persecution upon return to her country or claims under oath to be a U.S. citizen, refugee, asylee, or legal permanent resident. Only the latter categories of migrants have the opportunity to pursue their claims before an immigration judge. Migrants in expedited removal proceedings are afforded significantly less process than those who receive a hearing before an immigration judge. The effect of the order that ultimately issues, however, is similar. Like a formal removal order issued by an immigration judge, an expedited removal order allows DHS to immediately expel an individual from the United States and prevents that individual from seeking readmission for at least five years.

Most migrants are administratively detained throughout the expedited removal process, which, according to DHS, takes an average of thirty-five days. Before expedited removal began, the average detention period for a non-Mexican national apprehended at the border was about ninety days, since a hearing before an immigration judge is significantly more time consuming than an interview with an immigration officer. Detention beds were thus occupied for longer periods, making bed shortages common. If there was not space available to detain a migrant while her case was pending in immigration court, the Border Patrol would release her into the United States, with a notice to appear in immigration court on a specific date. Not all migrants returned for

Expeditied Removal, 69 Fed. Reg. 48,877 (Aug. 11, 2004) (expanding expedited removal to apply to individuals apprehended within one hundred miles of the border "who have not established to the satisfaction of an immigration officer that they have been physically present in the U.S. continuously for the fourteen-day (14-day) period immediately prior to the date of encounter"). This notice states that, "as a matter of prosecutorial discretion," DHS will apply the expansion "only to (1) third-country nationals [not from Mexico or Canada] and (2) to Mexican and Canadian nationals with histories of criminal or immigration violations, such as smugglers or aliens who have made numerous illegal entries." Id. at 48,878.

47. Id.
49. See 8 U.S.C. § 1182(a)(9)(A) (providing a five-year bar to readmission for aliens removed after both expedited and formal proceedings).
their court dates, and this led some critics to label the pre-IIRIRA procedure a "catch and release" program.\(^5\)

Seeking in part to combat the problem of "catch and release," DHS continued to expand expedited removal. By 2006, ten years after IIRIRA, DHS had implemented the expedited removal program along the entire U.S.-Mexico border.\(^5\)

**B. Operation Streamline Begins**

The story of Operation Streamline begins in the small town of Eagle Pass, Texas.\(^5\) Eagle Pass is located 142 miles southwest of San Antonio and a stone's throw from Piedras Negras, Mexico. The road from Monterey, Mexico, to the United States runs directly through Piedras Negras, making Eagle Pass an attractive point of entry for migrants in the region. The Border Patrol divides the U.S.-Mexico border into six sectors, and migrants who are criminally prosecuted for illegal entry are processed in the federal district courthouse in the sector where they cross.\(^5\) Eagle Pass falls within the Del Rio Border Patrol sector. Migrants arrested there are processed in nearby Del Rio, Texas, which is part of the Western District of Texas (see Figure 1).

For many years, the Border Patrol had been experiencing a frustrating problem in Eagle Pass. Large numbers of migrants were crossing at the Eagle Pass Golf Course, which hugs the Rio Grande River, the delineation of the U.S.-Mexico border in that region. Border Patrol agents could informally remove any Mexican migrant through the "voluntary return" process by simply taking the migrant's fingerprints, making a record of her border crossing, and escorting her back across the border. The Border Patrol could not, however, voluntarily return non-Mexican nationals,\(^5\) and the migrants arriving in Eagle Pass were subject to "catch and release." DHS officially put an end to "catch and release" in 2006. See Press Release, U.S. Dep't of Homeland Sec., Statement of the Honorable Michael Chertoff, Secretary U.S. Department of Homeland Security Before the United States Senate Judiciary Committee (Feb. 28, 2007), available at http://www.dhs.gov/xnews/testimony/testimony_1172853501273.shtm ("In July 2005, we were releasing up to 80 percent of non-Mexican illegal aliens because we did not have the bed space to hold them. As of August 2006, all removable aliens caught at the border are detained until returned to their home countries.").

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54. For this history of the implementation of Operation Streamline in the Del Rio Border Patrol sector, I am indebted to Richard Durbin, Criminal Chief of the U.S. Attorney's Office for the Western District of Texas. Unless otherwise indicated, this account comes from my interview with him. See Durbin Interview, supra note 14.

55. See supra Figure 1.

56. As a 2005 Congressional Research Service report explains, "OTMs apprehended along
Pass were increasingly from countries other than Mexico. DHS refers to these “Other Than Mexican” migrants as “OTMs.” The number of OTMs arrested in the Del Rio sector increased from 9,896 in 2004 to 15,642 in 2005. Until DHS expanded expedited removal to the southwest border in September 2005, these OTMs were subject to traditional removal proceedings, which meant longer detention periods. As discussed above, some border districts lacked adequate administrative detention facilities to hold migrants even for a reduced period, and bed space was at a premium.

The shortage of bed space was a problem all along the border, but was particularly pronounced in Del Rio because of the sector’s large number of OTM arrests. Limited bed space meant that the Border Patrol could not detain all of the OTMs it apprehended and was forced to release most OTMs with only a Notice to Appear in immigration court. Few migrants returned for their court dates. Knowledge of this loophole apparently spread; OTMs began walking up to Border Patrol agents in Eagle Pass and asking for a Notice to Appear, which they sometimes referred to as a “permiso” (or permit). In 2005, Dennis Smith, then the Border Patrol spokesman for the Del Rio sector, observed, “Word is out that we are unable to detain the other than Mexican crossers, and they are exploiting a bottleneck in the system.”

57. OTMs are generally from countries in Central and South America. Between 2002 and 2005, for example, the top four most common countries of origin of OTMs were Honduras, Brazil, El Salvador, and Guatemala. See id. at 17.


60. See, e.g., Verdery Testimony, supra note 51, at 12–13.

61. Then-Secretary of DHS Michael Chertoff stated, in a September 2005 press release announcing the expansion of expedited removal across the southwest border, that DHS would “acquire additional detention capacity to support the increase in Expedited Removals.” Press Release, U.S. Customs and Border Prot., DHS Expands Expedited Removal Authority Along Southwest Border, supra note 59.

62. In fiscal year 2005, the Del Rio Border Patrol released 90.9 percent of OTMs on their own recognizance. NUÑEZ-NEETO ET AL., supra note 30, at 16, 23.

In late 2004 or early 2005, the Border Patrol approached the USAO for the Western District of Texas with a plan. The Border Patrol proposed that the USAO criminally prosecute all OTMs apprehended in a one-mile stretch of the border near Eagle Pass under 8 U.S.C. § 1325 for misdemeanor illegal entry and 8 U.S.C. § 1326 for felony illegal reentry. The new plan would channel OTMs into the criminal justice system, where there was more bed space available, allowing DHS to undertake removal proceedings with the migrant in detention.

Congress enacted 8 U.S.C. §§ 1325 and 1326 in 1952, and the use of these federal statutes to prosecute migrants in Del Rio was not new. The year before Operation Streamline began, judges in the Western District of Texas had disposed of 5,261 misdemeanor immigration cases and 2,128 felony immigration cases, a large portion of which were prosecutions under 8 U.S.C. §§ 1325 and 1326.\(^{64}\) What was new about the Border Patrol’s proposal was the zero-tolerance approach: rather than selecting certain migrants for prosecution on the basis of factors such as number of prior attempted entries or criminal background, the Border Patrol would refer 100 percent of apprehended OTMs for prosecution.

The USAO for the Western District of Texas, however, “took one look” at the plan and declined to participate, informing the Border Patrol that prosecuting people on the basis of national origin would be a potential equal protection violation.\(^{65}\) The Border Patrol went back to the drawing board.\(^{66}\)

The Border Patrol ultimately came up with a plan to prosecute all migrants—Mexicans and non-Mexicans alike—apprehended in this particular area of Eagle Pass. The USAO’s equal protection concerns would no longer be an issue. In December 2005, DHS publicly introduced the final version of this plan, which the agency has alternately referred to as “Operation Streamline” and “Operation Streamline II.”\(^{67}\) In a press release describing the initiative, DHS touted Streamline as a “multi-agency law enforcement initiative,” which would be a collaborative effort between a number of DHS departments (CBP, Immigration and Customs Enforcement, and the Detention and Removal Office), the U.S. Courts’ Federal Probation and Pretrial Services, the U.S. Marshals Service, and the USAO.\(^{68}\) However, in Del Rio, the USAO never

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\(^{65}\) Durbin Interview, supra note 14.

\(^{66}\) See id.


directly prosecuted Streamline cases. Expressing concern that the new plan risked overwhelming the federal district court in Del Rio, the USAO told the Border Patrol it simply did not have enough assistant U.S. attorneys (AUSAs) to prosecute the Streamline docket. To address this scarcity, the Border Patrol had its own attorneys deputized as special assistant U.S. attorneys. To this day, in the Del Rio sector, Border Patrol attorneys, not AUSAs, prosecute Streamline cases.69

From DHS’s perspective, Streamline was an immediate success, allegedly reducing border apprehensions near Del Rio by 38 percent between fiscal years 2005 and 2006 and by 46 percent between fiscal years 2006 and 2007.70 Gradually, the Border Patrol expanded Operation Streamline to cover the entire 210 miles of the U.S.-Mexico border located within the Del Rio sector.

Since then, DHS has implemented zero-tolerance programs modeled after Operation Streamline in six of its nine border sectors. Streamline came to the Yuma Border Patrol sector in December 2006,71 to the Laredo sector in November 2007,72 and to the Tucson sector in January 2008.73 In the El Paso sector, DHS implemented Streamline in El Paso, Texas, in February 200874 and in New Mexico in March 2008.75 In the Rio Grande Valley sector, Streamline

69. When asked why Border Patrol attorneys prosecute Streamline cases in Del Rio and not in other jurisdictions like El Paso, Richard Durbin, Criminal Chief of the USAO for the Western District of Texas, explained that this is a result of “the differing size of the two branch offices and the way in which Streamline was introduced in each of them. When Streamline began in Del Rio in late ’05, we had about 7 or 8 AUSAs in Del Rio, handling about 1,000 felony cases each year. Streamline added about 300–400 additional prosecutions each week, and we simply did not have enough AUSAs on board to address those cases while still handling the felonies. DHS was willing to cross-designate its attorneys to appear in magistrate court each day to handle the cases there. El Paso was and is a much larger office and Streamline prosecutions were phased in more gradually—I don’t recall the numbers, but they started well under 50 and worked up over a number of months to 60 or 70 a week. With the larger number of AUSAs we had in El Paso and the smaller number of Streamline prosecutions, we were able to absorb the added workload.” E-mail from Richard Durbin, Criminal Chief, U.S. Attorney’s Office, W. Dist. of Tex., to author (Aug. 17, 2009, 13:07:12 PST) (on file with author).


71. Federal Courts Hit Hard by Increased Law Enforcement on Border, THIRD BRANCH, supra note 11. The Yuma program also encompasses migrants apprehended in the easternmost ten-mile stretch of southern California, who are transferred to Yuma for prosecution. Id.

72. See id.


74. Federal Courts Hit Hard by Increased Law Enforcement on Border, THIRD BRANCH, supra note 11.

began in Brownsville, Texas, in June 2008 and in McAllen, Texas, in late 2009.

These zero-tolerance immigration enforcement programs take slightly different forms, but they share the same mandate: the criminal prosecution of all migrants caught attempting to cross certain stretches of the U.S.-Mexico border. The following Part examines how zero-tolerance programs are currently functioning in three of the Border Patrol's busiest sectors: the Del Rio sector, the El Paso sector, and the Tucson sector.

II

OPERATION STREAMLINE IN ACTION

To understand how Operation Streamline is working in practice, I observed Streamline court proceedings and interviewed judges and practitioners in four cities where DHS has implemented versions of the program: Del Rio, Texas (located in the Del Rio Border Patrol sector); El Paso, Texas, and Las Cruces, New Mexico (located in the El Paso Border Patrol sector); and Tucson, Arizona (located in the Tucson Border Patrol sector). In addition to these in-person interviews, I conducted numerous telephone interviews. This Part describes Operation Streamline as it exists in each of the sectors I visited, outlines the program's impact on the courts and the defense bar, and provides an overview of typical outcomes for Streamline defendants in each location. My research reveals that Streamline looks different from sector to sector, but has a number of universal and troubling consequences.

Two brief introductory notes are in order. First, the case studies below focus on the impact Operation Streamline has had on those most deeply involved in its implementation: the federal judiciary, the USAO, the FPD, and CJA Panel attorneys. However, these groups are not the only ones affected by Streamline. The program has, in particular, also greatly impacted the U.S. Marshals Service, pretrial services, probation officers, district court personnel, court reporters, court interpreters, and, of course, the migrants it targets.

Second, while these case studies do not discuss the administrative removal process that occurs concurrently with Operation Streamline's federal court proceedings, DHS generally appears to be using expedited removal to remove Streamline defendants from the United States once their federal court proceedings have terminated. Any Streamline defendant who claims a
credible fear of return to her country of origin is, according to DHS, "given the opportunity to make [her] claim to an asylum officer who will determine the validity of such claim."\textsuperscript{80}

\textit{A. Sector-by-Sector Overview}

1. \textit{Del Rio}

As discussed above, Operation Streamline began in the Del Rio Border Patrol sector in December 2005. DHS initially conceived of Streamline as a spot-enforcement effort that would last just ninety days—a means of sending a deterrent message to OTMs in the Eagle Pass area.\textsuperscript{81} When DHS began to see a decline in apprehensions in Eagle Pass, however, it decided to make Operation Streamline permanent.\textsuperscript{82}

Streamline is now operating sector wide in Del Rio, with at least two limitations. First, there is currently a cap of eighty prosecutions per day in the sector.\textsuperscript{83} That does not mean that the Border Patrol can arrest only eighty people per day, but rather that it can channel only eighty migrants through the Streamline program. Second, it appears that the Border Patrol channels a small category of defendants who have prior criminal convictions but no prior contact with DHS through the expedited removal process rather than through Streamline.\textsuperscript{84} This is so that if the migrant is caught attempting to enter the United States a second time, she can be prosecuted under the felony statute, 8 U.S.C. § 1326.\textsuperscript{85}

2. \textit{El Paso}

Two cities in the El Paso Border Patrol sector process Operation Streamline defendants: Las Cruces, New Mexico, and El Paso, Texas. These cities, which are about forty-five miles apart, fall within the same Border Patrol sector, but they are not part of the same federal judicial district. Streamline

\begin{footnotesize}
\textsuperscript{80} E-mail from Stan Antey, Assistant Chief Patrol Agent, U.S. Border Patrol, Del Rio, Tex., to author (Sept. 15, 2009, 10:49:01 PST) (on file with author) [hereinafter E-mail from Stan Antey].
\textsuperscript{81} See id.
\textsuperscript{82} Interview with Honorable Alia Ludlum, U.S. Dist. Judge, W. Dist. of Tex., Del Rio, Tex. (Sept. 1, 2009) [hereinafter Ludlum Interview].
\textsuperscript{83} See id.
\textsuperscript{84} Interview with Honorable Victor Garcia, U.S. Magistrate Judge, W. Dist. of Tex., Del Rio, Tex. (Sept. 1, 2009) [hereinafter Garcia Interview].
\textsuperscript{85} See id.
\end{footnotesize}
defendants arrested in New Mexico appear before judges in the Las Cruces district courthouse, which is under the jurisdiction of the District of New Mexico. Migrants apprehended near El Paso receive hearings in the El Paso district courthouse, which is part of the Western District of Texas.

