

Arrests Without Warrant: The Legal and Organizational Environment of Immigration Law Enforcement

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This Article describes some of the routine immigration law enforcement practices of the Immigration and Naturalization Service observed by the author in 1981-82 fieldwork. It focuses primarily on the prevalence of arrests without warrant and civil processing of suspected deportable aliens. The Article concludes that legal, political, and resource constraints hinder expeditious and uniform enforcement.

INTRODUCTION

The United States Immigration and Naturalization Service (INS), an agency under the jurisdiction of the Department of Justice,¹ is responsible for providing aliens with the benefits and relief statutorily available to them under the Immigration and Nationality Act of 1952 (INA),² the Refugee Act of 1980,³ and any other statute having provisions that pertain to alienage or naturalization. The INS also has the primary responsibility for enforcing the criminal and administrative provisions of the INA against those aliens and citizens found to have violated the law.⁴ Although the reported increase in illegal immigration

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¹ Immigration and Nationality (McCarran-Walter) Act of 1952 (INA), 8 U.S.C. § 1103(a)(34) (1982).

² Pub. L. No. 82-414, 66 Stat. 163 (codified at 8 U.S.C. §§ 1101-1557 (1982)).

³ Pub. L. No. 96-212, 94 Stat. 102 (codified in scattered sections of 8 U.S.C.).

⁴ When U.S. citizens are involved in immigration violations, usually only criminal proceedings are at issue. United States citizens involved in alien smuggling and harboring, document counterfeiting and vending, or efforts to help aliens obtain benefits fraudulently are subject to criminal prosecution. Naturalized U.S. citizens who make

over the past fifteen to twenty years has stirred public interest,⁵ the public is not aware of the problems the INS confronts in its day-to-day administration and enforcement of the INA.⁶

This Article describes some of the routine enforcement practices that the United States Border Patrol agents, uniformed INS officers, and plainclothes INS criminal investigators carry out in the course of enforcing the INA.⁷ In addition, it examines some of the dilemmas INS

material misrepresentations in support of their application for naturalization or an earlier visa may be denaturalized and then deported. INA § 340, 8 U.S.C. § 1451 (1982).

Some other federal agencies participate in immigration law enforcement to a limited extent, for example, the U.S. Coast Guard. U.S. Customs Service inspectors often have interchangeable functions with INS inspectors while inspecting aliens and citizens at international land and air ports-of-entry.

⁵ In 1965, the United States terminated the bracero program that had provided low cost foreign labor by contract with Mexico. H. CROSS & J. SANDOS, *ACROSS THE BORDER: RURAL DEVELOPMENT IN MEXICO AND RECENT MIGRATION TO THE UNITED STATES* 46-49 (1981) (pointing out that the need for unskilled laborers continued to draw foreign workers despite the absence of legal sanctions). For a discussion of the variation in estimates of illegal immigration, see Corwin, *The Numbers Game: Estimates of Illegal Aliens in the United States, 1970-1981*, 45 *LAW & CONTEMP. PROBS.* 223 (1982). See generally *Developments in the Law — Immigration Policy and the Rights of Aliens*, 96 *HARV. L. REV.* 1286 (1983).

⁶ Accounts of enforcement practices of the U.S. Border Patrol can be found in some of the research literature on illegal immigration. See, e.g., J. SAMORA, *LOS MOJADOS: THE WETBACK STORY* (1971). Empirical studies of the adjudication of alien benefit and relief applications as well as enforcement practices against violators are scant. See, e.g., Sofaer, *The Change-of-Status Adjudication: A Case Study of the Informal Agency Process*, 1 *J. LEGAL STUD.* 349-421 (1972). Sofaer studied the adjudication of § 245 Adjustment of Status requests in a single INS district office. He sought to ascertain the criteria used by examiners when they exercised administrative discretion on grants and denials and the extent to which their decisions were consistent among various applicants. For a study of INS criminal investigators that analyzes some of the tensions arising from their perceptions of themselves as law enforcers in an agency concerned primarily with providing services, the expeditious adjudication of benefits, see G. Weisinger, *Law Enforcement and the Immigration and Naturalization Service: Resolving an Apparent Contradiction* (Ph.D. dissertation, N.Y. Univ. (1982)); see also Schuck, *The Transformation of Immigration Law*, 84 *COLUM. L. REV.* 1, 77-79 (1984).

⁷ Most INS officers, including inspectors and examiners, have important enforcement functions even when they are not making arrests or investigating criminal cases. Inspectors seek to insure that unauthorized aliens do not slip through inspections, and they can detain those who attempt to do so. Examiners scrutinize benefit and relief applications for misrepresentations and other fraud and, as a result, have an important role in initiating case investigations for the criminal investigators. However, as used in this Article, "officer" will generally refer to the approximately 2500 Border Patrol agents and to the approximately 760 plainclothes investigators nationwide.

Border Patrol agents mainly carry out alienage and deportability investigations on individuals apprehended through line watches on the border, farm and ranch checks in

officers confront as a result of judicial rulings, political and public relations pressures and an inadequate resource base, all of which make it difficult for the INS to achieve both rigorous and uniform enforcement of the law.⁹

Part I delineates the distinguishing features of immigration law enforcement, the most important of which is the option the INS has of using either or both civil and criminal proceedings to enforce the INA. Part II discusses the means by which suspected deportable aliens are apprehended and the dilemmas field officers confront in carrying out arrests without warrant in public and private places. Part III discusses why criminal prosecution for INA violations is infrequent, and the factors involved in decisions to prosecute. The Article concludes with a discussion in Part IV of the difficulties that hinder expeditious and uniform administration of the immigration law given the legal, political, and resource constraints operating on the INS.

I. IMMIGRATION LAW ENFORCEMENT

By the standards of federal law enforcement, the INS is clearly at the high volume end of the trade. In the 1982 fiscal year, INS officers approached and questioned over fourteen million persons, and appre-

the interior, city patrols (mainly in towns near the border), transportation checks, and highway observations. Some patrol agents, usually in the higher GS-12 or -13 government salary classifications, work in antismuggling units and some work undercover. Criminal investigators, although they also pursue leads on suspected deportable aliens through surveys of businesses or individual apprehensions (usually at places of work), typically handle more complex investigations involving aliens who have applied for benefits or relief, or aliens involved in narcotics or subversive activities.

⁹ The conclusions in this Article are based on interviews and observations carried out by the author between December 1981 and October 1982. The author visited INS district offices in five major U.S. cities on the east and west coasts and in the midwest, in addition to three U.S. Border Patrol Sector headquarters and a number of substations within these sectors in the southwest. Over that period of time, approximately two full months were spent gathering data in the field on INS enforcement activities. In addition to interviews with Border Patrol agents and criminal investigators, interviews were also conducted with INS inspectors, examiners, trial attorneys, detention and deportation officers, and supervisory personnel. Certain statements made by INS personnel to the author are quoted and used as sources without citation throughout this Article because they were made in confidence. Since the author's experiences in the field predominately involved male officers and male suspected deportable aliens, the masculine gender will be used throughout this Article. Funding for field research was made available by the Sarah Scaife Foundation, Pittsburgh, Pennsylvania, and the Weingart Foundation of Los Angeles, California. The Hoover Institution at Stanford University, California, provided a fellowship stipend to write articles and a book based on the field research.

hended almost one million persons for suspected violations of the INA.⁹ Approximately seventy-five percent of these apprehensions were made at the southern land border of the United States by the United States Border Patrol. Because of the large number of apprehensions made at the southern border, Mexican nationals account for over ninety percent of all INS apprehensions, although they are believed to constitute only between forty percent and sixty percent of all deportable aliens.¹⁰

Although INS apprehensions are high in volume, the majority are not "high quality" either in terms of the violation's seriousness or the threat posed by the offender. Most offenders are referred to as "administrative violators." However, many deportable aliens could be charged under the criminal provisions of both the INA (title 8) and title 18 (Crimes and Criminal Procedure)¹¹ of the United States Code.

Only a very few INA violators can be considered career or professional criminals, such as document counterfeiters or operators of alien smuggling rings.¹² Few violators could be considered danger-

⁹ Immigration and Naturalization Service, U.S. Dep't of Justice, Report of Field Operations, Form G-23.13 & Form G-23.14 (1982) (copies on file at U.C. Davis Law Review office) [hereafter Report of Field Operations].

¹⁰ See Corwin, *supra* note 5, at 223, 225.

¹¹ Immigration officers and employees have the power to arrest aliens violating immigration laws and regulations; they also have power "to make arrests for felonies . . . committed and . . . cognizable under any law of the United States regulating the admission, exclusion or expulsion of aliens." INA § 287(a)(2), (4), 8 U.S.C. § 1357(a)(2), (4) (1982); see 18 U.S.C. (1982).

¹² When immigration officers do pursue INA violators whom they think are real criminals, they take an attitude toward them similar to attitudes held by other law enforcement officers. Thus, INS officers working in Anti-Smuggling Units (ASU) perceive themselves as fighting organized crime. They "take down" smuggling operations in "hits," "duke in" undercover officers to build a tight web of evidence, and worry that their undercover operatives may be "made" (discovered) by members of the smuggling ring. They often plan their operations in consultation with the U.S. Attorney's office, and both their undercover officers and confidential informants can run considerable risks.

Euphemisms are sometimes employed to mute INS's enforcement functions. Thus detention facilities are "special processing centers," and the lock-up in a Border Patrol station or urban district office is a "holding room." Though investigators working in area control units, whose main function is to apprehend illegal aliens at work sites, refer to their activities as "raids," INS officials would probably prefer that they use the official designation "employer survey." Although some officers involved in enforcement activities prefer to use the more standard terminology of law enforcement in their everyday work, the use of euphemisms by INS administrators reveals the Service's public relations sensitivities. The INS would prefer that its many services to the alien community be spotlighted and coverage of its enforcement activities be muted except when the targets of enforcement are likely to win public approval. When a major

ous¹³ and, indeed, they are rarely armed.¹⁴ Thus, the enforcement situation facing most INS officers differs from that of the Federal Bureau of Investigation and Drug Enforcement Administration agents who confront individuals who are not just law violators, but true criminals, and sometimes dangerous ones.¹⁵

One very important distinction between the operational environment of the INS and the more conventional law enforcement agencies is the dual purpose of the INA. The INA both directs the INS to provide services to aliens, such as adjudicating applications for benefits,¹⁶ and to enforce civil and criminal provisions of the Act,¹⁷ often simultaneously. An alien who is initially perceived as a violator may well turn out to be a beneficiary of the law. For example, he may be in the process of marrying a United States citizen and become eligible as an immediate relative for adjustment of status,¹⁸ or he may qualify for discretionary

smuggling ring with a record of abusing aliens has been busted or a suspected terrorist is apprehended with INS help, this makes for good enforcement copy. The apprehension of aliens not involved in criminal activity and who, though INA violators, have made a successful life for themselves in American society often brings unwanted negative publicity.

¹³ Attorneys, doctors, public notaries, travel agents, and ministers, who are often U.S. citizens or lawful permanent residents, occasionally become involved in immigration frauds such as arranged marriages of convenience between citizens and aliens for the purpose of obtaining immigration visas and procurement of fraudulent visas and passports.

¹⁴ Although suspected deportable aliens occasionally carry knives or firearms, very few use these weapons against armed INS officers. The officers do have a high injury rate, however, mainly because of the high volume of apprehensions. Although only a small percentage of aliens try to evade apprehension by physically resisting arrest, the sheer number of arrestees translates into a high incidence of officer injury.

¹⁵ Some aliens involved in serious crimes, for example, drug smuggling, homicide, or assault, come to INS attention as a result of having been picked up by federal or local law enforcement officers on other charges. When the police and courts have finished processing them or have released them from prison, they are turned over to INS for administrative processing. Although some of these aliens are indeed dangerous offenders, they have usually been brought under control by other agencies before they become "turnovers" to the INS.

¹⁶ Officers accept and administer applications for immigrant visas and for adjustments in status. INA § 242(b), 8 U.S.C. § 1252(b) (1982).

¹⁷ See, e.g., *infra* notes 24-40 and accompanying text. This is similar to the FBI's "clients" who fall into two distinct groups. They are either individuals or groups to whom services such as fingerprint and record checks or training of local law officers are rendered, or they are violators who must be located, arrested, and charged with federal crimes. In contrast, INS "clients" are often subjects of enforcement interest and recipients of INA benefits. See *infra* notes 18-21 and accompanying text.

¹⁸ INA § 201, 8 U.S.C. § 1151 (1982). An alien who marries a U.S. citizen becomes

administrative relief such as suspension of deportation.¹⁹ Indeed, his immigration violations, including some that theoretically could lead to misdemeanor or felony prosecutions,²⁰ may be completely forgiven under certain circumstances.²¹ In consequence, INS officers should approach the individuals whom they apprehend, or whose benefit applications they are processing, with a dual orientation: Is this individual just an immigration law violator with no possible equities or is he eligible for a statutory benefit or favorable discretionary action? Conversely, is this applicant for lawful permanent residence or naturalization disqualified by a possible violation of the law, one which may subject him to deportation and possibly even prosecution?²² INS examiners may flag the file of a benefit applicant suspected of fraud and send it to the criminal investigators to check out, or the criminal investigators may independently discover possible violations while conducting a routine background check on a benefit or relief application.²³ Also, local police

eligible for lawful permanent residency as an immediate relative upon the citizen's filing a petition. Of the many priority classifications of immigrants, immediate relative, which also includes a citizen's children under 21 years of age, spouse, and parents, is the most desirable because there is no quota limiting this category. INA § 201(a), 8 U.S.C. § 1151 (1982). Spouses and unmarried sons and daughters of lawful resident aliens are eligible for second preference quota visas, if available. INA § 203(a)(2), 8 U.S.C. § 1153(a)(2) (1982). The wait for an available visa may be more than 10 years, however. For example, in December 1982, second preference applicants from Mexico were backlogged to November 8, 1973. U.S. DEP'T OF STATE, IMMIGRANT NUMBERS FOR DECEMBER 1982 (Nov. 9, 1983) (copy on file at U.C. Davis Law Review office).

