Illegal Immigration and the Southwest Border District Courts

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Introduction

The influx of illegal aliens from Mexico and other countries into the southwest United States has greatly burdened the five federal district courts in that region.1 Responding to the large number of apprehensions by the Border Patrol and other law enforcement agencies, federal courts and associated personnel have devised innovative solutions to this spiraling workload. This paper documents the increase in court cases from 1993 through 2005, a period when the Border Patrol and U.S. Attorneys in the Southwest initiated stepped up enforcement of U.S. immigration laws. It follows the shift in the tide of immigration cases from the Southern District of California (CA,S), eastward, as successive initiatives in different Border Patrol sectors continually diverted the flow of illegal immigrants. A model is then presented which relates the staffing of federal agencies, particularly the Border Patrol, with cases filed in the federal courts. Finally, a discussion based on interviews with federal officials in the Southwest serves to explain the complexity of the relationship among staffing, apprehensions, and case filings.

Retrospective

Over the past decade, but especially since the terrorist attacks on September 11, 2001, immigration from Mexico has become a focus of policy makers, the media, and the citizenry at large. The issue has generated marches,2 legislative proposals for immigration reform,3 and calls to tighten the border by constructing a 700-mile fence.4 The politics of the issue has produced strange bedfellows, as factions within both the Republican and Democratic parties have taken opposing stances on paths to citizenship for illegal aliens and the permeability of the border for the movement of labor.5

Despite the lack of a national consensus on illegal immigration, there has been one constant since the early 1990s: both the Clinton and Bush administrations have poured significant resources into making the Southwest border less open to illegal immigration. In 1994, Janet Reno, the Attorney General in the Clinton administration, initiated a Southwest border strategy that called for more Border Patrol staff, more time spent by Border Patrol agents

1Appellate courts have also felt an impact, especially the Ninth and Second Circuits, with larger caseloads arising from appeals from the Board of Immigration Appeals (BIA).
along the border, greater use of physical barriers, and an expanded use of technology.\(^6\) Starting with Operation Gatekeeper and Operation Hold the Line in 1994,\(^7\) and followed by passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub L. 104-208,\(^8\) the executive and legislative branches of the federal government have implemented policies that have dramatically increased the number of illegal immigration cases seen by the federal district courts in the southwestern United States (the Southern District of California, the District of Arizona (AZ), the District of New Mexico (NM), the Western District of Texas (TX,W), and the Southern District of Texas (TX,S). The growth in the caseload has been such that illegal immigration has displaced drug prosecutions as the leading criminal category in these districts.\(^9\) In 1995, the number of defendants charged with violating drug laws in the Southwest districts was 4,767; the number charged with violating immigration laws was 1,292. In fiscal year 2005, the numbers stood at 8,082 drug defendants and 13,080 illegal immigration defendants.\(^10\) Only TX,W of the five courts had more drug defendants than immigration defendants.


\(^7\)S.C. Gwynne, *The Unwelcome Mat, As the Proposition 187 Debate Roars, the U.S. Begins an Intensive Effort to Seal Off a 2,000 Mile Border*, Time, Nov. 18, 1994, at 35.


\(^9\)This does not mean that the illegal immigration workload is necessarily heavier than the drug workload. The typical illegal immigration case takes less time than the typical drug case and thus, on a per case basis, less of the court’s resources.

\(^10\)The national numbers also reflect the impact of illegal immigration, but at this level,
defendants. Figure 1 displays this growth in defendant filings from 1993 through 2005 for the combined five districts.\footnote{For most of the charts and graphs in this paper, 1993 will be the start year, as it serves as a base of comparison for the subsequent trends that were initiated in 1994.}

Figure 2 disaggregates the dramatic increase into the differential rates of growth of filings in each of the districts. The trend lines reflect the response of the federal government to shifts in the major illegal immigration routes, which, in turn, represent illegal immigrant avoidance of increased government resources in various Border Patrol sectors. The Border Patrol efforts have usually been coordinated with the U.S. Attorney’s office and, indirectly, with the federal district court in the district encompassing the Border Patrol sector.\footnote{The boundaries of the Border Patrol sectors are not the same as those of the federal district courts. For example, the Border Patrol’s San Diego Sector lies within the Southern District of California (CA,S), but the El Centro Sector lies within both CA,S and the Central District of California (CA,C). The Border Patrol’s El Paso Sector encompasses the district (and the state) of New Mexico, as well as the westernmost slice of Texas, around the city of El Paso.}

The initiatives have gone by defendants with drug charges still outnumbered those with immigration charges by a wide margin. In 1993, the respective figures were: drug laws, 23,114; immigration laws, 2,900. By 2005, they had changed to: drug laws, 32,637; immigration laws 18,322.