DHS started publicly introducing zero-tolerance programs modeled after Operation Streamline in the El Paso Border Patrol sector in early 2008. "Operation No Pass" began in February 2008 and created a zero-tolerance zone that encompassed about three to four miles of the border near downtown El Paso.86 In New Mexico, DHS had quietly been running a limited zero-tolerance program since late 2007, but Operation Streamline officially came to the state in March 2008, under the names "Operation Lockdown" and "Operation Swift Justice."87 For the sake of clarity, this Comment will refer to the zero-tolerance programs in El Paso and Las Cruces by the name "Operation Streamline," since they are fundamentally similar to the original Del Rio program.

When the Border Patrol initially proposed Operation Streamline in New Mexico in 2006, New Mexico’s federal judges questioned whether the district had the resources and detention beds to handle the caseload that Streamline would produce.88 Yet the introduction of a zero-tolerance approach to border enforcement was, in Las Cruces at least, “more of a slow evolution than a sudden change.”89 For some time, the Las Cruces USAO had prosecuted only 8 U.S.C. § 1326(b)(2) cases, which are prosecutions against unlawful entrants who have been deported in the past and have an aggravated felony in their

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86. Operation No Pass initially applied only to the stretch of border located between Mount Cristo Rey and the Paso del Norte Bridge in El Paso. See Louie Gilot, Undocumented Immigrants Will Get 'No Pass' on Border, El PASO TIMES, Feb. 22, 2008 (though relatively highly trafficked, "[t]he three- to four-mile stretch between the Paso del Norte Bridge and Mount Cristo Rey is not the busiest spot in the sector. Border Patrol officials said they chose the area because head gates make the canal dangerous at that spot and because the area is a drug-smuggling corridor."). Sara Miller Llana, On U.S.-Mexican Border, New Deterrent Is Jail Time, CHRISTIAN SCI. MONITOR, Mar. 18, 2008, at 1.

87. The Border Patrol first implemented Operation Lockdown along the stretch of the U.S.-Mexico border that runs between Mount Cristo Rey and Sunland Park, New Mexico, in late 2007 without announcing the program to the public. See Louie Gilot, 'Zero-Tolerance' Sector to Reach Santa Teresa, El PASO TIMES, Mar. 6, 2008. Shortly thereafter, in March 2008, the Border Patrol publicly expanded that zero-tolerance zone farther into New Mexico. See Mosier Interview, supra note 75. The Border Patrol used the name Operation Lockdown in the eastern portion of the New Mexico border and the name Operation Swift Justice in the Deming-Columbus area of the border, located farther west. Id.

88. Southwest Border Courts Swamped with Immigration-Related Felony Cases, ASSOCIATED PRESS, Apr. 27, 2007, available at http://www.foxnews.com/story/0,2933,268961,00.html ("'We said, "Do you realize that the second week into this we're going to run out of (jail) space?'" Martha Vázquez, chief judge for the District of New Mexico, recalled telling Border Patrol chief David Aguilar. 'We were obviously alarmed because where would we put our bank robbers? Our rapists? Those who violate probation?' she said.").

89. Interview with Gregory Wormuth, Assistant U.S. Attorney, Las Cruces, N.M. (Mar. 24, 2009). At the time of this interview, Mr. Wormuth was the attorney-in-charge of the Las Cruces USAO. He has since become a magistrate judge in Las Cruces.
From there, the USAO began prosecuting migrants who had other kinds of criminal records or were "major recidivist" border crossers. Then, about three years ago, the USAO began making an effort to prosecute more migrants for simple felony reentry under 8 U.S.C. § 1326(a). Prosecution data from the district of New Mexico demonstrates a steady increase in § 1326 prosecutions since the early 1990s.

The Border Patrol reports that Operation Streamline now encompasses the entire El Paso sector, meaning that migrants caught attempting to cross any portion of this stretch of the border are criminally prosecuted. However, local federal defenders, U.S. attorneys, and judges I interviewed believed that the Border Patrol was only enforcing a mandatory prosecution policy in discrete zones within the sector. This discrepancy typifies a lack of communication I observed between DHS and the other government agencies involved in its zero-tolerance prosecution efforts.

A recent decline in border apprehensions has facilitated the expansion of zero-tolerance programs in El Paso and Las Cruces. As of June 2009, the El Paso Border Patrol was only apprehending about forty to fifty people per day throughout the entire sector. Thus, there were enough detention bed spaces and court resources to prosecute all of those apprehensions. While the courts and relevant agencies in El Paso and Las Cruces used to set formal caps on the number of weekly Streamline prosecutions that the USAO could bring, it is not clear that those caps have been tested in recent months, or that they are still being enforced, given the decline in apprehensions.

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90. Id.
91. Id.
92. See Transactional Records Access Clearinghouse, Federal Criminal Enforcement: Going Deeper (2010), http://tracfed.syr.edu/index/cri/cri_godeep_index_pros.html (search by fiscal year, district, lead charge (title and section), and prosecutions filed; select 1990; select the District of New Mexico; repeat for 2009) (results on file with author). The data show that 8 U.S.C. § 1326 prosecutions in the District of New Mexico rose 11,640.9% between 1990 and 2009, from 22 prosecutions to 2,583.
93. See Mosier Interview, supra note 75. See also E-mail from Douglas Mosier, U.S. Border Patrol, Office of Pub. Affairs, El Paso, Tex., to author (Aug. 17, 2009, 8:04:01 PST) (on file with author).
94. I went on a line tour of the border with a representative of the El Paso Border Patrol in March 2009, and even he was not sure how much of the sector was comprised of zero-tolerance zones or where those zones were located.
95. Indeed, a July 2008 report by the Administrative Office of the U.S. Courts recommended that the executive branch provide more advance notice of its prosecution policies along the border, noting a "common complaint from judges and district court staff . . . that they rarely hear about major new prosecution initiatives until they have begun or are about to begin." ADMIN. OFFICE OF THE U.S. COURTS, REPORT ON THE IMPACT ON THE JUDICIAIY OF LAW ENFORCEMENT ACTIVITIES ALONG THE SOUTHWEST BORDER, supra note 16, at 17.
96. See Part III.A.1, infra.
97. See Mosier Interview, supra note 75.
98. See id. By comparison, three years ago, there were roughly 250 to 300 apprehensions per day in the Deming corridor of the El Paso sector alone. See id.
99. The Criminal Chief of the USAO for the Western District of Texas believes there may
While Operation Streamline defendants in Tucson and Del Rio receive just one court appearance, defendants in El Paso receive two. At the initial appearance, an El Paso defendant is informed of the charges against her and assigned counsel. She appears at this hearing with everyone else the Border Patrol has arrested that day, which has resulted in as many as eighty-seven people receiving an initial appearance at once. The defendant’s second hearing generally occurs about two weeks later and combines her arraignment, plea, and sentencing. While she appears in a group at this hearing as well, it is a much smaller group of seven or eight defendants.

3. Tucson

When DHS implemented a zero-tolerance program in the Tucson Border Patrol sector in January 2008, it began by referring forty migrants for prosecution each day. DHS labeled the program the “Arizona Denial Prosecution Initiative,” explaining that it would not be able to use the name “Operation Streamline” until the number of daily prosecutions increased. Regardless of what DHS is formally calling the program today, local judges, prosecutors, and defense attorneys I interviewed generally referred to it as “Operation Streamline,” which is the name this Comment will use.

The Tucson Border Patrol sector includes 262 miles of linear border and eight Border Patrol stations. This sector is consistently the Border Patrol’s busiest. In the 2008 fiscal year, for example, the Border Patrol made 317,709 apprehensions in the Tucson sector, which was significantly more than the combined apprehensions made in all other southwest border sectors.
According to Chief Judge John Roll of the U.S. District Court for the District of Arizona, around 45 percent of all individuals who enter the United States illegally each year do so through the Tucson sector.\footnote{108} It is difficult to implement a zero-tolerance prosecution initiative in a sector that averaged 870 apprehensions per day in 2008.\footnote{109} The district court in Tucson cannot handle anywhere near 870 new criminal cases each day, nor can the U.S. Marshals, the defense bar, or the Border Patrol attorneys who are deputized as special assistant U.S. attorneys to prosecute Operation Streamline cases in Tucson.

As a result of those resource constraints, the number of daily prosecutions under Operation Streamline in Tucson has slowly increased from the original forty to a current cap of seventy. That is the maximum number of Streamline prosecutions that the Tucson district court can handle each day, given the number of holding cells in the building, the volume of other prosecutions, and the capacity of the U.S. Marshals.\footnote{110} It is not clear what criteria the Border Patrol uses to select the seventy migrants it refers for prosecution each day, but those migrants who are not processed through Streamline are either voluntarily returned, removed through expedited removal, or separately prosecuted by the Tucson USAO.\footnote{111}

While Operation Streamline consistently generates more daily prosecutions in Tucson than in any other sector, Tucson’s program is, in a way, a restrained version of what exists in El Paso, Del Rio, and other locations. In Tucson, unlike in other border districts, the formal cap of seventy daily prosecutions means that the Border Patrol is not referring for prosecution anywhere near 100 percent of the migrants it apprehends each day. DHS has proposed increasing the number of daily prosecutions, which could be

\begin{itemize}
\item 20,761 in Del Rio, Tex.; 43,659 in Laredo, Tex.; and 75,476 in Rio Grande Valley, Tex.
\end{itemize}

\footnote{108}{Interview with Honorable John M. Roll, Chief Judge, Dist. of Ariz., Tucson, Ariz. (Sept. 2, 2009) [hereinafter Roll Interview].}


\footnote{110}{Roll Interview, supra note 108.}

\footnote{111}{Interview with Richard Bacal, CJA Panel Attorney, Tucson, Ariz. (Sept. 2, 2009) [hereinafter Bacal Interview]. I have made repeated attempts to contact DHS and the Tucson Border Patrol office to determine what criteria that office is using to select migrants for prosecution through Operation Streamline. I have not received a response to those requests. One Tucson federal defender believes the Border Patrol picks a different zone of the Tucson border each day within which to enforce its zero-tolerance policy. Williams Interview, supra note 16.}
facilitated either by having two Streamline sessions each day at the district court, or by having magistrate judges travel to Border Patrol headquarters in Tucson and conduct hearings there.\textsuperscript{112} Those proposals, however, have met with resistance from the district court, the U.S. Marshals Service, and the defense bar.\textsuperscript{113}

\textbf{B. Operation Streamline and the Courts}

Even in Tucson, which has a relatively large federal bench compared to other border cities, Operation Streamline has had a major impact on the workloads of magistrate judges and their staff. This Part examines the effect Streamline has had on the federal district courts that I visited.

\textit{1. Del Rio}

The federal district court in Del Rio was perhaps uniquely suited to handle the Operation Streamline caseload because, even before the program began, the Del Rio Border Patrol prosecuted migrants for misdemeanor illegal entry in relatively large numbers, without the USAO’s participation.\textsuperscript{114} A prosecutions agent for CBP filed each complaint, and the magistrate judges arraigned defendants in groups, with guilty pleas and sentencing occurring in the same proceeding.\textsuperscript{115} While the court appointed defense counsel only upon request, the Del Rio FPD was available in the courtroom as “stand-by” counsel.\textsuperscript{116}

Operation Streamline quickly generated staggering caseloads in the Del Rio district court. Available data suggests that in 2005 the two magistrate judges in Del Rio closed about 3,495 petty misdemeanor cases, the vast majority of which were filings under 8 U.S.C. § 1325.\textsuperscript{117} That number jumped to 11,786 in 2006 and to 12,600 in 2007.\textsuperscript{118} In the month of February 2008 alone, the Del Rio magistrates conducted 3,014 and 2,588 criminal proceedings, respectively, while their colleagues in other divisions of the Western District of Texas conducted an average of 306.\textsuperscript{119} The Del Rio magistrates’ caseloads appear to have decreased somewhat in 2009,\textsuperscript{120} but they

\begin{itemize}
\item \textsuperscript{112} Bacal Interview, \textit{supra} note 111. Currently, all Operation Streamline proceedings in Tucson take place in the Special Proceedings courtroom, which is the largest courtroom in the Tucson district courthouse.
\item \textsuperscript{113} \textit{See id.}
\item \textsuperscript{114} \textit{See} Durbin Interview, \textit{supra} note 14. Though the Del Rio district court did sometimes see as many as sixty misdemeanor illegal entry prosecutions per day, the number of daily prosecutions has certainly increased under Streamline. Ludlum Interview, \textit{supra} note 81.
\item \textsuperscript{115} \textit{See} Durbin Interview, \textit{supra} note 14.
\item \textsuperscript{116} Ludlum Interview, \textit{supra} note 81.
\item \textsuperscript{117} \textit{See} Williams Statement, \textit{supra} note 73, at app. 4.
\item \textsuperscript{118} \textit{See id.}
\item \textsuperscript{119} W. \textit{DIST. OF TEX., MAGISTRATE JUDGE CRIMINAL PROCEEDINGS FOR THE MONTH OF JANUARY 2008 AND JANUARY 2009} (on file with author).
\item \textsuperscript{120} For example, Magistrate Judge Garcia in Del Rio processed 2,124 criminal cases in the month of January 2009 and 2,782 in the month of February 2009, and Magistrate Judge Green
are still astronomically high when compared with those of their counterparts in other divisions. One Del Rio magistrate estimates that the Streamline cases make up anywhere from 60 percent to 80 percent of his docket, depending on the time of year.

The daily number of Operation Streamline prosecutions in Del Rio varies. When the program first began, it generated as many as 160 prosecutions each day. Given the case volume, the magistrate judges traveled to the local detention facility, Val Verde Correctional Facility and County Jail, to conduct hearings. These days, Del Rio Magistrate Judge Victor Garcia reports that the court sees about eighty prosecutions per day between January and May, when border-crossing rates are at their peak. However, during what Judge Garcia describes as the “low season,” the Streamline docket is far less busy.

