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**NAVAL  
POSTGRADUATE  
SCHOOL**

**MONTEREY, CALIFORNIA**

**THESIS**

**DEPORTATIONS: SECURING AMERICA OR RUNNING  
IN CIRCLES?**

by

Shannon Blaney Stammersky

June 2009

Thesis Advisor:  
Second Reader:

Jeanne Giraldo  
Anne Clunan

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**DEPORTATIONS: SECURING AMERICA OR RUNNING IN CIRCLES?**

Shannon Blaney Stammersky  
Major, United States Army  
B.A., University of Richmond, 1999

Submitted in partial fulfillment of the  
requirements for the degree of

**MASTER OF ARTS IN SECURITY STUDIES  
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from the

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## **ABSTRACT**

The United States was attacked by terrorists in 2001, and the country entered into a highly publicized debate on how to keep the country safe. Immigration reform to counter the ability of terrorists to circumvent U.S. immigration laws became the focus of much anti-terrorism legislation. Many immigration laws, especially concerning the deportability of an individual, which had been in place since the mid-1990s, were expanded and additional enforcement mechanisms created. However, policies emplaced have created new challenges with cooperation with Latin America due to the overwhelming impact the laws have had on Latin Americans, whether documented or undocumented. Additionally, the laws are written and passed due to the political pressure resulting from acts of terrorism, but there are significant provisions that can be applied to countering criminal activity. The broad approach has sent contradictory messages to Latin America in comparison to U.S. plans for economic integration. The impact on cooperation from Latin America is just one way the overall strategic goals of the United States have been affected by deportation policy. As the United States seeks faster mechanisms to emplace borders and return non-citizens, Latin America must reintegrate them into a society that is improperly prepared to deal with them. This strategy may serve the short-term goals of the United States if it was effectively implemented, but the sheer amounts of undocumented immigrants in this country do not make that possible. Additionally, deportation policy has not addressed the long-term goals of U.S. security strategy to promote freedom and economic opportunity to counter terrorism and crime.

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## I. INTRODUCTION

Government investigations in the aftermath of the 9/11 terrorist attacks revealed that a number of the attackers had entered the country legally and subsequently violated immigration policies. After discovering that at least a few 9/11 terrorist overstayed their visas due to the inability or unwillingness to enforce existing policies, immigration policy become intensely scrutinized. Immigration policy after 9/11 became a vital component of National Security Strategy, and immigration services were reorganized under the Department of Homeland Security (DHS). This reorganization increased resources and put more emphasis on security than on the previous principles of immigration policy. The creation of the DHS subordinated deportation policy to the homeland security goals of policing the homeland rather than policing the workforce or serving the needs of the immigrant community.

Seven years later, deportations were again making headline news though for different reasons. On the one hand, Immigration and Customs Enforcement (ICE) has carried out a series of highly publicized raids of workplaces since 2006. On the other hand, the federal government has targeted members of “violent transnational street gangs” for deportation. In addition, the media has begun to highlight crimes committed by illegal aliens whom local and state governments have failed to deport when they had the chance, putting pressure on these governments to change their policies and enforce federal laws.<sup>1</sup> In many ways, this shift in immigration policy from a counterterrorism focus to fighting crime and monitoring the workplace reflects a return to the original motives for the initiation of a strict deportation policy in the 1990s. More importantly, the shifting priorities raise important questions about what factors have shaped the making of deportation policy over time, how this policy has actually been implemented, and what the consequences has been for national security. Has the United States government enacted deportation policies that have successfully targeted terrorists or has legislation merely allowed for the broader application of counterterrorism mechanisms to

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<sup>1</sup> Jaxon Van Derbeken, “S.F. Mayor Shifts Policy on Illegal Offenders,” *San Francisco Chronicle*, July 3, 2008, <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2008/07/03/MNU911IPGK.DTL>.

expand into criminal investigations? Does the enforcement of deportation policy contribute to national security objectives by ridding the country of terrorists and criminals or has it undermined these objectives by creating transnational criminal networks of deported gang members and reducing the ability and willingness of Latin American countries to cooperate with the United States in combating transnational threats?

## **A. RESEARCH QUESTIONS AND ARGUMENTS**

It is my hypothesis that deportations are not an effective counterterrorism strategy. The events of 9/11 led to changes in deportation policy but not the kind expected from a counterterror justification. The disproportionate concern with the southern border puts Latin America on the front lines of U.S. homeland defense despite the lack of ties to terrorist organizations. Instead the driving force behind immigration policies relating to Latin America is deterring illegal activity rather than counterterrorism.

The preliminary questions this thesis seeks to address are:

- How have deportations served the national security goals of the United States? Are these goals truly related to terrorism or are they more concerned with fighting crime?
- Do deportations prevent crime or do they waste resources and manpower with the increased criteria that makes an individual deportable? Are priorities misplaced when determining who is to be deported?
- Is the strategy of the United States strengthening relations with Latin America or increasing ideological differences in the region? Is Latin America the next terrorist hot spot?

Latin American nations have no known ties with terrorist organizations, with the possible exception of the Tri-Border area and financing, and there is also no known evidence that support a link between terrorist cells with transnational gangs. However, restricting immigration and increasing deportations not only provides a false sense of security to U.S. citizens, but also fails to truly combat illegal activity.

While deportations of criminals allow for the United States to provide for the security of its citizens in the short run, they may also unwittingly increase this threat by contributing to the spread of transnational gangs based in the United States and Central America. A recent CRS report notes that gang violence has become a serious problem for the United States as well as Latin American nations. The method of deterring criminal gang activity has been associated with enforcing immigration laws and increasing deportation of gang members. This has brought on additional scrutiny as U.S. gang culture has been exported back to Latin America and has enabled gangs to establish transnational organizations that operate freely across borders. Congressional leaders have feared that this ease in movement would be ideal for terrorist networks to infiltrate, but currently there is no evidence to support such ideas. Policy goals of the administration would not be served properly if the DHS uses threats of terrorism to shape law enforcement, and if criminals are returned to their countries without their governments knowing their U.S. crimes. In addition to this unintended consequence, U.S. deportation policy may also make Latin American governments less willing and able to cooperate in combating transnational threats. These arguments and competing claims will be evaluated against the existing empirical evidence in order to assess the impact of deportation policy on U.S. security goals.<sup>2</sup>

Deportations are an important issue for national security for not only the United States, but also Latin America. The implications of deportations on Latin American countries effects regional cooperation and has unintended consequences which strain relations. Central American nations blame the increased organization and sophistication of transnational gangs on the deportation of their citizens from the United States. With failed U.S. policies focused on an unfounded correlation between terrorism and the undocumented, Latin American nations are disproportionately targeted for deportation since three-quarters are from Latin America.<sup>3</sup> As importantly, it is important to

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<sup>2</sup> Celinda Franco, “MS-13 and 18<sup>th</sup> Street Gangs: Emerging Transnational Gang Threats,” *CRS Report for Congress* (November 2, 2007): 2.

<sup>3</sup> Donald Kerwin and Margaret D. Stock, “National Security and Immigration Policy: Reclaiming Terms, Measuring Success and Setting Priorities,” U.S. Military Academy’s Combating Terrorism Research Center, July 2006: 41.

understand if changes in deportation policies serve counterterrorism goals. This question is significant since it increases resources spent on enforcing immigration policies that are not directly contributing to counterterrorism efforts as well as contributing to an unintended consequence of increasing the efficiency of transnational crime organizations.

The security of the United States depends on developing clear strategies focused on clear objectives. In order to provide adequate solutions for the security requirements of the United States, an honest assessment is necessary. In many cases, objectives do not match the reality of the problem. These efforts inhibit policy-makers judgment, strain relations with Latin American nations and present contradictory policies to the international community and to U.S. citizens. Misconceptions and the need to justify all actions as relating to terrorist threats relegate decision makers to making similar mistakes from the Cold War era.

## **B. LITERATURE REVIEW**

The majority of the literature on the impact of 9/11 on immigration is focused on the constitutionality of deportation policy and its impact on human rights rather than its impact on national security. For example, Tumlin argues that placing immigration services under the Department of Homeland Security (DHS) altered the manner in which all immigrants are treated and is contrary to the Constitution and the legal rights afforded to immigrants regardless of their status. Instead of making immigration services more efficient, DHS is focused on protecting the American way of life from terrorism: this will always lead to a focus on enforcement over services.<sup>4</sup> Tumlin shows that new immigration policies, based on counterterrorism measures, allowed for increased deportation of all groups of immigrants. Similarly, Walker argues that linking counterterrorism policies with an “other than us” mentality erodes the ability of the U.S.

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<sup>4</sup> Karen C. Tumlin, “Suspect First: How Terrorism Policy is Reshaping Immigration Policy,” *California Law Review* 92, no.4 (July 2004): 1179.

government to act in accordance with the Constitution and adequately target terrorist threats. This thought process allows for the increase in deportations and establish a parallel between crime and terrorism.<sup>5</sup>

Despite the abundance of studies of deportation policy from a legal perspective, there are no systematic studies of how deportation policy and its enforcement have evolved over time, nor the policies behind this. There are snapshots of key changes made in 1996 and post 9/11 and some studies of the enforcement action of federal, state and local governments but little overall sense of the factors driving the formulation and implementation of policy. This is the case even though there have been significant changes in legislation. The public reaction after the implementation of the North American Free Trade Agreement (NAFTA) and the first World Trade Center bombing moved Congress to act. They presented two acts focusing on criminals that were illegal immigrants: the Antiterrorism and Effective Death Penalty Act (AEDPA) and the Illegal Immigration Reform and Immigration Responsibility Act (IIRIRA) of 1996.<sup>6</sup>

The implementation of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act) allowed for the broader use of counterterrorism strategies to be used for general law enforcement. There are no restrictions on the types of crimes that can be investigated utilizing the tools authorized by the PATRIOT Act and law enforcement has been able to legally justify investigations on money laundering, drug offenses, espionage as well as suspected terrorist cells. The Department of Justice declared that law enforcement's greater surveillance power is not a misuse of authority. The unintended consequence or benefit of the PATRIOT Act's execution does not make the act unconstitutional. Opponents of the PATRIOT Act criticize the government for using terrorism as a justification to change law enforcement methods indefinitely.<sup>7</sup>

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<sup>5</sup> Clive Walker, "Keeping Control of Terrorists Without Losing Control of Constitutionalism," *Stanford Law Review* 59, no.5 (March 2007): 1396.

<sup>6</sup> Nancy Morawetz, "Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms," *Harvard Law Review*, 113, no.8 (June 2000): 1936.

<sup>7</sup> Eric Lichtblau, "U.S. Uses Terror Law to Pursue Crimes from Selling Drugs to Swindling," *New York Times*, September 28, 2003, sec.1, 1.

In addition to changes in national policy, there also appears to have been a series of changes in the way state and local law enforcement implement this policy. Until the 1980s, state and local law enforcement enforced federal immigration law on the borders as well as in the interior of the United States in a manner that allowed them to question an immigrant's status based on reasonable suspicion during the course of normal policy work. However, as political opposition to the Reagan administration's activities in Central America grew in the 1980s, churches across the country declared themselves as safe havens or sanctuaries for those fleeing political violence and civil war in Latin America. As Latin American communities grew, state and local law enforcement had to choose between enforcing federal immigration law and alienating crime victims and witnesses whose cooperation was necessary for law enforcement. States like Oregon, Alaska and Maine and cities such as San Francisco, Houston, New York, Chicago, Los Angeles, San Diego and Austin established "sanctuary" policies that do not require the police to inquire about a person's citizenship status. Other communities have taken even more drastic measures by forbidding state and local law enforcement officers from voluntarily communicating with federal immigration officials despite a Congressional ban on such measures.<sup>8</sup> These policies have come under criticism recently as more media attention has highlighted vicious crimes committed by illegal immigrants. Of the 12 million estimated illegal immigrants in the United States in 1999, 300,000 were determined to be criminals with an additional 400,000 leaving the country to avoid prosecution.<sup>9</sup>

In 2006, Boatright conducted a study analyzing how the character of federal, state and local law enforcement changed after 9/11. He provided both arguments for and against federal level mandates that state and local law enforcement must have an increased role in immigration enforcement in order to provide additional counterterrorism support. He concluded that the federal government requires state and local law enforcement to be successful in policing the homeland, but that priorities of these

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<sup>8</sup> Morawetz, 1645.

<sup>9</sup> Peter H. Schuck and John Williams, "Removing Criminal Aliens: The Pitfalls and Promises of Federalism," *Harvard Journal of Law and Public Policy*, 22(2) (Spring 1999): 380.

agencies may not be consistent with federal policies and mandates causing a fracture and lack of communication.<sup>10</sup> Arguments for increased use of state and local law enforcement assert that they provide 95% of counterterrorism capability in the United States and better training and federal funding can also assist in ordinary crime fighting especially in challenging the rising violence from street gangs such as MS-13.<sup>11</sup> It appears that state and local law enforcement will be the ones to make a choice about tradeoffs since the nature of the U.S. constitution allows them to defy federal law without much retribution from the federal government.

There are some studies discussing the effect of deportation on homeland security and national security objectives, but the debate tends to be a polarized one that relies on very limited evidence. The most comprehensive study, by Kerwin and Stock, outlines how immigration policy must be fully integrated in a national security strategy while acknowledging that the economic prosperity of the nation is dependent on accessibility by foreigners.<sup>12</sup> The most significant measure is the PATRIOT Act in 2001. This Act allowed for the detention of non-citizens before charges are filed and increased the security-related reasons for denying admission and deporting non-citizens.<sup>13</sup> Kerwin and Stock note that deportation is not an effective immigration policy or counterterrorism policy for several reasons. The first reason is that releasing suspected terrorists to their home nation does not stop future attacks nor does it allow for the U.S. government to monitor their actions. Second, deportations are appealing due to resource constraints and not necessarily due to their effectiveness. For example, deportations are ideal when resources and interrogation assets are limited.<sup>14</sup> When these resources are not limited, it would be preferable to question detainees in order to secure intelligence on actual security threats.

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<sup>10</sup> Laurel R. Boatright, "Clear Eye for the State Guy: Clarifying Authority and Trusting Federalism to Increase Nonfederal Assistance with Immigration Enforcement," *Texas Law Review* 84, no.6 (May 2006): 1633.

<sup>11</sup> Boatright, 1647.

<sup>12</sup> Kerwin and Stock, 1.

<sup>13</sup> Kerwin and Stock, 4.

<sup>14</sup> Kerwin and Stock, 15.

Finally, while much has been written about how 9/11 and the subsequent U.S. focus on counterterrorism has contributed to the deterioration of U.S.-Latin America relations, there has been surprisingly little focus on how deportation policies have affected our relations with our southern neighbors and whether they have undermined the U.S. pursuit of national security objectives that require multi-national support. The available evidence, however, suggest this is an important issue. For example, a USAID report analyzes gang activity in five countries: El Salvador, Guatemala, Honduras, Mexico and Nicaragua. All five countries have limited gang prevention and rehabilitation programs and there is limited communication between U.S. and Latin American officials concerning when gang members are deported. Without a successful means to share records on violent criminals, Latin American governments have limited ability to provide any remedial services nor are they fully aware of the crimes their citizens committed in the United States. The addition of the U.S. gang culture in Latin America is not the only reason for an elevation in gangs in Latin American, but it is a significant contributing one.<sup>15</sup>

### **C. THESIS OVERVIEW**

This thesis will use the case study methodology and cover the time period from 1994 through the present to compare changes in deportation policies pre and post 9/11, how they have been enforced, and their consequences for national security. Examining the changes in immigration policy and enforcement mechanisms emplaced after September 11, 2001 requires an understanding of the policies and politics of immigration legislation that was in place before the attacks. Therefore, Chapter II is focused on outlining the policies emplaced after 1994 and the driving factors behind those policies and enforcement strategies, especially deportation. The chapter first outlines the major Acts and initiatives from 1994-2001 and the extent to which their provisions were actually enforced. It then analyzes the key factors driving the policy changes and assesses their effectiveness in meeting their stated goals. It finds that the acts designed to protect the United States from terrorism and crime committed by undocumented immigrants failed to

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<sup>15</sup> U.S. Agency for International Development, *Central American and Mexican Gang Assessment* (April 1, 2006): 6.

solve the problems of illegal immigration or protect the United States from subsequent terrorist acts. Chapter III addresses the same issues for the post–September 11, 2001, period and finds that the root causes of illegal immigration were still not addressed and efforts to decrease illegal migration and deter terrorism and crime through the use of physical barriers and increased immigration personnel only showed the mismanagement of resources. The fourth chapter is an overview on how Latin America fits into the national security objectives of the United States and joint initiatives that serve those goals. It focuses on the impact of increased deportations on the terror and crime threat emanating from the region and U.S. relations with Latin America. In conclusion, Chapter V assesses the effectiveness of deportation as a tool of national security.

The primary sources for the thesis include empirical data relating to deportations and criminal incidents taken from the Transactional Records Access Clearinghouse (TRAC) Immigration Project and the Homeland Defense Digital Library. Other sources used in this thesis include U.S. congressional testimony, U.S. Congressional Research Service (CRS) reports, articles from legal reviews and other periodicals, U.S. government and non-government reports, books and journal articles pertaining to national security, immigration policy and economic policy.