Unless noted otherwise, the data displayed in this report is from the D-3 Defendants Table of Judicial Business of the United States Courts: Annual Report of the Director of the Administrative Office of the United States Courts for the years 1993 through 2005. These and related tables are available for the years 1997 through 2006 at http://www.uscourts.gov/judbususc/judbus.html.

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various names: Operation Gatekeeper in San Diego, Operation Hold the Line in El Paso, Operation Rio Grande in McAllen, TX, and Operation Safeguard in Tucson. While the first effort to be given a name was Hold the Line, in El Paso, the initial program in which the Border Patrol significantly increased the number of agents and coordinated its efforts with the federal prosecutors was Operation Gatekeeper in the Southern District of California. This sector was chosen because, at the time, it accounted for far more illegal immigration than any other sector. Figure 2 shows the rapid growth in filings in CA, S in 1995 as a result of Gatekeeper. For the next three years CA, S was the focus of the federal government’s efforts. Over this period, other named operations were initiated, but the timing did not always coincide with a dramatic rise in federal filings the way Gatekeeper did. For instance, Operation Safeguard began in the Yuma Sector at the same time as Gatekeeper started in San Diego, but it wasn’t until 1998 that Arizona witnessed a substantial jump, as opposed to a gradual increase, in illegal immigration filings. Despite the disparity in the initiation of increased prosecution, all five Southwest border districts are currently processing far more immigration cases than they were in 1993.

Not only did the sequential efforts of the federal government to tighten the border with Mexico result in a movement of the illegal immigration flow from district to district, but these actions also had a modest effect on the type of prosecutions seen by the courts. Illegal reentry

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14 Silvestre Reyes, formerly the Border Patrol Chief in El Paso and currently a Congressman representing El Paso (D-TX-16th), created the Hold the Line initiative over the initial objections of Immigration and Naturalization Service headquarters. Daniel W. Sutherland, The Federal Immigration Bureaucracy: The Achilles Heel of Immigration Reform, 10 GEO. IMMIGR. L. J. 109, 123-124 (1996). Staffing essentially was the same, (809 in 1992; 794 in 1993 in TX, W) but the agents were redeployed along the border as a deterrent to illegal immigrants coming through the city of El Paso, rather than in their traditional role of chasing or tracking down illegal immigrants who had already succeeded in crossing the border.


16 Illegal Immigration: Southwest Border Strategy Results Inconclusive; More Evaluation Needed, supra at 13.

17 Most criminal immigration offenses are brought as felonies under 8 U.S.C. § 1326, reentry of removed or deported aliens, and 8 U.S.C. § 1324, bringing in or harboring illegal aliens, with 8 U.S.C. § 1326 (reentry) garnering the lion’s share. A lesser number are brought as misdemeanors under 8 U.S.C. § 1325, improper entry by aliens. Other offenses involving various types of immigration fraud are brought under title 18 of the US Code and account for a very low percentage of prosecutions. In the year 2000 immigration suspects referred to U.S. attorneys for immigration offenses broke down as follows: 75 percent unlawfully entering or reentering; 20 percent alien smuggling; and 5 percent misuse of visas or other immigration
continued to be the charge most often brought, but filings for alien smuggling, which had been inconsequential prior to 1993, began to represent a reasonable share of the immigration filings (Figure 3). This pattern holds for all the districts except the Southern District of California, which had a significant drop from 1997 to 1999 in the number of defendants charged with illegal re-entry. At the same time, filings in the district of defendants charged with illegal entry dramatically increased. The Southern District of Texas was the other district which prosecuted an increasing number of entry cases.

Of these two developments, it is the rapid growth in immigration filings itself that has increased the burden for the judges in the Southwest border districts. The change in the nature of the immigration case filings has made little impact, because all three of the major laws produce cases of similar complexity. Prosecuting alien smuggling cases, as 18

These data are not published. They are present in the criminal filings database maintained by the Statistics Division of the Administrative Office of the U.S. Courts. The data are received monthly via electronic file transfer from the case management systems of the 94 district courts.

