

Winter 2013 U.S. Immigration Alert!
A Newsletter from National Immigrant Solidarity Network
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2013: What Happened to the Immigrant Reform?

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At Nearly 100,000, Immigration Prosecutions Reach All-time High in FY 2013

Illegal Re-entry Prosecutions Jump 76% During Obama Administration

TRAC Report

The latest available data from the Justice Department show that during FY 2013 immigration prosecutions reached an all-time high, with new cases being filed against 97,384 defendants. This number is up 5.9 percent over the past fiscal year, and up 22.6 percent over the past five years, according to the case-by-case information analyzed by the Transactional Records Access Clearinghouse (TRAC) and obtained from the Executive Office for United States Attorneys under the Freedom of Information Act.

Table 1. Growth in Immigration Prosecutions by Lead Charge

FY 2013 Prosecutions	97,384	53,789	37,346
FY 2012 Prosecutions	91,941	48,009	37,123
% Change from previous year	5.9%	12%	0.6%
% Change from 5 years ago	22.6%	8.4%	76.2%
% Change from 10 years ago	367%	1226%	233%
% Change from 20 years ago	1420%	6922%	1557%

As shown in Table 1, the largest component of these were prosecutions for illegal entry under 8 USC 1325, which made up 55 percent of immigration prosecutions during FY 2013. The next largest group of these prosecutions were classified as illegal re-entry under 8 USC 1326, comprising 38 percent.

Growth patterns for illegal entry and re-entry prosecutions have been quite different. As shown in Table 1 and contrasted in Figures 1 and 2, prosecutions for illegal re-entry increased only slightly this past year, while those for illegal entry rose by 12 percent. However, a different picture emerges when FY 2013 prosecutions are compared with the number during the last year of

President Bush's administration, five years ago. Over this time frame, prosecutions for illegal entry increased by just 8.4 percent, while illegal re-entry prosecutions zoomed up by 76.2 percent.

As we see in Figure 1, prosecutions for illegal re-entry took a big jump in FY 2009 and FY 2010 — right after President Obama assumed office — and then continued to climb, though at a much slower pace. In contrast, those for illegal entry reached their all-time peak of 54,113 during FY 2009 — the first year of President Obama's administration — and then declined during FY 2010 through FY 2011. However during the past two years, illegal entry prosecutions have again begun to rise, though their reported level in FY 2013 is still slightly less than it was in FY 2009.

11/25: Does the President Have the Power to Stop All/Most Removals?

Illuminating Immigration Law by Benach Ragland LLP

As official Washington administers last rites to immigration reform for 2013 only to have it pop up again with a barely detectable pulse, undocumented immigrants and their allies continue to press the President to use his power as the executive to suspend removals. Marches, sit-ins, hunger strikes, and social media combat for #notonemore deportation have reached a fever pitch as the House seems to be putting the last nail in the coffin for the comprehensive immigration reform bill passed by the Senate in June. A family feud exploded into the open today when activist Ju Hong challenged the President of the United States as the President delivered a steaming bowl of bromides to a friendly pro-immigrant crowd. Hong challenged the President and told the President that he has the power and the authority to suspend deportations. The President engaged Mr. Hong and said that he did not possess such authority.

So, who's right? Is Hong right and the President can, as a function of executive power, halt deportations? Or is the President right that he is obliged to enforce the law and Congress must act in order to reform our broken immigration system? The answer, like always, is very unclear. In the President's favor is that his constitutional obligation to "take care that the laws are faithfully executed" prohibits his ignoring the laws contained in the Immigration & Nationality Act. However, in Hong's favor is the fact that the President, through Deferred Action for Childhood Arrivals (DACA), relief for certain widows of American citizens, and the recent Parole-in-Place memo for military families, has already exercised his executive authority not to enforce certain portions of the immigration law. As Hong might argue, if the President can choose not to enforce the law for certain sub-groups of immigrants, what is there to stop him from expanding the beneficiaries of his grace to other groups? The question is whether there is a difference between a limited exercise of discretion versus a wholesale refusal to enforce the majority of the Immigration & Nationality Act ("INA"). Let's also agree before we look at this that it would be better if Congress passed a humane and comprehensive reform that kept families together. However, as it appears that Congress has no intention of doing that, let's take a look at what the President could do without Congress.

