



**Shadow Report of  
Grassroots Leadership and Justice Strategies  
to  
The International Convention on the Elimination of  
All Forms of Racial Discrimination  
  
Regarding Criminal Prosecutions of Migrants for  
Immigration Offenses and Substandard Privately-  
Operated Segregated Prisons**

**July 2014**

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In The Public Interest

## I. Reporting Organizations

This Shadow Report is jointly submitted by Grassroots Leadership and Justice Strategies. Founded in 1980, Grassroots Leadership is a multi-racial social justice organization based in the Southern and Southwestern United States that works to end the use of for-profit incarceration and reduce reliance on criminalization and detention through direct action, organizing, research, and public education. Justice Strategies, formed as an informal partnership in 2000 and launched as a formal organization in 2003, is a U.S.-based nonprofit research organization dedicated to providing high quality “action research” to advocates and policymakers pursuing more humane and cost-effective approaches to criminal justice and immigration law enforcement.

## II. Introduction and Issue Summary

1. The bases for the filing of this Shadow Report are found in the fact that signatories to the International Convention on the Elimination of All Forms of Racial Discrimination have resolved:

*[T]o adopt all necessary measures for speedily eliminating racial discrimination in all its forms and manifestations, and to prevent and combat racist doctrines and practices in order to promote understanding between races and to build an international community free from all forms of racial segregation and racial discrimination...*

As well as in the following provisions:

### ***PART I***

#### ***Article 1***

*1. In this Convention, the term "racial discrimination" shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.<sup>1</sup>*

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<sup>1</sup> International Convention on the Elimination of All Forms of Racial Discrimination. While paragraph 2 appears to make an exception to the definition of “racial discrimination as pertaining to disparities between citizens and non citizens:

*2. This Convention shall not apply to distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens.*

2. In this report, we examine the sharp increase in the number of migrants, the vast majority being Mexican nationals, who are criminally prosecuted for immigration crimes at the border; the increasing disparate impact on the federal incarcerated populations with regards to race, ethnicity, nationality and citizenship status resulting from such criminal prosecutions; and the substandard, privately operated segregated immigrant prisons where the majority of sentenced migrants are incarcerated. *These issues do not appear to have been addressed in prior CERD Committee Reports or Concluding Observations, perhaps because (as is illustrated on the chart below) the sharp rate of increase had just become evident, and the scale of the problems was still emerging in 2008.*

3. We make recommendations that include the end of criminal prosecutions of migrants at the border, a review of privately operated prisons for migrants, and a return to the exclusive use of the civil immigration system for migrants apprehended crossing the border.

### **III. Operation Streamline, the felony prosecutions of migrants, and the growth in incarceration of non-citizens**

1. The sharp increase in criminalization and prosecution of migrants at the border has caused a great burden for the federal court system and contributed greatly to overcrowding in the federal prison system. The problem stems from the rapid growth, over the past decade and a half, in the prosecution of immigrants who cross the border without authorization or proper documentation.

2. There are a number of criminal statutes that were under relatively moderate use by federal prosecutors before 2000, which have seen huge increases since then. Two sections of the United States Code are of particular concern. If apprehended at the U.S. border, migrants can be charged with one of two federal crimes:

8 U.S.C. § 1325 – unlawful entry to the U.S., a misdemeanor carrying a sentence of up to 180 days; or

8 U.S.C. § 1326 – unlawful reentry after deportation, a felony charge normally carrying a federal prison sentence of up to two years, but with aggravated circumstances the maximum may rise to 10 or 20 years.

These two charges are now the most prosecuted offenses in the federal court system. By 2011, the federal court in Arizona had such a clogged criminal caseload that the chief judge

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paragraph 3 clarifies that no exception is available in regard to provisions that affect “any particular nationality:

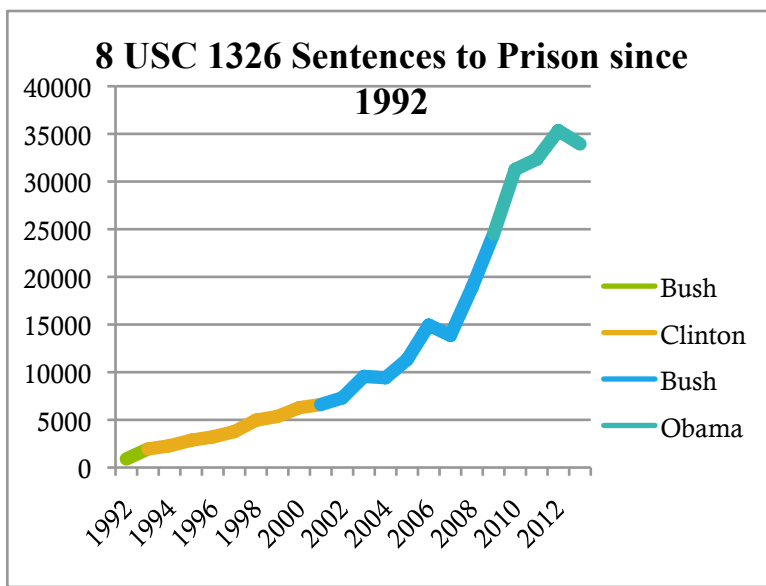
*3. Nothing in this Convention may be interpreted as affecting in any way the legal provisions of States Parties concerning nationality, citizenship or naturalization, provided that such provisions do not discriminate against any particular nationality.*

was forced to declare a judicial emergency, suspending requirements of the Speedy Trial Act.<sup>2</sup>