2. El Paso

Misdemeanor Operation Streamline prosecutions in the El Paso Border Patrol sector have been slowly increasing since the program was implemented there. In January 2008, the month before Streamline came to the city of El Paso, Magistrate Judge Norbert Garney conducted 638 criminal proceedings, Magistrate Judge Michael McDonald 557 proceedings, and Magistrate Judge Richard Mesa 478 proceedings. In January 2009, with Streamline in place, those judges’ caseloads had increased by an average of 330 cases per month. Judge Garney estimates that he currently hears between 170 and 180
misdemeanor cases per week, while he heard only fifty to sixty such cases per week before Streamline.128

On the day I visited the El Paso district court, March 25, 2009, the government initiated twenty-five Operation Streamline misdemeanor prosecutions, which seems to be fairly typical.129 However, the record in recent months was eighty-seven Streamline defendants in one day.130

Although Operation Streamline has had a striking impact on the workloads of magistrate judges in El Paso, the two El Paso magistrate judges I interviewed stressed that the bulk of the extra work that Streamline generates falls on their support staff.131 Because Streamline defendants appear in court in groups and almost always plead guilty, judges are able to process Streamline cases relatively quickly. The support staff, however, does not benefit from these efficient group proceedings, because they must create and maintain a case file for each defendant.132

3. Tucson

Operation Streamline appears to be somewhat less of a burden on the judiciary in Tucson than in other cities because of the size of the Tucson bench. There are currently seven magistrate judges in Tucson, which means that every seven weeks each judge spends one week on Streamline duty.133 Nonetheless, Operation Streamline has had an undeniable impact on the workloads of Tucson’s federal judges. The USAO in Tucson reports that Operation Streamline prosecuted 26,600 defendants between January 2008 and October 1, 2009.134 Filings under 8 U.S.C. §§ 1325 and 1326 comprised 83 percent of all criminal prosecutions in the District of Arizona in 2008.135 In

128. See Garney Interview, supra note 25.
130. See Interview with Honorable Richard Mesa, Magistrate Judge, W. Dist. of Tex., El Paso, Tex. (Mar. 25, 2009) [hereinafter Mesa Interview].
131. See id.; Garney Interview, supra note 25. The Administrative Office report echoes this concern. See ADMIN. OFFICE OF THE U.S. COURTS, REPORT ON THE IMPACT ON THE JUDICIARY OF LAW ENFORCEMENT ACTIVITIES ALONG THE SOUTHWEST BORDER, supra note 16, at 14. (“Courts report that Operation Streamline II has been particularly draining on their support staff because of the volume of additional paperwork.”).
132. See Mesa Interview, supra note 130.
133. See id.
135. While it is not ideal to measure prosecutions throughout the entire District of Arizona, as that district also encompasses courts in Phoenix, Flagstaff, Prescott, and Yuma, the clerk’s office in the District of Arizona unfortunately does not keep statistics on filings by specific charge within each division. E-mail from Michael O’Brien, Chief Deputy Clerk, Dist. of Ariz., Tucson,
2005, by comparison, those prosecutions occupied just 46 percent of the district's criminal docket.\footnote{137} Streamline has also meant that judges in the District of Arizona hear fewer felony cases, including drug prosecutions and prosecutions for alien smuggling under 8 U.S.C. § 1324.\footnote{138}

\section*{C. Defending Operation Streamline Cases}

Because the FPD lacks the capacity to handle much, if any, of the Operation Streamline caseload, CJA Panel attorneys represent the majority of Streamline defendants in Del Rio, El Paso, and Tucson. The amount of time that defense attorneys have to meet with their clients, and the relative privacy of those attorney-client meetings, however, varies by jurisdiction. This Part explains how the attorney assignment and representation process occurs in each of the cities I visited.

\subsection*{1. Del Rio}

The FPD in Del Rio did not become involved in the Operation Streamline docket until 2007.\footnote{139} When CBP first implemented the program, it proposed that all migrants receive a ninety-day sentence in exchange for a guilty plea to 8 U.S.C. § 1325(a), with the proviso that, as soon as the migrant's country of origin was ready to receive her, the sentence would be reduced to time served.\footnote{140} According to William Fry, supervisory assistant federal public defender in Del Rio, the Del Rio FPD refused "to play the game."\footnote{141} The FPD insisted on defending the Streamline prosecutions as it saw fit, rather than agreeing to a guilty plea and ninety-day sentence in every case.\footnote{142} The FPD also asked the court to limit FPD appointments to twenty per day, because of staffing constraints.\footnote{143} As a result of these demands, Mr. Fry says, the Del Rio district court essentially "fired" the FPD, instead assigning the Streamline cases exclusively to CJA Panel attorneys.\footnote{144} Del Rio District Judge Alia Ludlum tells the story somewhat differently. She says the FPD simply did not have the

\footnote{Ariz., to author (Nov. 10, 2009, 10:52:47 PST) (on file with author).}{136} There were 10,056 prosecutions filed under 8 U.S.C. § 1325 and 4,956 prosecutions filed under 8 U.S.C. § 1326 in the District of Arizona in 2008, out of 17,759 total prosecutions.\footnote{Transactional Records Access Clearinghouse, Federal Criminal Enforcement: Going Deeper (2009), http://traced.syr.edu/index/cri/cri_godeep_index_pros.html (search by fiscal year, district, lead charge (title and section), and prosecutions filed; click on 2008; click on Arizona) (results on file with author).}{137} There were 1,194 prosecutions filed under 8 U.S.C. § 1325 and 2,459 prosecutions filed under 8 U.S.C. § 1326 in the District of Arizona in 2005, out of 7,905 total prosecutions.\footnote{Id.}{138} See Part III.A.2, infra, and Figure 4, infra.\footnote{See Fry Telephone Interview, supra note 125.}{139} See Fry Telephone Interview, supra note 125.\footnote{See id.}{140} See id.\footnote{Id.}{141} See id.\footnote{See id.}{142} See id.\footnote{Williams Statement, supra note 73, at 5.}{143} Williams Statement, supra note 73, at 5.\footnote{Fry Telephone Interview, supra note 125.}{144} Fry Telephone Interview, supra note 125.
capacity to defend the Streamline prosecutions when the program began, so the court assigned the cases to CJA attorneys.\footnote{Ludlum Interview, supra note 81.} However, recognizing that the program would move forward with or without them, the Del Rio FPD began taking on a limited number of Streamline cases in 2007.\footnote{The Del Rio FPD now accepts Streamline assignments two days per week. See Fry Telephone Interview, supra note 125.} The FPD now covers the Streamline docket two days a week.\footnote{See id.}

On the other three days, CJA Panel attorneys accept Operation Streamline appointments, and one attorney is assigned to represent all of the Streamline defendants receiving initial appearances on any given day.\footnote{See id.} This arrangement can result in one lawyer accepting as many as eighty appointments per day.\footnote{See id.} Defense attorneys in Del Rio, whether CJA or FPD, have one day to interview their clients between the date that the Border Patrol files the complaint and the hearing that serves as the initial appearance, plea, and sentencing.\footnote{See, e.g., Williams Statement, supra note 73, at 5; id. The maximum attorney-client ratio in the Streamline proceedings in Tucson is six clients per defense attorney. Bacal Interview, supra note 111. The average ratio in El Paso is seven or eight clients per defense attorney. E-mail from Honorable Richard Mesa, U.S. Magistrate Judge, W. Dist. of Tex., El Paso, Tex., to author (Sept. 17, 2009, 11:25:29 PST) (on file with author).} If a CJA attorney receives eighty appointments and spends a full eight-hour day at the detention facility interviewing defendants without a break, she will be able to spend just ten minutes with each client. In contrast, defense attorneys in Tucson and El Paso reported that they were able to spend thirty minutes or more interviewing each Streamline client, given the much lower attorney-client ratios in those cities.\footnote{See Fry Interview, supra note 16. Along with the complaint, the defense attorney receives her client’s prosecution report and any discovery in the case, which she can take with her when she travels to the detention center to conduct client interviews. Ludlum Interview, supra note 81.} With apprehensions currently down in the Del Rio sector, there may be twenty, not eighty, new Streamline prosecutions per day. Even then, a CJA attorney would need to spend ten straight hours at the detention facility in order to see each of her clients for thirty minutes.

Generally, given the high volume of cases in Del Rio, defense attorneys first provide a group presentation at the detention center to all of their clients.\footnote{See, e.g., Bacal Interview, supra note 111; Melendez Interview, supra note 16.} During this presentation, the attorney outlines the defendants’ basic rights and provides an overview of the charges, the penalties and potential immigration consequences of those charges, and the defendants’ options.\footnote{See id.} Many attorneys then take a few minutes to speak with each client individually.\footnote{See Fry Interview, supra note 16.} Often,
defense attorneys have no more than five to ten minutes for each of these individual meetings. The group presentation takes place in a large room at the detention center, while the individual meetings may take place at a table in this same room or in a separate room nearby. If the meeting does not take place in a separate room, attorneys must speak to their clients in low tones to avoid having their conversations overheard.

The Del Rio FPD has the institutional resources and personnel to provide slightly more individualized attention to Operation Streamline defendants than do the CJA attorneys, who are generally solo practitioners. When on Streamline duty, the FPD sends a minimum of four staff members—usually two lawyers and two investigators—to the detention center to interview clients. The FPD has the capacity to send as many as eight representatives to the jail, which it may do on particularly busy days.

From Operation Streamline’s inception until sometime in 2008, the Del Rio district court paid the CJA attorneys $50 per Streamline defendant they represented, rather than their usual hourly salary. Many observers criticized that payment plan as violating the terms of the Criminal Justice Act and creating an incentive for CJA attorneys to represent as many clients as quickly as possible. District Judge Alia Ludlum defends the practice, explaining that it created much less work for the district court (which processes the CJA vouchers) and resulted in payments that almost equaled those that the CJA

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155. See id. See also Michael Riley, Criminal Crossing: Part 3, DENVER POST, Mar. 6, 2007, at A1, available at http://www.denverpost.com/fortressamerica/cgi_5363410 (“Before their court appearance, [Del Rio CJA Panel attorney] Jacques De La Mota quickly tries to find if there is anything that might keep his clients in the country, conceding he has only five to 10 minutes with each.”).


157. See id.

158. See Fry Telephone Interview, supra note 125.

159. See id.


161. At the time these $50 per client payments were occurring (between 2005 and 2008), the CJA hourly rate ranged between $90 per hour and $100 per hour. Id.

162. See, e.g., NAT’L ASS’N OF CRIMINAL DEF. LAWYERS, ADOPTED NACDL POLICY ON OPERATION STREAMLINE (May 4, 2008), available at http://www.nacdl.org/public.nsf/26cf10555dace2b85256d97005c8f0d/064ff68eac7e3ac5852575c80057c1147?OpenDocument; Williams Statement, supra note 73, at 5.
attorneys now receive. Nonetheless, Judge Ludlum revised the payment scheme at the suggestion of the Administrative Office of the U.S. Courts.

2. El Paso

As a result of the heavy felony immigration caseloads in El Paso, the city's FPD does not have the capacity to handle misdemeanor Operation Streamline prosecutions. All 8 U.S.C. § 1325 cases therefore go to the CJA Panel. Edgar Holguin, an assistant federal public defender in El Paso, estimates that the FPD handles about 90 percent of the 8 U.S.C. § 1326 felony filings in El Paso, while CJA Panel attorneys handle the remaining 10 percent. For the FPD, that amounts to an estimated sixty active cases per attorney at any given time, which simply does not leave room for misdemeanor representation, given current staffing levels.

Although the FPD does not participate in the misdemeanor Operation Streamline docket in El Paso, the attorney-client ratios remain relatively low. The court generally appoints CJA attorneys to represent seven or eight defendants at a time, though one defense attorney reports that he has, on occasion, been appointed to represent as many as fifteen or twenty Streamline defendants. Because Streamline defendants receive two separate hearings in El Paso, defense attorneys have several days, and sometimes as long as two weeks, between the two hearings to interview their clients. El Paso CJA attorney Alex Melendez, who accepts Streamline appointments two to three times each month, estimates that he typically spends about thirty minutes with each client, but can spend more time than that if necessary.

The downside to the El Paso system is that defense attorneys generally must meet with their clients in the visiting rooms of two local detention facilities. Attorneys and their clients sit in cubicles, separated by bulletproof plexiglass, and use telephones to communicate. However, if an attorney feels

163. Ludlum Interview, supra note 81. According to Judge Ludlum, in 2009, CJA Panel attorneys typically billed thirty minutes per Streamline defendant at an hourly rate of $110 per hour, for a total of $44 per client. See id.
164. See id.
166. See id.
168. See Melendez Interview, supra note 16.
169. See id.
170. See id.
171. El Paso Streamline defendants are typically held briefly at the El Paso County Jail in downtown El Paso and then transferred to the West Texas Detention Center in Sierra Blanca, Tex., almost ninety miles southeast of El Paso. See id.
172. While Mr. Melendez reported that the meeting spaces at these detention facilities tend to afford adequate privacy, he did say that occasionally it is possible to overhear other people's conversations. See id.
it is necessary, she can request a contact visit with her client. Mr. Melendez reports that the detention centers always grant such requests.173

3. Tucson

The Federal Public Defender and the CJA Panel share responsibility for the Operation Streamline cases in Tucson, though not equally. Two federal defenders and fourteen or fifteen CJA attorneys generally split the docket each day, yielding an average attorney-client ratio of four or five clients per attorney.174 All of the relevant parties have agreed that the attorney-client ratio under Streamline in Tucson will not exceed six clients per attorney.175

Defense attorneys in Tucson receive their clients’ complaints at 9:00 a.m. and then have roughly three hours to interview their clients.176 That generally provides attorneys with about half an hour to meet with each client.177 These attorney-client meetings take place in the Special Proceedings courtroom at the Tucson district court, where approximately fifteen tables, set about four or five feet apart, are available for attorneys to speak with their clients. The Streamline defendants sit in the courtroom gallery in handcuffs and leg irons, supervised by U.S. Marshals, waiting their turn to be called by a defense lawyer. This setup, while not entirely confidential,178 allows attorneys to interview their clients outside of the detention facility. After a break for lunch, during which the defendants generally receive a visit from a representative of their home country’s consulate, court proceedings begin at 1:30 p.m.

D. Outcomes

The majority of migrants prosecuted under Operation Streamline are first-time entrants with no prior criminal convictions. These individuals receive a sentence of time served in most jurisdictions and generally end up spending two to fifteen days in detention. The Streamline defendants who do have criminal records, however, receive fairly divergent sentences depending on where they are apprehended. This Part explores the typical outcomes for Streamline defendants in the four jurisdictions I visited.

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173. See id.
174. See Bacal Interview, supra note 111.
175. See Roll Interview, supra note 108.
176. See Bacal Interview, supra note 111.
177. See id.
178. Given that the desks are relatively close together in one open room, it is not difficult to hear the conversations that others are having. On the day I observed attorney-client meetings in Tucson, I could hear a number of the attorney-client conversations happening at nearby tables.
1. Del Rio

According to Mr. Fry of the Del Rio FPD, Operation Streamline defendants in Del Rio can generally be divided into three categories. The first is comprised of what Mr. Fry and Judge Ludlum refer to as “real” or “true” Streamline defendants, whom the program was designed to target. These are first-time entrants: individuals who have no prior arrests or deportations on their records. These defendants, if they plead guilty, usually receive a sentence of six or ten days (depending on which of the two magistrate judges happens to preside), with credit for time served. Since the government is afforded at least thirty days to prepare for trial and does not waive that time, a Streamline defendant will automatically spend at least a month in detention if she decides to contest the charges against her. Understanding that dynamic, as well as the desire of most Streamline defendants to minimize jail time, the Del Rio FPD always advises these first-time entrants to accept a guilty plea.