19 This situation arose from the Supreme Court decision in Almendarez-Diaz v. United States 523 U.S. 224 (1998). Almendarez-Diaz meant that plea bargains made under 1326 (reentry) had to include the sentence enhancing feature of article (b), prior felony convictions. The base plea offered by the U.S. Attorney in these cases usually had been two years. Now, with the court ruling, prosecutors in many instances might only be able to offer sentences of ten to twenty years. To keep the sentences reasonable so that the plea bargains would be accepted by the defendants, the U.S. Attorney began to offer pleas under section 1325 (entry). Telephone interview with Lori Garofalo, Chief Pretrial Service Officer, Southern District of California (Dec. 12, 2006).
opposed to reentry cases, does not increase the weighted case filings.\textsuperscript{20} It is the increase in the absolute number of all immigration filings that has given the Southwest courts some of the heaviest weighted filings in the country.\textsuperscript{21} The Congress, recognizing the strained conditions, has at several times in the past decade added judgeships to these courts.\textsuperscript{22} This year, Senators Domenici (R-NM), Kyl (R-AZ), and Cornyn (R-TX) reintroduced a bill, S. 389, that would increase the number of federal judgeships in districts that have “an extraordinarily high immigration caseload.”\textsuperscript{23} Under this proposed legislation, Arizona would receive four new permanent judgeships and one new temporary judgeship; the Southern District of California, one permanent judgeship; New Mexico, one permanent and one temporary; and the Southern District

\textsuperscript{20}Weighted case filings is a statistic that takes into account the average length of time that it takes federal judges to process a particular type of case, for instance, a drug possession case or a financial fraud case. Different criminal and different civil cases demand varying amounts of court resources. The Federal Judicial Center (FJC) computes weighted case filings, relative numbers representing a fraction or multiple of the median case type, once every five to ten years. These computations do not account for court staff workload by case type. Its last study was completed in 2004 and calculated a case weight for alien smuggling of .57 and for other immigration violations, .47. Prior to the 2003-2004 case weight study, the number was .77 for both categories. Patricia Lombard & Carol Kafka, 2003-2004 District Court Case Weighting Study: Final Report to the Subcommittee on Judicial Statistics of the Committee of Judicial Resources of the Judicial Conference of the United States, Appendix Y, at 12 (2005) available at www.fjc.gov/library/fjc_catalog.nsf.

Despite the modest case weights given to immigration cases by the FJC, there are some border courts where some felony filings under 8 U.S.C. § 1326 result in trials lasting two or three days, and sentencing stretching from the normal twenty minutes to two hours. Telephone interview with Judge Alia Moses Ludlum, Western District of Texas (5/21/2007).

\textsuperscript{21}In 2002, before CA,S received five new permanent judgeships, its weighted filings per judgeship stood at 785, compared to the national average of 504. After receiving the judgeships, CA,S’s number fell to 478 in 2003 and was 387 in 2005. In 2005 Arizona’s weighted filings were 651; Texas, Southern’s 600; Texas, Western’s 687; and New Mexico’s 586. The national average for 2005 was 489. Administrative Office of the United States Courts, 2005 Federal Court Management Statistics, March 2006, at 84-85, 126, 130, and 147.

\textsuperscript{22}Although there has been no comprehensive judgeship bill since 1990, TX,W received one permanent judgeship in 2000 and two permanent judgeships in 2002; TX,S, one permanent judgeship in 2000; CA,S, five permanent judgeships in 2002; AZ, three permanent judgeships in 1999, one permanent judgeship in 2000, and one temporary judgeship in 2002; and NM, one permanent judgeship in 2000 and one temporary judgeship in 2002. Administrative Office of the United States Courts, History of Federal Judgeships, available at http://www.uscourts.gov/history/authorized_district.pdf.

The creation of these new judgeships will undoubtedly improve the situation in the Southwest border districts, but the implementation of the plan by President Bush to double the number of Border Patrol agents to 18,000 by 2008, may significantly attenuate the positive effect. A look at Figure 4 shows why. Although the period of time covered by the chart is somewhat different from that shown in Figure 2, the overlap (1993 through 2002) reveals a strong correspondence between increases in Border Patrol personnel and growth in illegal immigration filings in the federal courts of the Southwest. The next section of this paper will

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24 Id.


26 The staffing data presented in this study for assistant U.S. Attorneys, for U.S. Customs agents and inspectors, and for Border Patrol agents are available from the Office of Personnel Management (OPM) via special request. General background information about the data in OPM’s Central Personnel Data File (CPDF) can be found at: http://www.opm.gov/feddata/html/cpdfinfo.asp.
offer a mathematical treatment of the relationship between Border Patrol personnel, other government staff involved with illegal immigration, and court filings.