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## **II. DEPORTATION POLICY PRE-9/11**

Immigration policy debates are not a result of the 9/11 terrorist attacks, but are a long-standing issue that has existed since our nation's conception. Policies concerning who should be allowed to enter and remain in the United States have changed through time as economic conditions in our nation and internationally have changed. National security concerns, sometimes unfounded, have guided policymakers especially during times of national emergencies, whether those emergencies are of an economic or security nature.

Harsher deportation laws were initiated after political pressure following acts of terrorism committed in the 1990s. Even those these acts were committed by foreigners and U.S. citizens, the popular target was the immigrant community. Capitalizing on the public need for an increased perception of safety, politicians turned to targeting the immigrant community. Deporting illegal aliens, especially those that had committed crimes, was seen as a very popular way to reduce the overall perception of crime and provide a sense of security, even if the sense of security was misguided. These laws were not effective in curbing illegal immigration or acts of terrorism since they did not focus on the underlying reasons for illegal immigration nor did they target legitimate terrorist organizations.

### **A. THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996 (AEDPA)**

Senator Robert J. Dole introduced the AEDPA to Congress with eight co-sponsors in 1995 after versions of the bill sat in committee for a decade until political pressure gave it new purpose. It received increased support after the 1993 World Trade Center and Oklahoma City bombings in the early 1990s despite only immigrant involvement in the World Trade Center attacks. The Act provided new guidelines on whether or not state and federal prisoners, who are immigrants, may appeal to the federal judiciary to review

their cases with respect to the U.S. Constitution.<sup>16</sup> The narrowing of the writ of habeas corpus had consequences for the deportability of immigrants by denying them the right to a judicial review. Title IV (Terrorist and Criminal Alien Removal and Exclusion), addressed immigration issues and points directly to a link with terrorism. As a result, it narrowed asylum provisions, seen as a means to thwart deportation, and reduced the evidentiary requirement for law enforcement to demonstrate that an immigrant is a danger to society. The Act cited that those eligible for deportation had used procedural provisions to remain in the United States. The ability of terrorists to stay in the United States by using asylum provisions was determined to be a threat to national security and a waste of manpower and resources due to the administrative costs of the applications.<sup>17</sup> The Act also challenged previous procedural requirements and allowed for the use of classified information in establishing deportability.

The AEDPA also contained special procedures for the deportation of foreign terrorists and upon initial review did not appear to cross constitutional grounds. For example, Section 401 authorized the Chief Justice to “name five district court judges to serve five year terms as judges of a special removal court, 8 U.S.C 1532. The removal procedure is initiated by an application from the Attorney General indicating that an identified alien is a terrorist.”<sup>18</sup> The judges would then examine the evidence and the alleged terrorist would have the ability to have counsel and present evidence. Evidence presented by the Department of Justice would have to show beyond a preponderance of evidence that the person is a terrorist. Classified information is also summarized and presented to the alleged terrorist without compromising national security or informants. The most controversial part of this section is a clause allowing the Attorney General to detain the individual at the onset of the removal process. Those that are found entering the United States after being deported or denied entry under Section 401 are also subject to ten years in prison.

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<sup>16</sup> Charles Doyle, “Antiterrorism and Effective Death Penalty Act of 1996: A Summary,” *American Law Division* (June 3, 1996): 4.

<sup>17</sup> Doyle, 4.

<sup>18</sup> Doyle, 6.

Subtitle B (Exclusion of Members and Representatives of Terrorist Organizations) established that association with terrorist organizations is justification for denying entry to the United States and also limited the discretionary ability of the Attorney General to withhold, suspend, permit voluntary deportation, and adjust status of an immigrant. Instead, the Attorney General is required by law to remove any immigrant that entered the United States illegally unless they can provide evidence that they entered in accordance with the law. Subtitle C (Modification to Asylum Procedures) allowed for immigration officers to make determinations as to the merits of asylum for those seeking entry to the United States at an individual's point of entry. It also put the burden of determining whether or not any alien terrorist is worthy of asylum directly on the Attorney General. The Attorney General must make the determination weighing the merits of asylum against national security. This provision also limits judicial review in Section 423 of the decisions made at the point of entry to those circumstances where an individual claims U.S. citizenship or has been admitted for permanent residence.<sup>19</sup>

The Criminal Alien Procedural Improvements provision outlined in Subtitle D permits the disclosure of confidential information concerning status and agricultural worker status through court order if related to a criminal investigation or if an immigrant has been killed or seriously injured. The provision also required the implementation of a criminal alien tracking station and identification system to assist in identifying and locating those that are deportable due to criminal acts. Also included in the provision was the addition of immigration offenses to the list of Racketeer Influenced and Corrupt Organization (RICO) provisions established in the 1960s. The additions to RICO include crimes involving fraud in obtaining passports, visas and other entry documents as well as human trafficking and providing safe haven and aid for illegal aliens. Under Section 435, courts can issue wiretapping orders for the use in immigration investigations. RICO convictions hold a sentence of up to 20 years.<sup>20</sup>

Subtitle D also provided additional description on crimes of moral turpitude. The definition provided clarification that an immigrant was deportable if the crime they

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<sup>19</sup> Doyle, 21.

<sup>20</sup> Doyle, 21.

committed was able to be punishable for up to one year in prison and not if they had actually received a one year prison sentence. Under Section 438, deportation is permitted before immigrants are convicted of nonviolent crimes (excluding drug trafficking) serve their complete sentences. Aliens that were repeatedly reentering the United States were required to serve their entire terms in addition to any new sentences. Local and state law enforcement can also detain those reentering the United States illegally. Furthermore, in Section 440, the crimes that call for immediate deportation of criminal aliens are increased. Aggravated felonies, drug violations, espionage and weapons laws all are included in crimes that call for expedited removal and under such circumstances there is no judicial review after the Board of Immigration Appeals and the Attorney General has no discretion to act. Despite mandating additional responsibilities and the implementation of systems and tracking mechanisms, Congress provided the Immigration and Naturalization Service (INS) with only \$5 million per year through FY97-FY00 for these added responsibilities and systems.<sup>21</sup>

## **B. THE ILLEGAL IMMIGRANT REFORM AND IMMIGRANT RESPONSIBILITY ACT (IIRIRA)**

The IIRIRA signed into law in 1996 was a combination of two bills concerning legal and illegal immigration separately. It is divided into six sections and concentrated on a variety of issues from border control, penalties on smuggling and document fraud to detention and deportation of aliens. Additionally, the Act restricted the benefits for illegal and lawful immigrant residents of the United States pertaining to social services and government programs. The most criticized aspects of the law are the lack of mechanisms to balance the social harms caused by the deportation of individuals for relatively minor crimes.<sup>22</sup>

The first section, Title I (Improved Border and Interior Enforcement) increased the total number of Border Patrol agents by 5,000 over a five-year period. This section

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<sup>21</sup> Doyle, 24.

<sup>22</sup> Marc L Miller, "The Randolph W. Thrower Symposium: Immigration Law: Assessing New Immigration Enforcement Strategies and the Criminalization of Migration- Introduction," *Emory Law Journal* 51, no. 3 (July 1, 2002): 967.

also provided \$12 million for a fourteen-mile fencing project in the San Diego area and new equipment for the INS (rotary and fixed-wing aircraft, night vision capabilities and four-wheeled vehicles) to assist in their enforcement duties. All those apprehended attempting unlawful border crossings could be fined \$250; high-speed evasion could result in up to five years in prison. Title I also included provisions that mandate the Attorney General develop an automated entry-exist system for the borders in addition to initiating pre-inspection areas in at least five foreign airports that send large amounts of ineligible persons to the United States.<sup>23</sup> Title I also charged the INS with investigating unlawful employment and visa overstays. It was mandated that each state have a minimum of ten INS investigators within one year and state officials were permitted to carry out federal investigations, apprehensions and the detention of illegal immigrants as long as they were trained in federal laws.<sup>24</sup>

Title II of the IIRIRA added human smuggling and document fraud to the Racketeer Influenced and Corrupt Organizations Act (RICO) list, increased the penalties for RICO crimes involving immigration offenses and increased by 25 the number of Assistant U.S. Attorneys participating in investigations of these crimes. RICO now included provisions that included violations of the Immigration and Nationality Act (INA) that would be considered as racketeering. This means that those who systematically engage in racketeering for profit can be held liable in the criminal and civil courts.<sup>25</sup>

The deportation system was reworked in Title III of the IIRIRA. Title III imposed a three-year and ten-year ban on reentry for illegal immigrants caught in the United States. For example, an individual who overstays their visa for 180 days but less than a year cannot be readmitted for three years. If an individual stays for longer than one year unlawfully, they are barred for ten years. Notable exceptions to these bans including minors, asylum applicants and family unity petitioners. The provision includes

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<sup>23</sup> Siskind Susser Immigration Lawyers, "IIRIRA 96- A Summary of the New Immigration Bill" (November 1996), <http://www.visalaw.com/96nov/3nov96.html>, 2.

<sup>24</sup> Siskind Susser Immigration Lawyers, 3.

<sup>25</sup> Micah King, "RICO: A New Tool for Immigration Law Enforcement," *Center for Immigration Studies Backgrounder* (August 2003): 1.

exemptions for abused women and children and spouses of U.S. citizens if separation would cause undue hardship on the family. Individual rulings can be appealed, but the rules themselves cannot be appealed.

Title III also allows for more discretionary ability at the individual INS officer level with no judiciary oversight. INS officials can make determinations on inadmissibility at point of entry or for those who cannot prove that they were in the United States prior to the Act for two years. The only recourse is for those seeking asylum; a separate officer, who determines whether they possess a “credible fear of persecution,” screens them. Even if they do not believe the asylum case is warranted, judicial review is required.<sup>26</sup>

“Deportation” procedures were also semantically changed to “removal” proceedings. Aliens who had been in the United States for seven years with no criminal history and had ties to U.S. residents were no longer allowed to apply for relief or “suspension of deportation” allowing them to remain in the United States and change their residency to that of permanent resident. Congress replaced this relief with a “cancellation of deportation” provision, but it distinguishes between green card holders and nonimmigrant aliens. Nonimmigrant aliens are considered temporary residents such as students, tourists, foreign diplomats, trainees and temporary workers. Green card holders are eligible if they held it for five years, resided in the United States for seven and never been convicted of a felony.”<sup>27</sup> Cancellation for nonimmigrant aliens is more difficult to obtain since they are required to prove they have been in the United States for 10 years with no convictions of serious crimes, show good morale character, and that their removal would result in hardship to a U.S. citizen. “Voluntary departure” is also included in Title III that allows those who voluntarily leave the United States to avoid the reentry bars. They must meet certain requirements as well including: presence in the United States for over one year, good moral character for at least five years, not deportable on criminal grounds, and intends to leave the United States and has the capacity to do so.

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<sup>26</sup> King, 4.

<sup>27</sup> King, 4.

Deportation procedural changes were also affected by the addition of new crimes that result in the deportability of an immigrant. Deportability was increased by the reduction in the amount of fines and length of sentence required to consider an immigrant deportable. Title IV required aliens currently in the probation system to register with the INS and mandated the tracking of illegal or deportable immigrants in the prison system. The Attorney General was required to provide statistics on the type of crime committed and incarceration rates to Congress on a regular basis. Added to the IIRIRA were additional exclusion categories: anyone thought to have participated in terrorist activities, domestic abuse stalking, as well as falsely claiming U.S. citizenship were all now determined to be non-admittable to the United States.

The IIRIRA also included new provisions intended to make it more difficult to obtain asylum in the United States. Applicants cannot be convicted criminals and may not have already been denied asylum unless under special circumstances. These restrictions were also coupled with duties on asylum case officers that mandated that hearings occur within 45 days of application with a decision determination within six months. Applicants must also provide positive identification in the form of fingerprints or comparable evidence and pay an application fee. Applicants who are found to provide false information will be permanently barred from U.S. citizenship. Humanitarian parole was also changed and now is determined only on a case-by-case basis. In order to accommodate the new restrictions, the number of funded asylum officers increased by 600.<sup>28</sup>

Student Visas, a major contributor to visa overstay violations, were also affected by the IIRIRA. Students are inadmissible if they plan to attend public elementary or non-college level adult programs. Additionally, students must plan on paying the school for attendance. Entrance is permitted for those seeking to attend private schools, but if they change their school to a public one, they are removable unless they reimburse the school district and meet the twelve-month limit. University students are required to provide additional information that will be compiled electronically. The Visa Waiver program for

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<sup>28</sup> King, 7.

those countries contributing to the lowest levels of visa violators and illegal immigrants was extended under this provision. Countries who contribute to 3.5% of the illegal immigrant population will have their Visa Waiver privileges automatically terminated.

Additionally, Congress enacted other initiatives that limited benefits for immigrants and created an atmosphere of fear, confusion and distrust in the government. The Personal Responsibility and Work Opportunity Act (PRWORA) of 1996 restricted the welfare benefits of immigrants, legal and illegal, in order to provide disincentives for illegal immigration. The PRWORA set limitations for states on groups of immigrants, including those that had previously been eligible for benefits. The Act redefined, under Title IV, who was eligible for benefits and put a new requirement on social service officials to understand how public benefits relate to immigration law, a difficult endeavor as the changes are not universal across all benefits.<sup>29</sup> The changes outlined in the federal Act also had enormous implications at the state level and many states challenged the federal mandate that they deny benefits for immigrants. Their main point of issue is that since the federal government establishes overall immigration policy and that mandating the states implement their own immigration policy will result in a “cost transfer” to the states and then to individual communities to enforce these policies.<sup>30</sup>

In addition, the law has been criticized for its potential public health consequences. Non-citizens, regardless of legal status may have false impressions of the policy. They may not seek medical attention for fear of deportation or losing their chances at permanent citizenship for utilizing social services even though that is not stated within the Act. The aversion to seeking care can potentially damage not only their own health, but also those they come into contact with. Failure to seek medical treatment for communicable diseases can result in epidemics and additional strain on the health care system. In large immigrant communities the effects of the PRWORA can be exponentially evident.

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<sup>29</sup> Dolores Acevedo-Garcia et al., “Impact of the Federal Welfare Reform on Immigrants,” Prepared for U.S. Commission on Immigration Reform, Lewin Group Inc. (July 28, 1997): 1.

<sup>30</sup> Dolores Acevedo-Garcia et al., 2.

## **C. ENFORCEMENT**

Federal policies put a tremendous burden on the law enforcement community to comply with Congressional mandates. These Acts also created the need for appropriations and additional enforcement capabilities at the federal level. In addition, the legislature may make mandates upon the states, but laws are meaningless without an enforcement mechanism. Enforcement of immigration laws have varied from implementing entry and exit tracking programs, increased border patrol and INS agents, increases in detention beds and tracking deportable criminals in the prison system. While databases and tracking mechanisms are essential in managing deportable aliens, it is also necessary to identify those residing illegally outside of the criminal justice system. Attempting to identify and remove non-criminal immigrants is difficult and puts the burden on state and local level law enforcement agents to understand and have the capacity to physically enforce those policies.

The AEDPA and the IIRIRA were designed to provide state and local police with the ability to arrest illegal aliens who were present in the United States unlawfully and who had previously committed a felony within the United States. These laws also required that state and local law enforcement work with federal agencies. Implementation, however, met with resistance at the state and local level and there is not one uniform standard maintained across the states. Each state has been able to interpret the Acts individually and develop law enforcement practices that best serve the needs of their individual communities.

### **1. Federal Initiatives**

Before 2001, there were fewer than 2,000 INS agents enforcing federal policies. The priority for the INS prior to 9/11 was to investigate “aliens committing crimes including fraud, smuggling and trafficking of aliens, and work site violations.”<sup>31</sup> The 1996 Acts required the INS to complete deportation proceedings on criminal aliens in prison as a means to rid the prison system of undocumented immigrants. The provisions

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<sup>31</sup> Lisa Seghetti, Stephen R. Viña, and Karma Ester, “Enforcing Immigration Law: The Role of State and Local Law Enforcement,” *CRS Report for Congress* (March 11, 2004): 2.

were designed to keep criminal aliens; especially those who had committed aggravated felonies, from returning to the United States. The Acts also provided for additional border patrol agents and increased patrolling along the borders. As a result, between 1996 and 1998, deportations increased from 80,000 to 180,000. These numbers reflect both legal and illegal immigrant statistics.<sup>32</sup>

The INS's ability to track and issue deportation orders was important in reducing the strain on detention facilities. However, statistics demonstrated that the INS was slow to establish automated tracking mechanisms for managing potentially deportable inmates and had no record on 27% of potentially deportable criminals as required by statute. The agency's inability to issue deportation orders before release cost the INS an estimated \$40 million dollars in detention costs.<sup>33</sup> The ability to identify potentially deportable criminals in prison is only one aspect of the enforcement provisions started in the 1990s. Federal initiatives designed to assist in enforcing the Acts included the establishment of Quick Response Teams, a physical barrier along the border, and the Absconder Apprehension Initiative designed to locate and deport those who have failed to show for their removal proceedings. In 1999, the Omnibus Consolidated and Emergency Supplemental Appropriations Act provided for the INS to create Quick Response Teams (QRTs) designed to apprehend and deport illegal aliens. The QRTs coordinate with state and local law enforcement agencies in areas with increased illegal immigrant activities.<sup>34</sup>

One of the most significant features of the IIRIRA is the written order by Congress to the Attorney General to construct physical barriers in "the vicinity of the United States borders" in order to prevent access in high risk areas.<sup>35</sup> High-risk areas have not been expressly determined nor has the term "the vicinity of the United States borders" been defined.

