

Ruth Ellen Wasem
Specialist in Immigration Policy
Congressional Research Service

October 4, 2011

“Does Administrative Amnesty Harm our Efforts to Gain and Maintain Operational Control of the Border?”

Committee on Homeland Security Subcommittee on Border and Maritime Security

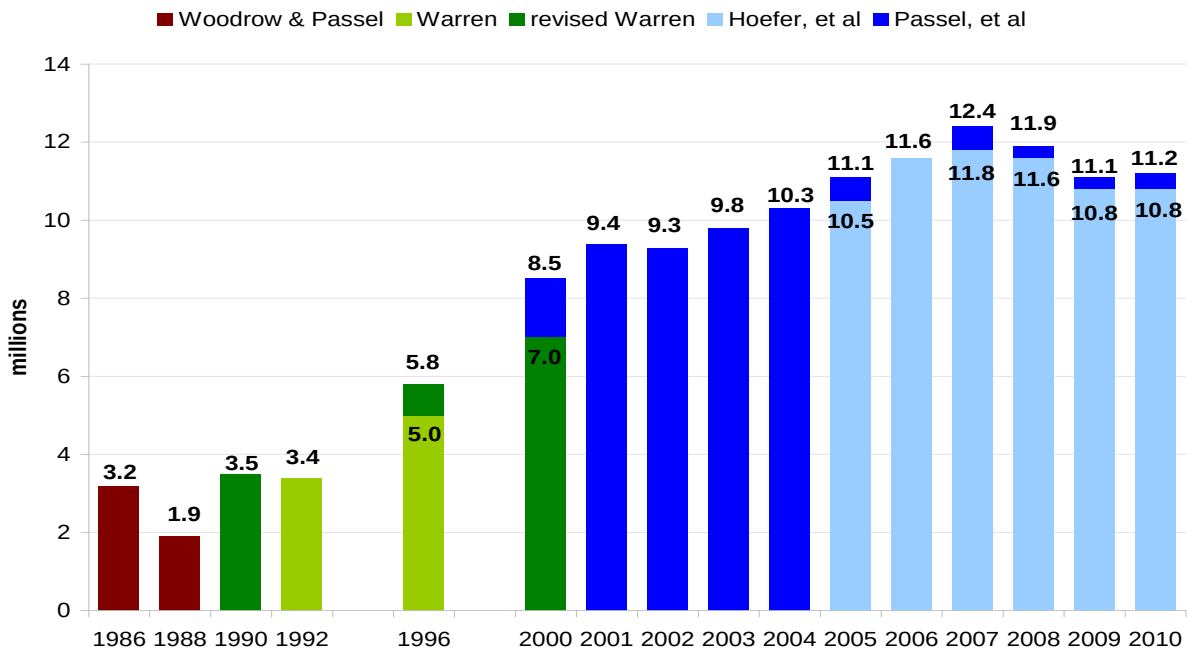
Chairman Miller, Ranking Member Cuellar, and members of the House Homeland Security Subcommittee on Border and Maritime Security, I am honored to be testifying before you today on behalf of the Congressional Research Service. This morning I will discuss some of the key features of U.S. immigration law that pertain to this hearing, the factors that drive unauthorized migration to the United States, and the relevance of the recent Department of Homeland Security (DHS) memoranda on prosecutorial discretion.

Four major principles underlie U.S. immigration policy: the reunification of families, the admission of immigrants with needed skills, the protection of refugees, and the diversity of admissions by country of origin. The Immigration and Nationality Act (INA) specifies a complex set of numerical limits and preference categories that give priorities for immigration reflecting these principles. Typically, about one million new legal permanent residents are recorded each year. The INA also provides for the admission of various categories of foreign nationals, who are admitted for a temporary period of time and a specific purpose. They include a wide range of categories, including tourists, students, business people, and workers.¹

In addition to the system of categories, priorities and numerical limits that govern who and how many may be admitted, the INA establishes a system of immigration authorities, tools, and procedures to control unauthorized migration and to enforce the law against those who violate the provisions governing legal entry. The law further targets special categories of foreign nationals for exclusion and removal from the United States. These categories include criminals (e.g., aggravated felons, human traffickers, and alien smugglers) and those that pose national security risks (e.g., terrorists, subversives and other threats to national security).²