In 1984, the Supreme Court heard a case called *Heckler v. Chaney*. In this case, inmates scheduled to be executed by lethal injection argued that the lethal drugs were not being used in conformity with their use as approved by the Food and Drug Administration (FDA) and they brought suit to compel the FDA to take enforcement action against the sheriff's departments that were improperly using the drug. The Supreme Court held that the decision to initiate, terminate or suspend enforcement proceedings were squarely within the unreviewable discretion of the executive branch. The Supreme Court wrote:

This Court has recognized on several occasions over many years that an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion (citation omitted). This recognition of the existence of discretion is attributable in no small part to the general unsuitability for judicial review of agency decisions to refuse enforcement. The reasons for this general unsuitability are many. First, an agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise. Thus, the agency must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake the action at all. An agency generally cannot act against each technical violation of the statute it is charged with enforcing. The agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities. Similar concerns animate the principles of administrative law that courts generally will defer to an agency's construction of the statute it is charged with implementing, and to the procedures it adopts for implementing that statute (citation omitted). In addition to these administrative concerns, we note that when an agency refuses to act it generally does not exercise its coercive power over an individual's liberty or property rights, and thus does not infringe upon areas that courts often are called upon to protect. Similarly, when an agency does act to enforce, that action itself provides a focus for judicial review, inasmuch as the agency must have exercised its power in some manner. The action at least can be reviewed to determine whether the agency exceeded its statutory powers (citation omitted). Finally, we recognize that an agency's refusal to institute proceedings shares to some extent the characteristics of the decision of a prosecutor in the Executive Branch not to

indict — a decision which has long been regarded as the special province of the Executive Branch, inasmuch as it is the Executive who is charged by the Constitution to “take Care that the Laws be faithfully executed.” U.S. Const., Art. II, 3.

In this instance, the Supreme Court seems to support Hong’s position when it states that a decision not to prosecute or enforce is left to the agency’s unreviewable discretion. This would support the argument that the administration could make a decision not to enforce the Immigration & Nationality Act. Yet, the Supreme Court did not give the President the *carte blanche* to ignore the statute. “We emphasize that the decision is only presumptively unreviewable; the presumption may be rebutted where the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers. Thus, in establishing this presumption, . . . Congress did not set agencies free to disregard legislative direction in the statutory scheme that the agency administers. Congress may limit an agency’s exercise of enforcement power if it wished, either by setting substantive priorities, or by otherwise circumscribing an agency’s power to discriminate among issues or cases it will pursue.”

As an example, the Supreme Court cited a discrimination case, *Adams v. Richardson*, in which a court ordered federal education officials to enforce portions of the Civil Rights Act of 1964. In that case, a court determined that education officials had failed to enforce a clear statutory directive from Congress and ordered the officials’ compliance. It could be argued that Congress provided in the INA very specific guidance to the executive branch about how to enforce immigration law. The INA provides for mandatory detention of certain foreign nationals, bars many removable individuals from all relief, and restricts jurisdiction in federal court over agency actions. In fact, when the President established DACA, a number of ICE bureaucrats brought suit arguing that the INA provides a mandatory duty upon ICE to initiate removal proceedings against all removable foreign nationals that ICE encounters. While the ICE bureaucrats thankfully lost, they lost on an employment law/ standing issue and the initial decisions of the judge suggested that he accepted the bureaucrats’ claims.

Thus, while the President and his appointees have considerable discretion in choosing how to enforce the law, it is less clear that they have the ability to decide to suspend all removals, or even a substantial majority of them. While principles of prosecutorial discretion— the authority of an enforcement agency to utilize limited resources in the best way it seems fit— legitimately empower the President to identify priorities, the President would not seem to have the power to decide not to enforce immigration law.

This is not to say that the President could not be bolder with his use of his discretionary authority. DACA has been the boldest step he has taken so far in asserting his executive authority to remedy the harsh effects of U.S. immigration law. Could the President extend his discretion to limit the removal of parents of U.S. citizens? Could he expand DACA to include more people? Could he decide that no children below 16 should be removed? This is where the legal question turns political. The anti-immigrant right wing already believes that, despite the record number of removals, the President is not enforcing immigration law. Should the President grow the universe of those eligible for favorable exercises of discretion, it is likely that whatever life remains in positive immigration reform in Congress will evaporate immediately. As long as the promise of immigration reform remains flickeringly alive, the President is unlikely to antagonize his Congressional tormentors. The House GOP seems to get that and feeds us all little scraps of “immigration reform is alive” every now and then in an effort to stave off unilateral action.