**Model**

Among the tasks assigned to the Administrative Office of the U.S. Courts (AO) is the estimation of the future caseload of the federal courts. This process involves both mathematical modeling and a survey of relevant economic, political, and administrative events. In attempting to gain a better understanding of the factors which have been driving criminal case filings, we are led, naturally, to the growth in illegal immigration which has been outlined above. Illegal immigration, in turn, points us to the correspondence between Border Patrol staffing and federal caseload filings illustrated in Figures 2 and 4.

The hypothesis to be tested is that increases in federal court workload in each district followed increases in staffing by the Border Patrol in that district. Since staffing increases in several other federal agencies might also play a role in caseload growth, they were included as independent variables in what is known as a pooled cross-sectional time series model.

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27 Every spring the Statistics Division of the AO provides caseload estimates to the AO Budget Division. These estimates are used to produce the judiciary’s budget request to Congress.

28 A more detailed discussion on methodology is included in the appendix.
immigration cases in each of the five Southwest border courts served as the dependent variable with the independent variables being Border Patrol staffing in each district, assistant U.S. Attorney staffing for each district, Customs agents staffing in each district, and, finally, Customs inspectors staffing in each district. Data were yearly from 1990 through 2002.\(^{29}\)

The results of the pooled cross-sectional time series model confirm the correspondence between Border Patrol staffing and federal court caseload.

<table>
<thead>
<tr>
<th>Period</th>
<th>Variable</th>
<th>Coefficient</th>
<th>Std. Error</th>
<th>t</th>
<th>P &gt;</th>
<th>R-Square</th>
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<td>border patrol</td>
<td>1.15318</td>
<td>.1343702</td>
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</table>

Table 1 - Fixed Effects Model

Of the four independent variables investigated, only the coefficient for the number of border patrol agents was significant for both the longer and shorter time periods.\(^{30}\) (The column

\(^{29}\)Although this study begins in the year 1993, staffing data were made available to the author for the three previous years. The author decided to compare the results from the model for the original and the extended series. In general, the longer the time series, the more reliable the result. The data also represent personnel in the organizations which existed prior to the reorganization of the Border Patrol and Customs into the Department of Homeland Security. The numbers are for those actually on board, not merely the number of positions authorized.

\(^{30}\)Since we are dealing with an entire population, not a sample, the test statistics do not serve to validate or refute the hypothesis that the coefficients match a true population parameter, but rather measure the strength of the relationship between the respective independent variable
P > 0.05 provides this information. P must be less than 0.05, the 95 percent confidence level.) Interestingly, the coefficient for the number of assistant U.S. attorneys was significant for the shorter time period, but not the longer. This result probably stems from the fact that the number of assistant U.S. attorney positions started to increase significantly in the Southwest border districts in the early 1990s in order to prosecute drug crimes. Since this growth preceded the jump in immigration cases (which were flat from 1990 to 1993), the causal relationship between immigration and assistant U.S. attorneys was weakened.

The amount of variation in the dependant variable accounted for by the model was impressive for both time periods, the R-square for the years 1993 to 2002 being .7085 and that for 1990 to 2002 .8520. We thus may conclude that the number of Border Patrol agents is far more significant than the number of prosecutors or customs agents or customs inspectors and more important than any other single factor not entered into the model, in determining the number of illegal immigration cases brought before the federal district courts in the Southwest. The narrative of this paper would then seem to lead to a simple and straightforward conclusion. However, real life tends to be complex and in the next section we will discuss an issue which complicates the simplicity of the preceding analysis.

**Apprehensions versus Filings**

The Administrative Office of the U.S. Courts records only criminal filings in federal courts, not arrests by federal, state, or local law enforcement authorities. For most crimes, however, there is a correspondence between the number of arrests and the number of cases that are brought before a federal court.\(^{31}\) Crimes involving the immigration laws of the United States are an exception to this rule. Table 2 shows number of apprehensions in the Southwest border sectors by the Border Patrol from fiscal year 1993 through 2003.\(^ {32}\) It also displays the number of

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\(^{32}\)Data gathered from INS’ Southwest Border Strategy: Resource and Impact Issues
defendants filed in immigration cases in the five Southwest border districts for those years and the ratio of apprehensions to filings.