The last major law that allowed unauthorized aliens living in the United States to legalize their status was the Immigration Reform and Control Act (IRCA) of 1986 (P.L. 99-603). Figure 1 presents the estimate of 3.2 million unauthorized resident aliens in 1986. As expected after the passage of IRCA, the estimate for 1988 dropped to 1.9 million.³ The estimated unauthorized resident alien population grew to 3.4 million in 1992 and to 5.0 million (subsequently revised to 5.8 million) in 1996.⁴ By the close of the decade, the estimated number of unauthorized alien residents reached 8.5 million.⁵ The estimated number of unauthorized resident aliens had risen to 9.3 million by 2002.⁶ During the first decade after IRCA, researchers projected that the net growth in unauthorized aliens had averaged about 500,000 annually; analyses done during the early 2000s estimated the average growth at 700,000 to 800,000 unauthorized alien residents annually.⁷

Figure I. Estimated Number of Unauthorized Resident Aliens, 1986-2010



Sources: CRS presentation of analyses of U.S. Census and CPS data conducted by Karen Woodrow and Jeffrey Passel (1986 and 1990); Robert Warren (1996, 2000, and 2003); Jeffrey Passel, Randy Capps, and Michael Fix (2002); Passel and D’Vera Cohn (2008, 2010, 2011); Michael Hoefer, Nancy Rytina, and Bryan Baker (2009, 2010, 2011).

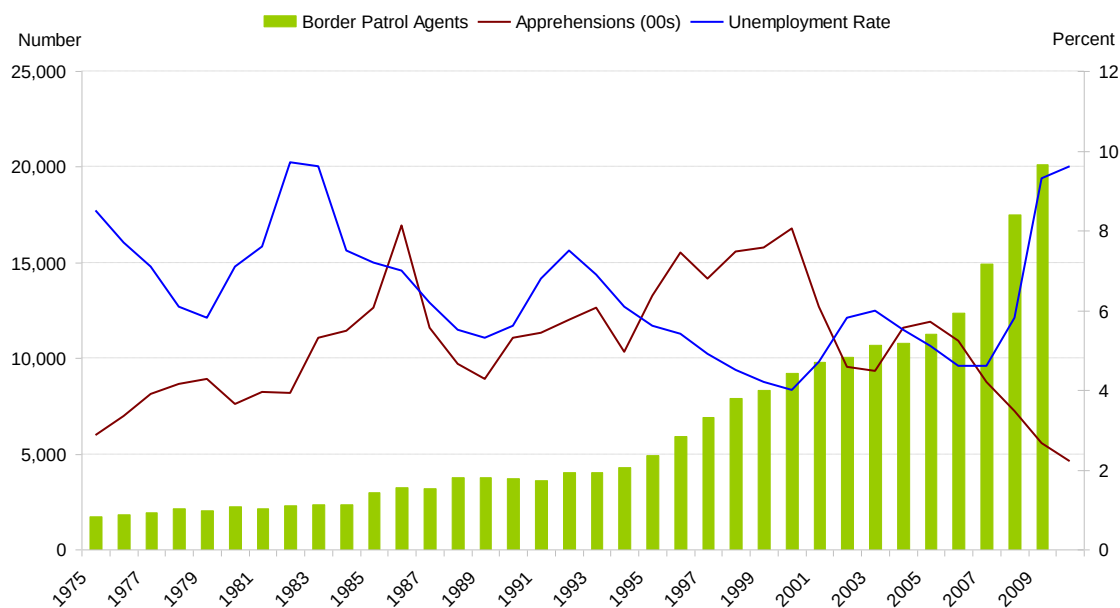
The calculated number of unauthorized alien residents peaked in 2007, when there were estimated 12.4 million unauthorized alien residents in the United States. The estimates made from both the Current Population Survey (CPS) and the American Community Survey (ACS) indicated that the number dropped in 2008 and in 2009 before leveling off in 2010.⁸

The research points to various factors that have contributed to the increase in unauthorized resident aliens over the past two decades as well as a leveling off of these trends. Historically, unauthorized migration is generally attributed to the “push-pull” of prosperity-fueled job opportunities in the United States in contrast to limited or nonexistent job opportunities in the sending countries.⁹ Accordingly, the economic recession that began in December 2007 may have curbed the migration of unauthorized aliens, particularly because sectors that traditionally rely on unauthorized aliens, such as construction, services, and hospitality, have been especially hard hit.