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<sup>32</sup> Pia Orrenius, "U.S. Immigration and Economic Growth, Federal Reserve Bank of Dallas," *Southwest Economy* 6 (November/December 2003).  
<http://www.dallasfed.org/research/swe/2003/swe0306a.html>.

<sup>33</sup> Norman J. Rabkin, "INS' Efforts to Identify and Remove Imprisoned Aliens Continue to Need Improvement," *United States General Accounting Office* (February 25, 1999): 2.

<sup>34</sup> Seghetti, 2004, 3.

<sup>35</sup> Blas Nuñez-Neto and Yule Kim, "Border Security: Barriers Along the U.S. International Border," *CRS Report for Congress* (May 13, 2008): 5.

Enforcement of immigration law in the workplace increased significantly in 1997 but soon tapered off as pressure from lobby groups in the agriculture sector and bureaucratic red tape that hinders prosecuting employers decreased the attractiveness of worksite enforcement as a tactic to deter illegal immigration. In 1997, 7,537 worksite inspections were conducted, but the apprehensions only represented a fraction of undocumented immigrants.<sup>36</sup> By 2002, worksite enforcements had dropped to just over 2,000.<sup>37</sup> Instead, the INS developed and tried to streamline strategies that focused more on those immigrants that provided a danger to communities and not those acting in relationship to global economic forces in addition to building physical barriers. The U.S. economic market requires certain levels of unskilled labor, which immigrant populations provide, and therefore enforcement met resistance from agricultural interests. However, studies have shown that this is not quite the case as the areas that require unskilled labor have higher rates of unemployment than any other group.<sup>38</sup>

## **2. State and Local Initiatives**

The IIRIRA provided law enforcement personnel the ability to intervene in civil immigration laws in two situations. First, if the presence of a “mass influx” of foreign nationals requires an immediate action, law enforcement personnel may react after gaining permission from their corresponding supervisors. Second, the Attorney General may delegate immigration authority to state and locals if those agencies received prior training and received a Memorandum of Understanding (MOU). However, no state or local law enforcement agency completed the training or received an MOU prior to 2001. Additionally, while the IIRIRA lifted a ban on public employees disclosure of individual immigration status to the INS, it did not empower employees to investigate status.

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<sup>36</sup> Marc R. Rosenblum, “U.S. Immigration Policy: Unilateral and Cooperative Responses to Undocumented Migration,” Policy Paper 55, Institute on Global Conflict and Cooperation, University of California Multi Campus Research Unit (2000): 4

<sup>37</sup> Wayne A. Cornelius, “Controlling ‘Unwanted’ Immigration: Lessons from the United States, 1993-2004” (working paper 92, Center for Comparative Immigration Studies, University of California, San Diego (December 1, 2004): 16.

<sup>38</sup> Rosenblum, 6.

Local law enforcement agencies were changing their practices at the same time the new immigration laws were being developed in Congress. Law enforcement agencies around the nation were changing methods and incorporating a “community policing” effort that made them reluctant to enforce new federal immigration statutes. Neighborhood watch groups and civic organizations were extremely effective in assisting local law enforcement agencies especially in minority areas. From 1993 to 2000, the Latino community reduced their non-fatal violent crime rate by 56%. The positive results of “community policing” efforts provided the data needed to ignore federal regulations in favor of methods that reduced crime in their own localities. In fact, some communities banned local law enforcement agencies from enforcing immigration status and questioning the citizenship of witnesses and suspects. Communities also countered welfare reform by instructing those working in social agencies to continue to provide social services for illegal immigrants by not asking for their immigration status. The Supreme Court has not challenged the plenary power of Congress over immigration, although it could bring up several questions under the equal protection clause.<sup>39</sup>

A lack of integration between the INS and local law enforcement has at times undermined law enforcement efforts. In 1999, an illegal Mexican immigrant named Rafael Resendez-Ramirez turned himself in to the Texas Rangers. He had been wanted for at least eight murders in Illinois, Kentucky and Texas. Resendez-Ramirez had also been deported three times for unrelated crimes and voluntarily returned to Mexico nine times despite his “wanted” status. In another instance, local law enforcement officials in the District of Colombia could not resolve 24 murder cases because the suspects fled to El Salvador before they could be apprehended. If the INS and local law enforcement personnel were more integrated, the INS may have been able to apprehend the suspects before they fled the country. While many studies suggest that immigrants commit crime at the same rates or lower as non-immigrants, there are important factors to consider that suggest that immigrant crime is higher due to the lower levels of reporting by their

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<sup>39</sup> Valerie F. Hunt, “When Institutional Boundaries Meet New Political Ideas: Courts, Congress and U.S. Immigration Policy Reform” (working paper 38, Center for Comparative Immigration Studies, University of California, San Diego, May 1, 2001): 10.

communities.<sup>40</sup> INS data did establish lower rates of recurrent criminal behavior among non-deported immigrant criminals, 37% compared to 66% of native born, from October 1994- May 1999, but this was still seen as an inability to safeguard the population from criminal aliens during congressional debates.<sup>41</sup>

States are required to pay for the associated costs of putting criminal aliens through the legal system, but the federal government has offered some assistance financially. States, especially those along the border, have developed programs that were designed to deter illegal immigration through cooperative efforts with the federal government. These systems include increased deportations, border control, and monitoring criminal aliens. Additionally, states have integrated with the federal government deportation screening proceedings through the Institutional Hearing Program (IHP). The IHP allowed the states and the INS a new means of collaborating for the early deportation within the state prison system. Some states, such as Florida and New York, offer clemency to those non-violent offenders in exchange for early deportation.<sup>42</sup>

#### **D. ANALYSIS OF POLICY CHANGES**

This section describes the main political factors that motivated the passage in 1996 of the IIRIRA and the AEDPA. Rising crime and the economic downturn in the mid-1990s were causing hardships on all levels of government. Immigrants were becoming a likely target for the nation's problems, but it was not until the terrorist attacks on the World Trade Center and in Oklahoma City that Congress moved to support the IIRIRA and the AEDPA. Even though the Oklahoma City bombing was an act of domestic terrorism, it did not stop the Acts from first targeting foreign terrorists and immigrants in general. The section also shows that these legislative attempts to strengthen national security through immigration fell short because of the lack of understanding the underlying reasons for illegal immigration and addressing it appropriately.

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<sup>40</sup> Carl F. Horowitz, "An Examination of U.S. Immigration Policy and Serious Crime," report prepared for the Center for Immigration Studies (April 2001): 8.

<sup>41</sup> Horowitz, 9.

<sup>42</sup> Horowitz, 19.

## 1. Driving Factors

The IIRIRA was a follow up to the Immigration Reform and Control Act (IRCA) of 1986. The IRCA was in response to the failing state of the Mexican economy contributing to higher levels of illegal immigration to the United States. It increased funding for the INS and border control and established the agriculture guest worker visa, the H-2A. Additionally, it offered amnesty to approximately three million illegal immigrants, the majority from Mexico.<sup>43</sup> The IRCA also provided for employer sanctions, but these were not enforced. Instead of enforcing current policy or adapting it to focus on the reasons for illegal immigration, the IIRIRA and AEDPA were a stricter repackaging of already enacted legislation.

The IIRIRA and the AEDPA attempted to redefine and provide stronger legislative support for the provisions of the IRCA, but neither was successful in countering illegal hiring practices. The IRCA left a loophole through the use of subcontractors that the IIRIRA did not close. The agricultural sector successfully won the battle against worksite enforcement becoming a central pillar in internal illegal immigration enforcement. The IRCA also provided amnesty for millions. The amnesty also increased illegal immigration as family members and other immigrants came to the United States in hopes of another amnesty offer.<sup>44</sup> The IIRIRA and AEDPA sought to counter the influx by denying social benefits to illegal immigrants and making it more difficult for legal residents to be eligible for services. It also failed to address the claims that the IRCA led to discriminatory hiring practices based on ethnicity.

The recession of the early 1990s resulted in rising unemployment and as a result, immigrant workers were often victims of crime and anti-immigrant legislation. At the federal level, the Republican-dominated Congress introduced the early forms of the IIRIRA and the AEDPA that contained provisions that would deny children of undocumented immigrants access to public schools, deport legal immigrants who used public assistance for over 12 months and restrict access to federally funded AIDS

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<sup>43</sup> Orrenius, 6.

<sup>44</sup> Susan Gonzalez Baker, "The "Amnesty" Aftermath: Current Policy Issues Stemming from the Legalization Programs of the 1986," *International Migration Review*, 31, No. 1 (Spring 1997): 11.

treatment programs to immigrants. These provisions were cut under pressure from those states with high immigrant communities in addition to threats of a presidential veto. However, the bill was seen, even by Democrats, as a measure to show effectiveness at border control.<sup>45</sup> While these provisions are primarily concerned with the economic strain on supporting immigrants, the bills also had an anti-crime focus that gave the bills more bipartisan support. The Clinton administration cited a need for immigration reform after years of no serious legislation backed by enforcement and promised to deport those who had committed a crime.<sup>46</sup>

The bill was passed as more of an anti-crime bill although the language specifically referenced terrorism, a direct result of the political pressure to show a tougher stance on terrorism after the 1993 World Trade Center and the 1996 Oklahoma City bombings. After the World Trade Center bombing, the flaws in the immigration system seemed even more pronounced after it was discovered that Mahmud and Mohammed Abouhalima entered on tourist visas and were later granted amnesty in 1986 by claiming to be agricultural workers. Both were convicted of involvement in the first World Trade Center bombings. Most notably, Sheik Rahman entered under a tourist visa and lied to receive permanent residency. When his residency was revoked due to his misrepresentation, he applied for asylum to prevent deportation. Since his asylum request was pending, he was able to remain in the country and to plan the first World Trade Center bombing as well as unsuccessful plans to destroy New York City landmarks.<sup>47</sup> Despite this, there was still not enough support in Congress for the immigration laws to be passed; it would take the worsening crime and economic situation and the Oklahoma City bombing three years after the World Trade Center attack, to generate support in Congress. Although the IIRIRA was modified from its original form to

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<sup>45</sup> Eric Schmitt, "Conferees Approve a Tough Immigration Bill," *New York Times*, September 25, 1996, A15.

<sup>46</sup> Sam Fulwood III, "Administration Boosts Deportation Projects," *Los Angeles Times*, August 16, 1995, 25.

<sup>47</sup> Fullwood, 25.

be less damaging to immigrants, it still was thought to be the harshest bill up to that time on the immigrant community since it directly related to the access to the writ of habeas corpus and access to appeals.

At the state level, similar Acts were being introduced. California Propositions 187 and 227 were passed in 1994 and 1998 respectively. Proposition 187 sought to exclude the children of undocumented immigrants from public schools and state benefit programs.<sup>48</sup> Proposition 227 was a campaign against bilingual education in public schools. A subsequent Supreme Court ruling based on three separate cases, *Lau v. Nichols*, *Castañeda v. Pickard* and *Phyller v. Doe*, stated that no school can deny the right to public education based on national origin, schools must provide tools to learn academic English, and that no one can be restricted from access to schools based on immigration status.<sup>49</sup> The implementation of NAFTA and economic recovery in the latter part of the 1990s reduced the overall animosity between citizens and non-citizens regarding the economy, but interest groups gained powerful momentum during this time. Interest groups assert that access to social services of undocumented immigrants drains U.S. economic resources and will increase illegal immigration to have access to U.S. programs. However, there is no evidence that immigrants come to the United States for the purpose of using social services.

The IIRIRA and the AEDPA were also in response to the growing perception that immigrant crime was rising and straining the U.S. legal system. A restrictive approach to immigration gained more popularity in the 1990s as the economy worsened and the media provided information that made citizens fear a change in the culture of the United States by the growing number of immigrants from Latin America. Ironically, the implementation of NAFTA in 1994 integrated the United States with Mexico while the subsequent 1996 laws sought to provide more barriers. The removal of legal protections for Mexican farmers under provisions of NAFTA contributed to the arrival of more

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<sup>48</sup> Kenneth Juan Figueroa, "Immigrants and the Civil Rights Regime: *Parens Patriae* Standing, Foreign Governments and Protection from Private Discrimination," *Columbia Law Review* 102, No. 2 (March 2002): 418.

<sup>49</sup> Deborah Escobedo, "Proposition 187 and 227: Latino Immigrant Rights to Education," *American Bar Association*, <http://www.abanet.org/irr/hr/summer99/escobedo.html>.

agricultural workers to the United States.<sup>50</sup> As cheap labor flooded the U.S. market and the U.S. economy entered into a downturn, the likely target of U.S. citizens was the immigrant community. Seen as a way to protect jobs of their constituents, many representatives were elected on anti-immigrant or restrictive platforms. At this time, there was also an increase in immigrants from Cuba and Haiti and the media capitalized on a sense of invasion of foreigners.

Although the IIRIRA and the AEDPA were originally drafted with an anti-crime and economic undertone, the terrorist attacks gave the bill a new purpose and increased the overall level of support for the provisions despite previous objections. Prior to the terror attacks, most opposition to the bills was from representatives from states with high levels of immigrants. Restricting access to services and easing deportation criteria caused hardship and frustration for their constituents and their families. Additionally, the bill had even harsher provisions concerning immigrants.

## **2. Consequences**

The IIRIRA and the AEDPA were designed to offer protections against terrorism and crime. The immigration system was the delivery method for these provisions through the increase in penalties for immigration violations and streamlined deportations of immigrants suspected of supporting terrorism and those who had committed crimes. Both aspects, terrorism and crime prevention, resulted in moderate success, but they also raised new legal questions and whether or not the Acts specifically address what they were written to do or if they were too broad and unfocused.

For example, in order to combat terrorism and crime, increased patrolling and barriers were funded at the border. After the 1996 Acts, border agents were hired at an all time high. The total number of border patrol agents increased by 42% from 1997 until 2001.<sup>51</sup> However, there is no correlation between increased border patrol agents and

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<sup>50</sup> Aristide R. Zolberg. 2006. *A Nation by Design: Immigration Policy in the Fashioning of America*. New York: Russell Sage Foundation: 383.

<sup>51</sup> The Transactional Records Access Clearinghouse, "Border Patrol Expands But Growth Rate After 9/11 Much Less Than Before Division Between North/South Border Little Changed" (Syracuse University, 2006). <http://trac.syr.edu/immigration/reports/143>.

increased apprehensions at the border, despite logic suggesting that more resources and manpower should increase overall levels of enforcement.<sup>52</sup> Additionally, the incidents of crossing deaths has increased each year as barrier projects force more illegal crossings to remote areas and increase the susceptibility of migrants to traffickers. From 1998 to 2004, there was a 29% increase in border deaths while the number of apprehensions was also reduced.<sup>53</sup> No evidence exists to show that terrorists have been able to cross through the southern border with Mexico, but fences were authorized. The levels of total illegal immigrants have not been affected by the increase in agents or barriers.

Another major point of the IIRIRA is expanded deportation criteria, an increase in penalties for immigration violations and bars of entrance for those who have violated immigration laws. One of the flaws of the system was presented in the Supreme Court case, *Zadvydas v. Davis* in June of 2001. The problem concerned the deportation of an individual whose home country would not accept the return. The court declared that once deportation was not an option, the individual could not be indefinitely detained unless the individual poses a substantive security risk. The court's ruling resulted in the release of over 3,000 illegal immigrants mostly from Cuba and Southeast Asia.<sup>54</sup> This ruling will play an important part in the detention of individuals suspected of terrorism after the 2001 terrorist attacks. The laws did streamline the deportation process and reduced constitutional protections afforded to all immigrants suspected of supporting terrorism.

The Acts addressed only a few of the ways in which terrorists have been able to exploit U.S. immigration policy. The Center for Immigration Studies examined how known terrorists gained entry to the United States from 1993-2001. The study provided evidence that terrorists abused the temporary immigration provisions by overstaying their visas, but not all violated their visa terms before committing terrorist acts within the United States. The statistics suggest that terrorism is not solely associated with temporary

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<sup>52</sup> The Transactional Records Access Clearinghouse, "Controlling the Borders" (Syracuse University, 2006). <http://trac.syr.edu/immigration/reports/141/>.

<sup>53</sup> Government Accountability Office, "Illegal Immigration: Border-Crossing Deaths Have Doubled Since 1995: Border Patrol's Efforts to Prevent Deaths Have Not Been Fully Evaluated, Report to the Honorable Bill Frist, Majority Leader, U.S. Senate" (August 1, 2006): 21.

<sup>54</sup> Julie Farnam. *U.S. Immigration Laws Under the Threat of Terrorism*. (New York, Algora Publishing, 2005): 36.

immigrants and therefore a more encompassing policy should be enacted.<sup>55</sup> The 1996 laws did not address this issue effectively since there were no mechanisms put into place that effectively could track violators nor was research conducted to examine the best way to counter this problem.