One is first struck with the great imbalance between the number of illegal aliens apprehended and the number of defendants in federal court faced with violation of immigration laws. In 1993 in the Southwest border districts, this ratio was almost 1000 to 1. Since then the ratio has steadily decreased to the point where it now stands at less than 100 to 1.

<table>
<thead>
<tr>
<th>Year</th>
<th>Apprehensions</th>
<th>Filings</th>
<th>Ratio</th>
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</thead>
<tbody>
<tr>
<td>1993</td>
<td>1,212,866</td>
<td>1,292</td>
<td>939</td>
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<tr>
<td>1994</td>
<td>979,101</td>
<td>1,219</td>
<td>803</td>
</tr>
<tr>
<td>1995</td>
<td>1,271,390</td>
<td>2,082</td>
<td>611</td>
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<tr>
<td>1996</td>
<td>1,507,020</td>
<td>3,404</td>
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<tr>
<td>1997</td>
<td>1,368,707</td>
<td>4,439</td>
<td>308</td>
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<tr>
<td>1998</td>
<td>1,516,680</td>
<td>6,166</td>
<td>246</td>
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<td>1999</td>
<td>1,537,000</td>
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<tr>
<td>2000</td>
<td>1,643,679</td>
<td>8,240</td>
<td>199</td>
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<tr>
<td>2001</td>
<td>1,235,717</td>
<td>7,772</td>
<td>159</td>
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<tr>
<td>2002</td>
<td>929,809</td>
<td>8,887</td>
<td>105</td>
</tr>
<tr>
<td>2003</td>
<td>905,065</td>
<td>11,060</td>
<td>82</td>
</tr>
</tbody>
</table>

Table 2 - Apprehensions and Filings in the Southwest Border Districts

Furthermore, if we go back to Figure 4, we see that there has been a steady increase in Border Patrol personnel that has not been paralleled by a similar increase in apprehensions. How does one explain these numbers in light of what appeared to be a clear relationship between number of Border Patrol personnel on staff and the number of illegal immigration cases filed in the federal courts?

Remain After Seven Years, United States General Accounting Office, August, 2001, at 31; and Southwest Border Apprehensions http://www.uscis.gov/graphics/shared/statistics/msrsep01/SWBORD.HTM.
Once a person has been apprehended by the Border Patrol, there are several different outcomes that may prevail. The illegal immigrant may be prosecuted, may volunteer to depart, may claim asylum, or may be subject to an order of removal. By far the greatest number of those apprehended are given the option of voluntary departure. This usually means they are put on a bus and driven back across the border to Mexico or are put on a plane and flown to their country of origin. These individuals are not entered into the criminal justice system, although they are likely to have their fingerprints taken. A considerably smaller number of illegal immigrants, approximately 186,000 in 2006, are removed by the Immigration and Customs Enforcement (ICE) branch of the Department of Homeland Security. These individuals usually go before an immigration judge in an immigration court, a tribunal that is part of the Department of Justice (DOJ), not a component of the federal judiciary. Some who appear in the immigration courts may apply for asylum, but their numbers are a relatively small percentage of those apprehended. Those illegal immigrants with felony criminal records are most likely to be


34 Nine out of every ten apprehended individuals are given (or choose) voluntary departures. During FY 2004, there were 1,035,477 voluntary departures and more than 99 percent of these were illegal aliens caught by the Border Patrol. Id.

35 Telephone Interview with Patsy Bingham, Chief Pretrial Services Officer, District of Arizona (Sept. 11, 2006). The fingerprints are recorded electronically on the IDENT system.

36 Immigration and Customs Enforcement (ICE) is the largest investigative branch of the Department of Homeland Security (DHS). It was created in March, 2003, from the law enforcement units of the former Immigration and Naturalization Service and the former U.S. Customs Service, http://www.ice.gov/about/index.htm.

37 When an individual is to appear before an immigration judge, he or she is issued a “Notice to Appear” or NTA. NTAs may be issued by Customs and Border Protection (CBP), by ICE, or by Citizenship and Immigration Services (CIS). Mary E. Kramer, Removal and Applications for Relief, Immigration Law: Basics and More, American Law Institute - American Bar Association, ALI-ABA Course of Study, Continuing Legal Education, 241 (2006).