Some researchers maintain that lax enforcement of employer sanctions for hiring unauthorized aliens facilitated the “pull” for many years and that the ratcheting up of work site enforcement in 2007 and 2008, along with increased investments in border security, has subsequently mitigated the flow.¹⁰ Trend data suggest a correlation, but it remains difficult to demonstrate this element empirically, especially because the increased worksite enforcement and removals were coincident with the housing downturn and the onset of the economic recession.¹¹

Although most policy makers have assumed that tighter border enforcement reduces unauthorized migration, some researchers have observed that the strengthening of the immigration enforcement provisions may have inadvertently *increased* the population of unauthorized resident aliens. This interpretation, generally referred to as a caging effect, argues that increased penalties for illegal entry, coupled with increased resources for border enforcement disrupted the historical pattern of a circulatory movement of migratory workers along the southern border; this in turn raised the stakes in crossing the border illegally and created an incentive for those who succeed in entering the United States to stay.¹²

Figure 2. Number of Apprehensions Compared with Number of Border Patrol Agents and the Unemployment Rate
Trends from 1975 to 2010



Source: CRS analysis of data from the Department of Homeland Security, the former Immigration and Naturalization Service, and the Bureau of Labor Statistics.

Notes: Apprehension numbers are presented in hundreds while agents are actual numbers; both are scaled on the left axis. The unemployment rate is scaled on the right axis.

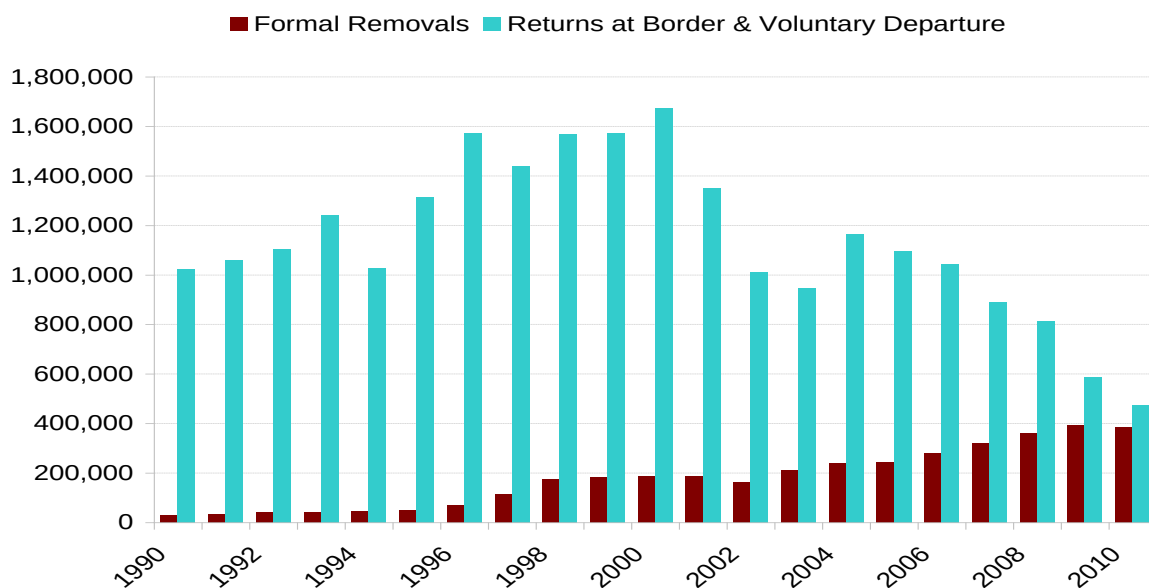
Data on the number of aliens apprehended entering the United States offers another perspective on unauthorized migration. Figure 2 compares apprehension data with the number of border patrol agents and with the unemployment rate. While it appears that apprehensions are correlated to the number of agents and unemployment levels over the past decade, the empirical evidence to support a causal link with either labor market demands or strengthened border enforcement policies has not been demonstrated.¹³