3. This flood of immigration cases started to become overwhelming in the mid-2000s with initiation of “Operation Streamline,” a policy that mandated that nearly all border crossers along the U.S.-Mexico border be criminally prosecuted if apprehended without proper documentation. Prior to the implementation of “Operation Streamline,” border crossers were primarily processed through the nation’s civil immigration system.

4. Operation Streamline resulted in an abrupt increase in misdemeanor prosecutions (8 U.S.C. § 1325). In 2002, just 3,192 cases were filed in the federal courts, but that number jumped to 17,969 in 2004. These prosecutions have continued to surge, reaching 53,822 last year. The average sentence currently imposed at conviction is one month in federal jail.<sup>3</sup>

5. The surge in misdemeanor prosecutions has been accompanied by a sharp increase in felony prosecutions (8 U.S.C. § 1326), from 9,337 in 2002 to 37,440 last year. This increase is driving a significant amount of the overcrowding that plagues our federal prison system. Last year 33,938 people were sentenced to prison for unlawful re-entry.



6. More than 90 percent of those were sentenced for “simple” re-entry after removal, which carries a sentence of up to two years in prison. The average sentence for that offense is 15 months, while aggravated circumstances boost the average to 16 or 30 months.

7. Unlawful entry and reentry to the U.S. are violations of civil immigration laws, which are punishable by removal, fines, and other civil penalties. The federal criminal statutes cited above are duplicative of civil immigration laws, and these prosecutions represent a departure from traditional law enforcement of immigration violations. Prior to the administration of

<sup>2</sup> [http://www.uscourts.gov/news/newsView/11-01-25/Judicial\\_Emergency\\_Declared\\_in\\_District\\_of\\_Arizona.aspx](http://www.uscourts.gov/news/newsView/11-01-25/Judicial_Emergency_Declared_in_District_of_Arizona.aspx)

<sup>3</sup> Data obtained from the Transactional Records Access Clearinghouse at <http://trac.syr.edu/>

George W. Bush, border crossers who did not represent any threat to public safety were handled primarily through the civil immigration system.<sup>4</sup>

8. Criminal prosecutions of migrants at the border have also had a profound impact on the racial and citizenship make-up of those in the federal courts and federal prison population. The U.S. Sentencing Commission reports that the proportion of people who are non-citizens sentenced in the federal courts has grown steadily over the last decade, reaching 45 percent of total prosecutions in 2013. Immigration offenses were tied with drug offences as the largest category of federal convictions last year.<sup>5</sup> By comparison, non-citizens make up only 16.3 percent of the total U.S. population.<sup>6</sup>

#### **IV. Privately operated segregated immigrant prisons in the U.S.**

1. The profound discriminatory effect of increased felony prosecution of migrants crossing the border on race, nationality and citizenship status is brought into sharp focus when one looks at the impact on the federal prison system. A recent federal data report indicates that 90 percent of those serving time for an immigration violation in the federal prison system are there for unlawful entry or reentry. Between 1994 – the year that NAFTA was enacted – and 2012, the number of Mexicans serving time for an immigration offense in a federal prison increased by more than 755 percent.

2. Of the people serving time for an immigration violation in the federal prison system, 91.6 percent are Hispanic or Latino. Slightly over two-thirds had been convicted and sentenced in a Southwest border district federal court, with nearly three-quarters coming from Texas Southern, Arizona, and California Southern districts. They comprised 97 percent of the increase of the growth in that offense category between 2002 and 2010.<sup>7</sup>

3. To handle the increasing number of Mexican migrants sentenced to federal prison after the passage of NAFTA, the federal Bureau of Prisons (BOP) launched a massive privatization initiative in 1999. BOP officials carved out a special population of federal prisoners: the so-called "criminal alien" population, designated for segregation from the rest of the prison population in private contract prisons. In September 1999, the BOP issued its first request for low-security private prison beds to meet the prison system's "Criminal Alien Requirements (CAR)." The first contract solicitation was termed "CAR-I" for short.