A new visa system that would be tamper proof was mandated. Better screening of applicants for citizenship may help identify possible candidates for deportation instead of citizenship and the Acts did recognize the benefit of pre-screening. However, the U.S. government is not immune from corruption. A Visa adjudicator in Mexico was sentenced to eighteen months in prison for selling U.S. Visas.<sup>56</sup> Although this act has not been associated with allowing terrorists to enter the country, it does show that the U.S. immigration system is still vulnerable to corruption and can be manipulated by criminals and terrorists.

Terrorists have not only been able to take advantage of temporary immigration policies, but also of the systems that allow for naturalization and permanent residencies. None of the 9/11 terrorists were permanent legal residents of the United States; however, prior to 9/11, more than half of the terrorist attacks on U.S. soil were committed by permanent residents or naturalized citizens.<sup>57</sup> Avenues to exploit the programs allowing for naturalization and long-term residencies include humanitarian based approaches. Refugees, those living outside their country and applying for admittance in foreign countries, have their applications reviewed by the State Department before they enter the United States. Asylum applications are filled out by those who are currently within the United States, although both groups are supposed to be held to the same standards. Reports show that approximately 75,000-100,000 refugees have been admitted to the United States while only 10,000-15,000 applicants have been awarded asylum.<sup>58</sup> However, terrorists have been able to use the asylum process to delay their deportation,

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<sup>55</sup> Steven A. Camarota, "The Open Door: How Militant Islamic Terrorists Entered and Remained in the United States, 1993-2001," *Center for Immigration Studies* (January 1, 2002): 19.

<sup>56</sup> Farnam, 35.

<sup>57</sup> Camarota, 19.

<sup>58</sup> Camarota, 20.

without having any legal basis to ask for asylum. The IIRIRA changed the asylum procedures and restricted applications in order to solve this problem and reduce the number of fraudulent claims. The number of asylum applications drastically decreased following the 1996 Acts.<sup>59</sup>

The IIRIRA and the AEDPA also had anti-crime provisions that led to increased prosecutions and deportations. Although the provisions may have provided some protections from terrorist activity, they were mainly concerned with targeting criminals. The challenge has been to balance public safety, national security and individual rights. As the federal government placed mandates on states through legislation, the states were able to pick and choose which provisions they wanted to establish based on public sentiment and the needs of local law enforcement. Sanctuary cities became common during the Reagan administration as a means to counter the effects of foreign policy in Central America. The civil wars in Central America led to an increase in illegal immigrants from Latin America escaping violence and the absorbing communities felt that deporting immigrants could result in their torture or death. The sentiment of protectionism against deportations during these early years had consequences for communities after the 1996 Acts increased their vulnerability to deportation.

The ability of individual cities to circumvent federal law decreases the effectiveness of the statutes laid out by the government. It also sent a message that local law enforcement authorities are not allowed to cooperate with federal immigration agents, establishing an atmosphere of distrust and non-cooperation between agencies. The lack of interagency cooperation and involvement reduced each sector's ability to combat crime and terrorism. For example, despite funding for additional training to state and local law enforcement officials by federal immigration authorities under the 287(g) program, not a single training agreement was signed until 2002.

The 1996 laws were written in order to prevent terrorism although most of the enforcement mechanisms authorized dealt more with the criminal aspect of violating immigration laws. The laws have had moderate success and have been met with

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<sup>59</sup> Ruth Ellen Wasem, "U.S. Immigration Policy on Asylum Seekers," *CRS Report for Congress* (May 5, 2005): 12.

resistance from immigrant rights groups. The laws have given rise to more questions over the constitutionality and fairness of the laws. A substantial benefit of the Acts came from easier deportation of criminal aliens and increased staffing levels for immigration agents. A more pro-active approach to preventing terrorism would have been to address the barriers in intelligence and information between agencies. This was later addressed by the PATRIOT Act. The 1996 Acts focused more on borders and crime while neglecting the challenges faced in the interior of the country in regards to terrorism and access for local law enforcement to intelligence. Additionally, they have served as a starting point for successive and more restrictive immigration and counterterror policy due to their inability to prevent the September 11, 2001 attacks.

The ability of terrorists to enter and remain in the country highlighted the flaws in the country's enforcement of existing policies and contributed to the largest terrorist attack in U.S. history. The events of 9/11 demonstrated the numerous gaps in immigration policy and enforcement and shocked the government into making considerable changes. The establishment of the Department of Homeland Security (DHS), the reorganization of the INS under the DHS, and new legislation were all put forth to counter terrorism and increase security within the United States. Similar to the motivations behind the IIRIRA and the AEDPA, government restructuring and additional legislation seeks to provide additional security from terrorism, but also encompasses anti-crime measures that suggest a more "all hazard" approach to establishing national security.

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### **III. DEPORTATION POLICY POST 9/11**

The terrorist attacks of 9/11 revealed the significant policy and structural issues that existed within the U.S. federal government. In response, Congress and the president enacted several orders and Acts designed to respond to the increased threat from terrorist organizations. Immigration policy was a natural target since the terrorists who conducted the 9/11 hijackings were all foreigners who gained lawful entry or who had violated immigration laws, thus highlighting the failure of the INS to enforce federal law. Four Acts implemented post 9/11 specifically addressed immigration policy and directly related national security to the deportation of illegal immigrants. They include: The USA PATRIOT Act, the Homeland Security Act of 2002, the Enhanced Border Security and Visa Reform Act, the Secure Border Initiative and the REAL ID Act. These Acts have raised considerable questions in regards to constitutionalism and the rights of non-citizens and permanent residents.

The events of 9/11 provided additional fuel for anti-immigrant sentiment within the United States. The policies of the IIRIRA and AEDPA in the 1990s set the stage for increasing the enforcement of immigration violations and provided mechanisms already in place to target immigrants. The increased public awareness of terrorist threats and organized criminal activity perpetuated by immigrant groups contributed to increased legislation. Actions such as the PATRIOT Act, the 287(g) and the establishment of the Department of Homeland Security, provided similar capabilities as the IIRIRA and the AEDPA, but created a new framework for enforcing the same ideas. All branches of government were eager to implement new safety measures in the wake of 9/11. The speed with which organizations were reorganized and created new legislative measures were enacted was unprecedented. However, the Acts signed into law after 9/11, were fairly consistent with immigration policy that pre-dated the terrorist attacks. The new Acts expanded federal government capabilities, but the ideas behind those policies were prevalent in the AEDPA and the IIRIRA as well as the IRCA. This chapter provides a brief description of the acts and highlights how these Acts are predicated on the belief that increased deportation capability will lead to increased national security. It also

analyzes the extent to which there have been changes in the enforcement of immigration policy since 9/11, showing that illegal immigration has not decreased due to new legislation, increased barriers and deportation. It concludes by analyzing the consequences of these changes on the immigrant community and in public perception.

#### **A. USA PATRIOT ACT**

One of the most scrutinized and heated debates concerns the legislation that directly brought immigration and national security to a critical juncture. The United and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act) was signed into law on October 26, 2001. The legislation that established that aiding terrorist organizations was a crime was already implemented by the AEDPA in 1996; the PATRIOT Act established tougher penalties and increased the scope of the previous Act.<sup>60</sup> The USA PATRIOT Act was a direct response to the terrorist attacks and the lack of coordination between the layers of government in intelligence and enforcement. The implementation of the PATRIOT Act allowed for broader use of counter-terror strategies to be used for general law enforcement. There are no restrictions on the types of crimes that can be investigated utilizing the tools authorized by the USA PATRIOT Act and law enforcement agencies have been able to legally justify their investigations on money laundering, drug trade, espionage in addition to suspected terrorists. The Department of Justice (DOJ) declared it within the rights of the Act despite the unintended benefits or consequences of its execution. Opponents of the Act criticize the government for using terrorism as a justification to change law enforcement methods applying to different crimes.<sup>61</sup>

The PATRIOT Act in general allows that “any information lawfully gathered during a foreign or domestic counterintelligence investigation or during a domestic law enforcement investigation should be able to be shared with other federal agencies.”<sup>62</sup> The

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<sup>60</sup> Paul Rosenzweig, Alane Kochems and James Jay Carafano, “The Patriot Act Reader, Understanding the Law’s Role in Global War on Terrorism,” *Heritage Special Report*, The Heritage Foundation (September 13, 2004): 36.

<sup>61</sup> Eric Lichtblau, “U.S. Uses Terror Law to Pursue Crimes from Selling Drugs to Swindling,” *New York Times*, September 28, 2003. <http://www.library.yale.edu/~license/ListArchives/0308/msg00278.html>.

<sup>62</sup> Rosenzweig, Kochems and Carafano, 7.

same tools that the PATRIOT Act authorizes have been used to investigate and convict drug dealers and those involved in organized crime. The expansion allows for the tools to be used by counterterrorism investigators in an expedited manner. The tools include wiretapping, delayed notification search warrants, and updated surveillance laws to include new technologies including the Internet. If a wiretap is requested, the requirements outlined by the Foreign Intelligence Surveillance Act (FISA) of 1978 still must be met. Investigators must provide a sworn affidavit that they believe an individual is an agent of a foreign power or terrorist organization. Delayed notification search warrants have previously been used by the Drug Enforcement Administration for protecting long-term investigation while simultaneously gathering evidence and keeping drugs from the retail market. It allows for law enforcement to conduct searches without having the requirement to inform the criminals about it until later. The Supreme Court in 1979 found that the delayed notification search was consistent with the Fourth Amendment.<sup>63</sup> In 1967 the Supreme Court established that the Fourth Amendment only protects “only those things in which someone has a reasonable expectation of privacy.” Anything exposed to the public does not require any form of court authorization.<sup>64</sup>

The PATRIOT Act also updated legislation to address the Internet age. Additionally, it allows for the government to subpoena library records. Similar to searching the Internet for information on how to conduct crime, order chemicals or build bombs, library records are fair game in establishing intent to commit crime. Other technological resources that the PATRIOT Act included were the monitoring of international students, in particular their travel in and out of the United States. Immigration officials are also able to use the tools authorized under the PATRIOT Act to investigate illegal financial activity.<sup>65</sup>

One of the most significant changes concerns the breakdown of the wall that existed between intelligence and law enforcement and allows for the necessary cooperation between the two agencies. Law enforcement agencies can share information

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<sup>63</sup> Rosenzweig, Kochems and Carafano, 11.

<sup>64</sup> Rosenzweig, Kochems and Carafano, 24.

<sup>65</sup> Rosenzweig, Kochems and Carafano, 13.

and have access to new tools, including the use of DNA of foreign nationals, to assist in criminal investigations, under the PATRIOT Act. While the original purpose of the Act was in countering terrorism, there are multiple benefits when combating not only terrorism, but also criminal organizations comprised of foreign actors. One success story is Operation Hamlet, where Immigration and Custom Enforcement (ICE) officials uncovered an international child molestation ring. The PATRIOT Act allowed for the quick issue of subpoenas to Internet service providers and 100 child victims were rescued in the process.<sup>66</sup>

Deportations and detentions are expressly cited in the PATRIOT Act as a tool for national security in Sections 411 and 412. The PATRIOT Act states that aliens are deportable from the United States if they were inadmissible at the time of entry or have subsequently engaged in terrorist activities. It also adds terror related grounds for denial of admission to the United States and redefines previous terror-related categories and adds three more to the list making individuals inadmissible or deportable.<sup>67</sup> It redefined the actions of engaging in terrorist activity as well as representing a terrorist organization to include the solicitation of funds or gathering information for terrorist organizations. It also makes members of political organizations who support terrorists inadmissible for entry as well as those who use their position to challenge U.S. counter-terror policy. Section 412 allows for the Attorney General to detain terrorist suspects for up to seven days with reasonable suspicion. After the seven days, the Attorney General must initiate removal or criminal proceedings or releases the individual. If the suspect is held, their case must be reexamined every six months. The President's Military Order of November 13, 2001 also gave the Secretary of Defense the authority to detain alien terrorist suspects within the United States or abroad under his powers from the Authorization for Use of Military Force Joint Resolution (Public Law 107-40, 115 Section 224) and Sections 821 and 826 of Title 10 of U.S. Code.<sup>68</sup>

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<sup>66</sup> U.S. Department of Justice, *Report from the Field: USA Patriot Act at Work*, July 1, 2004, 18.

<sup>67</sup> Charles Doyle, "Antiterrorism and Effective Death Penalty Act of 1996: A Summary," *American Law Division*, (June 3, 1996): 33.

<sup>68</sup> Doyle, 35.

Critics argue, however, that the PATRIOT Act expanded the definition of terrorist activity too much. Terrorist activity, under the Act, can be simple association with organizations that share similar ideologies. They argue that this overly broad definition brings the failed “guilt by association” model back into immigration law. An individual would be deportable even if they indirectly supported a terrorist association in some manner regardless of whether or not the organization had committed any act of terrorism. The concerns are directly linked to the First Amendment.

## **B. THE HOMELAND SECURITY ACT OF 2002**

The broadest measure after the terrorist attacks taken by the federal government was the implementation of the Homeland Security Act in 2002. This Act dissolved the INS and placed immigration services under the newly created Department of Homeland Security (DHS). The government created three organizations within the DHS to respond to immigration requirements. The United States Bureau of Customs and Border Protection (USBCBP) provides customs inspections and ensures only authorized personnel and goods enter into the United States. They also manage student visas through a computerized system. The State Department’s Bureau of Consular Affairs issues visas in overseas consulates, but the DHS issues and enforces the regulations of who is eligible for a visa. The U.S. Immigration and Customs Enforcement (USICE) is responsible for enforcing immigration laws, investigating, detaining and deporting illegal aliens. The U.S. Citizenship and Immigration Services (USCIS) formed to facilitate applications.

The immigration organizations under the new DHS acknowledged a transition period, but assured that there would be a substantial reduction in backlogs for those waiting processing with the addition of new resources, which included upgraded computers, additional personnel and access to new information systems. The Bush Administration authorized \$480 million for an entry-exist system that included biometrics with an additional \$500 million to reduce the backlog of applications. The USCIS expected to be able to complete over seven million applications, 70,000 asylum cases and

100,000 interviews of refugees.<sup>69</sup> The addition of automated resources gave the organization an expectation of being able to assist millions of customers through telephone and local offices.

Also within the DHS, the USICE goal is to enforce immigration and customs laws. It is responsible for securing the borders by maintaining the economic and transportation infrastructure. ICE is also an investigating agency focusing on human rights violations, arms smuggling, cyber and financial crimes and export enforcement issues. The FY 2006 mission statement of ICE, “protect America and uphold public safety by targeting the people, money and materials that support terrorist and criminal activities” is essential in understanding the ideological shift in ICE.<sup>70</sup> On top of the previously listed important areas of investigation, ICE has refocused their mission statement to reflect the threat of terrorism and the need to combat it through immigration services.

The Homeland Security Act of 2002 did more than restructure the INS and create a new bureaucracy; it also directly impacted the system of how deportations are handled and what agencies have responsibilities for their management and withdrawal adjudication. The Attorney General retained authority for determining whether or not an alien was deportable, but the DHS conducts all administrative functions. The administrative functions shifted from the INS to the DHS’ Under Secretary of Border and Transportation Security.<sup>71</sup> The move in immigration laws and enforcement under the DHS also corresponds with the DHS’s new ability to detain any alien upon determination of their status.

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<sup>69</sup> Thomas W. Donovan, “Immigration Policy Changes After 9/11: Some Intended and Unintended Consequences,” *The Social Policy Journal* 4, no.1 (2005): 40.

<sup>70</sup> The Transactional Records Access Clearinghouse, “Immigration Enforcement: The Rhetoric, the Reality.” (Syracuse University). <http://trac.syr.edu/immigration/reports/178>.

<sup>71</sup> Ruth Ellen Wasem and Alison Siskin, “Immigration Policy on Expedited Removal of Aliens,” *CRS Report for Congress* (September 30, 2005): 2.

### C. THE ENHANCED BORDER SECURITY AND VISA REFORM ACT

The Enhanced Border Security Act and Visa Reform Act, approved on May 14, 2002, directly laid out a plan for immigration agencies. The major points of the Act included a requirement for agencies to share information and to utilize technological resources. It provides millions of dollars for funding for technological improvements in addition to increased training and pay increases for employees. The use of technology and increased capability and cross sharing between agencies is important in enforcing federal law, but these benefits do result in criticism specifically from the use of enhanced technology to track individuals.

Sections 101 and 102 noted the importance of trained personnel and required additional training for consular, diplomatic security, and immigration personnel as well as increases in annual pay for border control and INS inspectors who complete a minimum of one year of service. The Act also appropriates \$150 million dollars for technological improvements that make commerce more efficient and expedient at the borders through the use of preclearance and pre-enrollment programs. In Section 201, the Act also obligated consulates to forward electronically visa files to immigration officials at all U.S. entry points. The section also includes a reporting requirement concerning the inadmissible or deportability criteria determined by the State Department and the INS. The Act also had provisions to protect against abuses of information gained through its provisions and established harsh criminal penalties for those found guilty. The Act in Sections 202, and 203 mandated that internal INS databases be linked to allow for easier searches on individuals and for federal law enforcement officials to share information with the INS and State Department. It also created a commission to provide oversight to prevent abuses of new technological features. The development of and implementation of the “Chimera System” was contained in Section 204.<sup>72</sup> The electronic system would be interoperable between agencies.