Political instability or civil unrest at home is another element that traditionally has led people to risk unauthorized migration.¹⁴ Asylum seekers who enter the United States illegally have always been included in the estimates of the unauthorized alien population. Asylum seekers have become a smaller share of the unauthorized alien residents,

however, and do not account the overall trends in the unauthorized resident aliens in recent years.¹⁵

The inadequacies in the current system of legal immigration is sometimes cited as another factor contributing to the growth in unauthorized alien residents.¹⁶ There are statutory ceilings that limit the type and number of immigrant visas issued each year, which create wait-times for visas to become available to legally come to the United States.¹⁷ The Immigration Amendments of 1990 cut the number of skilled and unskilled employment-based legal permanent residents from 27,000 to 10,000 annually, leading some to argue that the remainder of this migrant flow shifted from legal to illegal pathways to work in the United States. Family members sometimes risk staying in the United States on an expired temporary visa or entering the United States illegally to be with their family while they wait for the visas to become available. It remains difficult, however, to correlate these factors or to guarantee that increasing the levels of legal migration would absorb the flow of unauthorized migrants.¹⁸ The recent increase in the number of aliens formally removed from the United States annually might also have had a chilling effect on foreign nationals weighing the risk of illegal presence if they would ultimately be eligible to immigrate.¹⁹

Figure 3. Formal Removals and Returns, 1990 to 2010



Source: CRS presentation of data from the Department of Homeland Security Office of Immigration Statistics.

Figure 3 shows that formal removals have grown from 30,039 in 1990 to 387,242 in 2010. Since 2001, formal removals have increased by over 100%. The trends for direct returns at the border and voluntary departures (i.e., permitting aliens to leave the United States on their own recognizance and at their own expense) within the interior in Figure 3 resemble that of apprehensions over the same period as depicted in Figure 2.

All unauthorized aliens (i.e., aliens who have entered without permission or violated the terms of their visas) are potentially removable. The INA specifies six broad classes of foreign nationals who are removable, including persons who:

- are inadmissible at time of entry or violate their immigration status;²⁰
- commit certain criminal offenses (e.g., crimes of moral turpitude,²¹ aggravated felonies,²² alien smuggling);
- fail to register (if required under law) or commit document fraud;
- are security risks (such as aliens who violate any law relating to espionage, engage in criminal activity which endangers public safety, partake in terrorist activities, or assisted in Nazi persecution or genocide);
- become a public charge within five years of entry;²³ or
- vote unlawfully.

Foreign nationals who are removed are subsequently subject to bars to reenter the country.²⁴

In removal proceedings an immigration judge from the Department of Justice's Executive Office for Immigration Review determines whether a foreign national is removable. The courts have ruled that removal proceedings are civil not criminal proceedings.²⁵ The proceeding commences when the person is issued a notice to appear (NTA) which can be issued by a variety of DHS personnel including border patrol officers in Customs and Border Protection (CBP), asylum officers and adjudicators in U.S. Citizenship and Immigration Services (USCIS), and investigators and detention officers in Immigration and Customs Enforcement (ICE).²⁶

In 1986, Congress made deporting aliens who had been convicted of certain crimes an enforcement priority. IRCA required the Attorney General "In the case of an alien who is convicted of an offense which makes the alien subject to deportation ... [to] begin any deportation proceeding as expeditiously as possible after the date of the conviction."²⁷ Between 1988 and 1996, Congress enacted a series of measures, including the Illegal Immigrant Reform and Immigrant Responsibility Act of 1996 (P.L. 104-208), expanding the definition of aggravated felons and created additional criminal grounds for removal.²⁸

Table 1. Removals of Criminal Aliens and Non-Criminal Aliens, 2001 to 2010

Fiscal Year	Criminal	Non-Criminal	Percent Criminal
2001	73,298	115,728	39%
2002	73,429	91,739	44%
2003	83,731	127,367	40%
2004	92,380	148,285	38%
2005	92,221	154,210	37%
2006	98,490	182,484	35%
2007	102,394	216,988	32%
2008	105,266	254,529	29%
2009	131,840	263,325	33%
2010	168,532	218,710	44%

Source: DHS Office of Immigration Statistics Yearbook, 2010, Table 38.

The number of criminal aliens who have been removed has risen sharply in recent years. According to the DHS Office of Immigration Statistics presented in Table 1, the number of criminal aliens removed from the United States has gone from 73,298 in 2001 to 168,532 in 2010. These number constitute a 138% increase in the removal of criminal aliens over the past decade. Criminal aliens made up 44% of all removals in 2010, the largest portion of removals since 2002.

