

NOVEMBER 2022



## IMMIGRATION PROSECUTIONS BY THE NUMBERS

The laws used to criminally prosecute people for entering and reentering the United States without permission are known as Sections 1325 (“unauthorized entry”) and 1326 (“unauthorized reentry”) of Chapter 8 of the U.S. Code. They originate from a law passed in 1929 amid the height of the eugenics movement to further racist and white supremacist ideology. The [racist intentions](#) of that law were reinforced and confirmed with each successive reenactment, and continue to be felt today, as criminal prosecutions under Sections 1325 and 1326 are again [on the rise](#).

Under federal law, U.S. law enforcement agencies decide whether to refer someone who enters or reenters the United States without authorization for criminal prosecution. The Department of Homeland Security (DHS) refers around [99 percent](#) of all immigration-related prosecutions, subjecting people not only to civil immigration detention and deportation proceedings but also to criminal sanctions. Immigrants convicted under Section 1325 can be sentenced for up to six months in prison, while those convicted under Section 1326 can be sentenced for up to 20 years in prison.



DHS refers around [99% of all immigration-related prosecutions](#), subjecting people not only to civil immigration detention and deportation proceedings but also to criminal sanctions.

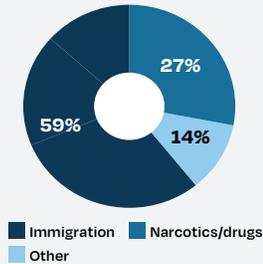
Prosecutions under 1325 and 1326 must end. They are some of the most frequently brought prosecutions in federal courts, and waste millions in taxpayer dollars. Although the U.S. government has claimed for decades that such prosecutions deter migration, even its own studies fail to support the claim. Disturbingly, 1325 and 1326 prosecutions continue the racist [legacy](#) of the law’s architects as they almost exclusively impact individuals from Latin America. Ending these prosecutions is essential to ending systemic injustices, reducing mass incarceration, keeping families together, and protecting fundamental human rights.

In recent years, people charged under Sections 1325 and 1326 have begun to challenge these charges based on the racist origins and discriminatory application of the statutes. Last year, a judge in the U.S. District Court for the District of Nevada [ruled](#) in *United States v. Carrillo-Lopez* that Section 1326 is indeed unconstitutional. However, the government appealed this decision. Oral arguments for that case and another Section 1326 challenge, [United States v. Rodriguez-Barrios](#), will be heard in the [Ninth Circuit Court of Appeals](#) on December 8, 2022.

This factsheet breaks down four essential facts about Sections 1325 and 1326 prosecutions and addresses how they are used today.<sup>1</sup> To learn more about how the laws impact people prosecuted for immigration-related offenses, read our [amicus brief](#) filed in *United States v. Rodriguez-Barrios*.

## 1 Prosecutions for immigration-related offenses are charged more than any other category of federal crimes.

Before the federal government instituted Title 42, prosecutions for immigration-related offenses made up around [60 percent of all criminal cases in federal district courts](#).



Before the federal government instituted Title 42—the xenophobic pandemic-era policy designed by Trump administration officials to prevent immigrants from entering the United States—prosecutions for immigration-related offenses made up around [60 percent of all criminal cases](#) in federal district courts. Even though most people who attempt to enter the United States via the southern border are immediately [expelled](#) under Title 42, the Biden administration continues to rely on [immigration prosecutions](#) as a punitive tool to “[deter irregular migration](#).” Federal prosecutors [charged](#)

[23,962 people](#) with unauthorized re-entry under Section 1326 in district courts from January 2021 through September 2022.

The latest Justice Department data released in October 2022 show the Biden administration is not slowing down. Prosecutors [charged 3,436 people in magistrate courts](#) for unlawful entry under Section 1325 and [13,670 in district courts](#) for unlawful reentry under Section 1326 in fiscal year (FY) 2022. All told, prosecutions for immigration-related offenses made up [34 percent of all federal prosecutions](#) in district court in FY 2021. This made immigration-related crimes the most charged category of federal crimes.

Unlike other federal offenses, virtually every immigration-related case referred to federal prosecutors leads to a prosecution. In FY 2020, while federal prosecutors declined to prosecute [16.7 percent](#) of all federal offenses referred, they [declined to prosecute just 1.2 percent](#) of immigration-related cases. Once in the immigration-prosecution pipeline, most people prosecuted for immigration-related offenses plead guilty, often in order to shorten their time in pre-trial custody and [decrease the likelihood of a long prison term](#). In FY 2020, nearly [98 percent of people charged](#) with these crimes pleaded guilty instead of taking their case to trial. That puts immigration-related crimes at the top of the list of federal offenses that result in a guilty plea.