¹⁹ INA § 244, 8 U.S.C. § 1254 (1982). An otherwise deportable alien who can prove seven years of uninterrupted physical presence in the U.S., good moral character, and extreme hardship to himself or his citizen or lawful permanent resident spouse, parent, or child is eligible for discretionary administrative suspension of deportation. Satisfaction of statutory prerequisites by no means guarantees suspension, however.

²⁰ For example, the first offense of misrepresentation and concealment of facts to gain entry is a misdemeanor, but repeated offenses subsequent to conviction will be prosecuted as felonies. INA § 275, 8 U.S.C. § 1325 (1982).

²¹ For example, an alien seeking visas, documentation or entry to the U.S. by fraud or misrepresentation may be forgiven if he is otherwise admissible at the time of entry and is the spouse, child, or parent of a U.S. citizen or lawful permanent resident. INA § 241(f), 8 U.S.C. § 1251(f) (1982).

²² Lawful residents are officially designated "lawful permanent residents," though they are referred to variously as "immigrants," "lawful resident aliens" (LRA's), "permanent resident aliens" (PRA's), and "green card holders." Unlike aliens entering with nonimmigrant or diplomatic visas, lawful residents are entitled to remain and work in the U.S. indefinitely.

²³ For example, whenever an alien applies for lawful permanent residence, suspension of deportation relief or naturalization, a routine check of FBI and local police records is carried out.

may alert the INS that an individual they have arrested and charged with an offense is an alien. If he is a lawful resident, he may be subject to deportation, depending on the seriousness of his offense.

A. *Civil v. Criminal Proceedings*

The distinguishing feature of immigration law enforcement is that the majority of violators are processed in civil rather than criminal proceedings. Civil action includes deportation at government expense,²⁴ voluntary departure at the alien's expense,²⁵ and voluntary return under safeguard²⁶ to the border in chartered or INS buses.²⁷ Less than three percent of apprehended suspected deportable aliens were officially

²⁴ Noncitizens are subject to expulsion from the U.S. for any reason specified in INA § 241(a), 8 U.S.C. § 1251(a) (1982), including entry without inspection, INA § 241(a)(2), 8 U.S.C. § 1251(a)(2) (1982).

²⁵ Voluntary departure at the alien's own expense is a discretionary form of relief available to deportable aliens at a deportation hearing who can prove good moral character for the preceding five years and are willing and able to depart from the U.S. INA § 244(e), 8 U.S.C. § 1254(e) (1982); 8 C.F.R. § 244.1 (1983). However, if the respondent is deportable on certain grounds of criminal activity, such as subversive activity, narcotics violations, activities related to prostitution, registration and reporting violations, or national security violations, he is ineligible for voluntary departure. INA § 244(e), 8 U.S.C. § 1254(e) (1982). INS officers may also grant voluntary departure prior to a hearing before a special inquiry officer (immigration judge) under specified circumstances. 8 C.F.R. § 242.5 (1983).

²⁶ This is not, technically, a form of discretionary relief after a finding of deportability, as is voluntary departure. Voluntary return under safeguard is the alternative to an official Order to Show Cause/Warrant of Arrest for a deportation hearing that a Border Patrol agent or investigator may give to eligible deportable aliens. INS Form I-2215 (Order to Show Cause), *reprinted in NATIONAL LAWYERS GUILD, IMMIGRATION LAW AND DEFENSE* app. A-29 (2d ed. 1981). It is used mainly for Mexican nationals apprehended in the interior and along the Mexican-U.S. border who can be persuaded to return to Mexico without formal deportation processing. Voluntary departure, in contrast, is often offered both before and after a deportation hearing, upon a finding of deportability.

²⁷ The authors of the standard practitioner's handbook note that "were it not for . . . grants of voluntary departure, the INS would find its work load virtually unmanageable. According to the 1975 annual report of the INS, 655,814 persons left through grants of voluntary departure, and 23,438 people were deported." *NATIONAL LAWYERS GUILD, IMMIGRATION LAW AND DEFENSE* § 8.7 n.90 (2d ed. 1981).

Many aliens who repeatedly reenter could be prosecuted for felony reentry if they had been convicted for the first time misdemeanor entry. INA § 275, 8 U.S.C. § 1325 (1982). Some candidly admit to their multiple reentries and apprehensions, a situation that — along with the use of aliases — is sometimes the subject of goodnatured banter between patrol agents and aliens.

deported in fiscal year 1982.²⁸ In recent years, fewer than three percent of apprehensions have resulted in federal criminal prosecution.²⁹ By securing voluntary departure or voluntary return, the alien later may be able to qualify for an immigrant or nonimmigrant visa and legally re-enter the United States without first having to secure the permission of the Attorney General.³⁰ By granting aliens this discretionary relief, the government is spared the cost of time-consuming deportation hearings and administrative appeals, along with the cost of alien detention and travel expenses in many cases. It is equivalent in some respects to plea bargaining in criminal cases.

Although criminal proceedings are statutorily available for most immigration offenses,³¹ they are infrequently resorted to. There are several reasons for this, but probably the most important is the nonviolent character of immigration violations, combined with the fact that there are just too many offenders to be dealt with.³² For example, entry without inspection (EWI) is a misdemeanor if the alien has not previously been convicted of the offense; it is a felony upon subsequent conviction.³³ EWI accounts for over ninety percent of all apprehensions nationwide,³⁴ but criminal prosecution for entry without inspection is virtually a dead letter because there are simply too many violators in relation to the federal prosecutors and magistrates available to handle such cases.³⁵ Other offenses, such as making false claims to United

²⁸ Report of Field Operations, *supra* note 9.

²⁹ For example, in 1975, according to the INS annual report, "655,814 persons left through grants of voluntary departure, and 23,438 people were deported." NATIONAL LAWYERS GUILD, *supra* note 27, at § 8.7 n.90. In the same year, there were 14,172 prosecutions. U.S. DEP'T OF JUSTICE, STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE 176 Table 52 (1978) (copy on file at U.C. Davis Law Review office).

³⁰ INA § 276, 8 U.S.C. § 1326 (1982).

³¹ For example, reentry without permission of the Attorney General within five years of deportation is a felony. INA § 276, 8 U.S.C. § 1326 (1982). Aliens who enter with valid nonimmigrant visas but subsequently violate the conditions of their visas by overstaying or working without authorization are not subject to criminal prosecution, although they are subject to deportation. INA § 241(a)(9), 8 U.S.C. § 1251(a)(9) (1982).

³² For a discussion of the reasons for infrequent prosecution of immigration offenses, see Harwood, *Can Immigration Laws Be Enforced?*, 72 PUB. INTEREST 107, 110-15 (1983).

³³ INA § 275, 8 U.S.C. § 1325 (1982).

³⁴ Report of Field Operations, *supra* note 9.

³⁵ Until the mid-1960's, the relatively small numbers of repeat EWI offenders were sometimes fined and even jailed for uninspected entry along both the Mexican and Canadian borders. In 1965, the U.S. ended the bracero program with Mexico, but the

States citizenship,³⁶ giving false and misleading information,³⁷ reentering the United States after deportation without permission,³⁸ and sale of firearms by an illegal alien,³⁹ are also frequently not prosecuted. Some, such as oral false claims to citizenship or lawful residency, may not even be reported by officers. Indeed, even offenders who appear to have committed multiple violations may be granted voluntary return by INS field officers. For example, an alien may appear to have entered without inspection, given false and misleading information about his identity or the ownership of documents on his person, and even made a false claim to United States citizenship, yet still be given voluntary return along with others apprehended at the same time because of administrative expediency.⁴⁰ When a field officer voluntarily returns an alien in this situation, he has exercised broad discretion neither to initiate the civil deportation action nor recommend criminal prosecution.

The high number of voluntary departures and voluntary returns of suspected deportable aliens, which reflects the considerable discretion available to INS officers, arises partly from humanitarian concerns and partly from the Service's sensitivity to public criticism.⁴¹ However, the limited resources available for investigation, adjudication, detention, and deportation are probably the main reason. The problem is aggravated by the cost to the INS of both criminal and deportation proceedings. It is this pressure on resources that explains the de facto liberalization of immigration enforcement in recent years.⁴²

employment of foreign workers, now undocumented, continued. H. CROSS & J. SANDOS, *supra* note 5, at 46-49.

³⁶ 18 U.S.C. § 911 (1982).

³⁷ 18 U.S.C. § 1001 (1982).

³⁸ INA § 276, 8 U.S.C. § 1326 (1982).

³⁹ 18 U.S.C. § 922(a)(6) (1982).

⁴⁰ *See supra* note 26.

⁴¹ *See, e.g.*, INS Operating Instructions, OI 103.1(a)(B). Officers may not have much choice but to enforce the law with apparent leniency by liberally granting voluntary return or deciding not to carry out immigration status checks in certain places (such as bars and residential streets) because a stricter enforcement policy would negatively affect either the resource base or public relations, and sometimes both. Though humanitarian considerations are sometimes involved (e.g., officers think that aliens "jump the fence because they have families to support south of the border" or that "if we confiscated the family's car for smuggling, it would represent a major capital loss to the family"), leniency primarily results from the severe limitations on INS resources in relation to the numbers of violators.

⁴² For a discussion of how litigation by INA enforcement critics can tie down INS resources and may be initiated partly with that effect in mind, see Harwood, *The Crisis in Immigration Policy*, J. CONTEMP. STUD. 45 (1983). If the courts were to require officers to notify aliens of their right to legal counsel or their right to remain silent

Contrary to the claims of INS critics, immigration enforcement is, in consequence, quite lenient.⁴³ Indeed, when officers encounter violators who technically could be apprehended as suspected deportable aliens, they may release them in the field because they believe the aliens are likely to qualify eventually for a benefit.⁴⁴ They will tell an alien to go to the nearest district office to put in a benefit application and get an immigration receipt, which he can show officers in the event he is encountered again. Additionally, many officers feel considerable sympathy towards the plight of honest and hard working deportable aliens, especially when they are doing jobs Americans will not do. By contrast, they have much less sympathy for better educated overseas aliens who fraudulently apply for immigrant visas or engage in other sophisticated frauds against the INS, and who seem more morally culpable than the alien who enters without inspection merely to work.

before questioning them about their place of birth and manner of entry, more aliens might request the opportunity to talk to attorneys and have hearings. However, after realizing they have no eligibility for benefits, many aliens might decide they want voluntary departure after all, imposing additional processing work on the INS. For example, in *Vallejo v. INS*, No. 78-1912-WMB (S.D. Cal. filed May 17, 1982), Legal Service Corporation attorneys succeeded in obtaining deportation hearings for aliens apprehended in raids on the Sbicca shoe factory. According to the government attorneys, none of the aliens had succeeded in gaining any immigration benefit at the hearings or on appeal to the Board of Immigration Appeals. Many INS officers believed the attorneys were more interested in crippling INS enforcement activities than in helping the aliens they were representing, many of whom may have wanted to be returned voluntarily.

⁴³ Certain groups of aliens are subject to more strict enforcement than others, however. See *infra* text accompanying notes 147-49.

⁴⁴ Agents generally assist an alien who appears to be a citizen or who appears to have other possible equities if the agent becomes aware of the fact during the initial interrogation in the field or the formal writing up of the I-213 form at the station. INS Form I-213 (1975) (Record of Deportable Alien form), reprinted in NATIONAL LAWYERS GUILD, IMMIGRATION LAW AND DEFENSE app. A-29 (2d ed. 1981). However, time pressures and an inherent enforcement bias make it unlikely that they will spend all the time needed to explore with an alien all conceivable possible equities. The dilemma, of course, is that there will be some borderline cases. For example, an alien who cannot speak English and does not have a birth certificate may claim to have been born in the United States and delivered by a midwife. Because the officers encounter so many cases that they assert are *mala fide*, they are understandably suspicious. Probably partly for this reason, they appear to scrutinize the emotions and body language of the people they interview almost as carefully as they do the statements an alien makes in support of his claim. Even though agents do not ordinarily articulate this aspect of their occupational expertise, which is usually acquired in the field rather than the academy, such skill appears to be of equal importance with the formal training they receive in such esoteric arts as sign cutting or in other enforcement techniques.

Even when the field officer believes that a criminal prosecution may be warranted, he often chooses civil action because he knows he will face problems getting prosecution authorized as a result of the case load pressures in the federal courts. But there is another factor as well: in a deportation proceeding the INS has the initial burden of proving that the person who has entered without inspection is an alien.⁴⁵ Usually, this proof is obtained as a result of the alien's cooperation, by his admitting to his alienage in the course of the initial questioning in the field. If criminal prosecution were contemplated, in contrast, the officer would have to read the alien the *Miranda* warnings before questioning him.⁴⁶ The warnings, which advise the individual of his right to remain

⁴⁵ INA § 291, 8 U.S.C. § 1361 (1982).