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<sup>72</sup> U.S. Department of State, *Enhanced Border Security and Visa Entry Reform Act of 2002*, [http://www.ofr.harvard.edu/additional\\_resources/Summary\\_of\\_Enhanced\\_Border\\_Security\\_Reform\\_Act\\_HR3525.pdf](http://www.ofr.harvard.edu/additional_resources/Summary_of_Enhanced_Border_Security_Reform_Act_HR3525.pdf).

The Act also restricted entry into the United States for individuals from countries with terrorist ties. It required that by October 2004, entry and exit documents must be tamper resistant, machine-readable and contain both fingerprints and photographs. Additionally, an integrated entry and exit data system was mandated in Section 302. This was first required by the IIRIRA in 1996, but not enacted. The president is also required to provide a study on the viability of a North American Security Program between the United States, Canada and Mexico. In Section 402, the Act required that all carriers provide data on their passengers and forward that information using the Advanced Passenger Information System (APIS).<sup>73</sup> The purpose of APIS is to identify passengers and crewmembers that are potential risks to U.S. national security while still allowing for legitimate travel. The APIS data is checked against Interagency Border Inspection System (IBIS) used by federal law enforcement. Fines for carriers found in noncompliance were also raised from \$300 to \$1000.<sup>74</sup>

The Act also amended the IIRIRA by increasing the monitoring provisions of student visas. The student visa program not only includes the electronic monitoring of students attending universities and colleges, but also language training, flight schools and other vocational type training facilities. Schools are also required to inform the INS if a student has not attended school for more than 30 days after class registration. Students must also provide additional personal information concerning their residence, family members, degree program and employers. No student will be issued a visa if they have failed to provide the required information and is reviewed and forwarded to the academic facility provided on their application. Academic institutions are also reviewed and authorizations to enroll foreign students and participate in exchange programs are granted

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<sup>73</sup> Demetrios G. Papademetriou, Stephen Yale-Loehr and Betsy Cooper, "Secure Borders, Open Doors: Visa Procedures in the Post September 11 Era," report by the Migration Policy Institute (August 1, 2005): 14.

<sup>74</sup> U.S. Department of Homeland Security, U.S. Customs and Border Protection, *Privacy Impact Assessment for the Advance Passenger Information System (APIS)*, March 21, 2005, 2.

by the Secretary of State. Congress also mandated a reporting requirement from the Attorney General to the legislature on the total number of absconders on a yearly basis in Section 605.<sup>75</sup>

#### **D. THE REAL ID ACT**

The REAL ID Act added more provisions, based on some of the recommendations of the 9/11 Commission, to counter the threat of terrorists using immigration laws. The Act affected asylum procedures, waived laws that impeded the construction of barriers at the borders, and further clarified the role of judicial review in removal/ deportation hearings. REAL ID also expands the definition of terrorist organization and association criteria. Deportation grounds were made the same as inadmissibility criteria.<sup>76</sup> The main criticisms of the Act concerned the belief that it would force a national identification card, and instead the legislature changed the language in the Act and only made a nominal effort to establish guidelines for identification cards.

One of the main focuses of the REAL ID Act is to prevent terrorists from using asylum procedures to remain in the United States. This was reinforcement to the previous 1996 Acts making asylum more difficult to obtain. The REAL ID Act makes clear that the Attorney General and the Secretary for Homeland Security can grant asylum. It also codifies existing regulations and standards. Asylum applicants must show a burden of proof that they will be persecuted in their home country based on at least one of the following discriminators: race, religion, nationality, political or social opinion.<sup>77</sup> The applicant must also provide corroborating evidence unless the adjudicator believes that individual testimony is sufficient and persuasive. There is significant leeway for the adjudicator in making decisions, but there is also no presumption of credibility for the

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<sup>75</sup>U.S Department of State, *Enhanced Border Security and Visa Entry Reform Act of 2002*, [http://travel.state.gov/visa/laws/telegrams/telegrams\\_1403.html](http://travel.state.gov/visa/laws/telegrams/telegrams_1403.html).

<sup>76</sup> Margaret Lee, Michael John Garcia, and Todd B. Tatelman, "Immigration: Analysis of the Major Provisions of the REAL ID Act of 2005," *CRS Report for Congress* (May 25, 2005): 19.

<sup>77</sup> Lee, Garcia, and Tatelman, 5.

applicant. The REAL ID Act diverges from previous case law in that it allows for any inconsistencies to be seen as evidence of lying whereas inconsistencies before were not subject to the same scrutiny.

Another point the REAL ID Act made was the clarification of judicial review in removal hearings. The clarification came after concerns by the judiciary over the language written in the IIRIRA and the AEDPA. REAL ID provides a list of criteria for limited judicial review and expands previous criteria by including claims under the Torture Convention. It also states that no court has jurisdiction for habeas review or judicial review of a removal order, but it does allow for review under constitutional claims or other legal issues. In essence, it states that courts do not get to decide in the matters of individual removal hearings, but they do get a voice in making sure that removal procedures occur and that any constitutional issues that arise are open for review.<sup>78</sup>

Other amendments include a stricter interpretation of immigrant support to terrorist organizations. Prior to the REAL ID Act, an alien could use ignorance to circumvent any links between their material support or solicitation and a terrorist organization. The REAL ID established that they must now show a *clear and convincing* case that there was no way they could have known or should have known about ties to any such organization. Providing support to a member of a terrorist organization, regardless of knowledge of the organization itself, is also included as grounds for inadmissibility and deportability. Also subject for deportation is the spouse or child of someone determined to be engaged in terrorist activity or associated with a terrorist organization if it was within the last five years.

The individual eligible for deportation due to the provisions concerning association with terrorists also have limited relief from deportation from the REAL ID Act as well. Membership in a terrorist activity is not only grounds for inadmissibility, but also grounds for deportation and ineligibility for asylum. Withholding removal was also another relief opportunity that was modified by the REAL ID Act. Aliens are ineligible if

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<sup>78</sup> Lee, Garcia, and Tatelman, 18.

the Attorney General determines the applicant is a threat to U.S. security, the community or has a suspicion that the individual committed a serious non-political crime outside the United States. This provides an avenue to deny criminals or anyone associated with criminal organizations relief proceedings in the interest of public safety.<sup>79</sup>

Another controversial provision of the REAL ID Act concerns identification card guidelines. The Act, “establishes minimum issuance standards for federal recognition requiring that before a state can issue a drivers license or photo identification card, a state will have to verify with the issuing agency, the issuance, validity and completeness of (1) a photo identification documents containing both the individuals full legal name and date of birth, (2) date of birth, (3) proof of a Social Security number or verification of the individual’s ineligibility for a SSN, and (4) name and address of the individuals principle residence.<sup>80</sup> Critics oppose the Act due to concerns over the Tenth Amendment and the ability of Congress to regulate interstate commerce and the federal government’s ability to put restrictions on the Tenth Amendment as well as the implications of the Act on the First Amendment including the free exercise of religion in addition to the expectation of privacy. The REAL ID Act provides that deportations of noncitizens, regardless of status, are lawful if the noncitizens verbalize support for terrorist organizations. Citizens are afforded freedom of speech under the First Amendment, but the REAL ID Act establishes that noncitizens are not.<sup>81</sup>

The REAL ID Act does not force states to comply with the guidelines, but they simply suggest there should be minimum guidelines and that following their guidelines will improve national security. The REAL ID Act does require that states determine the legality of an individual’s request for identification card, only issue temporary identification cards for the period an individual is eligible to remain in the United States, and set up policies and procedures for the management of identification cards.

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<sup>79</sup> Lee, Garcia, and Tatelman , 36.

<sup>80</sup> Todd B. Tatelman, “The REAL ID Act of 2005: Legal, Regulatory, and Implementation Issues,” *CRS Report for Congress* (April 1, 2008): 4.

<sup>81</sup> Tara Beech et al., “The Use and Abuse of Immigration Authority as a Counterterrorism Tool: Constitutional and Policy Considerations,” *The Constitution Project* (2008): 4.

## **E. ENFORCEMENT OF POLICIES**

The federal government fully understands the dependency between counter-terror initiatives and the state and local law enforcement community. In efforts to incorporate local officials in policing potential terrorist threats, the federal government implemented programs that dealt specifically with immigration problems. They identified as potential terrorist threats those who gained entry illegally, those who do not appear at removal hearings known as absconders, and those who failed to exit on time. Through multiple pieces of legislation, the federal government put redundant measures into effect. The policy and mandates are however, easier to write into law than they are to enforce. After 9/11, local governments were more willing to work within federal guidelines despite their previous positions. For example, New York City still remains a sanctuary city, but implemented its own anti-terrorism unit within the police department. The primary method of enforcing federal legislation comes with a dependency on technological advances and the interoperability of those systems.

### **1. Federal Initiatives**

In 2005, the Secure Border Initiative (SBI) outlined the goal to reduce the national security threat from illegal immigrants crossing U.S. borders. The SBI was a wide-ranging initiative that sought to incorporate all aspects of border control from deterrence to removal. The initiative is not one plan, but a group of plans and initiatives with the same goals including the Security and Prosperity Partnership (SPP) of North America and programs that rely on technological implementation such as the Smart Border Accord with Mexico and the Secure Electronic Network for Travelers' Rapid Inspection (SENTRI). The SBI acknowledged that the plan would only work with better coordination between all levels of government and the international community. ICE is responsible for eliminating the weaknesses in U.S. economic and transportation security. In conjunction with the Border Patrol, ICE used the SBI to expedite the removal of "other than Mexican" (OTM) illegal aliens to their home countries within 15 days as well as the immediate deportation of Mexicans. ICE officers have considerable authority when dealing with illegal immigrants detained at the border and their agents are able to make

judgment calls that effect the disposition of many Latin Americans seeking entry into the United States. The SBI does not only target those at the border, but also within the United States while still allowing for legitimate travel and commerce.<sup>82</sup>

The SBI incorporates new technology to assist in the monitoring of hundreds of miles of open border. The SBI provided for the use of cameras, unmanned aerial vehicles (UAVs), and sensors. The widest used technological capability is the U.S. VISIT system, which tracks biometrically a visitor's arrival and departure. This capability allows for the identification of those who overstay their visas. This is important in collecting data on the illegal population in the country and formulating policy in regards to those numbers. The idea is that a fence is not sufficient at deterrence and even with additional agents at the border, there is no one solution that can effectively deter and detect illegal border crossings. Other low-tech techniques are also utilized, but are labor intensive. These include fences, horses, dogs and traditional patrolling.

The program is designed to be a framework for integrated responses coupled with DHS funding of training and joint operations to counter criminal networks. Additionally, the DHS implemented a "catch and return" policy instead of a "catch and release" policy with the additional integration of all levels of enforcement. The DHS, under the SBI framework, also implemented more self-compliance programs for employers. This is to ensure that businesses and the government are united in deterring illegal immigration by establishing stiff penalties for non-compliance in addition to making it easier for employers to identify those that are not eligible for employment in the United States. This does not mean that the DHS makes deportation determinations on their own accord. The Department of Justice's Executive Office for Immigration Review (EOIR) still makes the final determination on the removability of an alien after the DHS apprehends and detains them.<sup>83</sup>

One of the major features of the SBI is the National Fugitive Operations Program (NFOP), previously known as the Absconder Apprehension Initiative (AAI). This is in

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<sup>82</sup> Jeff Erlichman, "Secure Border Initiative Program Guide, A Special Supplement to Washington Technology Business Intelligence for Government Systems," Trezza Media Group, 2006, 5.

<sup>83</sup> Erlichman, 6.

addition to another feature of ICE's enforcement agencies including the Criminal Alien Program (CAP). The NFOP targets criminal illegal aliens whereas the CAP targets illegal aliens within the prison system. NFOP has received an increasingly prominent role in immigration enforcement within the past five years with a budget that has increased from \$9 million in FY03 to over \$218 million in FY08 and is responsible for over 96,000 apprehensions of illegal immigrants. ICE estimates that there are more than 550,000 fugitive aliens within the United States. The NFOP was specifically designed to apprehend the most dangerous of illegal criminal aliens on a tiered scale providing those posing the most danger to the nation and their community at the top of the scale with minor infractions or merely illegal status at the bottom of priorities.<sup>84</sup>

In 2002, the NFOP was transformed from the Alien Apprehensions Initiative (AAI) in order to find those that pose the most risk to the nation and prioritize those who "come from countries in which there has been Al Qaeda terrorist presence of activity." The program was also designed to be coordinated with the U.S. Marshals, the FBI and local law enforcement.<sup>85</sup> The NFOP is conducted by the use of Fugitive Operations Teams (FOTs) who are composed of five individuals. The FOTs do not always work with local officials as standard operating procedures and only carry administrative warrants. This means that FOTs cannot enter into homes without consent, but do have the right to question others as to their immigration status. There are now close to 100 FOT teams and successful operations included the apprehension of 2,179 illegal aliens, including gang members, in 2006 during Operation Return to Sender.<sup>86</sup>

The successes and initial mission of FOTs has been undermined by mandates that require quotas on apprehensions. These quotas undermine the essence of why FOTs were established initially. Establishing quotas on apprehensions with no regard to the threat defeats the purpose. FOTs are more likely to go after easy targets than dangerous ones especially if there is a minimum amount of apprehensions they must make each year. For

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<sup>84</sup> Margot Mendelson, Shayna Strom and Michael Wishnie, "Collateral Damage: An Examination of ICE's Fugitive Operations Program," report by the Migration Policy Institute (February 1, 2009): 1-3.

<sup>85</sup> Mendelson, Strom and Wishnie, 5.

<sup>86</sup> Mendelson, Strom and Wishnie, 8

example, the percentage of fugitive aliens that posed a threat to the community or had a criminal conviction that were apprehended in 2003 was 32% of total arrests, but only 9% in 2007. The quota guideline was issued in 2006.<sup>87</sup> Other areas of concern with the use of FOTs concerns the safety of the officers in executing administrative warrants, poor community relationships, and racial profiling of immigrant groups.

The federal government also requires the assistance of state and local agencies to enforce current laws. In order to gain their assistance, the names of absconders were placed in the National Crime Information Center (NCIC) database which, as of March 2003, is exempt from Privacy Act standards. The NCIC database is used not only by the Federal Bureau of Investigations (FBI), but also the state and local law enforcement agencies as a method of pulling information on potential criminals. Law enforcement officials, even in sanctuary cities, are required to detain individuals that have warrants in the system. However, not all individuals in the NCIC are criminals and some have been placed in the system erroneously.

## **2. State and Local Initiatives**

The ICE's 287(g) program, named for the section in the Immigration and Naturalization Act authorized under the IIRIRA, provided ICE with the authority to train state and local law enforcement officials on how to enforce federal immigration laws. The program, although authorized in the 1990s, was not fully engaged until 2002. This authority has met with strict resistance and differing legal opinions, however the Congress has authorized its use and there have been no judicial rulings countering this. The section allows for the use of ICE databases in collecting information on the immigration status of individuals and the ability to process them for deportation in the absence of ICE agents. Advocates cite the use of the section in apprehending convicted gang members involved in the drug trade as well as registered sex offenders in addition to following the legislature's constitutional duty to provide for the "common defense" of the

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<sup>87</sup> Mendelson, Strom and Wishnie, 15.

United States.<sup>88</sup> The 287(g) program does not differentiate between the ability of police officers to detain major criminal offenders versus minor violators, whereas the FOT mission was to specifically target first those who pose the most risk.

The 287(g) program has considerable critics as well who argue that the program has harmed public safety by putting local police officers as a cornerstone in the enforcement of immigration laws. Advocates of community policing believe that fear of deportation reduces the willingness of immigrant communities to report crimes and that using local police to enforce immigration laws increases the risk of racial profiling violations. For example, a study conducted during the initial phases of the program noted that ICE did not focus their efforts on areas with high illegal immigrant crime, but on areas with high Latino populations. Comparing violent crime with Latino population confirmed that areas with higher than the national average for Latino populations received more ICE-deputized local officials than those areas with higher than national average crime rates. Another example of the incompatible relationship between civil and immigration laws was seen in Arizona. In 2005, the state passed the first international state human trafficking statute. However, 500 victims were prosecuted under this statute without a single organized crime leader being charged.

These possibilities for misuse and abuse of the 287(g) statute make communities reluctant to participate. Additionally, there is a possibility that depending on the community, there may be positive or negative financial ramifications of participating. For example, communities that participate in the 287(g) program share the cost of ICE enforcement, a federal responsibility. For some areas, the funding may cover their operating costs, but in other areas, it causes deficits resulting in increased taxes for their residents.<sup>89</sup>

In contrast to the 287(g), “Sanctuary Cities” allow for state and local law enforcement to ignore federal mandates dictated by the IIRIRA. However, the term

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<sup>88</sup> Jena Baker McNeill and Diem Nguyen, “Enforcing Immigration Laws: State and Local Law Assistance Needed,” WebMemo 2331, The Heritage Foundation (March 6, 2009): 1.