The second category of Operation Streamline defendants is comprised of individuals who are, in Mr. Fry’s words, “felonizable.” These include migrants who have either been deported or convicted of illegal entry under 8 U.S.C. § 1325 in the past and therefore risk being charged with felony reentry under 8 U.S.C. § 1326 if they do not plead guilty to the misdemeanor violation. Also part of this group are individuals who, as part of their attempt to cross the border, have made a false claim to U.S. citizenship and face potential felony fraud charges under 18 U.S.C. § 911, 18 U.S.C. § 1001, and other relevant statutes. Defendants in this category will receive a maximum sentence of 180 days if they accept a guilty plea, but if they request a trial, the government may choose to bring an indictment on the felony charges, which can carry a much
longer sentence. Thus, the Del Rio FPD also generally recommends that these "felonizable" Streamline defendants plead guilty to the misdemeanor offense in order to avoid the felony indictment.

Finally, there is a third, and much smaller, category of Streamline defendants who have some sort of prior criminal history but no prior deportation or voluntary return on their record. According to Mr. Fry, a defendant in this category will always receive the maximum sentence of 180 days if she pleads guilty to 8 U.S.C. § 1325. But if the defendant demands a trial, the government does not legally have the option to bring an indictment on more serious felony charges. This is therefore the one category of cases in which a defense attorney may recommend that her client wait thirty days and see if she can prevail at trial, rather than accepting a guilty plea.

The typical Streamline defendant has no prior deportation, § 1325 conviction, or other criminal conviction on her record and thus receives the six- or ten-day sentence, but the sentences of defendants who do not fit in that category vary. On the day I observed court proceedings, six of the twenty-one defendants appearing in court received something other than a ten-day sentence. Three of these defendants had prior deportations on their records, and the presiding judge imposed sentences based on the recency of the prior deportation. The judge gave a thirty-day sentence to a defendant whose deportation occurred in 2008 and 120-day sentences to those whose deportations occurred in 2009. Two of the defendants had prior convictions for misdemeanor illegal entry on their records, and both received sentences of 180 days. A woman who had falsely claimed to be a legal permanent resident at a border inspection point, though she had no prior deportations and no criminal record, was sentenced to sixty days because the circumstances of her entry involved fraudulent conduct.

While Operation Streamline defendants generally receive relatively short sentences in Del Rio, their jail time is lengthened because they spend more time in detention waiting for an initial appearance than defendants in other sectors. On both of the days I visited Del Rio, defendants were receiving initial appearances up to two weeks after their arrest dates.

2. El Paso

Almost all misdemeanor Operation Streamline defendants in El Paso receive a sentence of time served. El Paso Magistrate Judge Norbert Garney

188. See Fry Interview, supra note 16.
189. See id.
190. See id.
191. See Part III.B.5, infra, for a discussion of whether this practice of holding defendants for more than forty-eight hours before an initial appearance violates the Fourth Amendment or Federal Rule of Criminal Procedure 5.
192. See Garney Interview, supra note 25.
estimates that the average defendant ends up spending about fifteen days in detention, from the time of her arrest to her sentencing. Only a defendant who has multiple prior voluntary returns on her record, has a criminal record, or was caught with drugs will receive a sentence other than time served. In such a case, the sentence might be as high as 180 days, the statutory maximum under 8 U.S.C. § 1325.

3. Tucson

As in El Paso, the majority of Operation Streamline defendants in Tucson receive a sentence of time served. These are individuals charged under 8 U.S.C. § 1325, who may have prior voluntary returns on their records, but have no prior criminal conviction or formal removal order. In Tucson, any defendant with a prior illegal entry or formal removal on her record faces a so-called “flip-flop” indictment, which charges one misdemeanor count of illegal entry under 8 U.S.C. § 1325 and one felony count of illegal reentry under 8 U.S.C. § 1326. Defendants who receive the “flip-flop” charge are offered a fast-track plea agreement, under which they plead guilty to the misdemeanor count and the government agrees to dismiss the felony count. These defendants generally receive sentences of anywhere from thirty to 180 days. The use of this “flip-flop” charge is not new in Tucson; the USAO used it routinely in illegal entry cases prior to the initiation of Operation Streamline.

This “flip-flop” procedure generally results in better outcomes for most Streamline defendants with prior 8 U.S.C. § 1325 convictions than they would receive in other jurisdictions. While an illegal entrant with a prior § 1325 conviction in Del Rio might be prosecuted for her second attempted entry under § 1325 (rather than facing the felony charge), she is almost guaranteed the maximum sentence of 180 days. In Tucson, that same defendant would likely

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193. See id.
194. See id.
195. See id.
196. Bacal Interview, supra note 111.
197. Id.
198. Certain districts have obtained the authorization of the attorney general to implement a “fast-track program,” which allows the government to charge less than the most serious offense in exchange for a guilty plea from the defendant. These programs exist only where the volume of cases (generally immigration cases) is so high that, without such an agreement, the resources of the district would be strained beyond capacity. Memorandum from John Ashcroft, Attorney Gen., Dep’t of Justice, to All U.S. Attorneys, Department Principles for Implementing an Expedited Disposition or “Fast-Track” Prosecution Program in a District (Sept. 27, 2003), reprinted in 16 FED. SENT’G REP. 134 (2003), available at http://www.justice.gov/ag/readingroom/ag-092203.pdf. Currently, Tucson is the only Operation Streamline jurisdiction discussed in this Comment that has a fast-track agreement in place.
199. Bacal Interview, supra note 111.
200. Id.
201. Id.
receive a plea offer of thirty days.\textsuperscript{202}

A repeat offender with a prior deportation or criminal conviction might also benefit somewhat from Operation Streamline in Tucson. Pre-Streamline, a defendant fitting that profile in Tucson faced the "flip-flop" charge and a plea offer of sixty to ninety days.\textsuperscript{203} Today, given the high volume of cases, the USAO would likely offer that same defendant thirty days.\textsuperscript{204} Similarly, a defendant with multiple voluntary returns on her record would have received a sentence of fifteen to thirty days pre-Streamline, whereas she would typically receive a sentence of time served today.\textsuperscript{205}

But not all repeat offenders in Tucson benefit from the Operation Streamline process. Because the Tucson Border Patrol apprehends more migrants than it can channel through Streamline each day, the USAO independently prosecutes a small number of migrants who are not first-time entrants. Heather Williams, first assistant federal defender in Tucson, estimates that the USAO initiates about thirteen such non-Streamline prosecutions per day.\textsuperscript{206} These defendants often receive sentences that are significantly longer than what their Streamline counterparts receive.\textsuperscript{207}

While Operation Streamline does appear to benefit a small category of repeat offenders in Tucson, it is important to remember that most Streamline defendants are first-time entrants with no prior criminal record. Very few of these individuals would have faced criminal prosecution before Streamline was implemented. Streamline therefore results in worse outcomes for the vast majority of the migrants that it targets.

Another feature of the Tucson Operation Streamline program that does not appear to exist in other jurisdictions is that the USAO, upon the request of defense counsel, will move to dismiss several categories of cases. According to Tucson defense attorneys, the USAO will always move to dismiss a Streamline prosecution if the defense attorney discovers (and notifies the AUSA) that the defendant has a viable claim to U.S. citizenship, is a juvenile, does not speak Spanish fluently,\textsuperscript{208} has a qualifying medical condition, has not been brought to

\begin{footnotes}
\item[202.] \textit{Id.}
\item[203.] \textit{Id.}
\item[204.] \textit{Id.}
\item[205.] \textit{Id.}
\item[206.] Williams Interview, supra note 16.
\item[207.] Bacal Interview, supra note 111. On the day I observed Streamline proceedings in Tucson, for example, Mr. Bacal noted that one of his Streamline clients being offered a plea agreement of ninety days might have been offered ten to sixteen months had he ended up in the non-Streamline setting, given that he had a prior aggravated felony on his record. Mr. Bacal and the other defense attorneys I interviewed were unable to say why certain clients are put through the Streamline process while others, who seem to have identical profiles, end up in the non-Streamline process.
\item[208.] Interpreters are only readily available for Spanish-speaking defendants. If necessary, the defense attorney can obtain an evaluation by a federal court interpreter to determine whether the client has the requisite fluency in Spanish to work with an interpreter. Bacal Interview, supra
\end{footnotes}
court within forty-eight hours of arrest, or if the defense attorney has any concerns about the defendant’s competency.209

E. 8 U.S.C. § 1326 Prosecutions in Las Cruces

While this Comment focuses on the prosecution of 8 U.S.C. § 1325 cases under Operation Streamline, the practitioners and judges I interviewed in the El Paso sector tended to view Streamline as encompassing mandatory prosecutions for felony reentry under 8 U.S.C. § 1326 as well. Thus, I will briefly discuss the impact that increased § 1326 prosecutions have had in Las Cruces, New Mexico, as an example of Streamline’s effect in the felony context.

While a surge in misdemeanor prosecutions is the hallmark of Operation Streamline, increased felony reentry prosecutions are also part of the program, since many convicted Streamline defendants who attempt a second border crossing will face a § 1326 charge. While no Streamline jurisdiction appears to have a mandatory policy dictating how U.S. attorneys must treat second-time entrants, all of these jurisdictions have seen a concurrent rise in § 1326 prosecutions with the increase in misdemeanor prosecutions under Streamline.

District Judge Robert Brack presides over the felony reentry prosecutions in Las Cruces. ABC News named Judge Brack “America’s busiest judge” in July 2008.210 Judge Brack disputes this title—“I’m not even the busiest judge in this courthouse,”211 he says—but he does consistently carry one of the highest immigration caseloads of any district judge in the country. At the time of his interview with ABC News, Judge Brack estimated that he would process between 1,000 and 1,200 criminal defendants in 2008, but that number ended up being closer to 1,400.212 The national average is around eighty-seven.213 The Syracuse University Transactional Records Access Clearinghouse found Judge Brack to be the district judge with the highest number of immigration criminal cases in both January 2009 and January 2010.214 In both years, “Reentry of deported alien” under 8 U.S.C § 1326 was the most frequently recorded lead

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note 111.

209. See id.; Williams Interview, supra note 16.
212. See id.
charge in Judge Brack’s courtroom.\textsuperscript{215}

As a result of his disproportionately high criminal immigration caseload, Judge Brack’s civil docket has had to be reduced. He carries about half of the civil caseload that other district judges in New Mexico carry but about eight times the criminal caseload.\textsuperscript{216} The Las Cruces court has also had to transfer other kinds of felony cases to make room for its immigration docket; in 2007, the court transferred about six hundred felony cases to Albuquerque.\textsuperscript{217}

Beyond overwhelming the federal bench, Operation Streamline has also impacted the amount of time migrants spend in prison. A prior 8 U.S.C. § 1325 conviction sets a migrant up for a later 8 U.S.C. § 1326 charge, and felony Operation Streamline defendants receive much longer sentences than misdemeanor defendants, who often spend just days or weeks in detention. In 2008, prosecutions under § 1326 took an average of 122 days to move through the court system in the District of New Mexico, and the average sentence for a § 1326 defendant in New Mexico was ten months.\textsuperscript{218}

III

OPERATION STREAMLINE’S UNACCEPTABLE CONSEQUENCES

DHS has touted Operation Streamline as a success, noting impressive reductions in apprehensions of migrants in the border communities in which it has implemented the program.\textsuperscript{219} It is far from clear, however, that Streamline

\textsuperscript{215} “Reentry of deported alien” under 8 U.S.C § 1326 ranked first, followed by “Fraud and misuse of visas, permits, and other documents” under 18 U.S.C § 1546 and “Entry of alien at improper time or place; etc.” under 8 U.S.C § 1325. See TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, IMMIGRATION PROSECUTIONS FOR JANUARY 2010, supra note 214, tbl.4 (click “more” in the line for Judge Robert Brack); TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, SURGE IN IMMIGRATION PROSECUTIONS CONTINUES, supra note 214, tbl.4; TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, IMMIGRATION PROSECUTIONS FOR JANUARY 2010, JUDGE ROBERT C. BRACK, U.S. DISTRICT COURT (2010), available at http://tracfed.syr.edu/results/9x204bd3320cfc.html.

\textsuperscript{216} See E-mail from Honorable Robert Brack, U.S. Dist. Judge, Dist. of N.M., Las Cruces, N.M., to author (Oct. 29, 2009, 17:02:05 PST) (on file with author).


\textsuperscript{218} Transactional Records Access Clearinghouse, Federal Criminal Enforcement: Going Deeper (2009), http://tracfed.syr.edu/index/cr/dodeep/index_pros.html (search by fiscal year, district, lead charge (title and section), prison term, average prison term, and “Ave. Days Ref. to Court Disp.”; click on 2008; click on N. Mexico) (results on file with author). While this is an average for the entire District of New Mexico, Judge Robert Brack of Las Cruces notes that the average processing times are much lower in Las Cruces. Six years ago, the average § 1326 defendant in Las Cruces who received a sentence of time served spent about seventy days in jail. By Judge Brack’s estimation, that average is currently closer to forty days. E-mail from Honorable Robert Brack, U.S. Dist. Judge, Dist. of N.M., Las Cruces, N.M., to author (Aug. 17, 2009, 14:06:37 PST) (on file with author).

caused that decline in apprehensions. Moreover, Streamline has unacceptable consequences for the courts and agencies tasked with implementing the program, for our law enforcement priorities along the border, and for the rule of law in this country.

A. Policy Concerns

DHS’s claims about Operation Streamline’s deterrent capacity may not be correct. In addition, Streamline diverts resources from prosecuting more serious crimes, has negative consequences for the workload of the border district courts and for the behavior of migrants, and requires substantial expenditures of taxpayer money.

1. Questionable Deterrent Capacity

Border Patrol apprehensions, as reported by DHS, have generally been declining since 2005, when Operation Streamline first began.²²⁰ While DHS conceded in a June 2009 report that this decline “may be due to a number of factors including declining U.S. economic growth,”²²¹ the agency has consistently given Streamline credit for the reduction in apprehensions.²²² The agency has reported, for example, that during the last quarter of 2008, Streamline caused apprehensions to fall by nearly 70 percent in Yuma, Arizona, and Del Rio, Texas, and by 22 percent near Laredo, Texas.²²³

Yet DHS’s numbers do not tell the full story. First, the general decline in border apprehensions did not begin in 2005, when DHS introduced Streamline, but rather in 2000.²²⁴ Apprehensions reached a decade peak in 2000,²²⁵ then

²²⁰ See Rytina & Simanski, supra note 9, at 2 (“The number of apprehensions made by the Border Patrol declined for the third year in a row to 724,000 in 2008 after reaching a mid-decade peak of 1,189,000 in 2005.”).
²²¹ Id. at 2.
²²³ See Hsu, supra note 5.
²²⁵ According to DHS, “The all-time apprehension record was 1,693,000 in 1986
steadily decreased until 2003, went up slightly in 2004 and 2005, and decreased again through 2009.\textsuperscript{226} DHS points out that between 2005 and 2008, apprehensions went down by 465,137, or 39 percent. But they had gone down by a very similar rate—44 percent, or 744,443 apprehensions—between 2000 and 2003, well before Streamline began. The degree to which the recent decline in apprehensions can be attributed to Streamline is therefore highly suspect.