⁴⁶ Since immigration violators are rarely criminally prosecuted, the arresting officer generally does not give the alien the warning against self-incrimination that has been required in criminal arrests since *Miranda v. Arizona*, 384 U.S. 436 (1966). However, INS regulations do require that even if an alien is detained, questioned, and arrested for only civil deportation proceedings, he must at some point be given the warning that "any statement he makes may be used against him." 8 C.F.R. § 242.2(a) (1983). Section 287.3 of the Code of Federal Regulations further states that once an examining officer has determined that formal deportation proceedings will be instituted against an alien, the alien, shall, among other things, be given the quasi-*Miranda* warning described in 8 C.F.R. § 242.2(a) (1983).

It is unclear whether the quasi-*Miranda* warning must be given before or midway through the interrogation recorded on the INS Form I-213. See *supra* note 44. It is also unclear which violations of these agency regulations will invalidate subsequent agency action or result in exclusion of evidence from administrative proceedings. See *United States v. Caceres*, 440 U.S. 741 (1979); *American Farm Lines v. Black Ball Freight Serv.*, 397 U.S. 532 (1970); *United States v. Calderon-Medina*, 591 F.2d 529 (9th Cir. 1979); *United States v. Floulis*, 457 F. Supp. 1350 (W.D. Pa. 1978).

The *Caceres* Court noted that even when regulations are not founded on a constitutional or statutory requirement, an agency still has a duty to obey them. *Caceres*, 440 U.S. at 751 n.14; see also *Vitarelli v. Seaton*, 359 U.S. 535 (1959); *Service v. Dulles*, 354 U.S. 363 (1957); *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954). But see *American Farm Lines v. Black Ball Freight Serv.*, 397 U.S. 532 (1970). After reviewing these precedents, the Ninth Circuit ruled in *Calderon-Medina* that a two-prong test should be used to determine whether deportation proceedings should be invalidated when a Service regulation has been violated. First, the regulation in question must serve a "purpose of benefit to the alien." *Calderon-Medina*, 591 F.2d at 531. Secondly, if it does, the regulatory violation will render the proceeding unlawful "only if the violation prejudiced interests of the alien which were protected by the regulation." *Id.* In *In re Garcia-Flores*, 17 I&N Dec. 325 (1980), the Board of Immigration Appeals decided that 8 C.F.R. § 287.3 (1983) did serve a purpose of benefit to aliens and remanded to allow the respondent an opportunity to demonstrate that an investigating officer's failure to give the warning prejudiced his interests.

Most recently, in *Lopez-Mendoza v. INS*, 705 F.2d 1059 (9th Cir. 1983), *cert. granted*, 104 S. Ct. 697 (1984), the Ninth Circuit held that the exclusionary rule ap-

silent and his right to counsel at government expense, could jeopardize the officer's primary objective: to get the alien to admit that he entered without inspection or is not the citizen he claims to be. Officers do not want the alien whom they encounter as an administrative violator to "clam up." If potentially deportable aliens stopped talking to INS officers, it could jeopardize the main enforcement objective of the INS: expeditious removal of suspected deportable aliens through civil action, preferably, in the case of Mexican nationals, by getting them to accept voluntary return.

The obvious advantage to the INS of relying upon its civil power of deportation is that deportation hearings have lower due process standards than criminal proceedings.⁴⁷ In addition to the fact that aliens need not be given *Miranda* warnings, they have no right to counsel at government expense⁴⁸ or to a jury trial,⁴⁹ hearsay evidence is admissi-

plies in deportation proceedings. The court did not directly address whether or not statements following an officer's failure to give either a *Miranda* or quasi-*Miranda* warning would amount to illegally obtained evidence under the fourth amendment. Since the case involved statements made after an illegal arrest, which were fruit of the illegal search, the warning issue itself was never reached.

⁴⁷ Despite the severity of its effects, deportation has not been found to be a penalty requiring criminal procedure safeguards prior to its imposition. *Harisiades v. Shaughnessy*, 342 U.S. 580, 591 (1952); *Bridges v. Wixon*, 326 U.S. 135, 154 (1945). For a recent discussion of the civil nature of deportation, see Schuck, *supra* note 6. Nonetheless, basic fifth amendment standards of fairness must be applied before a noncitizen can be deported. See *Galvan v. Press*, 347 U.S. 522, 531 (1954). This has been an issue of legal controversy for many years. See Baldasare, *Immigration — In re Sandoval: Deportation and the Exclusionary Rule*, 58 N.C.L. REV. 647 (1980); Juceam & Jacobs, *Constitutional Policy and Considerations of an Article I Immigration Court*, 18 SAN DIEGO L. REV. 29 (1980). See generally *Developments in the Law — Immigration Policy and the Rights of Aliens*, *supra* note 5; *Symposium — Strangers to the Constitution: Immigrants in American Law*, 44 U. PITT. L. REV. 163 (1983).

When an individual admits to being an alien, or officers can determine that he is an alien based on their own sources of information, the alien bears the burden of establishing time, place, and manner of entry and his right to remain in the United States. INA § 291, 8 U.S.C. § 1361 (1982). This burden-shifting rule only applies, however, when the government has made a prima facie case of illegal entry, and not when an alien has simply fallen out of status. *Iran v. INS*, 656 F.2d 469 (9th Cir. 1981).

⁴⁸ INA § 292, 8 U.S.C. § 1362 (1982).

⁴⁹ Administrative adjudication of civil deportation proceedings is mandated by INA §§ 241-250, 8 U.S.C. §§ 1251-1260 (1982). See *Carlson v. Landon*, 342 U.S. 524, 537 (1952) ("Deportation is not a criminal proceeding and has never been held to be punishment. No jury sits. No judicial review is guaranteed by the Constitution."). The Supreme Court has recognized, however, that deportation is a very severe penalty. *Bridges v. Wixon*, 326 U.S. 135, 154 (1945) ("Though deportation is not technically a criminal proceeding, it visits a great hardship on the individual That deportation

ble,⁵⁰ involuntary testimony by the alien can be compelled, and the standard of proof is lower than for violations of criminal law.⁵¹

B. Civil Proceedings

In the event a Border Patrol agent decides to initiate deportation proceedings, he must call the district office to obtain authorization to serve an Order to Show Cause/Warrant of Arrest on the alien.⁵² Because immigration courts are heavily burdened in the major cities, as are most INS detention facilities, the officer may be asked by the district office why the alien should be formally processed.⁵³ This issue arises often in cases involving aliens who are eligible for voluntary return but whom the officer, nevertheless, decides to process for deportation. Deportation proceedings may require detaining the alien in jail facilities or an INS detention center at a cost of forty to seventy dollars per day, if he cannot post bond, pending a hearing before a special inquiry officer.

When an apprehended alien requests a deportation hearing or officers decide he should be processed for a hearing, he will be fingerprinted and photographed.⁵⁴ Theoretically, if he is deported, this documentation should make it easier to prosecute him for a subsequent illegal reentry.⁵⁵ However, because so many suspected deportable aliens use aliases, it is not easy to check for prior deportations and criminal convictions.⁵⁶ They are not likely to come to light unless the alien has given his correct name or is carrying identification with his true name, and INS officers believe there is good reason to do a more thorough background check. Otherwise they are apt to spot a felony re-entrant only if they chance to recognize the individual as someone they have

is a penalty . . . cannot be doubted.”).

⁵⁰ INA § 290(d), 8 U.S.C. § 1360(d) (1982). However, if it can be shown that the INS violated a regulation designed to benefit aliens and the alien was prejudiced by the violation, the INS may not on that basis support the burden of proof of alienage. *In re Garcia-Flores*, 17 I&N Dec. 325 (1980).

⁵¹ The standard of proof is “clear, unequivocal and convincing evidence.” *Woodby v. INS*, 385 U.S. 276, 285 (1966).

⁵² 8 C.F.R. § 242.1 (1983); *see supra* note 26.

⁵³ This situation applies mainly to Mexican nationals who would normally have accepted voluntary return because they lack equities that might make them eligible for INA benefits.

⁵⁴ 8 C.F.R. § 242.4 (1983).

⁵⁵ INA § 276, 8 U.S.C. § 1326 (1982); *see also supra* note 27.

⁵⁶ The use of false names leads to interesting scenes in the Border Patrol stations. When an alien is called out by name to get on the bus, he may not step forward because he has forgotten the alias he used when he was written up on the I-213 Record of Deportable Alien. *See supra* note 44.

processed before.⁵⁷ Although a record of the form I-213 arrest report, Record of Deportable Alien form, will be kept in the local station or district office where the apprehension was made, aliens voluntarily returned do not usually acquire Service files or alien registration numbers that would be available nationwide to field officers. Because of the high number of apprehensions in relation to manpower available, the routine fingerprinting and FBI record check of twenty to thirty years ago are rarely done today unless the alien is suspected of having been involved in other crimes.

All aliens are statutorily entitled to a deportation hearing if arrested after entering United States territory.⁵⁸ However, officers often try to persuade Mexicans to accept voluntary return when they believe the alien has no possible equity that would qualify him for discretionary action by a special inquiry officer at a deportation hearing, such as adjustment of status⁵⁹ or suspension of deportation.⁶⁰ The officer believes he is helping the alien, who otherwise would have to wait five to ten days in detention before the hearing, from which the officer assumes no benefits are likely to result. The officer presumes the alien can get back to his United States job sooner than that, and he believes he may also be sparing the alien the cost of legal representation that will not result in any benefits.

Officers point out that many aliens pay street "attorneys" (and sometimes bona fide legal practitioners) good money for "To Whom It May Concern Letters" which advise the Service that the alien has an attorney or an immigration specialist who should be notified if the client is picked up. If the alien does not qualify for benefits, the officers believe such letters are valueless. However, if the alien still insists on a hearing, he will be processed accordingly. What the officers find frustrating is that after doing the paperwork, some aliens change their minds and

⁵⁷ In patrol stations along the border, index files are kept of the aliases and other identifying characteristics of apprehended individuals suspected of being *polleros* (guides). They may also be fingerprinted even though the agents have decided to grant them voluntary return. Since the testimony of aliens who crossed the border with the guide is generally necessary to prosecute the guide successfully on a smuggling charge — and is usually difficult to obtain unless the guide mistreated his clients — the officers use these files to identify suspected guides when they are caught later. If officers still lack sufficient evidence for a smuggling prosecution, they may decide to process the suspected guide for civil deportation, which will at least put him out of the business for the time he is awaiting his hearing.

⁵⁸ INA § 242(b), 8 U.S.C. § 1252(b) (1982).

⁵⁹ INA § 245, 8 U.S.C. § 1255 (1982).

⁶⁰ INA § 244, 8 U.S.C. § 1254 (1982).

decide they want to join their friends on the bus and take voluntary return, especially after they learn that they will have to be detained because they cannot post the bond of from \$500 to \$10,000 and more. Though some critics consider an officer's threat of detention to be coercive when used to induce Mexican nationals to take voluntary return, the officer believes he is merely explaining the law. Without money for the bond, detention is unavoidable if the alien is judged likely to abscond. The exceptions are Mexican females who may sometimes be released because of the inconvenience of detaining them and their children.

Officers suspect that some male aliens who have families will claim to be single to avoid having to smuggle their families back to the United States, and also because they may not want the INS to go to their living quarters where friends and other relatives might then be subject to apprehension. They spare themselves the added smuggling charge for bringing their families back to the United States. INS officers are also spared having to get children out of school and pick up and inventory personal possessions at the residence. However, if the alien admits to having his family nearby and wants the family picked up, INS officers have no discretion: they must do so. If families are sometimes broken up, as critics allege, it may be because the alien has disguised the fact that they are present in the United States.

Before an officer grants voluntary departure, he must be satisfied that the person is an alien, based on the alien's admission recorded on the form I-213 Report of Deportable Alien.⁶¹ Aliens known to have been convicted of certain crimes or previously ordered deported are not eligible for voluntary departure.⁶² On the other hand, aliens without prior criminal convictions or prior deportations are not automatically given voluntary return. As will be discussed below, much depends on how the alien behaves at the time of apprehension. Because voluntary return is discretionary, officers can use deportation processing as a kind of situational sanction to maintain social control in their operational environment.⁶³

⁶¹ See *supra* note 46. Indeed, the officer must try to ascertain both alienage and deportability before he takes the individual into custody at all.

⁶² See *supra* note 25.

⁶³ This type of control is analogous to that observed by Maureen Mileski in her research in a lower criminal court. There, the threat of a jail sentence was sometimes used to control defendants who were causing trouble in the courtroom. Drunks were sometimes sentenced to jail terms, not because of public drunkenness per se but because they were imposing on the time of the court by their frequent appearances. Mileski, *Courtroom Encounters: An Observational Study of a Lower Criminal Court*, 5 LAW &

C. *Situational Control Enforcement*

The function of law enforcement can be examined in terms of both its strategic deterrence and incapacitation objectives, which are typically among the important reasons for its legislative enactment, and its contribution to bringing law violators under control in the immediate situation of arrest and processing. This latter function, which can be thought of as the situational control objective, is often of critical concern to field officers.

For the strategic deterrence function, the orientation is toward the general deterrent as well as specific incapacitation effects of enforcement. For example, a decision to prosecute an attorney involved in an arranged marriage fraud ring⁶⁴ may not only put that attorney out of business but also serve as a warning to others, especially if, as the INS investigators hope, the conviction is well publicized.

In contrast, situational control applies to the INS officer's mundane problem of expeditiously managing the aliens he encounters daily. Like law enforcement officers everywhere, INS officers resent affronts to their authority. They believe that disrespectful and nettlesome behavior, left unsanctioned, may increase and become an established, habitual response among suspected deportable aliens.⁶⁵ Thus, when an officer has the discretion either to begin formal deportation proceedings against a Mexican national (or sometimes a Canadian) or grant him voluntary return to the border,⁶⁶ the officer is less apt to be influenced by the strategic deterrent function — reasoning, for example, that if this alien

Soc'y REV. 473, 504-05, 523 (1971).