<sup>89</sup> Judith Greene and Aarti Shahani, “Local Democracy on ICE: Why State and Local Governments Have No Business in Federal Immigration Law Enforcement,” Justice Strategies Program of the Tides Center (February 1, 2009): 3.

“sanctuary city” is not as accurately portrayed in the media as most communities in essence practice it. The policy is closely aligned with community policing efforts in which states and localities develop rules concerning the investigation of one’s immigration status for that sole purpose. A “don’t ask, don’t tell” model does not specifically advocate violating federal laws, but does enable communities to focus on criminal matters and not solely civil immigration violations. It is more of a manner of working around the issue. Undocumented aliens are likely to be minorities and therefore law enforcement officials have the extra burden of investigating immigration status without using racial profiling.<sup>90</sup> A policy of non-inquiry into immigration status makes the abuses of racial profiling less likely. This does not mean that police officers cannot arrest and detain anyone that is suspected of committing a crime, it is their duty to do so. However, community policing does have a benefit in establishing trust in communities to report crime.

Illustrating the lack of trust that immigrant communities have in reporting crimes is the case of Danny Sigui, a Guatemalan immigrant who provided testimony resulting in the conviction of a murderer. At the end of the trial, Mr. Sigui (an undocumented immigrant) was deported back to home country by DHS after his status was revealed by the state attorney general’s office. He was asked if he would provide testimony again knowing he would be deported, and he responded negatively.<sup>91</sup> Many advocates of community policing cite this as an example that victims and witnesses are crippled by programs that are designed to enforce civil immigration law with little regard to benefits of community policing initiatives, and criminals are given incentives to prey on immigrant communities.

Los Angeles is one city in which community policing takes priority over federal civil immigration laws. Los Angeles passed Special Order 40 in 1979 in which police officers cannot ask the immigration status of those not suspected of crimes. Los Angeles, a city with a large immigrant population, believes that the general safety of the public is

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<sup>90</sup> Seghetti 2005, 22.

<sup>91</sup> “Guatemalan Immigrant to be Deported,” *Providence Journal*, August 6, 2003, Cited in Lynn Tramonte, “Debunking the Myth of Sanctuary Cities’: Community Policing Policies Protect American Communities,” *American Immigration Law Foundation* (March 1, 2009): 3.

best served by the ability of undocumented aliens to report crimes. This is especially true since many immigrant families consist of a combination of the undocumented, legal permanent residents and U.S. citizens.<sup>92</sup> Federal legislation to sanction police departments that fail to enforce civil immigration laws directly affects their ability to provide for the overall public safety of communities and is against the nation's founding federal principles. Sanctuary Cities do not provide safe havens for criminal aliens if police departments enforce criminal statutes and are properly executing their role to provide for the safety of all in the community.

#### **D. ANALYSIS OF POLICY CHANGES**

This section describes the main political factors that led to the passage of the PATRIOT ACT, the Homeland Security Act, the Enhanced Border Security and Visa Reform Act, and the REAL ID Act. Additionally, it describes the political pressure that resulted in a new strategy, the SBI, to combat terrorism and criminal activity and explains why anti-immigrant sentiment has been directed at Latin America. The terrorist attacks provided a spotlight on the flaws in the U.S. immigration system in addition to the flaws in the U.S. intelligence and security program. The overwhelming sense of fear and uncertainty paralyzed the public as the nation's leadership searched for targets. Although the United States embarked on a prolonged "War on Terror", the legislative and executive branches of government also needed to reform the flawed systems within the United States.

##### **1. Driving Factors**

There is little doubt that the Acts relating to the increased ability of the federal government to combat terrorism was a direct result of the 9/11 terrorist attacks. The government did not have to look too far when writing legislation in response to 9/11. Similar to the 1996 Acts involving counterterror legislation, the immigration system was again the prime target. In essence the policies put forth by the Act post 9/11 were measures that expanded and strengthening the current legislation, specifically the IIRIRA

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<sup>92</sup> Lynn Tramonte, "Debunking the Myth of 'Sanctuary Cities': Community Policing Policies Protect American Communities," *American Immigration Law Foundation* (March 1, 2009): 4.

and the AEDPA. There were some differences, but the majority of those differences were in mandating studies on the effectiveness and feasibility of new programs and utilizing new technology, specifically biometrics, to achieve the goals outlined in the previous versions of the IIRIRA and the AEDPA. Additionally, the 9/11 Commission was resourced in order to find how the United States could have been better prepared in order to offer solutions for future security measures.

The PATRIOT Act has received the most criticism, but passed easily through both houses in Congress in 2002. In 2005, the Act was reauthorized and in 2006 more substantial changes were made under the USA PATRIOT ACT Reauthorizing Amendments Act. The majority of these changes concerned more oversight in wiretaps. The basic language of the Act remained especially in the area of deportation. The Act allowed for the detention of noncitizens in order to combat terrorism, but again provisions for detention were already set forth by the IIRIRA in 1996. After 9/11, the PATRIOT Act along with the IIRIRA allowed for the legal extension of “administrative” or “preventative” detention of thousands of deportable immigrants.<sup>93</sup>

The Homeland Security Act was the implementation of necessary reforms within the INS. Although the reorganization was planned prior to 9/11, there was little political pressure until 2001 to actually move forward with a decision. Previously, there were problems with balancing services over the transition that may result in some individuals being deported due to administrative problems holding up their paperwork. After 2001, these concerns were largely dismissed. The new concern was to balance services with security.<sup>94</sup> The Homeland Security Act also provided the President with the ability to change the DHS without any additional statutory amendments.<sup>95</sup> This ability was used to create two functional divisions that included border functions in one and interior enforcement functions in the other. The change went into effect through presidential

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<sup>93</sup> Marc L. Miller, “The Randolph W. Thrower Symposium, Immigration Law: Assessing New Immigration Enforcement Strategies and the Criminalization of Migration, Introduction,” *Emory Law Journal* 51 (3) (Summer 2002): 970.

<sup>94</sup> David A. Martin, “Immigration Policy and the Homeland Security Act Reorganization: An Early Agenda for Practical Improvements,” *MPI Insight no. 1*, Migration Policy Institute (April 2003): 2.

<sup>95</sup> David Martin, 5.

mandate. A similar reorganization had previously been identified as being needed, but stalled for over fifty years due to pressure from union groups, politicians and agency infighting.<sup>96</sup>

The circumstances surrounding the 9/11 attacks demonstrate more association with foreigners than the previous Acts citing political pressure after the Oklahoma City bombing, an act of domestic terrorism. Since evidence showed that the majority of the terrorists entered the country legally, but remained past their authorization dates, more studies were funded to show how visa overstays and fraudulent entrance documents could be avoided. The evidence of visa overstays also demonstrated how foreigners needed to be tracked properly in order to deport those who remained in the country illegally. Deportation could be an effective tool to fight terrorists if those eligible for deportation could be identified, detained and deported. The major targets for increased detention and public animosity came from the Muslim community due to the association of their religion with Al Qaeda. However, as time passed, other immigrant groups felt increasing pressure as well.

As the initial shock of the 2001 terrorist acts faded from memory, new economic considerations have taken center stage in forming the opinions of citizens. The United States has lost a considerable amount of jobs to outsourcing and U.S. sentiment has associated globalization, and the threats of losing more jobs, with the problems of illegal immigration. Fighting illegal immigration, in the wake of 9/11 and globalization, has become a popular platform of politicians at every level of government. The easy targets were Latin Americans, especially Mexicans due to their higher levels of migration to the United States and proximity. In order to provide evidence of the damaging effect of illegal immigration, criminal activity, gang violence and vulnerability to terrorist organizations are all cited. The problem in this philosophy is that immigrants commit considerably fewer crimes than citizens and the majority provides a valuable economic advantage to the United States' capitalistic markets in the form of cheap labor for

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<sup>96</sup> David Martin, 6.

unskilled jobs.<sup>97</sup> Although former President George W. Bush advocated an expanded temporary worker program, he lacked support in the legislature to further his ideas.

## 2. Consequences

The Acts post 9/11 have been more successful than the 1996 Acts due to the increased levels of metrics and the expanded power of the government. Because of the expanded authority granted to the executive by the legislative branch, many critics express concern that the Acts were an overreaching of the executive branch with the acquiescence of the legislature; powers, once delegated, are difficult to withdraw. For example, an executive policy right after 9/11 allowed for INS district directors to “overrule release decisions by immigration judges.” This allows for one branch of government to effectively control the other thereby eliminating the checks and balance built in to our democracy.<sup>98</sup> Although Acts with sunset provisions receive more debate through the media and in Congress than before, they still pass. There have been some minor revisions and policies emplaced, such as more oversight required for wiretaps , but no Act has been entirely repealed because they attempt to do what they were written to do: effectively secure the United States from foreign threats. These threats were initially considered to come from terrorists, but the language in the Acts also made conditions so they could be applied to criminal activity.

Detention and deportation was considered an important tool for preventing terrorism, but may offer a false sense of security. In 2002, the United States deported almost 115,000 individuals. This was the largest number of deportations in U.S. history, but only accounted for a small number of the total undocumented immigrants residing in the United States.<sup>99</sup> Deportation cannot be considered an effective counterterrorism tool if it cannot successfully deport a considerable amount of illegal immigrants.

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<sup>97</sup> Geoffrey Colvin, “On Immigration Policy, We’ve Got it Backward,” *Fortune* 152 (5) (September 5, 2005): 44.

<sup>98</sup> Miller 2002, 974.

<sup>99</sup> Antje Ellerman, “Coercive Capacity and the Politics of Implementation: Deportation in Germany and the United States,” *Comparative Political Studies* 38 (2005): 1220.

Even the Homeland Security Act that created the DHS and dissolved the INS has experienced some contradictory evidence on their role in safeguarding the nation from security threats. Despite expanded executive authority and increased funding, the DHS has resorted to using more traditional criminal statutes when prosecuting suspected terrorists on order to fulfill a preemptive interdiction role instead of prosecuting terrorists after an attack occurs. In 2006, approximately 59% of all cases referred to prosecutors on international terrorism charges were not prosecuted for various reasons including evidence issues.<sup>100</sup> Studies also showed that prosecutions for international terrorism cases fell in 2006 by 52% from 2001, and sentences were reduced from an average of over three years pre-9/11 to 28 days in the first two years after 9/11. Cases involving domestic terrorism were prosecuted at levels two times as high compared to international terrorism. For the DHS and the Department of Justice, which received \$3.6 billion in FY06 for efforts to fight terrorism, this does not appear to be money well spent.<sup>101</sup>

The consequences of the REAL ID Act have not been fully examined since there have been many delays and debates concerning its implementation. Similarly, the EBSVRA has had some serious implementation issues especially concerning the construction of physical barriers. Although studies have shown that areas where fencing has been erected has decreased the number of apprehensions at the border, the odds of being apprehended in general attempting a border crossing as decreased from 33% in the 1970s and 1980s to just 5% in 2002.<sup>102</sup> Migrants have absorbed substantially increased risks associated with border crossings including exploitation from criminal groups providing transportation as well as harsher environmental conditions resulting from moving their crossing to isolated areas of the border. The loss of life and the increase in criminal opportunity from barrier projects has been an unintended consequence of the legislation.

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<sup>100</sup> Brian Levin, "Trial for Terrorists: The Shifting Legal Landscape of the Post-9/11 Era," *Journal of Contemporary Criminal Justice* 23 (2007): 213.

<sup>101</sup> Levin, 214.

<sup>102</sup> Patricia Fernández-Kelly and Douglas S. Massey, "Borders for Whom? The Role of NAFTA in Mexico-U.S. Migration," *The Annals of the American Academy of Political and Social Science* 610 (2007): 111.

In the area of enforcement, the post 9/11 Acts provided additional funding and research capability, but putting the actual recommended courses of action into effect has proven extremely difficult. For example, the Migration Policy Institute conducted a sixteen- month study along the Southwest border. The study found that approximately 42,000 individuals from nations other than Mexico were caught at the border attempting to gain entry into the United States. Only 14,000 of those were detained to wait for their deportation hearing while the remainder received notices to appear. Of those who received notices, only 10% showed. Although expanded programs include expedited deportations, the problems lie in the availability of detention beds resulting in the use of honor systems.<sup>103</sup> In 2007, ICE was found to have had limited training and supervisory guidance for immigration officers for “cases involving humanitarian issues and cases involving aliens who are not targets of ICE investigations.”<sup>104</sup> The problems annotated in the study provided fuel for interest groups who believe that ICE officials exercise too much discretionary ability and can abuse their authority.

The policies in the 1990s and the expansion of those policies after 9/11 have increased U.S. bureaucracy and demonstrate a commitment to keep the nation safe from terrorism as well as crime. However, all available analyses show that there is substantial room for improvement in all areas of the immigration system. In particular, deportation policy is applied too broadly and more consideration should be given to those who have families that are U.S. citizens, have gainful employment, and do not commit violent crimes. Additionally, the Acts and orders over the last thirteen years have raised questions as to the openness of a nation founded by immigrants on individual rights. The new Obama administration pledged greater transparency in government and scrutiny when analyzing post 9/11 Acts and executive orders. First, he will have to navigate the substantial concerns and challenges from Latin America that have arisen over the past decade as a result of conflicting priorities and contradictory policies, not the least of which is U.S. immigration policy.

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<sup>103</sup> Gary Fields, “Security Programs to Speed Action on Illegal Aliens,” *The Wall Street Journal*, New York, NY (August 11, 2004): B3.

<sup>104</sup> Government Accountability Office. “Immigration Enforcement: ICE Could Improve Controls to Help Guide Alien Removal Decision Making” (October 2007): 40.

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#### **IV. EFFECTS OF DEPORTATION POLICY ON NATIONAL SECURITY OBJECTIVES**

Deportation is designed to keep America safer from non-citizens who violate US laws and pose a significant threat to the country. Prior to and after 9/11, terrorist threats and crime have been cited as the primary reasons to increase deportations. The changes to immigration law sparked a debate between human and civil rights versus national security and what actually constitutes a threat. Despite multiple amendments and new legislation, there is not enough that successfully bridges the gap between immigration policy and national security.<sup>105</sup> In 1996, the United States acted in unprecedented ways to restrict immigrant rights in deference to national security under the AEDPA and the IIRIRA, but the 9/11 Commission found that immigration authorities were not focused on terrorism prior to 9/11.<sup>106</sup> The measures outlined by the AEDPA and IIRIRA were further intensified after the World Trade Center attacks in 2001 to protect the United States from terrorism, but the “all hazards” approach also tended to neglect the initial counterterrorism goals and entered into a new era of enforcement using counterterror provisions for broad applications in order to fight crime which had always been included in previous legislation to respond to crime committed by foreigners. The Latin American community through increased deportations has felt the effects profoundly. Undocumented Latin Americans in the United States may represent a security threat, but it is not necessarily in the form of terrorism.

The widespread use of these provisions sent contradicting signals and created unintended consequences for Latin American nations who are closely linked to the United States economically and socially. The objective of deterring terrorist threats and the associated enforcement mechanisms for achieving those goals has increased deportations in general, but Latin Americans constitute the majority of all those deported. Mexicans make up the largest group at 65% with Honduras and Guatemala at 9% and

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<sup>105</sup> Donald Kerwin and Margaret D. Stock, “National Security and Immigration Policy: Reclaiming Terms, Measuring Success and Setting Priorities,” U.S. Military Academy’s Combating Terrorism Center, July 2006, 1.

<sup>106</sup> Kerwin and Stock, 3.

8%.<sup>107</sup> The increased use of deportations as a counterterror strategy not only affects national security, but also international relations with Latin America. The side effects of deportation policies have had a negative impact on US relations with Latin America, undermining the regional assistance and cooperation needed to establish secure borders and reduce opportunities for terrorist networks to penetrate the Western hemisphere.

This chapter describes the threat posed by terrorism and crime in Latin America and evaluates the impact of U.S. deportation policy on this threat. Additionally, the policies and initiatives put forth since 1996 will also be analyzed to demonstrate their impact on U.S. and Latin American relations.

#### **A. TERRORISM AND CRIME**

Latin America is not without terrorist organizations and in fact many countries have a long history with their own internal struggles against subversive groups designed to undermine the government and terrorize the people. However, terrorist organizations within Latin America have maintained more of a domestic approach by either targeting their own government or attacking embassies of foreign governments located within their own country. On the other hand, criminal organizations have been able to operate without national boundaries and may pose a more significant security risk than that of Latin American terrorist groups. The following is a brief description of the terrorist and criminal threats located or operating within Latin America.