A recent study by the Center for Comparative Immigration Studies at the University of California, San Diego,\textsuperscript{227} suggests several other factors that may explain the recent fluctuation in apprehensions. The study, a survey of Mexican migrants and potential migrants, found that the primary causes of the decline in border crossings were the increased cost of crossing the border and the economic downturn in the United States.\textsuperscript{228} Likewise, almost all of the judges and practitioners I interviewed in Arizona, New Mexico, and Texas cited the economy as the primary cause of the decline in apprehensions, and their observations are supported by census data from the Mexican government,\textsuperscript{229} as well as the opinions of experts in the fields of economics and migration.\textsuperscript{230} Indeed, as noted above, DHS’s own June 2009 report conceded that the decline in apprehensions “may be due to a number of factors including declining U.S. economic growth.”\textsuperscript{231} The U.S. unemployment rate has more than doubled since 2000, when border apprehensions began falling, and as Figure 2 demonstrates, border apprehensions have largely tracked the U.S. job market since 1991.\textsuperscript{232}

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\textsuperscript{226.} See supra note 224.
\textsuperscript{227.} Mexican Migration and the U.S. Economic Crisis: A Transnational Perspective (Wayne A. Cornelius et al. eds., 2010).
\textsuperscript{228.} Id. at xii.
\textsuperscript{229.} Julia Preston, Mexican Data Show Migration to U.S. in Decline, N.Y. Times, May 14, 2009, at A1 (citing Mexican census data revealing that “about 226,000 fewer people emigrated from Mexico to other countries during the year that ended in August 2008 than during the previous year, a decline of 25 percent. All but a very small fraction of emigration, both legal and illegal, from Mexico is to the United States . . . . Mexican and American researchers say that the current decline, which has also been manifested in a decrease in arrests along the border, is largely a result of Mexicans’ deciding to delay illegal crossings because of the lack of jobs in the ailing American economy.”).

\textsuperscript{230.} See, e.g., Diana Washington Valdez, Officials: Apprehensions Dip as U.S. Economy Struggles, EL PASO TIMES, Oct. 20, 2008 available at (quoting Tom Fullerton, professor of economics and finance at the University of Texas at El Paso and an expert on the border economy, as saying that “fewer Mexican nationals are trying to cross the border because they know the U.S. economic downturn has resulted in diminished job prospects”); Christopher Sherman, Third Year of Fewer Illegal Immigrants Caught, ASSOCIATED PRESS, June 16, 2009, available at http://abcnews.go.com/US/wireStory?id=7855349 (quoting Jeffrey Passel, senior demographer at the Pew Hispanic Center, as saying that the main reason Mexicans emigrate to the United States is for jobs, “and there aren’t any”).

\textsuperscript{231.} RYTINA & SIMANSKI, supra note 9, at 1.
\textsuperscript{232.} According to the Bureau of Labor Statistics, the unemployment rate was 4.0 percent in
Beyond the U.S. economy's effect on migration patterns, another factor may be involved: Operation Streamline is only one of a variety of DHS enforcement efforts that could potentially be impacting border apprehension rates. In 1993, the Immigration and Naturalization Service, which later became DHS, began moving from a strategy of interior enforcement (apprehending migrants after they had already entered the country) to one of deterrence (preventing illegal entries in the first place). The deterrence strategy included developing technology and physical barriers to prevent illegal immigration and drug smuggling.\footnote{See U.S. GEN. ACCOUNTING OFFICE, BORDER CONTROL: REVISED STRATEGY IS SHOWING SOME POSITIVE RESULTS 12–15 (1994), available at http://www.druglibrary.org/schaffer/GOVPUBS/gao/pdf23.pdf.}


It is thus impossible to isolate the success of Operation Streamline’s efficacy into question.\footnote{MEXICAN MIGRATION AND THE U.S. ECONOMIC CRISIS: A TRANSNATIONAL PERSPECTIVE, supra note 227, at 65–67.}
Figure 2: Apprehensions Versus Detrended Employment, 1991 to 2009

Note: Nonfarm payroll employment is expressed in deviations from long-run trend. Apprehensions are shifted 6 months forward. Employment and apprehensions have been seasonally adjusted by the Dallas Fed.

Graph courtesy of Pia M. Orrenius, senior economist in the Federal Reserve Bank of Dallas.
Finally, federal defenders, judges, and immigration attorneys I interviewed question whether Operation Streamline can be affecting apprehension rates, because they do not believe that migrants are aware of Streamline or understood how it works. In El Paso, at least, the Border Patrol has made an effort to publicize its zero-tolerance program in Mexico.\footnote{238} Beyond such direct efforts, CBP insists that news of these programs spreads among potential migrants by word of mouth.\footnote{239} However, defense attorneys I interviewed reported that the criminal prosecution catches many of their clients off guard. Defense attorneys also noted that many migrants cannot begin to understand how Streamline affects them because they do not, at a basic level, understand the concept of bars to reentry or what it means to be charged with a misdemeanor or a felony in the United States.\footnote{240} The Criminal Chief of the USAO for the Western District of Texas echoed those observations and speculated that few migrants are aware of the “collateral consequences” of a criminal conviction, should they later wish to obtain lawful immigration status in the United States.\footnote{241}

Defense attorneys also emphasized that many of their clients have traveled a great distance and spent a significant sum of money to reach the border.\footnote{242} Some wish to reunite with family members already residing in the United States. Others are unable to find work in their own country to support young children, sick family members, or aging parents. These personal circumstances can be more powerful than the threat of any criminal sanction. As Alex Melendez, a CJA Panel attorney in El Paso, put it, many of his clients “want to believe that there is a better future [for their families]. So they come. I know that if I were in those circumstances, I would do the same thing for a child of mine.”\footnote{243}

2. Diverting Resources

Drug-cartel violence along the U.S.-Mexico border has been on the rise in recent years.\footnote{244} The U.S. Government Accountability Office reports that

\footnote{239. \textit{Id.}}
\footnote{240. \textit{See Holguin Interview, supra note 165; Interview with Robert Kinney, Supervisory Assistant Fed. Pub. Defender, Las Cruces, N.M. (Mar. 25, 2009) [hereinafter Kinney Interview] (“And it’s really hard to explain to someone who is not familiar with our system and our culture that if you have committed a crime and already paid the time for that crime, that that crime somehow advances you not only in your offense level but in your criminal history . . . . Because, conceptually, it’s hard for me to understand, too. For them, it’s almost impossible.”).}}
drug-related murders more than doubled in Mexican border cities between 2007 and 2008, reaching 6,200 deaths.\textsuperscript{245} DOJ has described Mexican drug trafficking organizations as "the greatest organized crime threat to the United States."\textsuperscript{246}

At a time when combating drug-cartel violence is a top priority, Operation Streamline is draining law enforcement resources. The program channels law enforcement funding and attention toward the apprehension and prosecution of low-level offenders, rather than focusing on the criminals who create border violence. As petty immigration prosecutions have increased in the border district courts, drug prosecutions have declined (see Figure 3). While alien smuggling prosecutions have risen somewhat since 2002 when charted across all of the border courts, they too have been on the decline in certain areas, such as the District of Arizona (see Figure 4).\textsuperscript{247}

This disturbing trend may result from Operation Streamline's high caseloads, which force resource-constrained prosecutors to decrease the number of non-Streamline prosecutions that they bring. AUSAs in certain jurisdictions have lamented their inability to aggressively prosecute the criminal organizations behind drug smuggling and human trafficking as a result of their high caseloads. In 2006, for example, AUSA Clint Johnson of Las Cruces explained:

Because of the caseload, we can't always be as proactive as we'd like to be because we're so busy being reactive. [Illegal drug and immigration trafficking] cases do exist, [and] we do work them up the ladder. To be very honest, would I like to spend a lot more time trying to work up the ladder to some of these organizations? Most definitely.\textsuperscript{248}


\textsuperscript{248} Immigration Crisis Tests Federal Courts on Southwest Border, supra note 213.
Figure 3: Operation Streamline's Effect: Petty Immigration Prosecutions Versus Felony Alien Smuggling Prosecutions in the Border District Courts

Figure 4: Operation Streamline's Effect in Arizona
Data from the border district courts bear out this trend. A January 2009 New York Times article reported that, as immigration prosecutions have risen nationwide over the past five years, white-collar prosecutions, weapons prosecutions, organized crime prosecutions, public corruption prosecutions, and drug prosecutions have declined.\textsuperscript{249} And in Tucson, prosecutions for drugs, firearms and explosives, violent offenses, forgery and counterfeiting, and larceny and theft all decreased in 2008, Operation Streamline’s first year there.\textsuperscript{250}

The New York Times interviewed Judge George Kazen of Laredo, Texas, who expressed concern that AUSAs in his district were not adequately targeting weapons smugglers or violent drug cartels.\textsuperscript{251} "The U.S. attorney isn’t bringing me those cases,' he said. 'They’re just catching foot soldiers coming across the border .... But they will tell you that they don’t have the resources to drive it and develop a conspiracy case.’"\textsuperscript{252} The article further noted that, as a result of their immigration caseloads, U.S. attorneys on the southwest border generally “decline to prosecute drug suspects with 500 pounds of marijuana or less—about $500,000 to $800,000 worth.”\textsuperscript{253} This often results in local agencies handling those drug prosecutions and becoming overwhelmed themselves.\textsuperscript{254}

3. Effect on the Justice System

Operation Streamline’s voluminous prosecutions also exact a significant cost from the personnel working in the border district courts, including federal judges and their staff members, AUSAs, federal public defenders, and U.S. Marshals. The rising caseload statistics cited above for the Del Rio, Tucson, and El Paso sectors are representative of a larger trend. In the Laredo sector, for


\textsuperscript{250} Evan Pellegrino, Factory Justice?, TUCSON WEEKLY, Feb. 11, 2010, available at http://www.tucsonweekly.com/tucson/factory-justice/Content?oid=1800952 ("According to data provided by the [Tucson district] court clerk, marijuana cases dropped 26 percent; other drug cases, 28 percent; firearms and explosives, 21 percent; violent offenses, 17 percent; forgery and counterfeiting, 63 percent; larceny and theft, 28 percent.").

\textsuperscript{251} Id; see also Dianne Solis, Immigration Prosecutions Surge Under Bush’s Watch, DALLAS MORNING NEWS, Jan. 13, 2009, at 1A (quoting former Dallas U.S. Attorney Richard Roper as saying, “The practical effect [of a zero-tolerance approach to immigration] is it hurt our ability to prosecute white-collar fraud. If we don’t do them in the U.S. attorney’s office they won’t get done because they are so labor-intensive. It is difficult for the local district attorney’s office to handle that.”).
example, Operation Streamline is reported to have caused nearly a 320 percent spike in misdemeanor prosecutions since it began two years ago. On a national level, The Transactional Records Access Clearinghouse (TRAC) reports that immigration prosecutions reached a record high in 2009, with filings under 8 U.S.C. § 1325 comprising almost 60 percent of all prosecutions. A July 2008 report by the Administrative Office of the U.S. Courts addressed Operation Streamline’s impact on the judiciary. The report noted that “recruitment and retention” problems in the border district courts are “exacerbated because many employees at border locations are experiencing burnout due to the nature and sheer volume of the work. Courts report that Operation Streamline II has been particularly draining on their support staff because of the volume of additional paperwork.” The judges I interviewed almost universally echoed these concerns. The Administrative Office report also stressed the need for additional border district judgeships, magistrate judgeships, and intra- and inter-circuit assignments of district judges from other courts, as well as the ability to call retired magistrate judges to active service in the interim. The report concluded that “[t]here are simply not enough jail beds, holding cells, courtrooms, and related court facilities along the border to handle all the cases that the government would like to prosecute under Operation Streamline II and other initiatives.”

Operation Streamline can also lead to low morale and inadequate training among AUSAs, by requiring them to focus on low-level immigration prosecutions. In jurisdictions like Del Rio and Tucson, where Border Patrol attorneys are deputized as special assistant U.S. attorneys, Streamline does not substantially affect AUSAs. In other jurisdictions, like El Paso and Las Cruces, however, the USAO prosecutes the Streamline cases. Former U.S. Attorney in the Southern District of California Carol C. Lam recently noted:

If two-thirds of a U.S. attorney’s office is handling low-level narcotics and immigration crimes, young prosecutors may not have the

256. TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, IMMIGRATION PROSECUTIONS AT RECORD LEVELS IN FY 2009, supra note 6.
257. This is the calculation for the first nine months of fiscal year 2009, when filings under 8 U.S.C. § 1325 comprised 58.9 percent of all charges filed. Filings under 8 U.S.C. § 1326 comprised an additional 32 percent. See id.
258. ADMIN. OFFICE OF THE U.S. COURTS, REPORT ON THE IMPACT ON THE JUDICIARY OF LAW ENFORCEMENT ACTIVITIES ALONG THE SOUTHWEST BORDER, supra note 16.
259. Id. at 14–15.
260. See id. at 12.
261. Id. at 18.
262. See Moore, supra note 249.
263. See Durbin Interview, supra note 14. The exception is when a defendant requests a trial, at which point the USAO does become involved.
opportunity to learn how to do a wiretap case, or learn how to deal with the grand jury, or how to use money laundering statutes or flip witnesses or deal with informants and undercover investigations. That’s not good law enforcement.264

Concerns about morale and training exist for federal public defenders along the border as well. Federal Public Defender for the District of Arizona Jon Sands says his office has combated potential burnout among its employees by working with the Tucson district court to ensure that federal defenders are not exclusively handling the misdemeanor Streamline cases, and that the attorney-client ratios are manageable. However, he notes that other FPD offices have not been so lucky. In border locations where the CJA Panel is small, federal defenders have to handle most, if not all, of the Streamline cases. The repetitive nature and high volume of the work can, Mr. Sands emphasizes, lead to high burnout rates and to difficulty in recruiting new lawyers.265

Finally, Operation Streamline has stretched the U.S. Marshals Service thin. Among other things, U.S. Marshals apprehend federal fugitives, protect the federal judiciary, operate the Witness Security Program, and transport federal prisoners.266 In 2008, the head U.S. Marshal in Arizona stated that "Operation Streamline' shows how a well-intentioned program to crack down on illegal aliens can be undermined by inadequate funding and the strain it places on all layers of the criminal-justice system."267 A February 20, 2008, internal report by the Marshals Service suggested that the Marshals’ immigration workload has made it difficult for them to focus on other responsibilities.268 According to the report, the Marshals are "being forced to balance the apprehension of child predators and sex offenders against the judicial security requirements" involved in handling immigration detainees.269

4. Effect on the Behavior of Migrants

Defense attorneys I interviewed reported that their clients were often not aware of Operation Streamline before crossing the border.270 To the extent that migrants are in fact aware of and deterred by zero-tolerance zones, however, several additional concerns arise. First, programs like Operation Streamline may drive more migrants to use human smugglers (popularly known as

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264. Moore, supra note 249.
268. Id.
269. Id.
270. See Part III.A.1, infra.
"coyotes" or "polleros"), out of a belief that coyotes can identify border areas where migrants are least likely to be apprehended.271 Around 90 percent of the migrants interviewed for the UC San Diego Study had hired a coyote for their most recent border crossing.272 Robert Kinney, head of the Las Cruces FPD's office, says people in his community refer to Streamline as "a coyote employment bill."273 This increased reliance on professional smugglers heightens border violence274 and may also make it more difficult for Border Patrol agents to apprehend unlawful entrants.275

The UC San Diego study further notes that the rates coyotes charge to help migrants enter the United States have risen sharply in recent years. According to the migrants interviewed, the cost of hiring a coyote increased from an average of $861 before 2001 to $2,858 in 2009.276 Enforcement programs like Streamline may have played a role in this increase, driving up the price by making border crossings more difficult.