⁶⁴ A marriage that is entered into for the purpose of immigrating to the U.S. may be presumed fraudulent by the INS if it is terminated or annulled within two years after receipt of permanent residence. INA § 241(c)(1), 8 U.S.C. § 1252(c)(1) (1982). However, if the alien can prove that his intent at the time of marriage was not fraudulent, the petitioner is eligible for adjustment of status to lawful permanent residency. *See, e.g., Bark v. INS*, 511 F.2d 1200 (9th Cir. 1975) (holding that separation and unconventionality of marriage are irrelevant if petitioner proves a valid marriage at formation).

⁶⁵ To an extent this has already happened; aliens run when they see the vans arriving in the fields or at the factories. Agents recall times years ago when they could go into a field with just a few men and call through their bullhorn for all those without papers to come over. The workers, usually rural-reared, were deferential and often came to the officers hat in hand. But today's fieldworker is younger, frequently urban born, and is much less deferential than his predecessors. Many officers believe that the new generation has also begun to realize that Border Patrol agents are nice guys in comparison to law officers in their own society, who might shoot them if they ran after being told to halt.

⁶⁶ *See supra* note 26 and accompanying text.

is deported, he and others will be deterred from entering — than by his need for inducing cooperative behavior on the alien's part so that he and other officers can efficiently question and process those who have been encountered in a field operation.

Although deportation is a civil rather than a criminal proceeding,⁶⁷ using it as a threat parallels the way in which local law officers sometimes use the threat of additional or more serious charges to achieve situational social control.⁶⁸ Although many overseas aliens may demand deportation hearings because the process allows them to buy time,⁶⁹ most Mexicans may have little to gain from a hearing because of the ease with which they can quickly re-enter surreptitiously. Thus, for those Mexican nationals who would prefer voluntary return, refusal by the INS to grant it can be used to a limited extent for situational control purposes against those who are recognized as having crossed over too frequently or who flaunt their disrespect for the officer's authority.⁷⁰ It can also be used against those who have perhaps persisted too

⁶⁷ *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952) (holding that deportation is not a "penalty" requiring criminal procedure safeguards).

⁶⁸ For examples of how the police will sometimes use threats of legal sanctions to achieve control over the behavior of violators, see J. SKOLNICK, *JUSTICE WITHOUT TRIAL: LAW ENFORCEMENT IN A DEMOCRATIC SOCIETY* 94-95, 106-08 (1966).

Whether situational control considerations take precedence over strategic deterrence or incapacitation objectives doubtless depends on the gravity of the offense or the threat posed by the offender. An officer who lets a polite speeder off with a warning rather than writing a ticket is obviously unlikely to do the same for a polite homicide suspect. By the same token, the driver of a smuggling car found with suffocated aliens in the trunk is certain to be charged with the 8 U.S.C. § 1324 (1982) felony of transporting, along possibly with other more serious state charges, no matter how cooperative he is or whether or not he has prior convictions.

⁶⁹ An early return to the U.S. is unlikely for aliens who come from overseas or distant Latin American countries and have invested a great deal of time, energy, and money to enter. Thus, any procedural action that delays their deportation not only gives them time to make arrangements for winding up their affairs here but also for acquiring equities such as marriage to a citizen that might enable them to qualify for immigrant status.

After any final order of deportation, an alien may within 10 days file an appeal with the Bureau of Immigration Appeals. INA § 242, 8 U.S.C. § 1252 (1982); 8 C.F.R. § 242.21 (1983). If he does not file an appeal within a six month period or attain immigrant status in some other way, he may be bound over to the INS for detention and deportation. Thus, with careful planning, an alien entitled to a hearing might be able to delay expulsion from the country for at least seven or eight months even if no appeal is filed after a final order. INS officers claim that in some of the busier districts deportable aliens can delay their hearings for a year or more by getting continuances.

⁷⁰ However, mere verbal disrespect from an alien probably does not increase the likelihood of a criminal prosecution because this requires the federal prosecutor's con-

long with a false claim to citizenship, causing an officer to go to considerable trouble to find the information necessary to break the claim.⁷¹ When used against suspected smuggling guides, deportation is apt to be a substitute sanction, arising not so much from the guide's disrespectful behavior as from the fact that criminal proceedings cannot be initiated because there is insufficient evidence.⁷²

Many aliens will attempt to evade arrest by running or hiding. Officers do not like to chase after runners, but are often lenient toward this behavior, although not toward aliens who fight or throw tools and rocks. Running, after all, has become part of the game, and there is not very much officers can do about it. Inside a building, on the other hand, aliens who run or hide sometimes make the officer's job easier, since this behavior not only helps provide the officers with probable cause for forcible detention, but also helps to sort out suspected deportable aliens from other workers.⁷³

Aliens who are rude, who openly challenge an officer's right to talk to them, or who resist questioning, may also be subject to situational sanctioning.⁷⁴ In such cases, if the alien claims to be a lawful resident

sent, which usually requires aggravating conduct more serious than an altercation or scuffle.

⁷¹ See *infra* notes 120-23 and accompanying text.

⁷² The officer's decision to process the suspected smuggler for deportation reflects a mixture of both strategic deterrence and situational control objectives. The alien will be given a service record (Alien Registration or A-file number). If he is subsequently encountered and recognized, he will be easier to prosecute. Officers are suspicious of an alien overheard speaking English because he could well be a lawful resident and these are often involved in smuggling. They are also suspicious of aliens observed using hand signals to guide a group of aliens, but this usually is not sufficient evidence for prosecution for smuggling.

⁷³ If an alien runs or is found hiding, there may be probable cause for his arrest even if he was not known to INS prior to the encounter. During one area control raid on a business in a large city, the supervisor explained that he did not mind that the front office management would have several minutes to alert their illegal workforce because this would help his men sort out the deportable aliens from the other workers. Runners pose more of a problem in open fields and in situations where the officers are few in number. As the officers express it, "The ones you catch are often the two you can hold in each hand."

⁷⁴ "Any alien," officers will insist, "has to talk to us." See INA § 287, 8 U.S.C. § 1357(a) (1982). This section of the Act gives Border Patrol officers the power "without warrant" to "interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States." Subparagraph three of this section, 8 U.S.C. § 1357(c) (1982), permits officers "within a reasonable distance from any external boundary of the United States" to search "any vehicle" for aliens. Subparagraph two permits the patrol to arrest "any alien who in [the officer's] presence or view" is attempting to enter the U.S. in violation of immigration laws. *Id.* § 1357(b). In reality

but is not carrying his I-151 card, the officer can detain and charge him with failure to carry immigration papers,⁷⁵ which will surely inconvenience the alien and may cost him a day's work. The same applies to nonimmigrant visa holders encountered without I-94 receipts or passports. By contrast, the lawful resident or nonimmigrant visa holder who cooperates is apt to be released if officers are satisfied about his status based on his ability to explain how he immigrated, or on other information.

Leniency is sometimes also extended to an entire group during an area control status check, although it is hard to know whether this is primarily for reasons of administrative convenience or because of the way the aliens have behaved. Thus, when an employer cooperates during a survey, the officers are more apt to give the aliens working for him who claim they left their I-151 cards at home the benefit of the doubt. They may check out the claims with somewhat less thoroughness or even break off the survey early. Often the reason is simply the pressure of time. If too many aliens are brought in, more time will be required to do the paperwork. Those who really are green card holders may complain and may have to have the cards brought by their relatives. Moreover, the employer's output for the day will suffer. The officers do not want to inconvenience a cooperative employer unnecessarily. They reason that if the employer has been cooperative, the aliens probably have nothing to hide.⁷⁶

these three paragraphs amount to detention provisions, and they have been the subject of considerable litigation. The case consensus is that the degree of suspicion of alienage for detention purposes is less than the probable cause needed for criminal searches. In *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975), the Supreme Court limited INA § 287 by holding that except at the border and its functional equivalents, vehicle searches may only be prompted by "specific articulable facts" that "reasonably warrant suspicion that the vehicles contain [illegal] aliens." *Id.* at 884. The Court loosened the standard in *United States v. Cortez*, 449 U.S. 411 (1981), adopting the "strong suspicion" requirement for detention from *Terry v. Ohio*, 392 U.S. 1 (1968) (reasonable suspicion required to stop and frisk suspect). This allowed officers to detain and question without specific articulable facts, but only if they had a suspicion based on the circumstances as a whole.

⁷⁵ INA § 264(e), 8 U.S.C. § 1304(e) (1982).

⁷⁶ In one factory survey, after the owner consented to entry by the officers, only two or three aliens were brought back and these were aliens who had either physically run off or had resisted questioning. The others may all have been the bona fide green card holders they claimed to be. But the noise in the plant and the fact that most workers were Asians who could not speak English — which made the officers dependent on a single manager to help with the translation — may also have been factors that inclined them to give the legal resident claimants the benefit of the doubt.

Aliens who try to bluff with false citizenship claims⁷⁷ pose a more troublesome problem. Citizens are not required to carry identification, and the burden of proving alienage and deportability is on the government.⁷⁸ Thus, the investigative resources required to establish proof of alienage in the absence of the suspect's own admission would be considerable if too many aliens persisted as far as a hearing with false claims. Yet, if an alien evades apprehension with a successful bluff, he may become emboldened and more difficult to handle for the next officer who encounters him in the field. He may also communicate his success to others. Luckily, false citizenship claims are few, and the majority of those who bluff usually confess at the time of initial questioning, when the factual inconsistencies in their stories are brought to their attention.⁷⁹

If the suspected claimant persists with his claim despite the officer's having shown him that the documents he has presented are false on their face, or that the statements he has made are shot through with errors and inconsistencies, the officer is likely to become increasingly irritated. All is forgiven if the alien plays according to the unspoken rules of the game and confesses after the patent absurdity of his claim becomes obvious. If, however, the officer has to spend considerable time tracking down birth records or other information from various agencies, he is much more apt to request that an Order to Show Cause/Warrant of Arrest⁸⁰ be served so that the claim can be tested in a deportation hearing, and may even insist that his superior press for criminal prosecution. The more typical procedure in the case of an alien who stone-

⁷⁷ See *infra* notes 120-23 and accompanying text.

⁷⁸ See INA § 242, 8 U.S.C. § 1252 (1982). Once the government proves alienage of a person who has entered without inspection, the individual is presumed deportable unless he can prove time, place, and manner of legal entry. INA § 291, 8 U.S.C. § 1361 (1982); see also *supra* note 47.

⁷⁹ For example, the alien may claim birth in a Tucson hospital, and the officer will point out that this hospital was built just four years ago.

I observed the questioning of an alien approached on a street by two investigators on the basis of reasonable suspicion of deportable status. He spoke broken English but claimed to be a U.S. citizen and said he had his papers in his apartment. After we went back to his apartment to look at his papers, he went through the motions of trying to find his certificate in a dresser, then asked his wife if she knew where it might be. The officer finally said, "Look, do you want to live a lie? Do you want your family to live a lie?" At this point the alien conceded his Mexican birth and was taken downtown.

⁸⁰ For additional discussion of interrogation techniques, see *infra* notes 120-23 and accompanying text. The issuance of INS Form I-2215, see *supra* note 26, commences every deportation hearing. It provides notice to the respondent so that he may obtain counsel and prepare his case. *Ungar v. Seaman*, 4 F.2d 80 (8th Cir. 1924).

walls with a highly suspect claim is to gather whatever information is known about the individual and release him.⁸¹ Then, as time permits, the agent can pursue the investigation. If he can positively establish alienage, he can go after the person later.

II. ARREST WITHOUT WARRANT OF SUSPECTED DEPORTABLE ALIENS

Another very important characteristic that distinguishes the INS from other federal law enforcement agencies is the frequency of arrest without warrant.⁸² Warrants are usually issued only for individuals suspected of having committed more serious immigration violations such as transporting or harboring deportable aliens,⁸³ fraudulent efforts to obtain lawful resident status or other benefits,⁸⁴ or failure to appear at a hearing.⁸⁵ Warrantless arrests, in contrast, usually involve aliens not previously identified by the INS and occur after officers approach and question individuals during routine field operations such as area control surveys in businesses,⁸⁶ farm and ranch

⁸¹ The Service is extremely concerned about the possibility of misapprehending and holding a citizen beyond an hour or so, which might subject the arresting officer to suits for false arrest, as well as create bad publicity for the Service. It appears that most supervisors urge subordinate officers to err on the side of caution, reasoning that it is better to let a suspected deportable alien go free than to bring in a person who turns out to be a citizen, because of the potential political and legal trouble. For a discussion of how the concerns of "street level" bureaucrats (school teachers, social workers, police officers) over tort actions can inhibit rigorous decisionmaking, see P. SCHUCK, *SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS* 59-81 (1983).

⁸² These arrests follow from the application of INA § 287(a)(1), 8 U.S.C. § 1357(a)(1) (1982) (authority to stop and question an individual known or believed to be an alien) which can turn up suspicion of illegal alienage sufficient for forcible detention and possibly probable cause to arrest without a warrant under INA § 287(a)(2), 8 U.S.C. § 1357(a)(2) (1982).

⁸³ INA §§ 273-274, 8 U.S.C. §§ 1323-1324 (1982).

⁸⁴ INA § 275, 8 U.S.C. § 1325 (1982).

⁸⁵ INA § 242(a), 8 U.S.C. § 1252(a) (1982).