In Peru, a university professor named Abimael Guzmán Reynoso founded Sendero Luminoso (or Shining Path). Sendero Luminoso's ideology was rooted in Maoist principles and carried out some of the most brutal attacks in history against the indigenous population. The ideas of establishing a type of indigenous communism were popular in the Ayacucho region of Peru, where inhospitable terrain and lack of education limited opportunity. The economic and social conditions were ideal for a terrorist network to gain momentum and support in Peru's poor rural and poor urban communities. Sendero Luminoso was a ruthless terrorist organization that terrorized the

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<sup>107</sup> Department of Homeland Security, Office of Immigration Statistics, "Immigration Enforcement Actions 2007," Annual Report (December 2008): 1.

people. The brutal nature of the organization set into motion a path for a self-coup by Peru's elected leader, Alberto Fujimori to not only crush the insurgency but also implement economic reforms with the hopes of reducing the economic factors that contributed to the insurgency. Battles between the government and Sendero Luminoso frequently inflicted hardship and terror on the innocent population caught in the crossfire of the two groups.<sup>108</sup> Sendero Luminoso is now only capable of carrying out small-scale attacks on military convoys or police.<sup>109</sup> The ideology of Sendero Luminoso and their small operational framework make the organization an unlikely ally of radical Islamic terrorist groups or a major threat to U.S. national security interests.

Although Sendero Luminoso poses no significant threats to the United States, other Latin American terrorist organizations have demonstrated the capacity to undermine U.S. security objectives. Narcoterrorism – a term first coined in Colombia in the 1980s to refer to terrorist actions carried out by drug traffickers in an effort to avoid extradition, the term – is today applied to any group that engages in narcotrafficking and terrorist acts. Groups such as the Fuerzas Armadas Revolucionarias Colombianas (FARC) and Ejercito de Liberación Nacional (ELN) in Colombia all have been labeled as narcoterrorists. Additionally, the right-winged terrorist group formed to fight the FARC and ELN, the United Self-Defense Forces of Colombia (AUC), was engaged in drug trafficking before it demobilized.

Both FARC and ELN engage in murder of government officials, drug trafficking and kidnapping. U.S. citizens were even held hostage by the FARC for over five years. Colombian borders do not bind the FARC and ELN. They often violate the sovereignty of Colombia's neighbors – Ecuador and Venezuela are accused as being used for rest and resupply – sparking international incidents when Colombia pursues the organization.<sup>110</sup> The inability of the region to solve the FARC problem at the strategic level hinders efforts at the operational and tactical levels. The failure of the region to join together to

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<sup>108</sup> Thomas C. Wright, *Latin America in the Era of the Cuban Revolution*. Rev ed., Westport, Conn.: Praeger, 2001, 97.

<sup>109</sup> United States Department of State, *Country Reports on Human Rights Practices-2003: Peru* (February 25, 2004) <http://www.state.gov/g/drl/rls/hrrpt/2003/27916.htm>.

<sup>110</sup> Mark P. Sullivan, "Latin America: Terrorism Issues," *CRS Report for Congress* (March 8, 2009):1.

counter the effects of the guerrilla groups have led to increased U.S. influence and assistance to Colombia to defeat narcoterrorists and support democracy in the region. Organizations like the FARC and ELN are contributing factors for increased prison populations, an influx of refugees seeking to avoid violence, increased military involvement in communities, and an increased reliance on the United States for financial aid. There are also conflicting reports on the sympathy and cooperation of other Latin American countries with the FARC, undermining Colombia and U.S. efforts to eliminate narcoterrorists.<sup>111</sup>

Despite suspicion that Latin American governments are sympathetic to terrorists, the only country in Latin America considered by the United States as a state sponsor of terrorism is Cuba. This is partly due to the lack of definitive proof of any ties, other than diplomatic, between other nations and state sponsors of terror. Additionally, Latin American terrorist organizations are different than those that actively act out on their anti-U.S. positions such as Al Qaeda. Cuba, however, has been on the list since 1982 along with Iran, Sudan and Syria due to its involvement with revolutionary movements in Africa in addition to other countries in Latin America. Accusations against Cuba for their involvement in terrorist activities includes: harboring members of the FARC, ELN, and Basque ETA, establishing close relationships with Syria and Iran and accepting U.S. fugitives from justice. In 2006, Cuban officials said they would no longer accommodate U.S. fugitives. Although countries such as North Korea and Libya have been removed from the list, Cuba still remains.<sup>112</sup>

Venezuela remains a country that does not support antiterrorism efforts, but it is not on the list of state sponsors of terrorism. The Venezuelan president, Hugo Chávez, has been critical of U.S. policies concerning counterterrorism and has strengthened economic and diplomatic relations with Iran and Cuba. In 2008, the U.S. Treasury froze the U.S. assets of a number of Venezuelan citizens for giving support to Hezbollah. The Venezuelan leader is also sympathetic to the ideologies of the FARC and ELN and the government is inefficient due to high levels of corruption. Venezuela's corruption

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<sup>111</sup> David W. Dent, *Hot Spot: Latin America*. Westport, Conn.: Greenwood Press, 2008, 107.

<sup>112</sup> Sullivan, 4.

threatens U.S. interests since the ease with which one can obtain citizenship and travel documents make it a potential infiltration avenue for U.S.-bound terrorists. The United States did levy an arms embargo on Venezuela that was validated after evidence was found during a raid on a FARC camp in Ecuador that Hugo Chávez's administration had provided financial support to the FARC. The provisions of the arms embargo prevent the sale of all weapons sales and re-transfer of U.S. commercial arms.<sup>113</sup>

Applying a broad counterterrorist policy that disproportionately targets Latin American immigrants is a complex and contradictory policy. While Latin America is not without terrorists and in fact has a long history of political violence, the leading terrorist organizations in Latin America are not actively targeting the United States. Instead, groups like the FARC and ELN are focused on their own nations and expanding their influence through establishing criminal businesses to fund their operations. While these organizations do not share the same ideology as Al Qaeda, there is a possibility they might cooperate with other terrorist organizations if it is profitable enough. Others discount this possibility since such an alliance would renew U.S. support for an offensive against them at a moment when U.S. interest in Colombia is declining.

There is also little that links Latin America to Al Qaeda, the largest terrorist threat to the United States. Approximately 6 million Muslims live in Latin America but the only significant terror ties to those immigrant communities are believed to exist in the Tri-border Area (TBA) of Argentina, Brazil and Paraguay. The TBA is considered an ungoverned space and an area with considerable criminal activity in addition to a large Muslim population that retains ties to their native countries in addition to Islamist organizations. The TBA has been associated with terrorist networks that target the United States such as Hezbollah and use the area to finance terrorist operations through criminal activities. An estimated \$500 million has been sent to fund terrorist organizations in the Middle East from the profits earned in the TBA.<sup>114</sup> Hezbollah is known to be active in the TBA in addition to having cells in Colombia, Venezuela, Guyana and Ecuador. Although terrorist organizations of all ideologies are known to exist in Latin America,

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<sup>113</sup> Sullivan, 2.

<sup>114</sup> Dent, 173.

there does not appear to be a significant amount of assistance or pressure to the governments that make up the TBA. In fact, the governments of Argentina, Brazil and Paraguay deny that any terrorist organization operate, outside financial support networks, within the TBA.<sup>115</sup> Brazil denies any terrorist organizations exist at all in their country.

There is a substantial criminal network that exists throughout Latin America. The connection between the drug trade and terrorism poses a particular challenge for the United States. Nineteen of forty-three terrorist organizations worldwide are linked to the drug trade. Over half of terrorist organizations are suspected of some sort of illegal drug trade connection.<sup>116</sup> Even those terrorist groups with strong ideologies against drugs will deviate from their strict ideology to support their military operations.

Latin American countries may have only loose ties with the Islamic terrorist threats commonly cited as the most significant against the United States, but they do pose other security risks. The bigger threat from Latin America involving U.S. national security is the growing and sophisticated nature of transnational criminal organizations and gangs. These organizations cross international boundaries and traffic in weapons, humans, drugs and other illegal commodities. They pose a significant threat to not only U.S. security interests by their ability to violate the sovereignty of the United States by establishing smuggling operations that enter the United States, but also by the goods they traffic. Whether drugs or humans, their ability to circumvent the border measures applied after years and billions of dollars demonstrates their level of complexity and represent a possible avenue of exploitation for terrorist organizations. They contribute to a growing dependence on illegal activity for economic survival reducing overall economic prosperity within the hemisphere.

Hybrid organizations are not the only threat. There are other traditional organizations, like criminal organizations, that destabilize government institutions, and also provide possible alternative avenues for terrorist organizations to exploit if necessary. Organized crime and gang activity have become increasingly more dangerous

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<sup>115</sup> Dent, 204.

<sup>116</sup> Dent, 4.

over the past thirty years. Increased income disparity in developing nations and globalization has contributed to the increased sophistication and networking of criminal groups involved in activities ranging from trafficking in drugs, weapons, and persons to kidnapping and immigration fraud. Unlike terrorist organizations, criminal organizations do not operate under an ideological agenda, but instead take advantage of regional conflicts in order to capitalize on opportunities for greater financial benefits.<sup>117</sup> Drug traffickers in Latin America are able to buy off government officials, as institutions are generally weak and incapable of fully eradicating the criminal organizations.

Due to the close geographic proximity of Mexico and their highly publicized problems with drug cartels, the United States is even more focused on enforcing Mexican immigration violations and building better barrier mechanisms at the border. Mexican drug cartels have grown in strength and complexity. Mexican drug traffickers smuggle in illicit narcotics from other Latin American nations into the United States. In the 1980s and early 1990s, Colombia provided the cocaine to Mexican smugglers who brought the cocaine across the border and delivered it to Colombian traffickers, but now Mexican drug cartels control exchanges from within U.S. cities. Almost half of the cocaine in the United States is believed to be from Colombia, but Mexican traffickers are expanding their operations by going directly to the growing sources of narcotics in Bolivia and Peru. Mexican cartels also have demonstrated influence in the Mexican government due to corruption. Not only are Mexican law enforcement officials corrupt, but there is also increasing evidence of corrupt U.S. agents at the border.<sup>118</sup>

There is also evidence that link U.S. based street gangs such as MS-13 and the 18<sup>th</sup> Street to criminal networks in Central America and Mexico. While street gangs do not appear to have evolved into a highly centralized and organized criminal organization, the potential exists for them to do so. Both MS-13 and the 18<sup>th</sup> Street gang are known to operate in Washington, D.C, Maryland, Tennessee, New York, Texas and California. MS-13 has an estimated 30,000 members and the 18<sup>th</sup> Street gang is said to have up to

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<sup>117</sup> James Phillips and others,” Terrorism and Crime: Containing the Threat,” Chap. 19 in *Issues '98: The Candidates Briefing Book*, The Heritage Foundation, January 1, 1998, 547.

<sup>118</sup> Phillips, 553.

10,000. Former guerrillas and soldiers from El Salvador started MS-13 in the 1980s during a brutal civil war in their country. Mexicans founded the 18th Street gang during the 1960s in Los Angeles in self-defense against other preexisting gangs. The 18<sup>th</sup> Street gang is multi-racial and multi-ethnic resulting in their higher numbers in membership.

The 18<sup>th</sup> Street and MS-13 gangs are threatening since they show signs of evolving. Street gangs are defined in generational terms from first to third generations. Each generation progresses to a more complex and networked organization. First generation gangs are characterized by participating in crimes of opportunities and focus on one specific area. Second generation gangs are more business focused and have tighter leadership structures. Finally, third generation gangs have more financially and politically motivated goals and are able to operate globally. Like terrorist organizations, third generation gangs are capable of transcending borders. The 18<sup>th</sup> Street and MS-13 gangs demonstrate the potential to operate as a third generation gang which is why they pose such a significant threat to the United States and are a source of possible concern of future terrorist infiltration or manipulation although this would be a long-term concern.<sup>119</sup>

## **B. LINKS BETWEEN U.S. DEPORTATION POLICY AND TERRORISM AND CRIME**

U.S. foreign policy toward Latin America after 9/11 changed dramatically from the ideas presented early in the Bush administration. The increased pressure to demonstrate U.S. sovereignty and capacity to protect the borders of the United States put forth new legislation that increased funding for the newly created Department of Homeland Security as well as to create and finish fencing projects along the southern border and reduce temporary work visas. U.S. leaders also recognized that security along the shared border with Mexico was a joint responsibility, but the two countries appear to look at the issue from different perspectives. The United States looks at border issues through a security lens and the Mexican government looks at migration through an economic one.

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<sup>119</sup> Phillips, 5.

With the prosperity of the U.S. economy, there seemed to be an emerging consensus that undocumented workers were filling jobs not wanted by higher educated U.S. citizens thereby adding to revenues and performing a valuable service within the U.S. economy. As cheap labor came into the United States, lobbyists worked for the reunification of immigrant families and civil rights organizations maintained that undocumented and immigrant groups should be afforded the same constitutional protections enjoyed by U.S. citizens. Before the 2001 terrorist attacks, a more open relationship with Mexico seemed to be coming to fruition with support from a variety of lobby groups.<sup>120</sup> However, after September 11, 2001, the entire agenda with Mexico and a more integrated region came to a drastic halt. The U.S. economy weakened and the implications of terrorists on U.S. soil caused perception to shift to more isolation from foreign threats, both economic and security related.

U.S. citizens concluded that it was too easy to enter the United States and that the government was not doing enough to protect its citizens. The potential for another amnesty bill was replaced by an increase in scrutiny of applications of immigrants and the need to better control the borders and interior of the border. Immigration topics became more of a priority than drugs and the focus on tougher border measures to fight terrorism focused on Mexico even though more terrorists were known to have entered the United States through Canada than Mexico (and Canada housed larger numbers of immigrants from countries with terrorist ties). However, the large number of smuggling routes crisscrossing the U.S.-Mexico border created the fear that terrorists or weapons of mass destruction could be brought across the southern border.<sup>121</sup> Early news reports after 9/11 mentioned an Iraqi-born Mexican citizen, George Tajirian, who was involved in an extensive human smuggling ring that is believed to have brought in over 130 undocumented immigrants to the United States from Middle Eastern nations. Some of the individuals were wanted for genocide and other violent crimes in their home nation as well as in Europe. His motivation appeared to be purely financial as he charged extra for

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<sup>120</sup> Robert S. Leiken, "Enchilada Lite: A Post-9/11 Mexican Migration Agreement," paper prepared for the Center for Immigration Studies (March 2002): 7.

<sup>121</sup> Leiken, 9.

those he knew had criminal pasts.<sup>122</sup> Evidence of smuggling from Mexico of individuals from outside Latin America only gave advocates for stricter border control more ammunition when Mexico was trying to increase student visas and greater protections for undocumented workers. While shutting down smuggling routes of criminal organizations may prevent infiltration of terrorist organizations, there can be unintended consequences. As barrier measures increase, the ingenuity of criminal organizations has proven successful in circumventing those tools. This may make it even more difficult to track smuggling rings, furthering increasing their effectiveness and appeal to terrorist networks.

Gang-specific deportation legislation was adopted late in the 1980s and underwent significant modifications during the 1990s. The Violent Crime Control and Law Enforcement Act of 1994, in addition to the IIRIRA and AEDPA, sought to address gang violence on some level. It streamlined the deportation process by adding to list of deportation criteria in relation to felony activity. Additionally, Congress funded programs for local communities to help establish gang prevention and intervention strategies. Various agencies under the Department of Justice counter gang violence. Due to their involvement with the drug trade and use of weapons to carry out crimes, gangs face the FBI, Drug Enforcement Administration (DEA), and the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF). The U.S. Attorney's Office Criminal Division handles gang prosecutions and has their own task force devoted solely to the prosecution of gangs.

After 9/11, the FBI focused their investigative efforts on terrorism by shifting agents from gang investigations to investigating terrorist organizations. Despite this, gang task forces opened more investigations after the reduction in personnel than before the shift. During the same time, the FBI did establish a national task force to integrate federal, state and local enforcement agencies that may account for the increase despite reduction in federal personnel. The task force also cooperates with Central American

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<sup>122</sup> Sam Dillon, "Iraqi Accused of Smuggling Hundreds in Mideast to U.S.," *New York Times Late Edition (East Coast)*, October 26, 2001.

nations through the development of the Central American Fingerprint Exploitation (CAFÉ) Initiative, which consolidates Central American criminal records with the FBI fingerprint database.<sup>123</sup>

Other initiatives include the Safe Streets and Violent Crimes Initiative (SSVCI), the establishment of the National Gang Intelligence Center (NGIC), the Regional Area Gang Enforcement (RAGE) Task Force, the Gang Targeting Enforcement Coordinating Center (Gang TECC), and international cooperative initiatives. The SSVCI adapted the same techniques used to fight organized crime and applied it to investigating gangs. It also integrates investigative procedures between the federal and local levels through the implementation of a FBI led specialized task force that oversees 139 subordinate task forces.<sup>124</sup> The NGIC is the intelligence coordination aspect of the FBI's efforts. The ATF also tracks gang violence by tracing firearms through the National Tracing Center (NTC) and regional tracking centers in areas with increased gang violence.

In 2005, Operation Community Shield was implemented specifically to address MS-13 but expanded to include other violent street gangs nationwide. MS-13 was targeted initially due to their involvement in drug and human smuggling, murder and kidnapping. Operation Community Shield resulted in a total of 11,106 arrests of gang members including 7,109 administrative immigration arrests from its inception through Operation ICE Surge in 2008.<sup>125</sup> Operation Community Shield officials reported that 80 percent of the aliens arrested had committed a serious crime and 40 percent had violent criminal histories and therefore arrests were not solely based on immigration violations.<sup>126</sup> However, the way Operation Community Shield worked was based on using immigration laws to detain and deport criminal undocumented aliens. Local law enforcement presented information to ICE agents on gangs and gang members in their

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<sup>123</sup> Franco, 12.