Second, zero-tolerance zones may cause more migrants to attempt crossing along remote and physically hazardous stretches of the border that are less likely to be heavily manned by Border Patrol agents.277 The harsh conditions can lead to migrant deaths from exposure, drowning, and other causes. According to a recent report by Mexico's National Commission of Human Rights and the American Civil Liberties Union of San Diego, border-crossing deaths have increased in recent years, "despite the economic downturn, fewer migrant crossings, and a steady drop in apprehensions."278

Third, Operation Streamline may drive more migrants to attempt to enter the United States using false identity documents. Under Streamline, being caught in an illegal crossing area means definite prosecution and detention, so walking through a border checkpoint with false papers may become more attractive. Data from TRAC shows recent nationwide increases in prosecutions related to the fraudulent use of identity documents.279

272. See id. at 63.
273. Kinney Interview, supra note 240.
274. See, e.g., Julia Preston, Two Arrested in Attempt to Crash Border, N.Y. TIMES, Sept. 23, 2009, at A29 ("ICE official Michael Unzueta] said that violence linked to human smuggling was rising because the business has become dominated by well-organized criminal groups in Mexico.").
277. See, e.g., Brack Interview, supra note 211.
279. TRAC reports, for example, that prosecutions under 18 U.S.C. § 1028 ("fraud and
Fourth, while there is reason to question how successful Operation Streamline has been at keeping undocumented immigrants out of the United States, enforcement efforts like Streamline appear to be highly effective at keeping undocumented immigrants in the United States. Indeed, migrants already living in the United States would seem most likely to have heard about Streamline.) The UC San Diego researchers found that border enforcement programs like Streamline, by making it more difficult for migrants to enter the United States, prevent them from leaving once they have arrived, a phenomenon known as “reduced circularity in migration.” In the past five years, the average Mexican migrant currently residing in the United States and interviewed for the UC San Diego study returned to her hometown only once, and the median length of time that migrants stay in the United States has risen sharply since 1990.

Finally, Operation Streamline has an important human impact on the migrants in targets, and on their family members. Among other things, Streamline can result in undocumented parents being separated from their U.S.-citizen children. The day I observed proceedings in Judge Brack’s courtroom, a father who had lived in the United States for the past sixteen years and whose wife and children were U.S. citizens was among the group of eleven defendants being sentenced. Rather than stipulating to removal as part of his plea, the defendant requested a removal hearing before an immigration judge in an attempt to adjust his status. The judge granted the defendant’s request, wishing him luck in securing lawful immigration status “so this isn’t another family devastated—another family divided—by this change in our immigration laws.”

"We are all complicit," Judge Brack continued, “in this family being divided in this way.”

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281. Id.

282. Id. at 56–57. See also Holguin Interview, supra note 165 (“I think one of the things you’re seeing is people leave the U.S. a lot less frequently than they used to. People would return to Mexico two to three times a year, for Christmas, a wedding, a funeral, and they would come back. Now people are foregoing those trips.”).


284. Id.

285. Id.
5. Cost to Taxpayers

The administration should also reevaluate Operation Streamline, especially considering the economic downturn, because it is an expensive program to run. In a February 2010 order, District Judge Sam Sparks of Austin, Texas, described the expenses involved in prosecuting undocumented immigrants for illegal entry as "simply mind boggling."286 "The U.S. Attorney's policy of prosecuting all aliens," Judge Sparks wrote, "presents a cost to the American taxpayer at this time that is neither meritorious nor reasonable." Streamline's expenditures are difficult to pinpoint, as relatively little information about the program's costs is publicly available. However, a basic review of the resources required to run the program suggests that its costs are likely significant.

Operation Streamline requires increased funding for DHS to support the Border Patrol agents and agency attorneys that enable the program. CBP alone is set to receive $10.1 billion for fiscal year 2010, more than $3.5 billion of which will fund the Border Patrol agents that make Streamline possible.288 As Judge Sparks noted in his order, Operation Streamline also requires significant funding for the district courts, U.S. Attorney's offices, federal public defenders, CJA Panel attorneys, court interpreters, U.S. Marshals, Office of the Federal Detention Trustee, and detention centers in each of the federal districts along the border.289 An examination of just one of these entities' fiscal year 2010 budget requests begins to reveal the potential magnitude of Streamline's costs.

The Department of Justice asked for a funding increase of $231.6 million for fiscal year 2010 to strengthen immigration enforcement and combat crime along the southwest border.290 $8.1 million of that request was aimed at funding seventy-five new positions in U.S. Attorneys' Offices—a number "sufficient to address the prosecutorial workload associated with the significant funding increases provided for law enforcement activities along the border."291 The DOJ request also included $144.3 million in funding for the U.S. Marshals Service, to create seven hundred new positions and construct the new courthouse space necessary to "better accommodate immigration enforcement initiatives, such as DHS'[s] Secure Communities and Operation Streamline."292
An example of Operation Streamline’s estimated fiscal impact at the local level provides further evidence of the program’s expense. The Tucson district court processes seventy Streamline defendants each day, and while most migrants receive a sentence of time served, some receive sentences as high as 180 days, making the average detention period approximately thirty days.\footnote{McCombs, supra note 104. On the day I observed Streamline proceedings in Tucson, the average sentence among defendants who pled guilty was 31.5 days.} DHS estimates that it costs the agency roughly $100 per day to detain a migrant,\footnote{Fact Sheet, U.S. Dep’t of Homeland Sec., ICE Detention Reform: Principles and Next Steps (Oct. 6, 2009), available at http://www.dhs.gov/xlibrary/assets/press_ice_detention_reform_fact_sheet.pdf (noting that the cost of detaining an immigrant varies by location but can exceed $100 per day).} which results in a cost of about $52.5 million per year to detain Streamline defendants in Tucson.\footnote{This assumes a detention cost of $100 per migrant per day, with five days of Streamline proceedings per week, for fifty weeks each year (accounting for about ten federal holidays).} Roughly $2 million of that money is spent on first-time entrants who have no prior criminal convictions.\footnote{One Tucson magistrate judge reports that each day at least thirty Streamline defendants receive a sentence other than time served. E-mail from Honorable Bernardo Velasco, U.S. Magistrate Judge, Dist. of Ariz., Tucson, Ariz., to author (Nov. 3, 2009, 13:33:35 PST) (on file with author). Given that there are seventy prosecutions each day, approximately forty defendants are sentenced to time served. Time served in Tucson works out to one or two days in detention, unless the migrant is apprehended over a weekend, in which case she may spend three or four days in detention. Williams Interview, supra note 16. Thus the calculation used an average detention period of two days and an average daily detention cost of $100, multiplied by forty defendants each day, five days per week, fifty weeks per year.} It costs taxpayers at least another $2.3 million per year to compensate the CJA attorneys who represent the majority of Streamline defendants in Tucson.\footnote{CJA Panel attorneys are paid $125 per hour and typically spend five hours on Streamline proceedings in a day. Approximately fifteen CJA Panel attorneys participate in the Streamline proceedings each day, five days per week. Bacal Interview, supra note 111. That results in an average weekly cost of $46,875 and an annual cost of $2,343,750.}

Operation Streamline also imposes a cost on state courts and prosecutors, who must manage the overflow of criminal cases that federal prosecutors can no longer handle because of their Streamline caseloads. The Southwest Border Prosecution Initiative (SWBPI), a DOJ program that began in 2001, provides federal grants to border region courts experiencing high levels of crime. Because Streamline has focused federal resources on the prosecution of low-level immigration offenses, states use SWBPI grant money as reimbursement for taking the cases federal courts have declined.\footnote{See, e.g., U.S. Dep’t of Justice Office of the Inspector Gen., Audit Report: Southwest Border Prosecution Initiative Program (Mar. 2008), available at http://www.usdoj.gov/oig/reports/OJP/a0822/final.pdf.} In 2009, the SWBPI cost taxpayers approximately $31 million.\footnote{U.S. Dep’t of Justice, Office of Justice Programs, BJA Programs: Southwest Border Prosecution Initiative, http://www.ojp.usdoj.gov/BJA/grant/southwest.html (last visited Mar. 3, 2010).}
6. Troubling Incentives

Another disconcerting aspect of Operation Streamline, and a potential barrier to its reform, is the degree to which certain groups are profiting from the program.

Some interviewees expressed concern about the extent to which CJA Panel attorneys stand to benefit financially from Operation Streamline. A CJA attorney who handles Streamline cases in Tucson, for example, could theoretically make a living entirely from Streamline proceedings. Working at a rate of $125 per hour, if the attorney were to handle Streamline cases five days a week for at least four hours each day, that attorney would make $125,000 per year on the Streamline representation alone. Until about a year ago, as discussed above, the CJA attorneys in Del Rio were being paid $50 per Streamline client they represented, and attorneys flocked to Del Rio from as far as San Antonio because they could make up to $4,000 in one day. Today, with the hourly rate reinstated, given that one CJA attorney provides representation for all of the Streamline defendants arraigned on a given day in Del Rio, that attorney stands to make at least $1,000 for a full day of client interviews, and another $250 to $375 for a morning’s worth of court appearances the following day.

One judge I interviewed, who did not wish to be named, worries that CJA attorneys will not challenge Operation Streamline’s legality because they are gaining financially from the program. While this judge believes migrants have potential constitutional claims against Streamline, he does not think CJA attorneys will be motivated to litigate those claims as long as the program provides such a steady stream of work. However, a CJA attorney I spoke with disagrees, arguing that the true barrier to reform is finding defendants who are willing to spend extra time in prison in order to challenge Operation Streamline’s constitutionality.

The private correctional corporations operating many of the detention facilities that house Operation Streamline defendants also profit from the

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300. See Ludlum Interview, supra note 81.
301. Fifty dollars per client multiplied by eighty clients results in a payment to the CJA lawyer of $4,000 for one day of representation.
302. This assumes one eight-hour workday spent conducting client interviews and another two to three hours the following day participating in the Streamline court proceedings, at $125 per hour.
303. Telephone Interview with CJA Panel Attorney, Tucson, Ariz. (Feb. 25, 2010) (notes on file with author) [hereinafter Tucson CJA Panel Attorney Telephone Interview]. The attorney asked to remain anonymous. As noted in Part II.D.1, infra, if an Operation Streamline defendant contests the charges against her, she faces at least thirty days in detention (the time the government automatically receives to prepare for trial). See 18 U.S.C. § 3161(c)(2) (2006). Similarly, certain magistrate judges in Tucson are allegedly requiring defendants who object to the en masse plea hearings to wait two weeks for an individual hearing. Tucson CJA Panel Attorney Telephone Interview. Because most Streamline defendants will receive a sentence of time served if they plead guilty, very few are willing to spend additional time in detention to contest the charges or object to the format of the hearings. Id.
program. In Del Rio, for example, Streamline defendants are detained in the Val Verde Correctional Facility and County Jail, which had 180 beds in 2000, and after two expansions, now has room for 1,425 prisoners. D'Wayne Jernigan, Sheriff of Val Verde County, attributes this expansion exclusively to the rise in federal detainees in the county: "If it wasn't for federal prisoners we wouldn't need any of this. It just wouldn't be necessary." As noted above, DHS recently announced that it costs the agency about $100 per day to detain an immigrant. The Geo Group (formerly known as Wackenhut Corrections Corporation) is just one of the private detention corporations that DHS contracts with to house Streamline detainees. The Geo Group runs the Val Verde jail in Del Rio and other detention facilities throughout the country and posted a gross profit of $221 million in 2008, up 55 percent from 2006. While many factors may affect the company's profits, the jail expansions that programs like Streamline necessitate seem to be good for business.

B. Legal Concerns

Operation Streamline raises a number of important legal concerns. Despite the best efforts of border jurisdictions, Streamline may deprive at least some migrants of procedural due process and effective assistance of counsel. The high volume of daily prosecutions requires group proceedings in which as many as eighty defendants appear before a magistrate at once. Additionally, not all migrants are receiving timely appearances. Some federal judges whom I interviewed also worry that Streamline requires a level of coordination between the executive and the judiciary that may violate the separation of powers doctrine. Finally, the deputization in some jurisdictions of Border Patrol attorneys as special assistant U.S. attorneys to prosecute Streamline cases raises prosecutorial-independence concerns.

Because each of these legal issues could occupy its own Comment or Article, I will not attempt to analyze any of them in depth. Rather, this Comment provides a basic overview of Operation Streamline's constitutional implications.

305. Id.
306. See supra note 293.
308. The Due Process Clauses of the Fifth and Fourteenth Amendments protect undocumented immigrants in the United States. See Zadvydas v. Davis, 533 U.S. 678, 693 (2001) ("[O]nce an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent.").
309. Though the topic will not be addressed here, Operation Streamline may also result in violations of the Model Rules of Judicial Conduct, given the ways in which it implicates the ability of judges to remain independent, impartial, and professionally competent.
Figure 5: A View of the Tucson Operation Streamline Courtroom

Seat numbers indicate where each of the seventy Operation Streamline defendants sits each day.
1. Due Process

The chief judge of the U.S. District Court for the District of New Mexico, Martha Vázquez, has summarized the due process concerns that arise in border districts as immigration caseloads skyrocket without a concurrent infusion of resources:

The increase in our criminal caseload, especially in Las Cruces, has caused us to conduct hearings in a way that we’ve never had to conduct them before, and in a way that other jurisdictions don’t have to . . . . We have . . . up to 90 defendants in a courtroom. Our magistrate judges try very hard to conduct their hearings in a way that is understandable to the defendants. But most of our defendants have a first or second grade education in their native countries. Some of them are not even able to read in their native languages. And so, we explain to them their constitutional rights in a legal system entirely foreign to them . . . .