⁸⁶ Some field operations are initiated by tips mailed or phoned in to Service offices by an informant. To raid businesses, INS officers need to have reliable information that deportable aliens are employed, in case the owner refuses to consent to the survey and a search warrant is necessary. In that case, the officers need the names of specific individuals suspected of being deportable.

One result of increasing judicial scrutiny of INS field operations to insure adherence to fourth amendment guarantees against unreasonable searches and seizures is a heightened conservatism on the part of investigators and patrol agents. During area control factory surveys in Los Angeles in the summer of 1982, officers carried a pad of paper and immediately jotted down the articulable facts they observed for each worker ques-

checks,⁸⁷ city patrols, traffic observation, and the border linewatch activities of Border Patrol agents.⁸⁸

A. Temporary Detention

Officers must have reasonable suspicion that an individual is an alien before questioning him.⁸⁹ The questioning may then lead to probable cause for arrest. The United States Supreme Court has not yet decided whether temporary detentions, pedestrian stops, require reasonable suspicion of illegal alienage or merely alienage. In most jurisdictions, the circuit courts of appeal require that officers need only have reasonable

tioned and apprehended in case they might be called to testify in court months later. A recent decision in the Ninth Circuit required that investigators conducting factory surveys have individualized suspicion of illegal alienage for each worker questioned. *International Ladies' Garment Workers' Union v. Sureck*, 681 F.2d 624 (9th Cir. 1982), *cert. granted*, 103 S. Ct. 1872 (1983). However, this decision was reversed by the United States Supreme Court. *INS v. Delgado*, 52 U.S.L.W. 1162 (U.S. Apr. 24, 1984) (holding that individual questioning of employees about their citizenship by INS agents did not amount to a detention or seizure under the fourth amendment).

In July, 1983, INS initiated a new case management system for criminal investigators. The term "employer survey" or "employer operation" is now used in place of the earlier "Area Control" and "factory survey" terminology. Under the new case management system, investigations supervisors establish priorities for cases based on the seriousness of the violation and likely enforcement impact of targeting certain violator groups or business establishments. Thus, "body count" alone is no longer as important a measurement for employer surveys as it was before July 1983.

⁸⁷ Administrative searches of open fields do not require a warrant or the consent of the owner. *Cf. Air Pollution Variance Bd. v. Western Alfalfa Corp.*, 416 U.S. 861, 865 (1974) (affirming the "open fields" doctrine that some administrative inspections do not infringe on a searched entity's reasonable expectation of privacy).

⁸⁸ Patrol agents often go to areas where they know aliens can be found, such as railroad yards, bus stations, and agricultural fields. Not all deportable aliens will necessarily be questioned and apprehended, because of limitations on time and resources. If too many aliens are apprehended, the officers may not be able to process them by the time the bus arrives on its scheduled route to the border, in which case the aliens must be housed overnight at INS expense. On occasion, female workers encountered in a crew may not be questioned because if they turn out to be deportable, the Service must locate and bring in any children with them in the U.S., adding to time and resource pressures. Females also require separate facilities and procedures.

⁸⁹ Immigration officers may "interrogate any alien or person believed to be an alien as to his right to be or remain in the United States." INA § 287(a)(1), 8 U.S.C. § 1357(a)(1) (1982); *see Au Yi Lau v. INS*, 445 F.2d 217, 222 (D.C. Cir.), *cert. denied*, 404 U.S. 864 (1971) (quoting *Yam Sang Kwai v. INS*, 411 F.2d 683, 686 (D.C. Cir.), *cert. denied*, 396 U.S. 877 (1969)). In the Ninth Circuit, questioning does not require reasonable suspicion when no seizure is involved and the individual remains free to depart at will. *Cuevas Ortega v. INS*, 588 F.2d 1274, 1277 (9th Cir. 1979); *cf. United States v. Mendenhall*, 446 U.S. 544 (1980).

suspicion of alienage.⁹⁰ This low standard may be satisfied by a combination of foreign appearance, language, and location. Thus, for individuals encountered at night near the border, fewer articulable facts are required than for individuals encountered in public settings away from the border.

In other jurisdictions, the officer may, depending on the circumstances, need to have reasonable suspicion of illegal alienage,⁹¹ a higher standard that may be satisfied by additional facts such as nervousness and attempts to walk away. This higher standard is also required for any temporary detention of a vehicle beyond the immediate border or its functional equivalent.⁹² Specific, articulable facts combined with the experience of the officer may be weighed in the aggregate of factors giving rise to reasonable suspicion in vehicle stops.⁹³ However, race, foreign physical appearance, or foreign language alone are insufficient grounds.⁹⁴

The problem for officers is that articulable facts of alienage alone can be ambiguous, although those of illegal alienage are usually fairly well defined. Aliens are not readily distinguishable from naturalized citizens of foreign birth or, indeed, from many native born citizens. A foreign appearance, attire, heavy accent or even foreign speech is not always a reliable indicator of alienage. In grappling with this dilemma, INS policy guidelines emphasize that while officers may question any individual they have reason to suspect is an alien, if the individual is nonetheless free to disregard the questions and walk away, then there is no intrusion upon that individual's liberty in the event he turns out to be a lawful alien or citizen.⁹⁵

The United States Supreme Court recently approved INS enforcement practices in *INS v. Delgado*.⁹⁶ The Court held that factory "surveys" by armed INS agents did not constitute a seizure of the entire work force. This holding was reached in spite of the fact that the show of force, by any standard, was coercive. In *Delgado* a relatively

⁹⁰ See *United States v. Brignoni-Ponce*, 422 U.S. 873, 884 n.9 (1975) (cases cited therein).

⁹¹ E.g., *International Ladies' Garment Workers' Union v. Sureck*, 681 F.2d 624, 635-38 (9th Cir. 1982), *rev'd on other grounds*, *INS v. Delgado*, 52 U.S.L.W. 1162 (U.S. Apr. 24, 1984).

⁹² *United States v. Brignoni-Ponce*, 422 U.S. 873, 884 (1975).

⁹³ *United States v. Cortez*, 449 U.S. 411 (1981).

⁹⁴ See *id.*; *United States v. Brignoni-Ponce*, 422 U.S. 873, 878-87 (1975).

⁹⁵ See U.S. DEP'T OF JUSTICE, *MANUAL M-69, THE LAW OF ARREST, SEARCH AND SEIZURE FOR IMMIGRATION OFFICERS* (rev. 1983).

⁹⁶ 52 U.S.L.W. 1162 (U.S. Apr. 24, 1984).

large number of agents, from fifteen to twenty-five, surrounded the exits and systematically directed questions to all the workers inside. Later testimony of citizens and lawful permanent residents indicated an atmosphere of compulsion which coerced them to answer even though they had no wish to do so. Nevertheless, the Court decided that questioning of the employees by INS agents concerning their citizenship did not amount to a detention or seizure under the fourth amendment.

In his dissenting opinion, Justice Brennan noted that indiscriminate questioning of all workers present was not surprising since many of them may appear to be of Latin origin. Paradoxically, fourth amendment scrutiny may result in an enforcement bias favoring apprehension of Mexican and other Latin American nationals. This arises not because of any subjective prejudice on the part of officers against Latinos. To the contrary, some would actually prefer to work the OTM (other than Mexican) aliens, for reasons discussed above, and, in most districts, efforts are made to target other nationality groups.⁹⁷ However, the officers assert that Mexicans are much more apt to provide the necessary articulable facts for a defensible interrogation because Mexicans tend to be more apprehensive and more apt to provide the demeanor cues — furtive behavior or running — giving rise to reasonable suspicion of illegal alienage. Also, if they are recently arrived or migratory agricultural workers who travel back and forth between Mexico and the United States with some regularity, they are less apt to be acculturated in dress and other aspects of appearance in contrast to the students and tourists from abroad who overstay their visas.

1. Specific Articulable Facts

Although the potential articulable facts must number in the hundreds,⁹⁸ officers keep in mind the strongest indicators of illegal alienage.

⁹⁷ Many officers prefer to arrest other than Mexican (OTM) aliens because more investigative skill is required and there is more variety in the work than is provided by the "bus to the border" apprehensions of Mexicans. Additionally, some OTM aliens will lose their jobs when their employers learn that they lied about their immigration status on a job application form. Some officers believe that apprehending white-collar aliens of other nationalities also increases public awareness that the "illegal alien" problem is not just a Mexican problem. Finally, many believe that no nationality group should feel that it is "home free." All nationalities should be worked to the extent administratively possible, both to insure fairness and to insure that all illegal aliens have to at least "look over their shoulder" and worry about possible apprehension.

⁹⁸ *United States v. Brignoni-Ponce*, 422 U.S. 873, 884-85 (1975), includes a list of specific, articulable facts. In addition, on highway observation, INS officers will look for heads ducking down, passengers riding up front in a van disappearing into the back

These include those that are universal, such as furtive demeanor, and those that are specialized, pertaining to a particular locale or work situation.⁹⁹ When an officer sees an individual in a place where deportable persons are known to congregate or have been apprehended in the past — a bus station, railroad yard, lettuce field, business notorious for employing undocumented aliens, near the border — he has one articulable fact: location. The time of day may be another: the officer may spot individuals among freight cars in a railroad yard or in an uninhabited place near the border at night. If the individual has bits of brush in his hair, dirt on his pants, is wet from the waist down (near the Rio Grande), is wearing two changes of clothing at the airport, has a Mexican style haircut, or is wearing clothing of a style not typical of citizens and legal residents of the same ethnic group, the officer has additional articulable facts of appearance.¹⁰⁰

At a highway checkpoint, officers look for individuals who suddenly become rigid at the wheel and whose neck veins bulge from a surge of adrenalin, or who have rolled up their car windows in the belief the agent will not seek to question them, even though it is hot and they have no air conditioner in the car. In open fields, officers will look for individuals who move from the row they have been working to another, or who try to work their way into a group that has already been questioned and who are throwing furtive glances back in the officer's direction.

There are potentially hundreds of facts that officers may observe, but usually the strongest and most dependable articulable facts for reasonable suspicion are behavioral traits.¹⁰¹ If the individual refuses to look the officer in the eye, or after seeing the officer, quickly glances away, or if the individual looks nervous or seeks an escape route, the officer has all he needs to approach and talk to the person. Here, too, the

when the patrol car appears, drivers refusing to look at the officers when they drive alongside, drivers appearing to be looking for a good place to pull over and dump their loads, and cars with airshocks.

⁹⁹ Agents may spot a kind of hat with a tassel worn by aliens who cross into southern Texas from a certain state in Mexico, or a U-Haul trailer stationed near the Rio Grande riverbank at night.

¹⁰⁰ Most of these facts apply to Mexican nationals. In contrast, a Canadian student working in a bar or a Filipino clerk working in a clothing store does not often give officers articulable facts for reasonable suspicion. Their dress and behavior are apt to be no different from that of others working around them. In such cases, investigators rely almost entirely on tips from informants that name the individual and give his place of work.

¹⁰¹ See, e.g., *Lee v. INS*, 590 F.2d 497, 502 (3d Cir. 1979).

locale and circumstances determine to an extent which articulable facts are significant.

The articulable facts giving officers reasonable suspicion to stop an individual are not generally ambiguous. Indeed, their considerable diversity and number give officers great leeway. The field duties of officers may nevertheless be scrutinized by courts to see if a detention has been effectuated. However, while courts are able to ascertain the existence of a detention, they are left only with the officer's testimony concerning the necessary articulable facts.¹⁰²

The following tactic is sometimes used by officers, though it has not, to my knowledge, yet become a matter of litigation. A plainclothes officer goes to a bus stop known to be used by aliens awaiting transportation to work. The officer ambles by a waiting group, then turns toward a man and asks an apparently innocent question in English, "What time is it?" or "Does the 87 bus stop here?" The man answers in Spanish or appears confused. The officer then introduces himself, "Hello, I'm with Immigration. Where are you from?" One advantage of such a tactic for the plainclothes investigators is that it maximizes the element of surprise and, thus, they rationalize, enhances safety. The officer can approach close enough to the person to arrest him before the person realizes what is going on and decides to run, perhaps into a car or another pedestrian. Another more important advantage of this covert means for checking a person's immigration status is that it spares embarrassment on both sides if it turns out that the officer guessed wrong. A patrol agent stationed in a southern border town explained that when he spotted an individual who was a "50-50" candidate for a status check, he might ask the individual in English if he had happened to notice two fictitious men passing by. Based on the individual's response, he would decide whether he should continue with explicit questions about the person's immigration status. He explained that he used this approach to avoid embarrassing an individual who might be an American of Mexican descent.

Avoiding unpleasant encounters with Mexican-Americans is a genuine motive for using such covert interrogatory gambits. When Mexican-Americans are questioned by mistake, some are understandably irritated, especially if they live in the more heavily patrolled areas of the southwest and have been questioned a number of times. As a rule, they do not appear to be upset over or able to verbalize the fourth amendment issue that has figured in litigation, that is, of being "unreasonably

¹⁰² It is, of course, easy to simply create the necessary articulable facts after the fact. See *infra* notes 103-04 and accompanying text.

seized" in a sidewalk interrogation. Rather they express annoyance at being mistaken for a *mojado* (wetback) or because the officers still have not recognized who they are. "When are you guys going to remember who I am?" or "What, do I look like a wetback?" is more likely to be the response than an insistence on constitutional rights.