We tend to look at our times as if the political atmosphere was never more poisonous. That is simply not true. There have been plenty of times in our history where a President took a very expansive view of his authority. Andrew Jackson did it on a nearly daily basis. Lincoln utilized his powers as commander-in-chief to imprison half of Maryland and emancipate millions of enslaved humans. Franklin Roosevelt threatened to add six new justices to the Supreme Court to tilt the balance on the Court to favor his agenda. Harry Truman took over steel mills during the Korean War. These were bold political moves in response to urgent situations.

As the atmosphere grows more poisonous, perhaps the President will channel his inner Jackson or Roosevelt and take these drastic steps. Perhaps Mr. Hong’s biggest contribution was to serve as Jefferson’s “firebell in the night” to tell the President that the situation has grown desperate. As the President spoke, young activists, chained themselves in civil disobedience at the Adelanto detention center in California.

As Congress fails to deliver any relief to immigrant communities, the pressure will continue to mount on the President to take a leap of faith and assert a robust exercise of discretion and reap whatever political harvest is unleashed.

11/10: Chinese Americans protest against Jimmy Kimmel skit

CCTV NEWS (CHINA)

Chinese Americans across 26 cities in the United States protested on Saturday against what they believed was an offensive skit on comedian Jimmy Kimmel’s late night show on the ABC Network.

The segment, which aired on October 16, evoked outrage across the community, after it featured a child suggesting that a solution to the US debt owed to China would be to "kill everyone in China."

Most protesters have argued that the problem was not the child's comment, but the fact that Kimmel did not challenge it.

The network and Kimmel have apologized on air and in writing to Chinese and Asian American groups, but the apology was deemed "insincere" by the majority of Chinese community.

The protesters have demanded stern action against the comedian and are hoping to deliver a positive message to children to reject violence.

Fact Sheet on U.S. "Constitution Free Zone"

American Civil Liberties Union

The problem

Normally under the Fourth Amendment of the U.S. Constitution, the American people are not generally subject to random and arbitrary stops and searches.

The border, however, has always been an exception. There, the longstanding view is that the normal rules do not apply. For example the authorities do not need a warrant or probable cause to conduct a "routine search."

But what is "the border"? According to the government, it is a 100-mile wide strip that wraps around the "external boundary" of the United States.

As a result of this claimed authority, individuals who are far away from the border, American citizens traveling from one place in America to another, are being stopped and harassed in ways that our Constitution does not permit.

Border Patrol has been setting up checkpoints inland - on highways in states such as California, Texas and Arizona, and at ferry terminals in Washington State. Typically, the agents ask drivers and passengers about their citizenship. Unfortunately, our courts so far have permitted these kinds of checkpoints - legally speaking, they are "administrative" stops that are permitted only for the specific purpose of protecting the nation's borders. They cannot become general drug-search or other law enforcement efforts.

However, these stops by Border Patrol agents are not remaining confined to that border security purpose. On the roads of California and elsewhere in the nation - places far removed from the actual border - agents are stopping, interrogating, and searching Americans on an everyday basis with absolutely no suspicion of wrongdoing.

The bottom line is that the extraordinary authorities that the government possesses at the border are spilling into regular American streets.

Much of U.S. population affected

Many Americans and Washington policymakers believe that this is a problem confined to the San Diego-Tijuana border or the dusty sands of Arizona or Texas, but these powers stretch far inland across the United States.

To calculate what proportion of the U.S. population is affected by these powers, the ACLU created a map and spreadsheet showing the population and population centers that lie within 100 miles of any "external boundary" of the United States.

The population estimates were calculated by examining the most recent US census numbers for all counties within 100 miles of these borders. Using numbers from the Population Distribution Branch of the US Census Bureau, we were able to estimate both the total number and a state-by-state population breakdown. The custom map was created with help from a map expert at World Sites Atlas.

What we found is that fully TWO-THIRDS of the United States' population lives within this Constitution-free or Constitution-lite Zone. That's 197.4 million people who live within 100 miles of the US land and coastal borders.