You line them up in a courtroom that is intimidating even to American citizens, and we ask them to waive their constitutional rights. It is a difficult atmosphere in which to waive important constitutional rights, and to ask them if they understand their rights. Defendants in other parts of the country do not have to give up critical rights in this atmosphere, only in the border districts because of this exploding caseload.310

Operation Streamline court proceedings generally conform to Judge Vázquez’s description. Many Streamline defendants receive just one court appearance, which serves as an arraignment, plea, and sentencing.311 These hearings are conducted en masse, with up to eighty defendants arraigned each day in Del Rio,312 seventy in Tucson,313 and an average of twenty in El Paso.314

Operation Streamline’s accelerated, en masse hearings implicate both the Due Process Clause and Federal Rule of Criminal Procedure 11, which details the requirements a court must satisfy before it can accept a defendant’s guilty plea. The court must address the defendant “personally,” make sure she understands the constitutional rights she is waiving, and determine that her plea is voluntary.315 Streamline plea proceedings are conducted in groups, with the court addressing up to eighty defendants at a time.316

310. Immigration Crisis Tests Federal Courts on Southwest Border, supra note 213.
311. The exception, as noted above, is El Paso, where defendants receive two appearances.
312. See, e.g., Garcia Interview, supra note 84.
313. See, e.g., Roll Interview, supra note 108.
314. See supra note 129.
315. FED. R. CRIM. P. 11(b).
316. In El Paso, however, defendants generally plead guilty in groups of seven or eight at a time. E-mail from Honorable Richard Mesa, U.S. Magistrate Judge, W. Dist. of Tex., El Paso, Tex., to author (Sept. 17, 2009, 11:25:29 PST) (on file with author).
In December 2009, the Ninth Circuit Court of Appeals held in *United States v. Roblero-Solis* that Operation Streamline’s group hearings in Tucson violate Rule 11 and that the court “cannot permit this rule to be disregarded in the name of efficiency.” Because the Ninth Circuit panel found that the Rule 11 errors had not been properly preserved, however, it applied a plain error standard of review and did not grant a remedy. While *Roblero-Solis* is a positive development, it has not hindered Operation Streamline in Tucson. As of the publication of this Comment, Tucson magistrate judges are using a variety of plea procedures to comply with the Ninth Circuit’s opinion, and while plea hearings are taking somewhat longer than they used to, the court still processes seventy Streamline defendants each day.

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

2. Effective Assistance of Counsel

Another constitutional issue of great concern to judges and practitioners whom I interviewed was whether Operation Streamline defendants are receiving effective assistance of counsel, as guaranteed by the

318. Under that standard of review, the court held that each of the defendants had failed to show “a reasonable probability that, but for the error, he would not have entered the plea.” *Id.* at 701 (quoting *United States v. Dominguez Benitez*, 542 U.S. 74, 83 (2004)).
320. For example, William Fry, head of the Federal Defender’s office in Del Rio, points out that under 8 U.S.C. § 1325(a)(1), the government has to prove an entry, which may be impossible when a Border Patrol agent has not seen the migrant cross the border and there is no circumstantial evidence of an entry. See 8 U.S.C. § 1325(a)(1) (2006). Even if the client has confessed to illegal entry, the defense attorney may be able to get that confession suppressed. See Fry Telephone Interview, supra note 125.
321. See infra note 328 for a discussion of the INA provisions that may prevent a Streamline defendant from acquiring legal status in the United States after pleading guilty.
322. The Las Cruces Federal Defender, for example, represented a legal permanent resident prosecuted through Streamline who had lost his “green card” and could not afford the renewal fee. The client traveled to Mexico and, upon return to the United States, was told at a border inspection station that he could not enter until he paid the renewal fee. Unable to pay, he attempted to cross the border illegally. When he spotted a Border Patrol truck, the client walked up to the truck and asked the agents inside to help him get his “green card” back. The client was arrested and prosecuted under 8 U.S.C. § 1325. See Kinney Interview, supra note 240.
Sixth Amendment. This concern was present even in Tucson, where attorney-client ratios are lowest and defense attorneys conduct client interviews in semiprivate meeting spaces in the courthouse. The head of the Federal Defender’s office in Tucson, when asked if she had concerns about Operation Streamline defendants receiving effective assistance of counsel, responded, “always.”

"The lawyers try their hardest," she explained, “but they have a limited amount of time.”

Depending on the jurisdiction, a defense attorney representing an Operation Streamline client may have as little as a few minutes (in Del Rio) or as much as half an hour (in Tucson and El Paso) to meet with her client, assess the client’s competency, explore potential defenses or claims to immigration relief (including whether the client may face persecution if returned to her home country), obtain mitigating information, and advise her client whether to accept a plea. The client’s ability to ever legally reside in the United States may hang in the balance during this short period, as a removal order and a conviction under 8 U.S.C. §§ 1325 or 1326 can make it impossible for a migrant to later obtain permanent residency or U.S. citizenship.

Federal defenders in all of the jurisdictions I visited have built up significant institutional knowledge concerning Operation Streamline cases; attorneys have either acquired immigration law experience prior to joining the office or they develop it quickly after arrival through formal trainings and informal immersion. But in most Streamline jurisdictions, CJA Panel

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323. See U.S. Const. amend. VI; Powell v. Alabama, 287 U.S. 45, 68–69 (1932); McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970) (“It has long been recognized that the right to counsel is the right to the effective assistance of counsel.”); see also Padilla v. Kentucky, No. 08-651, 2010 WL 1222274, at *11 (U.S. Mar. 31, 2010) (“It is our responsibility under the Constitution to ensure that no criminal defendant—whether a citizen or not—is left to the ‘mercies of incompetent counsel.’”) (quoting Richardson, 397 U.S. at 771).

324. Williams Interview, supra note 16.

325. Id.

326. In Padilla, the U.S. Supreme Court held that the Sixth Amendment requires defense attorneys to advise noncitizen defendants about the immigration consequences of a guilty plea. Padilla, 2010 WL 1222274, at *11.

327. Williams Statement, supra note 73, at 7.

328. There are multiple sections of the Immigration and Nationality Act that may prevent a Streamline defendant from eventually acquiring legal status in the United States. First, an individual who has been found to have entered the United States without passing through immigration inspection will generally never be eligible to adjust her status to Legal Permanent Resident. See 8 U.S.C. § 1255(i) (2006). Second, under 8 U.S.C. § 1182(a)(9)(A)(i), an individual who has been ordered removed cannot seek readmission to the United States within five years of the removal, or within twenty years if she was convicted of an aggravated felony. See id. § 1182(a)(9)(A)(i). Third, those Streamline defendants who are arrested after having already crossed the border and who have spent more than 180 days or more than one year unlawfully present in the United States are subject to the three- and ten-year bars to reentry in 8 U.S.C. § 1182(a)(9)(B)(i)(I) and (II), respectively. See id. § 1182(a)(9)(B)(i)(I), (II). Fourth, if a Streamline defendant is found to have committed a “crime of moral turpitude” in the past, she will be inadmissible under 8 U.S.C. § 1182(a)(2)(A)(i)(I). See id. § 1182(a)(2)(A)(i)(I).

329. See Holguin Interview, supra note 165; Kinney Interview, supra note 240.
attorneys, and not federal defenders, are assigned to represent groups of defendants in the misdemeanor proceedings. These groups may be as small as six defendants (in Tucson) or as large as eighty defendants (in Del Rio). Given their caseloads, CJA attorneys, who often lack the staff and institutional resources of the FPD, may not always have the capacity to interview defendants individually. Furthermore, some Streamline defendants are called into attorney-client meetings at detention centers in groups; thus, attorneys may not be able to adequately investigate defenses, negotiate dismissals or reduced charges, or attempt to secure bond for individual defendants.

Group attorney-client meetings also implicate an attorney's duty to engage in confidential conversations with her clients. As the Administrative Office of the U.S. Courts has recognized with respect to the rising immigration caseload in the border district courts, "Attorneys representing a large number of defendants may be unable to speak to them individually or privately before rendering advice, especially if they do not have sufficient time or space to consult with them." In such an atmosphere, attorney-client confidentiality concerns abound, and many people I interviewed concluded that cases are not receiving individualized attention.

Another problem arising out of group representation is the potential for conflicts of interest among Operation Streamline defendants. For example, one migrant may have witnessed another crossing the border or have obtained false documentation for another. Such a situation implicates both the Model Rules of Professional Conduct and the Sixth Amendment, which requires on-the-record disclosure to the court to preserve a client's right to conflict-free counsel. While one CJA Panel attorney I interviewed in Tucson immediately runs a conflict check when he receives his Streamline client list each morning, this does not seem to be the norm. Particularly in Del Rio, where a defense attorney might have one day to interview as many as eighty clients, it seems unlikely that the attorney would have time to identify and assess conflicts of interest.

3. Separation of Powers

Some judges I interviewed also worried that Operation Streamline pressures the judiciary to cooperate with the executive branch in a manner that

330. Bacal Interview, supra note 111; Fry Telephone Interview, supra note 125.
331. See, e.g., Fry Telephone Interview, supra note 125; Holguin Interview, supra note 165.
332. See, e.g., MODEL RULES OF PROF'L CONDUCT R. 1.6 (2004).
335. Holloway v. Arkansas, 435 U.S. 475, 485–86 (1978) ("[D]efense attorneys have the obligation, upon discovering a conflict of interests, to advise the court at once of the problem.").
336. Bacal Interview, supra note 111.
violates the separation of powers doctrine.\textsuperscript{337} As one magistrate judge phrased the issue, “To what extent should the court be facilitating the executive’s exercise of its power with respect to immigration?”\textsuperscript{338}

Federal defenders and U.S. attorneys echoed this concern.\textsuperscript{339} Richard Durbin, the criminal chief of the U.S. Attorney’s Office for the Western District of Texas, noted that for Operation Streamline to work, “[t]he courts basically have to agree that they’re going to process eighty people in a day.”\textsuperscript{340} If Streamline defendants received the level of individualized attention from judges that other criminal defendants in federal court generally receive, the program would simply be unmanageable. As is, the border district courts are already overwhelmed. In a 2006 article about the impact of the rising immigration caseload in the border district courts, Judge Garney said, “I try to give every defendant as much personal attention as I can. I even take questions. But at a certain point, you cut it off or we’re going to be sitting here until 10, 11 or 12 every single night.”\textsuperscript{341}

If federal judges along the border were to conduct individual plea colloquies in the Operation Streamline proceedings, they would almost certainly, in Judge Garney’s words, be in court “until 10, 11 or 12 every single night.”\textsuperscript{342} While Streamline’s en masse proceedings are not what most judges would prefer, they are, in many jurisdictions, the only way for an overburdened court system to process the onslaught of cases. That raises questions about whether the judiciary should compromise its definition of due process in order to facilitate a prosecution initiative.

In 2007, Texas Congressman John Culberson described Operation Streamline as “a cooperative effort between the U.S. Marshals, the federal judges, the prosecutors, and the Border Patrol,” noting, in particular, the strong teamwork between law enforcement officers and judges in the Laredo and Del Rio Border Patrol sectors.\textsuperscript{343} When the Del Rio sector implemented Streamline, the district court took an active role in structuring the proceedings, including setting a special payment rate of $50 per client for the CJA Panel\textsuperscript{344} and choosing to assign the Streamline cases exclusively to the Panel rather than to

\textsuperscript{337} Citizens and noncitizens alike are entitled to the separation of powers guarantee in the U.S. Constitution. See, e.g., Boumediene v. Bush, 128 S. Ct. 2229, 2246 (2008) (“Because the Constitution’s separation-of-powers structure, like the substantive guarantees of the Fifth and Fourteenth Amendments . . . protects persons as well as citizens, foreign nationals who have the privilege of litigating in our courts can seek to enforce separation-of-powers principles.”) (citing INS v. Chadha, 462 U.S. 919, 958–59 (1983) (internal citation omitted)).

\textsuperscript{338} Mesa Interview, supra note 130.

\textsuperscript{339} See, e.g., Durbin Interview, supra note 14.

\textsuperscript{340} Id.

\textsuperscript{341} Immigration Crisis Tests Federal Courts on Southwest Border, supra note 213.

\textsuperscript{342} Id.

\textsuperscript{343} Lou Dobbs This Week (CNN television broadcast Nov. 10, 2007) (transcript available at http://edition.cnn.com/TRANSCRIPTS/0711/10/lwtw.01.html).

\textsuperscript{344} Ludlum Interview, supra note 81.
Indeed, Congressman Culberson has portrayed the Del Rio district court as an architect of Operation Streamline. In a 2007 press release, he announced that "[t]he Del Rio sector is now closed to illegal immigrants thanks to the initiative of local Federal District Judge Alia Ludlum and Border Patrol Chief Randy Hill." In a letter that same year, Congressman Culberson described Streamline as having been "conceived by U.S. District Court Judge Alia Moses Ludlum, Judge Dennis Green, Judge Victor Garcia, and U.S. Border Patrol Sector Chief Randy Hill." Judge Ludlum strongly denies that Operation Streamline’s implementation in Del Rio runs afoul of the separation of powers guarantee. When the Border Patrol proposed the program in Del Rio, she says her goal was simply to avoid having anyone say, "‘We couldn’t do this because the judges wouldn’t let us.’ Instead, we chose to implement the program in such a way that we could preserve the system and preserve people’s rights."

Nonetheless, if federal district courts are cutting procedural corners to accommodate Operation Streamline’s voluminous prosecutions, that is constitutionally problematic.

4. Prosecutorial Independence

Border Patrol attorneys, who work for DHS, are deputized as special assistant U.S. attorneys in some jurisdictions to prosecute Operation Streamline cases. Such staffing choices may not adequately preserve prosecutorial independence or give due attention to potential conflicts of interest. While 28 U.S.C. § 543 authorizes the attorney general to appoint special assistant U.S. attorneys "when the public interest so requires," the United States Attorneys’ Manual makes clear that "[s]uch appointments raise ethics and conflict of interest issues that must be addressed."