But the question remains whether the officer himself has created the necessary articulable fact justifying a formal immigration check when he turns up a deportable alien using the innocuous question approach. Aside from the suspicious behavior he has generated, the officer may have had no other facts, apart from physical location or a foreign physical appearance, to justify approaching the person to begin with.¹⁰³ The interesting legal issue is whether the INS officer's asking a person on the street the kind of innocuous question people routinely ask each other is impermissible. If the question is considered an official act, it is arguable that the officer should first have had reasonable suspicion of alienage (or illegal alienage, depending on the jurisdiction) before he approached the individual with his innocuous question.¹⁰⁴

Apparently, INS policy discourages officers from using the innocuous question as a covert means of beginning an immigration status check, although such practices are probably very hard to monitor. Policing officer compliance with the legal and policy standards for approaching and questioning suspected deportable aliens is probably beyond the ability of the courts or higher level INS supervisors. Officers can easily strengthen their reasonable suspicion for an interrogation after they have begun talking to an individual by looking more closely at his behavior or dress once they have moved closer to him and have begun their conversation. What they saw vaguely from a distance comes more clearly into focus at close quarters, and a hunch may be borne out after the individual they began talking to becomes nervous. As one officer put it, "Once in tow, you got to come up with articulables and you look at [the alien] more closely."

It is easy to come up with the necessary articulable facts after the fact. When this occurs, it is referred to as "canned p.c." (probable cause). Who is to say if a glance was furtive and who is to judge

¹⁰³ An analogous situation can arise when patrol agents are checking a car on the highway. They may drive alongside and wave to the occupants to test their response to their presence. The response may then add additional articulable facts to those they may have already had.

¹⁰⁴ For example, in *Marquez v. Kiley*, 436 F. Supp. 100 (S.D.N.Y. 1977), the court held that when an INS officer approaches an alien for questioning, the alien is being stopped and detained; thus the officer must have suspicion of illegal alienage prior to questioning. *Contra Lee v. INS*, 590 F.2d 497 (3d Cir. 1979).

whether the clothing an individual was wearing was Mexican? Any strenuous effort by the courts to properly enforce the reasonable suspicion standard would probably come to naught. In any case, the stakes involved are usually too trivial to make such an effort worthwhile. Agents try to adhere to the requirement, but their primary motivations are professionalism and administrative efficiency, rather than fear of censure. Little is gained by spending time interviewing persons who are not illegal aliens. Mistakes do occur but officers take no pride in that fact.¹⁰⁵

Though a sense of professionalism combined with administrative pressures constrains rank-and-file officers to try their best to winnow the possible candidates for immigration status checks to "good traffic" (deportable aliens), INS officials higher up the chain of command want the legal standards adhered to primarily because they are concerned that politicians and the public will complain. They also fear that exposés by the media will cause new public relations difficulties, or that the officers' authority in the field will be curbed by new court rulings. Thus, policy is often more restrictive than court rulings on fourth amendment search and seizure issues. For example, there is no judicial prohibition on carrying out checks in residential streets,¹⁰⁶ but if officers

¹⁰⁵ Most officers I observed and spoke to subscribe to what might be called a myth of invincibility. They believe they make correct discriminations based on visual observation, before any questioning of the individual, in 90-99% of the cases. Officers claim they soon develop a "sixth sense" for distinguishing an illegal alien in a public place such as a bus stop or street. How good they become at this is hard to know. My admittedly limited observations suggest that they may be exaggerating their infallibility. While riding with one patrol agent who guessed that we would have nine out of 10 "hits" on cars we pulled over during a highway traffic check, the actual tally was closer to one out of about four or five.

While the reality of day-to-day enforcement may not bear out their estimate of their skill in this regard, the existence of the belief suggests that professionalism is a strongly held norm. Though the articulable facts that give them grounds for suspicion are not usually legally problematic or ambiguous, neither are they absolutely reliable guides to the successful sorting of illegal from legal aliens and citizens in public places. I have observed incidents when the individuals approached and questioned turned out to be authorized aliens. But I have no data which would show the average success rate for pedestrian encounters in the field.

¹⁰⁶ There are other valid reasons. When the decision was made to restrict area control operations to businesses after the Carter administration's 1980 census moratorium on area control, farm and ranch checks, and other large-scale operations was lifted, INS policy had begun to shift in the direction of targeting employed aliens. With high unemployment, it made sense to concentrate the Service's limited resources on worksites since jobs might thereby be liberated for citizens and lawful residents. Also, residential raids usually have much lower productivity because more aliens will be encountered

were to go into residential areas, they might pursue aliens into private dwellings or yards. In any case, why make arrests in such areas when doing so will lead to public charges of shotgunning or complaints that aliens are being dragged from their homes — since even distorted media accounts of an operation can cause problems.

Not surprisingly, many officers consider efforts by federal judges to assess the constitutional adequacy of INS field tactics — which officers consider relatively nonintrusive — as an expression of judicial lack of faith in the professional judgment of officers. In their view, the judiciary fails to acknowledge that most officers have internalized standards of professional practice that lead them to try to minimize enforcement encounters with lawful aliens and citizens. Moreover, only the apprehensions of administrative or criminal violators count in productivity measures for a Border Patrol station or INS district office.

B. Arrests

Although the INA states that immigration officers need only have a reasonable belief that an individual is an alien in violation of the law in order to arrest,¹⁰⁷ the courts have interpreted “reasonable belief” under constitutional standards to mean probable cause.¹⁰⁸ Hence, officers must have knowledge of facts and circumstances sufficient to justify a prudent person’s belief that an offense has been or is being committed. However, with respect to arrests for INA violations, the Supreme Court in *United States v. Cortez*¹⁰⁹ upheld an arrest based on the ability of Border Patrol agents to make deductions about criminal activity from facts meaningless to the average person. This case is distinguishable from most arrest cases, however, by the Border Patrol’s unusually painstaking factual investigation prior to arrest.

For raids on businesses, INS officers need to have reliable information that illegal aliens are working there, in case the owner refuses to consent to a survey and a warrant must be obtained. Having the names of specific individuals (often provided by informants) strengthens the probability that illegals will be found in the business, and the officers must show probable cause when they request a warrant. If they do not have a tip from a reliable citizen contact, they sometimes go out to the

who, though deportable, have equities that may make them eligible to remain. That means more administrative processing work.

¹⁰⁷ INA § 287(a)(2), 8 U.S.C. § 1357(a)(2) (1982).

¹⁰⁸ See, e.g., *United States v. Olivares*, 496 F.2d 657 (5th Cir. 1974); *Cabral-Avila v. INS*, 589 F.2d 957 (9th Cir. 1968), cert. denied, 440 U.S. 920 (1979).

¹⁰⁹ 449 U.S. 411 (1981).

business and bolster their justification for a warrant by picking up some of its illegal employees on their way to work.

Some area control apprehensions in cities involve only those individuals whose names and places of work were reported to the Service by a tipster. However, in the majority of area control surveys, which usually involve businesses in the blue-collar or service sector, officers expect to find more illegals than those listed in the informant's letter or phone call. As one investigator expressed it, "A good lead contains specific and detailed information rather than a vague allegation of illegals and has the possibility of leading to at least ten to twenty other illegal workers."

In contrast to the investigators, patrol agents often simply go to areas where they know illegals can be found, such as railroad yards, bus stations, or agricultural fields. In public places, the problem of obtaining consent for a search does not arise. This difference in emphasis between the criminal investigators and patrol agents may be partly due to the difficulty in obtaining administrative warrants, though differences in the enforcement mission and style of the two groups are probably the main reason. Patrol agents enjoy working outdoors and are stationed in areas where outdoors apprehensions are productive. They are trained in the tactics of "cutting sign" on aliens moving through desert and other terrain. Many criminal investigators, in contrast, view their role as gathering information to make important cases, especially cases relating to aliens involved in crime or immigration fraud. Many view area control surveys as "plainclothes Border Patrol" work involving "people moving."

In addition to being an area of continuing and troublesome litigation for the Service, warrantless arrests in public and private places carry an additional heavy load of uncertainty for INS field officers, who must try to keep pace with the latest legal rulings and policy guidelines from the Central Office.¹¹⁰ Even when they have met all of the legal requirements of an arrest, officers can and frequently do exercise discretion as to whom to apprehend. Aliens are sometimes encountered in the field who technically could be brought back to the Border Patrol station or

¹¹⁰ Interestingly, officers seem to be unclear as to what constitutes an arrest. Some officers believe that when they put handcuffs on an alien or order him into a van or car, they have arrested him. Others believe that an arrest may not necessarily have occurred even after they have taken the individual back to the station if they were doing so in order to check out the bona fides of his claim to lawful residence or citizenship and if they have no intention of holding him beyond an hour or so to make the necessary checks. One investigator supervisor explained that he instructed his officers never to tell an individual that he was under arrest until they had ascertained that he was a deportable alien.

district INS office and served with an Order to Show Cause, yet are "cut loose" (allowed to return to work) instead. When this happens, it is typically because officers believe that the alien has something going for him, that is, has acquired equities that are likely to qualify him for a benefit. For example, the alien may tell the officer that he has just married a United States citizen. The officer may be satisfied after seeing the marriage certificate, calling the wife, or just asking a few questions and deciding that the alien is leveling with him. The officer reasons that at some point the alien's wife will put in a petition for an immediate relative visa. Thus, he may simply tell the alien to go to the district office, make application for the benefit and obtain the proper immigration receipt. The officer can easily rationalize this use of discretion by pointing out that a warrantless arrest is justified only when he believes that an alien will abscond. Aliens who have something going for them may be judged unlikely to abscond.

Residential arrests are a significant exception to the usual practice of warrantless arrests. When officers decide to make an arrest at a residence, INS policy usually requires them to have a warrant. As a matter of law, they must have a search or arrest warrant if the resident refuses them entry.¹¹¹ Ordinarily, officers must obtain approval from regional INS headquarters to carry out certain residential arrests.¹¹² Officers do not, however, need regional approval to pursue a case investigation that requires calling on individuals at home to obtain information pertinent to either a criminal or a routine adjudications investigation.¹¹³

Because the INS is extremely sensitive to charges that its officers "shotgun" in residential areas (carry out area control sweeps of apartment buildings in neighborhoods with high concentrations of suspected deportable aliens), shotgunning in urban neighborhoods, or raiding "wet shacks" in rural areas, is no longer approved, and supervisors try

¹¹¹ See, e.g., *Katz v. United States*, 389 U.S. 347 (1967) (electronic eavesdropping on public telephone violated fourth amendment).

¹¹² INS officers usually require regional authorization when an informant's tip leads them to a suspected deportable alien who, the investigators have determined, cannot be apprehended at his work place. INS policy is to find out where an alien works and arrest him there if at all possible. Regional approval for residential arrests is not required (although warrants usually are) in cases arising out of antismuggling or other criminal investigations involving "pattern and practice" violators, aliens, or citizens who are involved in an organized pattern of criminal activity.

¹¹³ For example, agents may talk to neighbors to ascertain whether an alien who is applying for naturalization or legal resident status is an individual of good moral character, or check out the bona fides of a form I-130 marriage petition submitted by a citizen on behalf of an alien spouse. Nor do agents need regional approval to pick up an alien who absconds after having been found deportable in a hearing.

to prohibit it.¹¹⁴ It sometimes happens, however, that when officers pursue a legitimate case lead to a residence, they encounter individuals who, based on their behavior and appearance, appear to be deportable aliens. Many officers feel obliged to carry out an immigration and citizenship status check on anyone who they have reasonable grounds to believe is deportable regardless of where he is encountered. They cite their statutory authority to "to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States."¹¹⁵ For example, upon entering a building, they may ask a person in the hall where they can find Mr. Gomez' apartment. If the individual is uncomprehending and becomes furtive, the officers may have reasonable suspicion to believe he is an alien and possibly a deportable alien. Their regulations also require that they inquire into the immigration status of anyone they interview in the course of a case investigation.¹¹⁶ They will next ask him where he was born. When INS higher-ups wonder how the officers could have apprehended so many aliens, the investigators will explain that they encountered the other individuals in the course of pursuing a legitimate case investigation. But the Service's critics are apt to see it differently, as another instance of residential shotgunning. INS administrators in the regional and central offices may have to answer to the press or to politicians who do not understand the difference between shotgunning and the serendipitous apprehensions arising from a case investigation.

C. Interrogation

An alien may be questioned about his immigration status before and after arrest for both criminal and civil offenses. In civil proceedings, it is not clear whether the questioning need be preceded by a statement of the individual's rights to due process. The regulations require that ex-

¹¹⁴ The policy exists partly to prevent sweeps by officers in residential and public places that can lead to media exposés and political complaints. The central reason for INS restraint, however, probably arises from the Central Office's concern that court challenges might lead to further curbs on officers' field authority. There is no legal prohibition on officers carrying out immigration status checks in public places such as streets or bus stops in residential neighborhoods. However, in some districts, the officers are discouraged from working in these areas because of the political problems it can cause for the INS. It appears that another reason for curtailing area control operations in residential areas is that when officers questioned individuals on the street, they occasionally had to pursue those who fled onto private property.

¹¹⁵ INA § 287(a)(1), 8 U.S.C. § 1357(a)(1) (1982).

¹¹⁶ U.S. DEP'T OF JUSTICE, INVESTIGATOR HANDBOOK TM 87, 3-3.2 (Oct. 1, 1980).

aming officers advise individuals of the reasons for arrest and their right to counsel only after the decision to begin formal proceedings.¹¹⁷ This decision is often made after the alien's Form I-213, in which the alien has admitted alienage and manner of entry, is made out.