38 There were 50,753 individuals seeking asylum in the United States in 2005. In the same year, 10,164 were granted asylum, 19,166 were denied, and 13,425 withdrew their requests. These latter three numbers include asylum seekers from previous years. United States Department of Justice, Executive Office for Immigration Review, Index of Frequently Requested FOIA - Processed Records, available at http://www.doj.gov/oir/efoia/foiafreq.htm. Not all
This is a general outline of what happens in any of the Southwest border districts. The respective percentage represented by voluntary returns, deportations, requests for asylum, and criminal prosecutions may differ from district to district and may vary within one district over time. What has not changed in the period under study is the dominant role of the Border Patrol in apprehensions and the use of the voluntary return as the preferred method for removal of the illegal alien from the United States.\footnote{Telephone interview with Craig Valashek, Chief Pretrial Services Officers, Western District of Texas (September 7, 2006).}

A variety of factors affect the number of apprehensions by the Border Patrol. The first, which has been discussed, is staffing. But in considering this cause, one has to be aware of the dynamic process set in motion when increased staffing leads to more apprehensions. An increase in apprehensions usually causes potential illegal immigrants to delay their crossing or to cross in another Border Patrol sector. This, in turns leads to a drop in apprehensions as deterrence takes effect. In addition to increases in staffing, the Border Patrol receives technology, equipment, and infrastructure improvement all of which initially enhance the ability to make apprehensions, but which ultimately create a deterrent.\footnote{Id., at 16.} To complicate matters further, there is evidence that deterrence works differentially, that long-distance labor is less likely to be discouraged by border control initiatives than is labor attempting to do cross border work or engage in criminal activity.\footnote{Id. at 36-37.}

If most apprehensions were to be considered for criminal prosecution, then another set of factors would go into determining whether the individual would end up in federal court. These elements include the level of staffing of assistant U.S. attorneys at the cities on the border, the availability of beds provided by the U.S. Marshals to house those awaiting trial, the number of public defenders or panel attorneys to represent the accused in court, the number of ICE staff allotted for deportation and removal, and even the number of bus drivers to take defendants from the places of detention to trial. Thus, the very low prosecution rate which has characterized enforcement of immigration laws stems from the necessity of having sufficient resources across a number of different federal agencies to deal with the high volume of illegal immigration cases.\footnote{From 1991 through 1998, there were 572,250 formal removals (which include deportations, exclusions, and removals) throughout the United States. In the same period, there were 10,336,800 voluntary departures. \textit{Illegal Immigration: Southwest Border Strategy Results Inconclusive; More Evaluation Needed}, supra at 212.}
Of these potential bottlenecks, the most visible obstacle to prosecuting a greater number of cases is the number of assistant U.S. attorneys. The reality is that the federal prosecutor’s office can handle only a fraction of the apprehensions by the Border Patrol and because of this, U.S. Attorneys have established flexible guidelines as to how many previous immigration violations will be needed before prosecution will be initiated.44

The decision of what percentage of illegal alien cases to prosecute is often arrived at through discussions between the Border Patrol and the U.S. Attorney with the staffing and workload in the U.S. Attorney’s office the determining factor in setting the limit on how many cases the Border Patrol sends to the court.45 Depending on the district and the year, the U.S. Attorney may decide that someone who has been caught illegally in the U.S. six times should go to trial or he or she may put the figure at nine. This is largely a function of case management.46 If the U.S. Attorney for the district agrees to take on a greater caseload, perhaps as the result of a Border Patrol initiative, administrative adjustments are often required.47

The federal courts, being the last stage of the criminal justice system (absent prisons), typically do not influence the volume of cases that are put on the criminal docket, although at least two chief judges have expressed satisfaction with the degree of cooperation extended by other federal agencies, including the U.S. Attorney, in managing caseload surges originating from immigration law enforcement initiatives.48 In one other court, the small size of the city and the existence of a relatively close knit community of federal officials has allowed the judiciary to be knowledgeable of and to plan for large caseload growth.49

44 Telephone interview with David Medellin, Supervisory Pretrial Services Officer, Southern District of Texas (September 6, 2006). Velashek, supra note 40. Telephone interview with Glenda Edmunds, Magistrate Judge, District of Arizona (March 22, 2007).

45 Telephone interview with Serra Tsethlikai, Assistant U.S. Attorney, District of Arizona, Tucson office (February 26, 2007).