## 2 Prosecutions for immigration-related offenses cause severe harm without any evidence that they deter migration.

Policy measures that seek to decrease migration to the United States through deterrence, including the prosecution of immigrants for their manner of entry into the United States, are based on the

<sup>1</sup> This fact sheet focuses on prosecutions for violations of 8 U.S.C. §§ 1325 and 1326, and not for other migration-related offenses, such as prosecutions relating to 8 U.S.C. § 1324, which includes penalties for harboring, transporting, smuggling, and encouraging unauthorized immigration. According to USAO data, prosecutions for Section 1324 made up around 4 percent of immigration-related prosecutions in Fiscal Years 2018–2019, 8 percent in FY 2020, 26 percent in FY 2021 and 22 percent in FY 2022.

inhumane notion that the government has the right to inflict punishment to deter people from migrating. The Biden administration is [ramping up](#) the use of criminal prosecutions to punish migrants despite decades of evidence showing these prosecutions cause widespread harm, lead to racial and ethnic discrimination, and are [ineffective](#) toward the government's stated goal of deterring future migration.

The Biden administration continues to [assert](#) that the more you punish the act of migration, the more likely that punishment will deter future migration. But migration [data](#) over the years shows that attempts to deter migration through prosecutions and other punitive measures do not actually work. The government's own studies have shown that the metrics used to defend migration-related prosecutions are flawed. A 2017 Government Accountability Office [report](#) found weaknesses in Custom and Border Protection's methodology for calculating recidivism rates, limiting their ability to assess the effectiveness of the [Consequence Delivery System](#) program, which includes immigration prosecutions. CBP's own [budget justification](#) for FY 2023 shows that repeat border crossing attempts actually increased from FY 2019 through 2021, despite the CDS programs.

Non-governmental studies also dispel the myth that immigration prosecutions deter migration. A 2018 [study](#) found no statistically significant relationship between the 2017 pilot of the "zero tolerance" family separation policy, which relied on criminal prosecution of immigrant parents, and the number of U.S. Border Patrol apprehensions at the border. Another 2018 [study](#) found no evidence that mass criminal prosecution and incarceration of immigrants had any deterrent effect on migration.

### **3 Almost everyone prosecuted for immigration-related offenses is from Latin America, and they are disproportionately likely to be given a sentence of incarceration.**

In FY 2022, [96 percent of persons charged under Section 1326](#) were from Mexico, Central America, South America, and the Spanish-speaking Caribbean countries



In FY 2022, [96 percent of persons charged under Section 1326](#) were from Mexico, Central America, South America, and the Spanish-speaking Caribbean countries. The number is just as drastic for 1325 prosecutions. [93 percent of defendants charged under Section 1325](#) in magistrate courts in FY 2022 were from these Latin American countries.

Latinx people are also disproportionately likely to be sentenced when charged with Section 1326. [Latinx people](#) accounted for 99 percent of people sentenced for Section 1326 in FY 2021. Even though Section 1326 does not mandate incarceration, Latinx people sentenced under this statute are more likely than others to be given a term of incarceration. [99.2 percent people](#) convicted for Section 1326 in FY 2021 were sentenced to prison. The Sentencing Commission's 2015-2019 data also [show](#) that people convicted under Section 1326 were more likely to be sentenced to incarceration than all but one of the most commonly used sentencing guidelines, when controlling for comparable offense and criminal history. Individuals convicted under Section 1326 also receive disproportionately [punitive terms of incarceration](#), given the higher security classifications and harsher treatment that foreign born people face in privately run U.S. [segregated](#) prisons.

## 4 Prosecution of immigration-related offenses costs taxpayers millions of dollars a year and diverts resources away from other priorities.

The renewed focus on immigration prosecutions will further waste taxpayer dollars and siphon government [resources](#) from other programs. While the government does not publish the total costs of prosecuting and incarcerating immigrants under Sections 1325 and 1326, what numbers do exist demonstrate that the overall cost is massive. One conservative 2019 [estimate for the cost](#) of judges, defense and prosecuting attorneys, U.S. Marshals, interpreters, courthouse costs, detainee transportation, and incarceration for one year in Tucson, Arizona was \$62.4 million. Another study estimated that between 2005 and 2015, [taxpayers paid more than \\$7 billion](#) to incarcerate immigrants charged or convicted of unlawful entry or re-entry. The private prison [industry](#) reaps the benefits from immigration prosecutions driving up incarceration rates at the expense of the public and of basic human rights.

One conservative 2019 estimate of the [cost of prosecuting immigrants for one year in Tucson, Arizona](#) was \$62.4 million.

70% of the costs of carrying out this policy went to the pocket of an out-of-state private prison corporation.

The state of Arizona could have paid the annual salaries of [1,220 elementary school teachers](#) with this money instead.