If, after being approached and asked where he was born, the alien admits to foreign birth but has no documents or can give no plausible account of his presence in the United States, officers have probable cause for arrest. If the individual claims immigrant status, he is usually asked a series of questions. In this situation, the officer stands on firm legal ground. Having admitted alienage, the individual must prove that he is lawfully in the country;¹¹⁸ although aliens have a right to do this at a deportation hearing, most aliens are not processed through deportation hearings.¹¹⁹ The officer can ask the individual for his name, date of birth and alien registration number and call in for a computer check. Since the computers are notoriously often "down" or unreliable (some numbers do not match names, for example), the officer may simply ask the alien a few questions about how he immigrated. If the alien is knowledgeable about the procedures and gives answers that are factually adequate and consistent, the officer will usually release him. If the officer has time and the alien claims to live not too far away, the officer may offer to drive him by his residence to get his card. If the alien is bluffing, this is a good way to call his bluff.

1. False Claims to Citizenship

The officer has a more difficult task when the individual claims to be a United States citizen, because citizens are neither required either to carry proof of citizenship nor to answer questions. Nevertheless, officers who have approached an individual on the basis of reasonable suspicion of alienage or illegal alienage are usually able to assess the sincerity of the citizenship claim through adroit questioning.¹²⁰ Yet

¹¹⁷ 8 C.F.R. § 287.3 (1983); *see supra* note 46.

¹¹⁸ INA § 291, 8 U.S.C. § 1361 (1982). If the questioning is likely to produce criminally incriminating statements, *Miranda* warnings are required. *See In re King & Yang*, 16 I&N 502 (1978).

¹¹⁹ *See supra* notes 28-29 and accompanying text.

¹²⁰ Officers assume that bona fide citizens mistakenly approached and questioned will have been weeded out very early on, usually within minutes of the initial encounter in the field and rarely after being forcibly detained. Citizens, after all, will know what bona fide citizens should know about their backgrounds and places of birth, and are much more apt to be adamant in defense of their citizenship status. Citizens will know how many siblings they have and their correct birth order when they present their birth certificates to the officer. Citizens have no good reason to be carrying fraud-

there is a catch-22 for the alien. If the individual decides to break off the questioning by walking away, which is a citizen's right, the officers may take that act as an additional articulable fact for detentive questioning, reasoning that the normally behaving citizen would have no good reason to refuse to answer. If an individual refuses to talk during a factory raid, the officers' reasonable suspicion ground for detaining him would be the fact that when individuals have stood mute in the past they have usually turned out to be deportable aliens.

Officers test suspect citizenship and lawful residency claims by interrogatory ploys learned not, as a rule, in the academy, but from more experienced officers in the field. Sometimes the match of wits between the officer and the alien is clearly uneven. The alien claims to be Puerto Rican, but the officer detects a Mexican accent. He asks the alien how he got to California and the alien says that he "drove." The officer can also test him on the idiomatic linguistic variations between the Spanish spoken in Puerto Rico and Mexico. If the alien tells him he was born in Tucson and mentions the name and location of a hospital he knows about, the officer points out that the hospital is only four years old. Or an alien might fail to memorize the information on the birth certificate he purchased. He claims he has two sisters but the birth certificate lists two brothers and one sister. Or he forgets the names of his "parents." Often that will cause the alien to abandon his claim, because most people have difficulty persisting in a patent falsehood. But if the agent needs to, he can call the El Paso Intelligence

ulent I-151 cards or other faked documents. In any case, a true citizen would never buckle under no matter what ruse the officer might have employed to test a claim.

Once when I accompanied a patrol agent during a check of suspected illegals among the inmate population of a jail, an individual whom the agent wanted to check was called out by the sheriff's deputy. When the individual came out of the cell, he said, "F—ing Border Patrol," then stood rigidly against the wall, looked straight ahead and refused to speak further. The patrol agent waved him back into the cell, then turned to me and muttered under his breath, "He must be a citizen. Illegals are never that bold." Of course, this could have been a clever bluff.

INS officers, interestingly, also have to deal with "reverse" false claims by citizens and lawful residents claiming to be illegal. Lawful residents involved in smuggling will sometimes claim they are illegal because of their concern that their lawful residence status might be jeopardized. They assume, usually correctly, that they will simply be voluntarily returned to the border along with the rest of the group. Other lawful residents and (or so I have been told) some citizens of hispanic background have been known to claim they are illegal in the hope of beating a local police problem. They hope that police and local prosecutors will turn them over to the Border Patrol to clear a crowded court docket. INS agents resent local law officers' dumping petty criminal violators on them in this manner and they try to explain to law officers that petty violators sent by bus back to the border can be back within two or three days.

Center¹²¹ to find out if it has a record on the birth certificate.¹²² Confronted with the mounting *mala fides*, most false claimants concede alienage and deportability.

Sometimes more ingenious ploys using trick questions may be used in this verbal and psychological chase. For example, if an alien claims he was born in Los Angeles, but cannot remember what high school he attended, the officer may ask him whether he took math, history and so forth. Then he asks if the alien graduated in "prom." If the alien says he also took prom, the officer points out that there is no such course. INS officers will usually not thus prolong the interrogation unless they are reasonably certain the alien is a false claimant¹²³ based on the totality of both spoken and unspoken behavior: for example, the alien's refusal to make eye contact or abnormal nervousness evidenced by trembling hands. Officers are unlikely to forcibly detain aliens unless the *mala fides* stand out in sharp outline. The most important indices are obvious factual errors and inconsistencies in what the suspected false claimant has said during the interrogation along, perhaps, with the unexplained possession of multiple false ID's.

¹²¹ Established in 1975 by the Drug Enforcement Administration (DEA), the El Paso Intelligence Center is the INS's central nationwide intelligence center. One of its functions is to keep records on all fraudulent documents picked up, including birth certificates that have been used or circulated by individuals who are not their true holders. The center also provides assistance to other federal law enforcement agencies, including DEA and Customs.

¹²² When the officer is almost positive that he is dealing with a false claimant, pressures of time may lead to deceptive tactics. If the apprehension occurred over the weekend, and the vital statistics office in the state the alien claimed birth in is closed, the officer may call a dummy number and pretend to check the alien's birth record. Then he tells the alien there is no record. Or, he may ask the alien if he is a devout Catholic and whether it is a serious sin to tell a falsehood. Often that will be enough to induce the alien to confess. I did not observe such techniques but was told they are occasionally used.

¹²³ When officers decide to spend the necessary time on a suspected false claimant, which may require their superiors' approval, the motives are apt to be professional pride as well as a desire to make sure the alien does not "walk out a citizen." Yet in this, as in almost every aspect of INS enforcement operations, officers run up against the tradeoff problem of the return on invested time, and the return is usually marginal. When there are so many aliens who can be easily picked up, it is hard to justify putting in several hours to investigate a single suspected false claimant. The concern with "making the stats," processing the aliens already apprehended and, as a background factor, the possibility that the alien may indeed be the citizen he claims to be — which would bring unwanted bad publicity and possibly a reprimand from higher-ups — weigh in as potent considerations that work against the officer's ability to fully investigate every case. See generally P. SCHUCK, *supra* note 81.

III. CRIMINAL PROSECUTION

Immigration officers are often influenced by situational control concerns¹²⁴ when they choose to process INA violations through civil deportation action.¹²⁵ However, the officer may request criminal prosecution¹²⁶ by the United States Attorney's Office if any of the following factors are present: (1) the individual is a pattern and practice violator; (2) there are aggravating factors; or (3) INS officers possess reliable information that the individual is involved in other more serious crimes such as drug or gun smuggling. Criminal prosecution applies not just to aliens illegally living and working in the United States, but also to many lawful permanent residents and even some citizens.

Pattern and practice violators include principals or key operatives in alien smuggling rings, persons who produce or distribute fraudulent green cards, birth certificates or other documents, and persons who arrange marriages of convenience for the purpose of evading immigration laws. Unlike the alien who purchases a bogus document to evade apprehension or who courts a United States citizen for the purpose of marrying to attain immediate relative immigrant status,¹²⁷ for which there is no quota,¹²⁸ pattern and practice violators are usually involved

¹²⁴ See *supra* notes 64-81 and accompanying text.

¹²⁵ See *supra* notes 24-29 and accompanying text.

¹²⁶ For a chart of the various types of criminal prosecution for INA violations, see 2 C. GORDON & H. ROSENFELD, *IMMIGRATION LAW & PROCEDURE* § 10.6 (1981). It should be noted that criminal punishment cannot be imposed by immigration officers. Only the courts operating under the procedural safeguards of the Constitution may determine guilt and fix punishment. *Wong Wing v. United States*, 163 U.S. 228 (1896); see also *Dear Wing Jung v. United States*, 312 F.2d 73 (9th Cir. 1962) (decision to prosecute is made by Attorney General, not INS).

United States Attorneys have guidelines for accepting cases that often vary among federal districts. In districts with heavy caseloads and more serious crimes, the threshold standard for taking immigration cases may be higher. Thus, according to patrol agents I talked with in one district, the Assistant United States Attorneys will not take a reentry after deportation case unless the alien has at least three priors for that offense or there are other aggravating factors.

For an illuminating discussion of the various factors that affect federal prosecutorial discretion, see Rabin, *Agency Criminal Referrals in the Federal System: An Empirical Study of Prosecutorial Discretion*, 24 *STAN. L. REV.* 1036 (1972).

¹²⁷ INA § 241(c)(1), 8 U.S.C. § 1251(c)(1) (1982). This particular section refers to obtaining an entry visa or other documentation after entering into a marriage for the purpose of evading INA requirements. This ground of deportation can be waived, however, if the alien entered with a fraudulent document but was otherwise admissible and is the spouse, parent, or child of a citizen or LPR. INA § 241(f)(1)(A), 8 U.S.C. § 1251(f)(1)(A) (1982).

¹²⁸ INA § 201(b), 8 U.S.C. § 1151(b) (1982).

in fraud, smuggling, and other services to aliens as part of their livelihood, and are more likely to be prosecuted.

Aggravating factors that increase the likelihood of criminal prosecution are primarily of two kinds: conduct associated with the charged offense, which occurred at the time the violator was apprehended, and prior convictions. Thus, if a violator caused injury to an agent in the process of trying to avoid arrest¹²⁹ or, as the driver of a smuggling "load car," tried to outrun a patrol pursuit sedan, risking injury to the aliens as well as to others on the highway,¹³⁰ this aggravating factor will increase the likelihood of prosecution, and possibly bring prosecution on a more serious charge.

Although aliens caught entering without inspection¹³¹ (EWI) are rarely prosecuted today, the charge is still useful for plea bargaining purposes. A subject who causes minor injury to a patrol agent while fleeing from him may be allowed to plead guilty to the EWI misdemeanor in exchange for having the felony charge of assaulting a federal officer¹³² dropped.

Drivers of load cars who cause injury to the aliens or others are almost certain to be charged with felony transporting,¹³³ along with the applicable state vehicle code violation. If any aliens are killed, a manslaughter charge is likely to be added. By contrast, the driver who promptly comes to a stop when the agents turn on their lights will, if he is charged at all, often be allowed to plead to misdemeanor aiding and abetting entry without inspection¹³⁴ in exchange for dropping the felony charge.¹³⁵

Much also depends on whether the individual has prior convictions.¹³⁶ These are considered aggravating factors by officers and United States Attorneys. Thus, a smuggler with prior misdemeanor convictions

¹²⁹ For criminal penalties for assaulting, resisting, or impeding such officers, see 18 U.S.C. §§ 111, 2231 (1982). For criminal penalties for escape or aiding escape from custody, see 18 U.S.C. §§ 201, 202, 209, 210 (1982).

¹³⁰ If injuries are sustained by participants in the act, the driver of the car may be responsible for the additional injuries. Aiding escape from custody is a crime. 18 U.S.C. §§ 751, 752, 755 (1982).

¹³¹ INA § 241(a)(2), 8 U.S.C. § 1251(a)(2) (1982).

¹³² 18 U.S.C. §§ 111, 372, 2231 (1982). The felony charge would very likely require a trial. In addition to the resource costs to the court, it is uncertain whether the jury could be persuaded that an alien of diminutive build could do much damage to the armed, robust, and stocky patrol agent standing before him.

¹³³ INA § 274(a)(2), 8 U.S.C. § 1324(a)(2) (1982).

¹³⁴ INA § 275, 8 U.S.C. § 1325 (1982).

¹³⁵ This is called the "flip-flop" in Service jargon.

¹³⁶ A statutory example is INA § 275, 8 U.S.C. § 1325 (1982). *See supra* note 20.

for aiding and abetting entry is more likely to be charged with the felony of transporting. An alien who has several priors for reentry after deportation, which the United States Attorney declined to prosecute earlier, may finally be prosecuted on felony charges.¹³⁷ In the latter case, the alien has become a flagrant repeat violator.

Since prosecutorial and court resources are scarce, prosecution priorities must be set. INS officers consider the strength of the case in terms of the available evidence and adherence to due process and other standards. If it is a smuggling case,¹³⁸ they will be concerned with finding witnesses willing to testify, whether there was adequate reasonable suspicion to stop the car,¹³⁹ and whether gain can be established.¹⁴⁰ In addition, it will be important that the *Miranda* warning was read to the suspected smuggler at the proper time.¹⁴¹ The availability of INS resources for handling the case may also enter into the decision. Thus, in a smuggling bust, in addition to the issue of available officer time to conduct interviews, the officer must decide whether material witnesses need to be detained and whether the case is sufficiently serious to justify using locally available detention space to hold the smuggled aliens as witnesses.