46 Even with an arbitrary cutoff for prosecution, assistant U.S. attorneys assigned to the border work “day and night.” Burnout is common. Telephone interview with Judge Alia Moses Ludlum, Western District of Texas, (9/14/2006). Judge Ludlum worked as an assistant U.S. attorney from 1990 to 1997. Judge Ludlum also noted that most assistant U.S. attorneys opt for assignments in the large cities rather than along the border, thus contributing to the heavy workload of those who do accept positions in cities like Del Rio.

47 Currently, in Del Rio, Texas, administrative policies have been changed to allow probation officers, instead of assistant U.S. attorneys, to prepare Revocation of Supervised Release Form 12 for signature by the U.S. Attorney. Id. Though this accelerates processing, it is yet another example of increased workload for court staff.


49 Ludlum, supra.
In view of the complexities of administering the immigration laws of the United States along the Southwest border, does the simplicity of the model presented in the previous section hinder its utility as a guide to future immigration filings? Clearly, a linear chain of causality is difficult to defend. Each additional Border Patrol agent does not automatically add two or three cases to the yearly total on the criminal docket. A number of institutional players are involved in bringing illegal immigrants to court and not all see budget and staff increases which match those of the Border Patrol. Rather, it may be more useful to explain the statistical relationship as reflecting a coupled response of the system to the general political climate on the issue of immigration. When public and political concern results in the hiring of more Border Patrol personnel, that same sequence of events translates into more filings for the courts, as the U.S. Attorneys make adjustments to increase the number of prosecutions from the large pool of apprehended illegal migrants. (See Figure 5) At a macro level, the complexities of the apprehension/filing chain of events cancel out, leaving Border Patrol staffing to serve as a proxy indicator of caseload increases in the federal courts. In philosophy of science, this would be termed a common cause model.  

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50. This is analogous to the field of classical thermodynamics where the motions of individual molecules are ignored and attention is paid to macroscopic quantities like temperature, pressure, and volume.

51. Iain Martel, *The Principle of the Common Cause, the Causal Markov Condition, and Quantum Mechanics: Comments on Cartwright*, http://www.uni-
Conclusion

The model presented in this paper does not have the force of a physical law. It shows a relationship that existed for ten years in the five Southwest judicial districts. Changing circumstances in the nation, in Mexico, or in any of the five districts could affect the linkage between Border Patrol staffing and federal court caseload.

One change that immediately comes to mind is President Bush’s doubling the size of the Border Patrol. At the completion of this build-up in 2008, will there be twice as many apprehensions as there were in 2004? At what may be called the micro-level, the increase in Border Patrol staff will likely produce an initial growth in apprehensions, at least in those border areas where the increases are concentrated. Then, after several months have passed, the deterrent effect of having additional Border Patrol staff will result in a decrease in apprehensions in those same areas. In the past, illegal immigrants have sought new routes of entry into the United States as sectors became more difficult to negotiate, and those new sectors then saw a rise in apprehensions. Whether this will occur again may be a function of how the increased staff is distributed and the effect of other deterrents such as fencing and electronic surveillance.

In the future, the percentage of apprehensions that turn into court filings may not change, or may even decrease. However, with the Border Patrol doubling in size, the number of illegal immigration filings could still go up even if the “yield” from apprehensions goes down. Indeed, there may be a felt need to show that the growth of the Border Patrol is succeeding by bringing more cases to court, at least in the initial period of staffing growth.

Yet another factor complicates the issue of what path immigration filings will take in the future. In December of 2005, the Del Rio Sector of the Border Patrol initiated Operation Streamline, which sought to discourage illegal entry into the U.S. by making it virtually certain that even first time caught job seekers would spend some time in jail. Persons who enter the United States without inspection are charged under 8 U.S.C. 1325 and put into a detention facility. They then go before a Magistrate Judge, and if convicted, spend an average of 25 to 30 days in jail, though some sentences may be as high as 90 days. The initiative seems to have had a deterrent effect as Border Patrol apprehensions have fallen from 400 to 500 per day in the first two months following inception to approximately 50 per day nine months later. In Operation Streamline, all elements of the federal government dealing with illegal immigration have coordinated their efforts to eliminate the bottlenecks likely to occur when nearly all illegal aliens are prosecuted. More recently, in December, 2006, the Border Patrol sector of Yuma has