Since its enactment in 1952, the Immigration and Nationality Act has given the Attorney General and more recently the Secretary of Homeland Security prosecutorial discretion to exercise the power to remove foreign nationals. In 1959, a major textbook of immigration law wrote, "Congress traditionally has entrusted the enforcement of its deportation policies to executive officers and this arrangement has been approved by the courts."²⁹ Generally, prosecutorial discretion is the authority that an enforcement agency has in deciding whether to enforce or not enforce the law against someone. In the immigration context, prosecutorial discretion exists across a range of decisions that include: prioritizing certain types of investigations; deciding whom to stop, question and arrest; detaining an alien; issuing a notice to appear (NTA); granting deferred action; agreeing to let the alien depart voluntarily; and executing a removal order.

As early as 1975, the former Immigration and Naturalization Service (INS) issued guidance on a specific form of prosecutorial discretion known as deferred action, which cited "appealing humanitarian factors." The INS Operating Instructions said that consideration should be given to advanced or tender age, lengthy presence in the United States, physical or mental conditions requiring care or treatment in the United States, and the effect of deportation on the family members in the United States. On the other hand, those INS Operating Instructions made clear that criminal, immoral or subversive conduct or affiliations should also be weighed in denying deferred action.³⁰ It is especially important to note that not all prosecutorial discretion decisions to halt removal proceedings result in a grant of deferred action to the foreign national.

In an October 24, 2005 memorandum, then-ICE Principal Legal Advisor William Howard cited several policy factors on needs to exercise prosecutorial discretion. One factor focused on institutional changes, as he wrote,

"Gone are the days when INS district counsels... could simply walk down the hall to an INS district director, immigrant agent, adjudicator, or border patrol officer to obtain the client's permission to proceed ... Now the NTA-issuing clients might be in different agencies, in different buildings, and in different cities from our own."

Another issue Howard raised was resources, as he pointed out that the Office of Principal Legal Advisor (OPLA) was "handling about 300,000 cases in the immigration courts, 42,000 appeals before the Board of Immigration Appeals (BIA or Board) and 12,000 motions to re-open each year." He further stated:

"Since 2001, federal immigration court cases have tripled. That year there were 5,435 federal court cases. Four years later, in fiscal year 2004, that number had risen to 14,699 federal court cases. Fiscal year 2005 federal court immigration cases will approximate 15,000."³¹

Howard offered examples of the types of cases to consider for prosecutorial discretion, such as someone who had a clearly approvable petition to adjust to legal permanent resident status, someone who was an immediate relative of military personnel, or someone for whom sympathetic humanitarian circumstances “cry for an exercise of prosecutorial discretion.”³²

In November 2007, then-DHS Assistant Secretary Julie L. Myers issued a memorandum in which she clarified that the replacement of the “catch and release” procedure with the “catch and return” policy for apprehended aliens (i.e., a zero-tolerance policy for all aliens apprehended at the border) did not “diminish the responsibility of ICE agents and officers to use discretion in identifying and responding to meritorious health-related cases and caregiver issues.” Myers referenced and attached a November 7, 2000, memorandum entitled “Exercising Prosecutorial Discretion,” which was written by former INS Commissioner Doris Meissner in 2000.

“Like all law enforcement agencies, the INS has finite resources, and it is not possible to investigate and prosecute all immigration violations. The INS historically has responded to this limitation by setting priorities in order to achieve a variety of goals. These goals include protecting public safety, promoting the integrity of the legal immigration system, and deterring violations of the immigration law. It is an appropriate exercise of prosecutorial discretion to give priority to investigating, charging, and prosecuting those immigration violations that will have the greatest impact on achieving these goals.”