From the United States Attorney's perspective, the case must be more than procedurally adequate: there must also be a serious offense, a substantial threat posed by the offender, and good strategic deterrence potential to other possible offenders. In addition, United States Attorneys will consider the attitudes of federal judges and juries, who may be irritated if scarce court time is taken up with immigration violations when the dockets are crowded with more serious criminal cases. Additionally, immigration cases impose added costs, such as providing translators at each stage of the proceedings and during the trial.¹⁴² Thus,

¹³⁷ INA § 275, 8 U.S.C. § 1325 (1982).

¹³⁸ If INS cannot proceed against a suspected smuggling guide because of insufficient evidence, the decision to process him for deportation reflects a mixture of the strategic deterrence and situational social control objectives. The Border Patrol station will keep a file on a suspected *guia* (Texas) or *pollero* (California). If he is subsequently encountered and recognized, his record of priors will make it easier for the officers to lobby for prosecution. In this case, deportation processing is a back-up sanction for dealing with the more serious violator suspected of smuggling for gain.

¹³⁹ See *supra* notes 92-94 and accompanying text.

¹⁴⁰ Gain is not a necessary element of the felony of transporting an undocumented alien under INA § 274(a)(2), 8 U.S.C. § 1324(a) (1982), but it may make the U.S. Attorney more interested in prosecuting the case.

¹⁴¹ See *supra* notes 46-47 and accompanying text.

¹⁴² Interpreters must be provided for those who need them at each stage of the proceeding, not merely at deportation. See, e.g., *Gonzalez v. Zurbrick*, 45 F.2d 934, 937

United States Attorneys may balk at taking on cases involving false citizenship claims or "mom and pop" smugglers caught driving relatives who are deportable aliens, and they can rationalize their refusal by noting that the INS has the alternative of civil deportation.¹⁴³

Criminal proceedings on immigration charges are occasionally useful to federal and state prosecutors as a back-up charge against aliens suspected of other crimes, when prosecutors are uncertain whether they can successfully prosecute the more serious criminal charge. Thus, the United States Attorney may prosecute a suspected Columbian drug trafficker on a felony reentry after deportation charge¹⁴⁴ because it is usually an open-and-shut case that is easier to make than a drug case which may have defects of evidence or procedure. All that needs to be done is to certify the suspected drug smuggler's prior deportation, get the deportation order from the district office, match fingerprints to insure that the alien in custody is the individual who was earlier ordered deported, and check with the Attorney General's Office to make sure the alien had no pending request for a waiver to allow him to return to the United States. Similarly, officers might lobby the federal prosecutor to proceed with a felony charge for a false claim to United States citizenship¹⁴⁵ against a flagrant violator, such as a Canadian fugitive with a past record of felony criminal activities, or a Filipino national who has engaged repeatedly in immigration frauds in several districts. The federal prosecutor is more likely to be receptive to taking on a case when such aggravating factors are present.

(6th Cir. 1930). They should be used from the time a person is initially questioned by the INS until his final contact with the INS, although there is no specific law that requires interpreters at a deportation proceeding. *Cf. Jara v. Municipal Court*, 21 Cal. 3d 181, 578 P.2d 94, 145 Cal. Rptr. 847 (1978), *cert. denied*, 439 U.S. 1067 (1979). The failure to provide an interpreter has been held a denial of a fair hearing. *Niarchos v. INS*, 393 F.2d 509 (7th Cir. 1968). At the outset, the immigration judge determines whether the applicant has adequate understanding of English. If he does not, the judge arranges for an interpreter. A hearing at which the respondent is unable to understand or speak English would be manifestly unfair. *See id.* at 511.

¹⁴³ Again the characterization of a deportation hearing as civil affects the degree and amount of rights which are guaranteed. Fourth and fifth amendment rights and the exclusionary rule are not universally guaranteed at deportation hearings. *See supra* notes 46-51 and accompanying text.

¹⁴⁴ INA § 276(2), 8 U.S.C. § 1326(2) (1982).

¹⁴⁵ 18 U.S.C. § 911 (1982).

IV. RESOURCE LIMITATIONS AND UNEQUAL ENFORCEMENT OF THE INA

INS field officers face some of the same dilemmas that local and federal law officers confront. Like other law agents, they are annoyed when prosecutors decline to accept criminal cases that are procedurally sound, even though they realize that INA violations often cannot compete with other more serious crimes for the limited resources of the federal courts.¹⁴⁶

Although the administrative remedy of deportation proceedings for INA violators is available, some INS officers doubt the deterrent effectiveness of deportation processing. The INS is hampered by insufficient resources to achieve effective enforcement. The level of apprehensions in the interior cities, for example, is much less a function of the investigators' knowledge of where deportable aliens can be found living or working than it is a function of the funds and manpower available in that district for processing, detaining and transporting aliens. Whether consciously intended or not, the INS can make the statistics look good by concentrating on more efficient apprehensions, especially those involving Mexican EWI's near the border or in southwestern agriculture, who are much more likely to accept voluntary return under safeguard¹⁴⁷ and who can often be found in concentrations that produce high productivity in terms of the ratio of officer hours expended per apprehension.¹⁴⁸ Other aliens, who have farther to travel and have in-

¹⁴⁶ Investigators in other federal agencies experience many of the same problems. For example, the potential for 18 U.S.C. § 1001 (1982) cases involving charges of willful misrepresentation on government documents, application forms, and travel vouchers, is unlimited, and most are routinely declined. As Professor Rabin notes, federal prosecutors must not only consider whether a case can be easily won at trial, but also whether the time required to pursue it, along with the likely reaction of the judge and jury to the violation, justifies prosecution. Rabin, *supra* note 126, at 1044-46. INS is by no means alone in getting the cold shoulder. Postal inspectors develop good mail fraud cases but are sometimes rebuffed by the Assistant U.S. Attorney because a successful mail fraud prosecution can take three weeks compared with half a day for a bank embezzlement case. Rabin, *supra* note 126, at 1046-48. Even FBI agents sometimes have difficulty getting the federal prosecutor's interest, as in Dyer Act cases involving car thieves who are youthful offenders and not part of a professional car theft ring. See J. EISENSTEIN, COUNSEL FOR THE UNITED STATES: U.S. ATTORNEYS IN THE POLITICAL AND LEGAL SYSTEMS 105 (1978).

¹⁴⁷ See *supra* notes 25-27 and accompanying text.

¹⁴⁸ In 1981, the INS Central Office was seriously considering the possibility of shifting more manpower from low-productivity Border Patrol sectors and district offices to the higher-productivity southwest. Many officials in the districts and regions that would have lost personnel objected to the proposal and pointed out that apprehensions

curred much greater costs getting into the United States, are more likely to resist their removal by demanding deportation hearings. Apprehending other than Mexican (OTM) aliens in the interior is also more likely to generate additional relief and benefit applications for examiners and immigration judges, adding to the burdens of already overburdened district offices and immigration courts.

It is not unreasonable for the INS to concentrate on cheaper, "lower quality," apprehensions given the conflicting and multiple public pressures on the Service. The officers need to "make the stats" to show their superiors they are doing the job expected of them, especially in the Border Patrol, and the INS Central Office needs the statistics to demonstrate to Congress that the taxpayers are getting something for the money spent on enforcement. If linewatch, farm and ranch checks and employer surveys produce decent arrest statistics by concentrating on the "higher productivity" groups of deportable aliens, it is easier to justify the more time-consuming investigations in other areas such as smuggling rings, benefit and visa fraud, and document counterfeiting.¹⁴⁹

Enforcement in the urban interior, in addition to being less productive than rural border operations, also causes more political and legal problems for the Service. Whereas other law enforcement agencies can set priorities such that serious offenders who pose the clearest threat to society will be served first from the tray of available enforcement resources, it is difficult for the INS to assess and compare the threat potential of different categories of deportable aliens, all of whom the Service knows need attention. Thus, the individual Mexican EWI violator is not viewed as being as serious a violator as the alien who manages to immigrate fraudulently or engages in crime and welfare fraud. Rather, it is the large number of Mexicans apprehended in comparison to other nationality groups that make it possible for Mexican EWI violators to

in the southwest were of lower quality because they involved predominantly Mexican EWI's who often quickly reentered the U.S. after being given voluntary return. In 1984, the Reagan administration drafted plans to deploy 850 additional agents to the southwest border. *N.Y. Times*, Feb. 13, 1984, at 9, col. 2.

¹⁴⁹ Interior enforcement by the criminal investigators has begun to shift under INS new case management system to higher priority groups: the more serious immigration violators and aliens involved in other crimes. Interior arrests declined dramatically in fiscal year 1983 because area control apprehensions had been de-emphasized. This may also partly reflect an improving economy. Factory surveys were given greater emphasis in 1981 because of the recession.

Offsetting this, however, is the belief many officers have that no nationality group should feel that it is "home free" once in the interior. Hence, lower productivity area control surveys are conducted partly for that reason and also because many officers feel that it is not fair to concentrate solely on Mexicans.

be considered a major enforcement problem.

Whether the INS is effective in deterring the flow of EWI violators, despite the heavy commitment of resources to this violator group, is open to question. As has already been pointed out, the policy of voluntary return under safeguard, although an inconvenience to the violator, is hardly a credible deterrent for determined aliens. One might well argue that the chief function of the Border Patrol and INS inspectors at ports-of-entry is to create an unofficial tariff in the form of legal expenses, costs for smugglers, and fraudulent visas. On the other hand, in the absence of a heavy commitment of patrol agents near the border or inspectors at ports-of-entry, one can only guess at the additional numbers who might try to enter. If there were fewer agents, the inconvenience or risk of apprehension would presumably drop and therewith the tariff. If it became cheaper to enter, economic theory suggests that more would try to immigrate. Thus it might be argued that the linewatch screen selects for the more productive Mexican nationals who can afford the unofficial tariff of the smuggling fee along with the other risks and inconveniences illegal entry poses.

Whatever the case, resource limitations make it difficult for the INS to do very much in the way of achieving strategic deterrence objectives. There are resources to sustain a reasonably high level of EWI apprehensions, but not enough to deter violators with criminal sanctions, which many Americans would be averse to applying to Mexican EWI violators on humanitarian grounds even if the resources were available. Moreover, the use of formal deportation proceedings would greatly swell the resource costs to the government without necessarily achieving deterrence since, to be effective, formal deportation would have to be backed up by criminal sanctions for those caught re-entering. It would also require a considerable expansion of INS detention facilities.

The same resource constraints explain many other anomalies of INS procedures that result in unequal enforcement. Chinese, for example, cannot be given equal enforcement attention, in the sense of having the same risk of arrest as Mexicans, without the INS's hiring more bilingual translators or providing more officers with costly training in that language. And females cannot be treated equally with males without providing additional and more expensive detention facilities for them and their children. To the extent such differential enforcement occurs, it is primarily because of resource constraints, not officer bias. Whether bonds will be required, and the amount that an alien may have to post, can also vary widely between districts, according to the availability of detention space and the funds available to a district office for alien detention and travel costs.

In addition to inadequate resources, the legal requirements for defensible stops and interrogations can also create pressures that undermine uniform enforcement of the law. Officers will naturally prefer working in areas and concentrating on individuals whose apprehension will minimize legal and public relations problems. Indeed, civil lawsuits that tighten the standard for detentive questioning work against more equitable targeting of "other than Mexican" aliens. The belief that uniform enforcement of the immigration law can be achieved through legislative or judicial remedy is a chimera, pure and simple.

The impact of resource constraints on discretionary field practices is clear. For example, if INS field officers had only the option either to investigate suspected false claims in the field with the same rigor that is required in an immigration hearing or to let the suspected false claimant go, or if officers were expected to spend the time necessary to explore all possible benefit equities that an alien picked up in the field might have, the control objectives of the law might not evaporate altogether but they would surely be severely weakened. Conceivably, under such a rigorous standard some aliens who normally elect to return voluntarily might turn out to have equities that would enable them to stay. But to insist on a standard of interrogation that would insure that *no* alien having any possible equities was induced to return voluntarily would play havoc with field operations. Among false claimants, such a policy would reward the dishonest, as aliens began to realize that a false claim was their ticket to freedom. The exorbitant costs that would be incurred if these claims made in the field had to receive the same level of investigation required for establishing alienage in an immigration hearing would effectively prohibit detaining suspected false claimants. Many officers believe that to the extent immigration enforcement does work, it is because most aliens, even those who may carry fraudulent green cards or birth certificates, are basically honest people, or can be induced to become so by officers skilled in making immigration-status inquiries. But they could not achieve this result in the absence of the field practices they have evolved, including some techniques that might strike critics as shady.

CONCLUSION

The crisis in immigration law enforcement, although primarily caused by the dramatic increase in INS caseloads without equivalent increases in INS resources, is partly due to the statutorily available appeal rights for aliens, the various relief and benefits provisions of the INA, and to judicial scrutiny of both INS adjudications and enforce-

ment activities. All these factors weaken the INS's ability to deliver uniform and expeditious treatment to suspected immigration violators. Behind the veil of the official INS statistics on apprehensions and deported aliens is the reality that enforcement is neither uniform in its application nor very effective. Ironically, as regards the administrative violator category (EWI's and visa abusers), whatever semblance of effective enforcement exists is owing mainly to the large numbers of suspected deportable Mexican aliens who accept voluntary return, either because they lack the money to post the required bonds and hire attorneys, or because they lack the sophistication, unlike many educated and more affluent overseas aliens, to make the fullest possible use of the appeals and other rights available to them. But if Mexicans bore heavier reentry costs, which might happen if border controls were tightened appreciably, they might well begin to make fuller use of the availability of deportation hearings and appeals. In that case, immigration enforcement might well deteriorate further.