Nine of the top 10 largest metropolitan areas as determined by the 2000 census, fall within the Constitution-free Zone. (The

only exception is #9, Dallas-Fort Worth.) Some states are considered to lie completely within the zone: Connecticut, Delaware, Florida, Hawaii, Maine, Massachusetts, Michigan, New Hampshire, New Jersey, New York, Rhode Island and Vermont.

Part of a broader problem

The spread of border-search powers inland is part of a broad expansion of border powers with the potential to affect the lives of ordinary Americans who have never left their own country.

It coincides with the development of numerous border technologies, including watch list and database systems such as the Automated Targeting System (ATS) traveler risk assessment program, identity and tracking systems such as electronic (RFID) passports, the Western Hemisphere Travel Initiative (WHTI), and intrusive technological schemes such as the Secure Border Initiative Network (SBINet) or "virtual border fence" and unmanned aerial vehicles (aka "drone aircraft").

This illegitimate expansion of the extraordinary powers of agents at the border is also part of a general trend we have seen over the past 8 years of an untrammelled, heedless expansion of police and national security powers without regard to the effect on innocent Americans.

This trend is also typical of the Bush Administration's dragnet approach to law enforcement and national security. Instead of intelligent, competent, targeted efforts to stop terrorism, illegal immigration, and other crimes, what we have been seeing in area after area is an approach that turns us all into suspects. This approach seeks to sift through the entire U.S. population in the hopes of encountering the rare individual whom the authorities have a legitimate interest in.

If the current generation of Americans does not challenge this creeping (and sometimes galloping) expansion of federal powers over the individual through the rationale of "border protection," we are not doing our part to keep alive the rights and freedoms that we inherited, and will soon find that we have lost some or all of their right to go about their business, and travel around inside their own country, without interference from the authorities.

11/18: UT's Young Conservatives Hosting "Catch an Illegal Immigrant" Game (and Cancelled!)

by **Rebeldes**

****UPDATE, November 19, 2013: The event has now been cancelled!**

Apparently drawing from a 2005-06 plan of Young Conservative organizations on campuses across the country, the UT Austin chapter of Young Conservatives of Texas (YCT) is hosting a game on campus this Wednesday called "Catch an Illegal Immigrant." The game involves students walking around campus with the words "Illegal Immigrant" on their back. Students who capture the marked students and bring them back to the YCT table will be rewarded with a \$25 gift card.

As was the case with the YCT bake sale on the west mall last month, such tactics are inflammatory and demeaning. And once again in trying to be provocative, the YCT is contributing to an environment of exclusion and disrespect among our students, faculty and staff by sending the message that certain students do not belong on our campus. Some UT Austin students are undocumented, and under Dream Act legislation signed into law in 2001, these students are entitled to attend state universities. They are part of a growing diverse population on campus and in the state of Texas—a population that plays increasingly larger roles in our intellectual, economic, political and cultural communities.

The university honor code entreats students to abide by the core values of the university, one of which is freedom, but two others of which are individual opportunity and responsibility. The university also values free speech and our campus continues to be an arena that inspires dialogue from diverse viewpoints. However, it is also meant to be a community where students exhibit respect for each other while holding those viewpoints.

If the members of YCT carry out their plan for "Catch an Illegal Immigrant," they are willfully ignoring the honor code and contributing to the degradation of our campus culture. And once again, they will have resorted to exercising one of the university's core values to the detriment of others. Such actions are counterproductive to true dialogue on our campus, and it is unrepresentative of the ideals toward which our community strives.

Also, UT's President Bill Powers also issued a statement:

"The proposed YCT event is completely out of line with the values we espouse at The University of Texas at Austin. Our

students, faculty and the entire university work hard both to promote diversity and engage in a respectful exchange of ideas. The Wednesday event does not reflect that approach or commitment.

As Americans, we should always visualize our Statue of Liberty and remember that our country was built on the strength of immigration. Our nation continues to grapple with difficult questions surrounding immigration. I ask YCT to be part of that discussion but to find more productive and respectful ways to do so that do not demean their fellow students."

The university Staff Council has unanimously endorsed the statement.

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About National Immigrant Solidarity Network

NISN is a coalition of community, immigrant, labor, human rights and student activist groups, founded in 2002 in response to the urgent needs for the national coalition to fight immigrant bashing, support immigrant rights, no to the sweatshops exploitation and end to the racism on the community. Please visit our website: <http://www.ImmigrantSolidarity.org>

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