Meissner further stated that prosecutorial discretion should not become “an invitation to violate or ignore the law.” She concluded by citing the “substantial federal interest” principle governing the conduct of U.S. Attorneys when determining whether to pursue criminal charges in a particular instance, and claimed that this principle was pertinent to immigration removal decisions as well. According to the memorandum, immigration enforcement officers “must place particular emphasis on the element of substantiality. How important is the Federal interest in the case, as compared to other cases and priorities?”³³

The backdrop of the Meissner, Howard and Myers memoranda provide historical context for the recent memoranda on prosecutorial discretion written by ICE Director John Morton. In March 2011, Morton published agency guidelines that define a three-tiered priority scheme that applies to all ICE programs and enforcement activities related to civil immigration enforcement.³⁴ Under these guidelines, ICE’s top three civil immigration enforcement priorities are to (1) apprehend and remove aliens who pose a danger to national security or a risk to public safety, (2) apprehend and remove recent illegal entrants,³⁵ and (3) apprehend aliens who are fugitives or otherwise obstruct immigration controls.

In his June 17, 2011 memorandum, Morton spells out 18 factors that are among those that should be considered in weighing prosecutorial discretion. The factors included those that might halt removal proceedings, such as whether the person’s immediate relative was serving in the military, whether the person was a caretaker of a person with physical or mental disabilities, or whether the person had strong ties to the community. The factors

Morton listed also included those that might prioritize a removal proceeding, such as whether the person had a criminal history, whether the person poses a national security or public safety risk, whether the person recently arrived in the United States and how the person entered.

“This list is not exhaustive and no one factor is determinative. ICE officers, agents and attorneys should always consider prosecutorial discretion on a case-by-case basis. The decisions should be based on the totality of the circumstances, with the goal of conforming to ICE’s enforcement priorities.”

The Morton memoranda would halt removal proceedings on those foreign nationals that are not prioritized for removal.³⁶

It is also useful to point out what the Morton memoranda do not do. They do not:

- give an unauthorized alien a legal immigration status;
- entitle an alien to employment authorization;
- alter the target on the number of aliens to be removed;
- count as time toward cancellation of removal; or
- prevent re-opening a removal case at later date.

It is possible that the guidance of the memoranda, along with the procedures described in a subsequent letter Secretary Janet Napolitano wrote August 18, 2011, might provide a system or structure that would lead to greater consistency in the use of prosecutorial discretion. The interagency working group that Secretary Napolitano is establishing with the Department of Justice is charged with reviewing (on a case-by-case basis) the files of persons currently in removal proceedings and issuing guidance on the appropriate consideration necessary to meet the enforcement priorities.³⁷ The Task Force on Secure Communities recently recommended that DHS ensure that its personnel exercise prosecutorial discretion systematically.³⁸ Whether this interagency working group will provide such a structure to do so remains to be seen.

The relevance of these memoranda on prosecutorial discretion may be viewed through the lens of a changing environment. The sheer size of the unauthorized population has grown substantially, despite a recent drop in both the unauthorized resident alien population and the apprehensions of illegal aliens. State and local governments are playing an increasing role in enforcing immigration law.³⁹ As a result of congressionally-mandated programs as well as technological advances, there have been dramatic improvements in the identification of removable aliens. These dynamics serve to expand the pool of removable aliens at a time when the financial resources of the federal government are especially pressed.

This concludes my formal testimony, and I look forward to your questions.

¹ Customs and Border Protection inspectors tallied 163 million temporary admissions of foreign nationals to the United States during 2009. CRS Report RL31381, *U.S. Immigration Policy on Temporary Admissions*, by Ruth Ellen Wasem.

²These criteria include: health-related grounds; criminal history; security and terrorist concerns; public charge (e.g., indigence); illegal entrants; and aliens previously removed. INA §212(a). CRS Report RL32480, *Immigration Consequences of Criminal Activity*, by Michael John Garcia; CRS Report R41104, *Immigration Visa Issuances and Grounds for Exclusion: Policy and Trends*, by Ruth Ellen Wasem.

³ Karen Woodrow and Jeffrey Passel, "Post-IRCA Undocumented Immigration to the United States: An Analysis Based on the June 1988 CPS," in *Undocumented Migration to the United States*, by Frank D. Bean, Barry Edmonston, and Jeffrey Passel (RAND Corporation, 1990).

⁴ *Annual Estimates of the Unauthorized Immigrant Population Residing in the United States and Components of Change: 1987 to 1997*, by Robert Warren, Office of Policy and Planning, U.S. Immigration and Naturalization Service, September 2000.

⁵ U.S. Congress, House Committee on the Judiciary, Subcommittee on Immigration and Claims, *Hearing on the U.S. Population and Immigration*, August 2, 2001.