Defense attorneys in some jurisdictions, who did not wish to be named, told me that Border Patrol attorneys can be more difficult to negotiate with than U.S. attorneys, and that the Border Patrol attorneys do not function, in practice, as part of the USAO. Instead, they work largely out of the Border Patrol office and receive little oversight from the USAO. Federal Public Defender for the District of Arizona Jon Sands also noted that when a Streamline client complains to her lawyer about misconduct on the part of a Border Patrol agent who arrested or processed her, it can be difficult for the defense attorney to

345. Fry Telephone Interview, supra note 125.
348. Ludlum Interview, supra note 81.
bring that complaint to the Border Patrol attorney, who is a co-worker (and often also a friend) of the agent.\textsuperscript{350}

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

5. \textit{Delayed Initial Appearances}

In Del Rio, there is another problem: Operation Streamline defendants are not receiving probable cause determinations within forty-eight hours of their warrantless arrests, as the Fourth Amendment requires.\textsuperscript{351} In Tucson and El Paso, Streamline defendants do seem to be receiving court appearances within forty-eight hours of arrest.\textsuperscript{352} (In Tucson, the USAO drops the charges if the defendant does not receive an initial appearance within forty-eight hours.)\textsuperscript{353} In Del Rio, however, the court does not make the probable cause determination during the initial appearance, but when a magistrate judge reviews the complaint and probable cause statement two days before the defendant's initial appearance, in the defendant's absence.\textsuperscript{354} On the days I observed Streamline proceedings in Del Rio, some defendants had waited as long as fourteen days after being arrested to appear in court, which means they waited for a probable cause determination ten days longer than the Fourth Amendment allows.\textsuperscript{355}

Del Rio District Judge Alia Ludlum agrees that the initial appearance sometimes “does not take place as soon as practicable,” but points out that the defense bar does not have concerns about the time lapse because the court appoints defense counsel and provides a copy of the complaint and any discovery prior to the initial appearance.\textsuperscript{356} If a defense attorney feels that her client needs an immediate initial appearance, Judge Ludlum notes, she need only request one, and the court will grant that request.\textsuperscript{357} Most defense attorneys, Judge Ludlum says, “want the case to be taken care of in one proceeding,” but the court has “held initial appearances on dates other than those for the plea and sentencing hearings” as necessary.\textsuperscript{358}

\begin{itemize}
\item \textsuperscript{350} Sands Interview, \textit{supra} note 265.
\item \textsuperscript{351} County of Riverside v. McLaughlin, 500 U.S. 44 (1991).
\item \textsuperscript{352} See, e.g., Mesa Interview, \textit{supra} note 130; Bacal Interview, \textit{supra} note 111.
\item \textsuperscript{353} Bacal Interview, \textit{supra} note 111.
\item \textsuperscript{354} E-mail from Honorable Alia Ludlum, U.S. Dist. Judge, W. Dist. of Tex., Del Rio, Tex., to author (Sept. 8, 2009, 11:02:55 PST) (on file with author) [hereinafter E-mail from Honorable Alia Ludlum].
\item \textsuperscript{355} The probable cause determination is typically made two days before the defendant appears in court for plea and sentencing. \textit{See id.}
\item \textsuperscript{356} \textit{Id.}
\item \textsuperscript{357} \textit{Id.}
\item \textsuperscript{358} \textit{Id.}
\end{itemize}
Judge Ludlum also points out that County of Riverside v. McLaughlin requires a probable cause determination only for a defendant who is under the jurisdiction of the criminal court,\textsuperscript{359} and Operation Streamline defendants can be considered to be in administrative custody until they “get ‘moved’ to the criminal side of the cases.”\textsuperscript{360} It is not clear, however, that DOJ and DHS view Streamline defendants as being in administrative custody for the period between their arrest and the filing of formal criminal charges. That courts in Tucson and El Paso take care to provide initial appearances within forty-eight hours of arrest indicates that those courts view Streamline defendants as being in criminal custody. And even if Streamline defendants can be considered to be in administrative detention for some initial period, DHS is only authorized to detain a migrant for forty-eight hours without charging him, “except in the event of an emergency or other extraordinary circumstance.”\textsuperscript{361}

Judge Ludlum further notes that, in the Fifth Circuit, the only remedy Riverside provides is a presumption that any confession taken after the expiration of the forty-eight-hour period is involuntary,\textsuperscript{362} and, in Streamline cases, “[m]ost confessions are taken well before the expiration of the 48 hours.”\textsuperscript{363}

Regardless of whether Riverside provides a remedy in the Operation Streamline context, however, the long wait for initial appearances also implicates Federal Rule of Criminal Procedure 5, which mandates that a defendant be brought “without unnecessary delay before a magistrate judge, or before a state or local judicial officer as Rule 5(c) provides” and that “a complaint meeting Rule 4(a)’s requirement of probable cause . . . be promptly filed in the district where the offense was allegedly committed.”\textsuperscript{364} A two-week delay may not satisfy either provision.\textsuperscript{365}

\textsuperscript{359} See, e.g., Rhoden v. United States, 55 F.3d 428, 432 n.7 (9th Cir. 1995) (distinguishing criminal arrests, to which Riverside applies, from “border detentions,” which “involve a distinct set of considerations and require different administrative procedures”).

\textsuperscript{360} E-mail from Honorable Alia Ludlum, supra note 354.

\textsuperscript{361} 8 C.F.R. § 287.3(d) (2009).

\textsuperscript{362} See United States v. Perez-Bustamante, 963 F.2d 48, 51 (5th Cir. 1992) (holding that the delay between arrest and arraignment is one factor a court can consider in determining whether a confession was voluntary). In Riverside, the Supreme Court left open the issue of what remedy was appropriate for an unreasonable delay in determining probable cause. Powell v. Nevada, 511 U.S. 79 (1994).

\textsuperscript{363} E-mail from Honorable Alia Ludlum, supra note 354.

\textsuperscript{364} Fed. R. Crim. P. 5(a)(1)(A), (b) (emphasis added).

\textsuperscript{365} In United States v. Encarnacion, the First Circuit Court of Appeals found no violation of Rule 5 where DHS detained an undocumented immigrant for one week prior to filing criminal charges under 8 U.S.C. § 1326. 239 F.3d 395 (1st Cir. 2001). The court found that the arrest and detention were civil in nature and were neither a pretext for holding the defendant in order to develop criminal charges, nor a dilatory tactic. See id. at 399. It is unclear, however, whether those same conditions are fulfilled in Del Rio, with its two-week delays, or whether other courts of appeals will follow the First Circuit’s reasoning.
IV
AN ALTERNATIVE TO OPERATION STREAMLINE

There is just one southwest border district that has yet to implement a version of Operation Streamline: the Southern District of California. This district includes the San Diego and El Centro Border Patrol sectors, as well as a ten-mile portion of the Yuma sector. Except in that small stretch of the Yuma sector—where apprehended migrants are channeled to Yuma, Arizona, for mandatory prosecution—\(^{366}\) the USAO has retained full discretion to choose which unlawful border crossers to prosecute throughout the Southern District of California.\(^^{367}\) In lieu of Operation Streamline, the USAO has implemented a targeted approach to border enforcement, which serves as an effective alternative to Operation Streamline and a potential model for other districts.

In 2007, the USAO for the Southern District of California, in collaboration with DHS and other federal law enforcement agencies, developed a border prosecution plan that addresses four unique challenges the district faces. The first challenge is the district's volume of apprehensions.\(^{368}\) The San Diego sector ranks second only to the Tucson sector in annual apprehensions.\(^{369}\) The Border Patrol made 203,354 apprehensions in the San Diego and El Centro sectors in 2008, which accounted for about 28 percent of the Border Patrol's nationwide apprehensions that year.\(^{370}\) The USAO for the Southern District of California therefore does not have the capacity to prosecute 100 percent of unlawful border crossers apprehended throughout the district each day—some 550 migrants.\(^{371}\) If the district chose to implement a version of Operation Streamline, the Border Patrol would need to follow Tucson and select a handful of migrants for mandatory prosecution each day.

The second challenge the Southern District of California faces is the populous nature of the U.S.-Mexico border in that district, which includes major population centers in San Diego on the U.S. side and in Tijuana and Mexicali on the Mexican side.\(^{372}\) Densely populated areas experience higher border crossing rates and a greater potential for other, more serious crimes that the USAO must focus on.

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366. See supra note 71.
367. Telephone Interview with Karen Hewitt, U.S. Attorney, S. Dist. of Cal. (Feb. 12, 2010) [hereinafter Hewitt Interview].
368. Id.
370. Id. This number includes the apprehensions for both the San Diego and El Centro sectors. There were 162,392 apprehensions in the San Diego sector in 2008, and 40,962 apprehensions in the El Centro sector. Id.
371. There was an average of 557 daily apprehensions in the Southern District of California in 2008 (203,354 annual apprehensions in El Centro and San Diego combined, divided by 365 days). See id.
372. Hewitt Interview, supra note 367.
A third challenge is that the Southern District of California is the only southwest border district besides the Southern District of Texas that includes a port, which means the USAO is responsible for prosecuting all ocean-based drug and human smuggling activity in the region.\textsuperscript{373} That responsibility has added a substantial amount of work in recent years, as smugglers have increasingly been using the Pacific water route to attempt to bring drugs and humans into the United States.\textsuperscript{374}

Finally, a chronic shortage of detention bed space in California prisons requires the USAO in the Southern District of California to be more targeted in its prosecution decisions than other offices must be.\textsuperscript{375}

As a result, when it comes to unlawful border crossers, the USAO in the Southern District has decided to focus its resources on the most serious offenders. While AUSAs retain full discretion to choose which border crossers to prosecute, the USAO usually only prosecutes those who have been previously removed and who have substantial criminal records.\textsuperscript{376} Generally speaking, this includes individuals who have committed aggravated felonies, who have a long history of many prior lesser crimes committed over years in the community, or who have engaged in multiple illegal reentries after full exposure to civil immigration proceedings.\textsuperscript{377} The USAO charges these individuals with illegal reentry under 8 U.S.C. § 1326.\textsuperscript{378}

Migrants who do not have a prior criminal record and who are caught attempting an unlawful entry in the Southern District of California are generally channeled through the civil immigration system for detention and removal.\textsuperscript{379} This prosecution plan is meant to focus resources on the border crossers whom the USAO believes are most likely to create spillover violence in U.S. cities and to ensure that AUSAs have the time and resources to prosecute other crimes along the border, such as drug trafficking and alien smuggling.\textsuperscript{380}

Since the USAO implemented this approach in 2007, prosecutions under 8 U.S.C. § 1326 have increased by more than 165 percent in the Southern District of California.\textsuperscript{381} And because individuals charged with illegal reentry in the

\textsuperscript{373} Id.
\textsuperscript{375} Hewitt Interview, \textit{supra} note 367.
\textsuperscript{376} Id.
\textsuperscript{377} Telephone Interview with Karen Hewitt, U.S. Attorney, S. Dist. of Cal. (Feb. 16, 2010).
\textsuperscript{378} Hewitt Interview, \textit{supra} note 367.
\textsuperscript{379} Id.
\textsuperscript{380} Id.
\textsuperscript{381} There were 745 prosecutions filed under 8 U.S.C. § 1326 in the Southern District of California in 2007, 1,069 in 2008, and 1,978 in 2009. Transactional Records Access Clearinghouse, Federal Criminal Enforcement: TRAC Express (2009), http://tracfed.syr.edu/index/cr/cr_expr_index_proj.html (search by Lead Charge: Focus; select the Southern District of California, lead charge 8 U.S.C. § 1326, prosecutions filed, annual series, and last 7 years)
Southern District of California tend to have serious criminal records, they receive longer sentences, on average, than § 1326 defendants in other districts.\textsuperscript{382}

The Southern District of California’s approach has led to a number of positive outcomes. Likely because U.S. attorneys in the district have retained the discretion to choose which crimes to prosecute, the Southern District of California has consistently ranked first nationwide in per capita prosecutions of alien smuggling under 8 U.S.C. § 1324 and importing controlled substances under 21 U.S.C. § 952.\textsuperscript{383} The district’s prosecution approach is also, U.S. Attorney Karen Hewitt believes, "consistent with what the public [in the Southern District of California] would like to see."\textsuperscript{384}

Furthermore, the decline in border apprehensions in both the El Centro\textsuperscript{385} and San Diego\textsuperscript{386} sectors from 2008 to 2009 provides proof that the recent reduction in apprehensions that other sectors have experienced is likely not a result of Operation Streamline.\textsuperscript{387}

Ms. Hewitt is quick to emphasize that her district’s prosecution plan may not work for every border jurisdiction, as each district faces its own unique set of challenges and has its own priorities.\textsuperscript{388} Nonetheless, the Southern District of California’s successes demonstrate that a tailored approach to border enforcement that allows U.S. attorneys to retain prosecutorial discretion can serve as an effective alternative to Operation Streamline.

\textsuperscript{382} The average sentence under 8 U.S.C. § 1326 in the Southern District of California was twenty-one months in 2008 and twenty-three months in 2009. By comparison, the average sentence under 8 U.S.C. § 1326 in the District of New Mexico was ten months in 2008 and eight months in 2009. Transactional Records Access Clearinghouse, Federal Criminal Enforcement: Going Deeper (2009), http://tracfed.syr.edu/index/cri/cri_godeep_index_pros.html (search by fiscal year, district, lead charge, prosecutions filed, and average prison term) (results on file with author).


\textsuperscript{384} Hewitt Interview, supra note 367.


\textsuperscript{387} Though apprehensions did not decline in San Diego between 2007 and 2008—the first year this prosecution plan was in place—they did decline in El Centro. McCabe & Batalova, supra note 369.

\textsuperscript{388} Id.
At a time when combating drug-cartel violence along the U.S.-Mexico border is a top priority for DHS and DOJ, the Obama administration should eliminate Operation Streamline. Streamline diverts resources away from fighting violent crime along the border, and the program is not an effective means of stemming the flow of illicit drugs to the United States or curbing undocumented immigration.

First, Operation Streamline does not target drug traffickers and human smugglers but rather migrants who are coming to this country in search of employment or to reunite with family. As Judge Robert Brack of Las Cruces has observed, "The people I generally see are humble people who have no criminal offenses other than coming back and forth to pick chili. We're spending a lot of time catching these folks when we could concentrate on those penetrating our border to do us harm." T.J. Bonner, president of the National Border Patrol Council, shares the view that Streamline uses resources unwisely. "This strategy pretty much has it backwards," he told the Washington Post in 2008. "It's going after desperate people who are crossing the border in search of a better way of life, instead of going after employers who are hiring people who have no right to work in this country."

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

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

The administration should therefore replace Operation Streamline with a more holistic and effective approach to border enforcement, like the one the Southern District of California has adopted. The administration should revert to

391. Hsu, supra note 5.
392. Id.
the longstanding practice of treating first-time unlawful entry as an administrative violation. That allows DHS to detain a migrant for a brief period, enter a formal order of removal on the migrant’s record, and deport the migrant without draining the resources of the district courts, the U.S. Attorney’s Office, the Federal Public Defender, or the U.S. Marshals Service.  

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

Should the administration choose, however, to retain Operation Streamline, it must take immediate action to bring the program into compliance with the Constitution. Leaving Streamline in its current overextended state has negative repercussions not just for our border districts and for the migrants processed through the program, but also for the rule of law in this country. If we accept procedural shortcuts in our border district courts, we risk undermining basic notions of due process. In the words of Fifth Circuit Court of Appeals Judge Carolyn King, we “can’t have a rule of law for the southwest border that is different from the rule of law that obtains elsewhere in the country.”

393. It is important to note, however, that expedited removal is far from a perfect solution. As it currently exists, the procedure has received widespread criticism and involves potential constitutional violations of its own. See, e.g., David A. Martin, Two Cheers for Expedited Removal in the New Immigration Laws, 40 Va. J. Int’l L. 673, 674 n.2 (detailing many examples of articles criticizing expedited removal).