4. Currently non-citizens comprise 25.1 percent of the total BOP prison population, with

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<sup>4</sup> Grace Meng. *Turning Migrants into Criminals: The Harmful Impact of U.S. Border Prosecutions*, Human Rights Watch, May 2013. [http://www.hrw.org/sites/default/files/reports/us0513\\_ForUpload\\_2.pdf](http://www.hrw.org/sites/default/files/reports/us0513_ForUpload_2.pdf)

<sup>5</sup> U. S. Sentencing Commission's *2013 Annual Report*, <http://www.ussc.gov/research-and-publications/annual-reports-sourcebooks/2013/annual-report-2013>

<sup>6</sup> Bureau of Labor Statistics. *Foreign Born Workers: Labor Force Characteristics –2013*. <http://www.bls.gov/news.release/pdf/forbrn.pdf>

<sup>7</sup> Marc Motivans. (July 2012) *Immigration Offenders in the Federal Criminal Justice System, 2010*. Washington, DC: Federal Justice Statistics Program.

17.4 percent of the total made up of Mexican nationals. There are 13 private prisons under contract with the BOP holding a “CAR” population – a virtual “Gulag” of segregated sub-standard prisons designed for migrants whose only crime may be re-crossing the border. The average prison sentence being meted out in border federal district courts for a felony reentry conviction is 15 months, after which a “criminal alien” is transferred to ICE for the civil removal process.

5. “CAR” prisons are notoriously plagued with human rights violations. A new report from the ACLU details results from a multi-year investigation of five “CAR” prisons located in Texas, including a finding that, “the men held in these private prisons are subjected to shocking abuse and mistreatment, and discriminated against by BOP policies that impede family contact and exclude them from rehabilitation programs.”

6. Excessive numbers of these prisoners are held in solitary confinement, nearly double the rate of prisoners in BOP-operated prisons. Some have been subjected to racist language from guards using terms such as “wetback” and “Mexican nigger.” Access to both routine and emergency medical treatment is reported to be limited. Conditions are squalid, especially at one of the largest “CAR” prisons, the Willacy Correctional Institution, where prisoners are warehoused in large tents.<sup>8</sup>

7. When the “CAR” prison initiative was launched back in 1999, BOP officials explained that the choice would provide “management flexibility” to help them deal with this fast-growing segment of the prison population. The “Criminal Alien” population typically requires only low-security housing, and perhaps they could rationalize the lack of any program services on the basis that most would be sent back to Mexico when their sentences were served.

8. BOP officials have admitted to treating immigrants like second-class prisoners. Mike Janus, the privatization administrator at the BOP in 1999, claimed that because they faced deportation at the end of their sentences, they did not require the kinds of education and counseling programs available in BOP-operated federal prisons.<sup>9</sup> Responding to the ACLU report in 2014, BOP spokesperson Chris Burke reiterated the agency’s policy of providing separate and unequal treatment to immigrant prisoners, saying:

The majority of these inmates are sentenced criminal aliens who will be deported upon completion of their sentence. Use of private facilities for this population allows staff in BOP institutions to focus on pre-release preparation for U.S. citizens returning to their communities upon release.<sup>10</sup>

But this is no excuse for segregating these prisoners in isolated private prisons where they are subjected to the shameful conditions documented by the ACLU.

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<sup>8</sup> Carl Takei *et. al.* (June 2014) *Warehoused and Forgotten: Immigrants Trapped in Our Shadow Private Prison System*. Washington DC: American Civil Liberties Union.

<sup>9</sup> Judith Greene. “Bailing Out Private Jails,” *American Prospect*, September 2001

<sup>10</sup> Forrest Wilder and Priscilla Mosqueda, “Immigrants in Federal Prisons ‘Subjected to Shocking Abuse and Mistreatment’,” *Texas Observer*, June 9, 2014.



## **V. Questions and Recommendations**

### **Suggested Questions:**

1. Last year, the U.S. Attorney General directed federal prosecutors to deprioritize the prosecutions of defendants charged with low-level non-violent drug charges citing racial disparities in the criminal justice system. Given the dramatic discriminatory impact of immigration prosecutions on Mexican migrants and other Latino immigrants in the federal prison system, has the government considered guidance to U.S. Attorneys that would scale back the scope of criminal prosecutions of migrants?
2. Bureau of Prisons-contracted “Criminal Alien Requirement” private prison facilities have widely been reported to operate with substandard and dangerous conditions. BOP officials have admitted that the facilities are unequal to those housing U.S. Citizen prisoners. Why has the government chosen to prosecute migrants in the federal criminal justice system rather than continuing the long-established, customary civil immigration process – thus eliminating the need, as well as the enormous cost, of expanding a system of segregated second-rate contract prisons?

### **Suggested Recommendations**

1. The Department of Justice and the Department of Homeland Security should issue guidance to relevant agencies instructing them to end the widespread practice of prosecuting immigration offenses in criminal court, returning to reliance on the civil immigration system to process those apprehended on immigration charges, whether at the border or in the nation’s interior.
2. The Department of Justice should undertake a thorough review of privately-operated, segregated federal prisons for immigrants. Pending findings of this review, any new contracts for these facilities should be halted. If this review finds conditions unequal to those in publicly operated facilities, contracts with private prison corporations should be terminated.