⁶ The Urban Institute, *Undocumented Immigrants: Facts and Figures*, by Jeffrey Passel, Randy Capps, and Michael Fix, January 12, 2004.

⁷ Jeffrey S. Passel and D'Vera Cohn, *Trends in Unauthorized Immigration: Undocumented Inflow Now Trails Legal Inflow*, Pew Hispanic Center, October 2, 2008.

⁸ Jeffrey S. Passel and D'Vera Cohn, *Unauthorized Immigrant Population: National and State Trends, 2010*, Pew Hispanic Center, February 1, 2011.

⁹ CRS Report RL32982, *Immigration Issues in Trade Agreements*, by Ruth Ellen Wasem.

¹⁰ CRS Report R40002, *Immigration-Related Worksite Enforcement: Performance Measures*, by Andorra Bruno.

¹¹ Steven Camarota and Karen Jensenius, *A Shifting Tide: Recent Trends in the Illegal Immigrant Population*, Center for Immigration Studies, July 2009.

¹² Wayne Cornelius, "Death at the Border: Efficacy and Unintended Consequences of U.S. Immigration Control Policy," *Population and Development Review*, vol. 27, no.4 (December 2001); Wayne Cornelius, "Evaluating Recent US Immigration Control Policy: What Mexican Migrants Can Tell Us," in *Crossing and Controlling Borders: Immigration Policies and Their Impact on Migrants' Journeys*, ed. Mechthild Baumann, Astrid Lorenz, and Kerstin Rosenhow (Farmington, MI: Budrich Unipress Ltd, 2011); Thomas J. Espenshade, "Undocumented Migration to the United States: Evidence from a Repeated Trials Model," in *Undocumented Migration to the United States*, by Frank D. Bean, Barry Edmonston, and Jeffrey Passel (RAND Corporation, 1990); Douglas S. Massey, Jorge Durand, and Nolan J. Malone, *Beyond Smoke and Mirrors: Mexican Immigration in an Era of Economic Integration* (Russell Sage Foundation, 2002).

¹³ For further discussion see: CRS Report R41237, *People Crossing Borders: An Analysis of U.S. Border Protection Policies*, by Alison Siskin.

¹⁴ For a summary of this research, see Commission for the Study of International Migration and Cooperative Economic Development, *Unauthorized Migration: An Economic Development Response*, Appendix E, July 1990.

¹⁵ Not all humanitarian migrants are eligible for asylum or refugee status, and roughly 30% of all asylum cases in recent years have been approved. The legal definition of asylum in the INA is consistent with the refugee definition, which specifies that a refugee is a person who is unwilling or unable to return to his country of nationality or habitual residence because of a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. CRS Report R41753, *Asylum and "Credible Fear" Issues in U.S. Immigration Policy*, by Ruth Ellen Wasem.

¹⁶ U.S. Congress, Senate Committee on the Judiciary, Subcommittee on Immigration, Refugees and Border Security, *Comprehensive Immigration Reform in 2009, Can We Do It and How?* 111th Cong., 1st sess., April 30, 2009.

¹⁷ CRS Report RL32235, *U.S. Immigration Policy on Permanent Admissions*, by Ruth Ellen Wasem.

¹⁸ U.S. Congress, Senate Committee on the Judiciary, Subcommittee on Immigration, Refugees and Border Security, *Comprehensive Immigration Reform in 2009, Can We Do It and How?* 111th Cong., 1st sess., April 30, 2009.

¹⁹ Office of Immigration Statistics, *Immigration Enforcement Actions: 2010*, Department of Homeland Security, June 2011, <http://www.dhs.gov/xlibrary/assets/statistics/publications/enforcement-ar-2010.pdf>.

²⁰ All aliens must satisfy to DHS inspectors upon entry to the United States that they are not ineligible for admission under the grounds for inadmissibility specified in INA §212. These include health-related grounds, criminal history, national security and terrorist concerns, becoming a public charge, seeking to

work without proper labor certification, illegal entry and immigration law violations, lack of proper documents, ineligibility for citizenship, and aliens previously removed.

²¹ Moral turpitude is not easily defined under immigration law. Some argue that the flexibility in the term allows for changing social norms.