52 Telephone interview with Hilario Leal, Supervisory Border Patrol Agent, Del Rio Sector (Sept. 12, 2006).

53 Telephone interview with Philip Calk, U.S. Border Patrol Officer, Del Rio Sector (February 22, 2007). The additional staff which the Border Patrol has received has enabled the
implemented Operation Streamline. As of this writing, it is unclear whether Operation Streamline will be adopted by more Border Patrol sectors. The high degree of coordination required among the Border Patrol, the U.S. Attorney, the U.S. Marshals, the Office of the Federal Public Defender, and the federal district court imposes a constraint that discourages implementation despite the apparent success in Del Rio. If Operation Streamline were to become more widespread, the effect on the Article III judges might well be minimal, but the caseload of the magistrate judges and the workload of court staff would probably skyrocket. This has been the experience of the Western District of Texas in which the Del Rio Sector is located. (See Table 3)⁵⁴

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Table 3 - Effect of Operation Streamline on Court Workload

Even though apprehensions may plunge due to the deterrent effect (thus easing the burden on the Border Patrol), the necessity of continually prosecuting all illegal immigrants will insure that the judiciary, and elements associated with the judiciary, will experience workloads

Border Patrol to assist other federal agencies and make Operation Streamline work. Attorneys from the Border Patrol’s Office of General Counsel have been appointed special assistant U.S. Attorneys and have done all the prosecuting of Streamline cases. Other Border Patrol officers have been detailed to assist ICE deportation and removal staff in San Antonio. Border Patrol officers have even been detailed to the U.S. Marshals to help them move prisoners by driving buses.

⁵⁴These monthly data are not published. The “criminal defendants disposed of” data are present in the criminal filings database maintained by the Statistics Division of the AO. The “petty offense defendants disposed of” data are kept on the Magistrate Judges Statistics Through Automated Reporting (MJSTAR) database maintained by the Magistrate Judges Division of the AO. Annual data are available from the D-3 Defendants and M-2 tables at the website mentioned in footnote 10.
exceeding the pre-Operation Streamline level. Short of a dramatic change in the economic prospects for millions of Mexicans and other inhabitants of less developed countries or a significant reduction in U.S. Attorney resources, the federal judiciary will continue to see a large illegal immigration caseload arising either from the prosecution of a small percentage of a very large number of foreign-born crossing illegally into the United States, or from the prosecution of virtually all of a much smaller number of illegal migrants who were not deterred by intensified enforcement from attempting to enter this country. There is no certainty that the correlation between Border Patrol staffing and court caseload will remain as strong as it is at present, but any weakening of this relationship is unlikely to signify a diminution in the immigration-related workload of the federal courts of the Southwest.

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55 Additional criminal prosecutions may also occur as a result of a strengthened Border Patrol turning its attention to drug smuggling. In Del Rio, during Operation Streamline, the number of narcotics seizures went up as the number of illegal immigration apprehensions dropped. Calk, supra note 54.
Appendix

The format of the data used in this study was across both time and organizational units (district) and thus lent itself to a statistical technique called pooled cross-sectional time series analysis. This procedure makes use of the additional data available at successive points in time (in this case the succeeding years) to model independent variables which are not part of the formal model. In doing so, the technique accounts for a greater amount of the variance in the dependant variable (court caseload).

There are three different models associated with pooled cross-sectional time series analysis: fixed effects, between effects, and random effects. The fixed effects model is appropriate when the researcher wants to control for factors that are not part of the model but are constant over the time period examined. It permits the researcher to use the time-dependent changes of the omitted (or unknown) variables to estimate the effect of the independent variable(s) on the dependent variable. This is equivalent to generating dummy variables for each of the cases and including them in a standard linear regression. The between effects model allows the researcher to control for omitted variables that vary with time, but are constant between cases. It gives information about the cross-sectional nature of the data, but it is seldom used because it discards information from the time series component of the data in favor of simple means. In the random-effects model, a weighted average of the fixed and between estimates is taken. The random effects model is used when the researcher believes that some of the omitted or unknown variables may be constant over time but that others may vary over time. A test (Hausman) determines whether the fixed effects or random effects method is superior.

The Hausman test tests the null hypothesis that the coefficients estimated in the random effects model, which is more efficient (lowest variance among all unbiased estimators), are the same as the ones estimated by the fixed effects model, which is more consistent (converges to the quantity being estimated as the sample size grows). If they are not, then it is appropriate to use fixed effects. In our model, the difference in the coefficients of the fixed effects and the random effects models was large enough to reject the null hypothesis, requiring us to use the fixed effects model.

\(^{56}\) A statistical package called STATA contains this procedure. Jim Woods, a member of the AO Statistics Division staff who possesses this software, ran several series of data that I provided to him in Excel format.