²² The definition of aggravated felony (defined in INA §101(a)(43)) includes over 50 types of crimes. In addition, an alien convicted of an aggravated felony is conclusively presumed to be deportable (INA §238(c)). Misdemeanors at the state level may be aggravated felonies under the INA.

²³ So few aliens have been deported under these grounds since 1980, that DHS does not report the number.

²⁴ There is a five-year bar to admissibility for aliens who have been subjected to expedited removal or those ordered removed when trying to enter the United States. There is a 10-year bar for admission for those who were ordered deported. There is a 20-year bar for those who have been previously removed, and those convicted of an aggravated felony are permanently inadmissible. INA §212(a)(9)(A).

²⁵ Charles Gordon, Stanley Mailman, Stephen Yale-Loehr, *Immigration Law and Procedure*. Newark: LexisNexis, vol 6.

²⁶ 8 C.F.R. §239.1(a)

²⁷ P.L. 99-603, §701.

²⁸ Anti-Drug Abuse Act of 1988 (P.L. 100-690); Immigration Act of 1990, P.L. 101-649 (1990); Immigration and Nationality Technical Correction Act of 1994, P.L. 103-416 (1994); Antiterrorism and Effective Death Penalty Act of 1996, P.L. 104-132 (1996); Illegal Immigrant Reform and Immigrant Responsibility Act of 1996, P.L. 104-208, Div. C (1996).

²⁹ Charles Gordon and Harry N. Rosenfield, *Immigration Law and Procedure*, Albany, New York: Banks and Company, 1959, p. 406.

³⁰ Shoba Sivaprasad Wadhia, "The Role of Prosecutorial Discretion in Immigration Law," *Connecticut Public Interest Law Journal*, Spring 2010.

³¹ William J. Howard, Principal Legal Advisor, U.S. Immigration and Customs Enforcement, *Prosecutorial Discretion*, memorandum to all Office of the Principal legal Advisor Chief Counsel, October 24, 2005.

³² William J. Howard, Principal Legal Advisor, U.S. Immigration and Customs Enforcement, *Prosecutorial Discretion*, memorandum to all Office of the Principal legal Advisor Chief Counsel, October 24, 2005.

³³ Doris Meissner, Commissioner of the Immigration and Naturalization Service, *Exercising Prosecutorial Discretion*, memorandum to regional directors, district directors, chief patrol agents, and the regional and district counsels, November 7, 2000.

³⁴ ICE's mission includes the criminal and civil enforcement of federal laws governing border control, customs, trade, and immigration; see ICE, "ICE Overview: Mission," <http://www.ice.gov/about/overview/>. Laws governing the detention and removal of unauthorized aliens generally fall under ICE's civil enforcement authority, while laws governing the prosecution of crimes, including immigration-related crimes, fall under ICE's criminal enforcement authority. Also see Hiroshi Motomura, "The Discretion That Matters: Federal Immigration Enforcement, State and Local Arrests, and the Civil-Criminal Line," *UCLA Law Review*, vol. 58, no. 6 (August 2011), pp. 1819-1858.

³⁵ The memorandum does not define "recent illegal entrants." DHS regulations permit immigration officers to summarily exclude an alien present in the United States for less than two years unless the alien expresses an intent to apply for asylum or has a fear of persecution or torture; and DHS policy is to pursue expedited removal proceedings against aliens who are determined to be inadmissible because they lack proper documents, are present in the United States without having been admitted or paroled following inspection by an immigration officer at a designated port of entry, are encountered by an immigration officer within 100 miles of the U.S. border, and have not established to the satisfaction of an immigration officer that they have been physically present in the United States for over 14 days.

³⁶ John Morton, Director of Immigration and Customs Enforcement, *Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for Apprehension, Detention and Removal of Aliens*, memorandum to field office directors, special agents in charge, and chief counsels, June 17, 2011.

³⁷ The Honorable Secretary Janet Napolitano, letter to the Honorable Senator Dick Durbin, August 18, 2011.

³⁸ Homeland Security Advisory Council, *Task Force on Secure Communities Findings and Recommendations*, September, 2011.

³⁹ CRS Report R41221, *State Efforts to Deter Unauthorized Aliens: Legal Analysis of Arizona's S.B. 1070*, by Kate M. Manuel, Michael John Garcia, and Larry M. Eig.