<sup>124</sup> Franco, 13.

<sup>125</sup> U.S. Immigration and Customs Enforcement, *Fact Sheets, Operation Community Shield: Targeting Violent Transnational Street Gangs*, October, 1, 2008, 1.

<sup>126</sup> Jessica M. Vaughan and John D. Feere, "Taking Back the Streets, ICE and Local Law Enforcement Target Immigrant Gangs," *Backgrounders*, Center for Immigration Studies (October 1, 2008): 1.

area. The ICE agents analyze the information to see if there are any immigration violations that can be used to arrest the individuals of concern. The tactic takes the gang member off the street immediately and serves as a beginning step in future investigations into their criminal activity.<sup>127</sup>

Operation Community Shield was a national effort, but states have implemented their own anti-gang initiatives. Texas implemented Operation Border Star late in 2007 and the state legislature put over \$110 million dollars into collaborative efforts to respond to crime, drug smuggling and terrorism. However, initiatives such as Operation Border Star have been met with considerable opposition based on the measures used to evaluate the operation's effectiveness. The overall goal of the program was to reduce crime at the Texas border and thereby increase the safety of the entire state. However, in attempting to show progress and the state legislature exerting control over enforcement capability without focusing specifically on criminal activity, Operation Border Star pours millions of dollars into measuring normal police work. A report conducted by the American Civil Liberties Union of Texas found that there were ineffective performance measures due to the performance standards mandated with no association to the context in which arrests are actually made. In addition, the reporting procedures for local law enforcement to report to the Joint Operations Intelligence Center (JOIC) make analysis difficult since even minor arrests are reported to show progress and compliance. In fact, the most reported performance measure sent to the JOIC is a call for service. A call for service does not help measure the effectiveness of the operation in combating drug dealers or human smugglers. Reporting data with no security implications burdens those responsible for analysis at the JOIC and wastes manpower and resources.<sup>128</sup>

Transnational gang organizations operate in criminal activity that is punishable under Racketeer Influenced and Corrupt Organization (RICO) and Violent Crimes in Aid of Racketeering (VICAR) statutes. The increased penalties under legislation passed in the aftermath of 9/11 made gangs a legitimate target for not only immigration violations,

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<sup>127</sup> Vaughan and Feere, 15.

<sup>128</sup> Laura Martin and Rebecca Bernhardt, "Operation Border Star: Wasted Millions and Missed Opportunities," *The American Civil Liberties Union of Texas* (March 16, 2009): 8.

but also additional criteria of deportable offenses. Ironically, when prosecutors try to enforce RICO and VICAR regulations on normal street gangs, they face substantial problems establishing links between the crime and a criminal network, however the more a street gang behaves and evolves into an organized criminal network, the better chance prosecutors have in enforcing stricter penalties.<sup>129</sup> There is conflicting evidence about the evolution of street gangs. The Washington Office on Latin American (WOLA) conducted a study and provided evidence that MS-13 and the 18<sup>th</sup> Street gangs were simple street gangs, however, law enforcement and immigration officials disagree and have successfully implicated and prosecuted gang members in RICO related violations. WOLA's study, conducted over a period of 12 months, concluded that the majority of the offenses were "petty theft and neighborhood extortion."<sup>130</sup> WOLA argues that gangs have no intent of expanding their operations and thus should not be considered racketeering operations.

The idea that increased cooperation and integration between law enforcement and immigration enforcement is essential in promoting safety and security is not without merit. However, priorities and accurate reporting are necessary in order to measure success. Operation Border Star is one of the most recent initiatives in Texas, but it does not seem to have incorporated many of the lessons learned from previous operations in Texas. For example, Operation Linebacker in 2005 increased patrols, checkpoints and cameras on the border, but the operation netted seven times more undocumented immigrants than criminals.<sup>131</sup> Operation Rio Grande in 2006 emplaced cameras along the border's rural areas at a cost of \$5 million dollars. The cameras streamed live to a website that anyone could access, which they did out of curiosity and not as a community policing effort. Additionally, allowing unfettered access to tools designed for security provides the same tools to drug cartels and terrorists who can then develop their own procedures around U.S. security measures. Operation Wrangler involved 133 police departments, 90 sheriff's offices and Texas National Guard Soldiers in addition to federal

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<sup>129</sup> Franco, 7.

<sup>130</sup> Franco, 8.

<sup>131</sup> Martin and Bernhardt, 24.

agents. The operation accounted for an increase in drug arrests, but also was criticized by the Mexican government for racial profiling. The operation was criticized for using racial profiling to catch undocumented immigrants for traffic violations rather than investigating drug and human smuggling crimes.<sup>132</sup>

Gang members are not the only targets of enforcement measures. Even though the largest threats to security are from criminal organizations, the policies of using law enforcement to pursue all undocumented workers poses its own limitations and questions. For example, statistics show that only illegal immigrants are deported. However, once an immigrant is found in violation of any number of civil or criminal codes, they are considered illegal and deportable. Additionally, statistics that differentiate between the types of crimes committed that warrant deportation and those for which individuals remain incarcerated are unavailable, but efforts are improving. As a result of changes in immigration laws, there is also a lack of discretion when it comes to deporting an individual who has committed minor offenses or civil offenses.<sup>133</sup> While border measures and immigration reform were politically focused domestically, they had international impact. The security dilemma of the United States had an undeniable impact on relations with Latin America.

### **C. IMPACT OF DEPORTATIONS ON U.S.-LATIN AMERICAN RELATIONS**

Despite the limited ties with terrorist organizations, Latin Americans have the highest rates of deportations. The higher rates are primarily due to the disproportionate number of undocumented Latin Americans, especially Mexicans, compared to other ethnicities; however if the true threat is terrorism, then why waste resources on the least threatening group? The United States is supposed to be targeting terrorist threats, but without definitive intelligence, it can be easier to target criminal networks to improve security for the public with the use of local law enforcement capabilities to enforce

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<sup>132</sup> Martin and Bernhardt, 25.

<sup>133</sup> United States. Congress. House. Committee on Foreign Affairs. Subcommittee on the Western Hemisphere (2007), *Deportees in Latin America and the Caribbean: Hearing and Briefing Before the Subcommittee on the Western Hemisphere of the Committee on Foreign Affairs, House of Representatives, One Hundred Tenth Congress, First Session* (July 24, 2007): 31.

immigration laws. Deportation is an appealing avenue for law enforcement officials. Returning criminals and terrorists to their home countries reduces and eliminates the need for long detentions for those who may fall into gray areas of the domestic criminal code. Relaxing deportation criteria keeps costs of investigations and detention space lower than if deportations were the last resort. However, moving the threat – whether criminal or terrorist – can unintentionally create new networks or reinforce the individual’s status within an organization.<sup>134</sup>

For example, to the extent street gangs in Central America and key U.S. cities are becoming more complex and involved in the transnational activity of the drug trade, this can be attributed to the deportation of Latin American gang members back to their home country since the mid 1990s changes in immigration law. It is argued that deported gang members participated in gang activity in their new homes for economic survival or as a way to further interests of U.S. based gangs.<sup>135</sup> While local youth gangs were present in Central America and Mexico before the enactment of the IIRIRA and the AEDPA, these were first-generation neighborhood gangs involved in petty crime. The U.S. deportation policy exported U.S. gang culture (which was much more violent than Central American gang culture) to Central America along with the deportees; deportees were able to take over and consolidate existing organizations and make them far more dangerous (and transnational) than they had been before.

The massive number of deportations within the Western Hemisphere constitutes an enormous security challenge for the entire region. Deporting a criminal to their home nation does not necessarily protect the United States from further actions from the same deported individual. The majority of those deported from the United States are from Mexico and Central America. The governments in Latin America are small and not as well resourced as the United States. Removing criminal aliens to their home nations may not always ensure that those individuals will receive any rehabilitation, incarceration or

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<sup>134</sup> Emily Hunt, “Bad Riddance: The Dangers of Deportation as a Counterterror Policy,” *Policy Watch*, no. 1096, Washington Institute for Near East Policy, April 28, 2006, 1. <http://www.washingtoninstitute.org/templateC05.php?CID=2461>

<sup>135</sup> Franco, 8.

have reasons to not reenter the United States.<sup>136</sup> Not only do governments have challenges to reintegrating deportees, but families are also separated for even minor violations causing more unintended effects.

In addition, efforts are made to deport all undocumented immigrants, which undermines the more targeted use of deportation policy. Arguments can be made that terrorist and gang members will have jobs not associated with criminal activity in order to make a living and that worksite raids and deporting all undocumented workers will prove dividends in the long run. However, an encompassing approach has many unintended consequences and does not accurately address the problems with the U.S. immigration system. The United States has no responsibility to harbor criminal immigrants who violate U.S. laws, however the lack of discretion may cost the nation more economically and socially than a more targeted deportation policy. The costs are seen not only in the impact of deportees to their home nations, but also to U.S. citizens for a variety of reasons that are not examined in the cost-benefit analysis of deportations in general.

U.S. immigration policy has always been important to Latin America as many from the area seek to live in the United States indefinitely or temporary as opportunities in the United States are greater than in their home countries. The United States has a long history of changing their immigration policies based on domestic politics mainly stemming from fluctuations in the economy. Economic factors as well as conflict and racial motivations also are important to understand in analyzing U.S. immigration policy. These underlying factors result in preferential treatment to immigrants from specific countries depending on the time period. For example, in 1882, the Chinese Exclusion Act discriminated against Chinese citizens solely on their national origin. The Immigration and Nationality Act Amendments of 1965 removed specific quotas that discriminated against non-northern Europeans. The removal of restrictions led to more immigrants from Africa, the Middle East and Latin America migrating to the United States. The amendment and the Civil Rights movement determined that excluding one specific group of people based on nationality, education, race or economic status was against the

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<sup>136</sup> United States. Congress. House. Committee on Foreign Affairs. Subcommittee on the Western Hemisphere (2007) 2007, 38.

founding principles of the United States and should be avoided. The result was a tremendous growth in immigrants in communities; this, in turn, created a backlash among some who felt that immigrant groups were burdening federal and state systems as the immigrant community grew from 19 million in the 1990s to over 31 million by 2000.<sup>137</sup>

The large influx of immigrants after the 1960s also increased their political power through participation in labor unions and calls for more immigration restriction were met with calls for amnesty to all undocumented workers. The amount of remittances sent back to immigrants' home countries are essential to Latin American governments, which advocate for more opportunities for their citizens to work in the United States. The United States had little resources to deal with the enforcement of immigration violation for workers and despite the 1996 AEDPA and IIRIRA legislation, there was little that was actually done to curb illegal immigration and counter the large influx of immigrants into the country. It also appeared that there would be more regional integration after the election of George W. Bush who advocated new guest worker programs and free trade areas. However, the events of 9/11 demonstrated how ineffectual the 1996 acts were and gave political power to groups that wanted to curb immigration. The idea of an open and integrated region was sidelined by a demand for increased security at U.S. borders that disproportionately affected Latin Americans due to their sheer proximity.

The increase in deportable offenses and increased policing efforts targeting immigrant communities and grouped nonviolent criminals, undocumented workers and gang members into one group despite the recognized need for priorities. One of the unintended consequences concerns the impact on families comprised of U.S. citizen children and undocumented or criminal immigrant facing deportation. Under the new rules, even a long-term legal resident of the United States is subject to deportation if they have any conviction relating to a controlled substance or receive a minimum one-year sentence for any offense.<sup>138</sup> Essentially this means that even someone who came to the United States as a child and is a long-term legal resident is deportable for a drug

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<sup>137</sup> Thomas Donovan, "Immigration Policy Changes After 9/11: Some Intended and Unintended Consequences," *The Social Policy Journal* 4 (1) (2005): 36.

<sup>138</sup> The Transactional Records Access Clearinghouse, "Aggravated Felonies and Deportation," (Syracuse University. December 8, 2003): 3. <http://trac.syr.edu/immigration/reports/155>.

violation. Their entire family may reside in the United States and may not even remember their home country or speak the language. Families may also be separated as parents are deported from the United States and their U.S. born children remain, causing unnecessary hardship on families. Since legislative changes have removed room for discretion in applying deportation policy, the amount of cases where the costs of deportation far outweigh the benefits have certainly increased.

Deportations not only hurt families, but they also reduce remittances to many Latin American nations. Remittances to Mexico account for over \$20 billion and in Central American and the Dominican Republic, remittances surpass foreign investment and assistance combined.<sup>139</sup> In the United States as well as in Latin America, political action groups of immigrants are becoming increasingly important in domestic politics. The hemisphere is becoming more regionally integrated through mutual migration and transnational economic policies and not solely through criminal transnational networks. The strengthening of both criminal and legitimate networks that surpass any border makes deportations less effective. The complete integration of the United States and Latin America through economic policies and social connections make legislative initiatives less effective. The systematic relaxation in offenses that warrant deportation has established mixed reactions. The United States has increased their efforts for border fences and stricter immigration policies due to the threats of terrorism and perceptions of increased immigration crime rates, but the efforts have not resulted in substantial benefits for the United States nor helped to strengthen relations with Latin American nations.

#### **D. U.S.-LATIN AMERICAN EFFORT TO IMPROVE REGIONAL SECURITY**

The United States had new policy objectives after September 11, 2001, and combating terrorism and crime was at the forefront of any initiative. Additionally, the National Security Strategy presented in 2002 and 2006, while only briefly mentioning Latin America, cited promoting freedom as an inseparable priority for fighting the War

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<sup>139</sup> Abraham F. Lowenthal, "Beyond the Western Hemisphere Idea: Understanding and Improving U.S. Policies Toward Latin America and the Caribbean," *Special Report* Pacific Council on International Policy, March 2007, 9.

on Terror in addition to ending illicit trade (drugs, humans, weapons) as an important area to address to strengthen U.S. strategy.<sup>140</sup> Security had many different interpretations from economic security to preventing violations of immigration regulations and terrorism. The United States also reevaluated their foreign policy in regards to Latin America as the Cold War enemies disintegrated and a new foreign enemy, Islamist terrorists, proved to be more elusive and adaptive. Even though the threat from the Middle East was more prevalent and Latin America seemed to be an unlikely ally for extreme Islamist terrorists, the U.S. government also attempted to put in place strategies that attempted to circumvent anti-American sentiment through humanitarian assistance and aid with the full understanding that lack of opportunity and income disparity are potential weaknesses for terrorists to infiltrate. Additionally, Latin America had their own brand of terrorists and new resources to fight “narcoterrorism.” The United States decided to engage Latin America to fight transnational criminal networks, regardless of type, to improve U.S. security. For many Latin American countries, the U.S. “War on Terror” was inconsistent with pressing items on their agenda.

The reaction to 9/11 in the United States also gave Latin America new problems to address. Shutting down the southern border and crippling the economies of both the United States and Mexico was not a realistic option. Neither was it realistic to round up and deport any undocumented immigrant within the United States; however, politicians perceived little support for another amnesty program or an increase in temporary guest worker programs for Latin Americans despite the financial benefits related to cheap labor and the enormous costs associated with mass deportations.<sup>141</sup> Latin America, however, has joined in some efforts with the United States to show integration with antiterrorism and crime efforts that encompass a wide spectrum of operations from supporting counter terror efforts to drug trafficking. The United States has shown assistance to Latin America by providing additional resources for strengthening democracy and support for Latin American countries that receive deportees.

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<sup>140</sup> George W. Bush, *The National Security Strategy of the United States*, March 2006, 47.

<sup>141</sup> Geoffrey Colvin, “On Immigration Policy, We’ve Got It Backward,” *Fortune* 152 (5) (September 5, 2005): 44.

A number of initiatives have been developed to assist nations with the effects of deportation. One deals with the initial reception and reintegration of those deported. A study conducted on Jamaicans deported from the United States, Canada and the United Kingdom found that “reintegration efforts could be a cost-effective way for deportee-sending countries to promote development and weaken international crime networks.”<sup>142</sup> Many Latin American nations have called for more integration and assistance in deportation concerns. They have expressed concern over a lack of communication over and access to the criminal records of the deportees.<sup>143</sup> Many deportees, even those with criminal convictions, arrive without the knowledge of their home governments. El Salvador and Honduras, nations with high deportation rates, have both signed agreements with the United States to implement electronic travel systems. This system would provide the information on the person deported to law enforcement in their home countries.<sup>144</sup> The Congress has expressed a willingness to implement more assistance programs, but proposals are not currently available. Proposals to stop migration are more popular than reintegration programs despite the long-term benefits associated with reintegration programs.

Whereas assistance to deported individuals is lacking, the United States has shown compassion in joining in a bilateral agreement with Mexico to combat human smuggling. The Operation Against Smuggling Initiative on Safety and Security (OASISS) was started in 2005, but was limited to specific areas around San Diego, Yuma, Arizona. It eventually was expanded to include El Paso, Texas and Coahuila, Mexico. In FY2007, over 660 prosecutions of human smuggling and trafficking were preferred with almost half tried in Mexico.<sup>145</sup> The U.S. Customs and Border Patrol also created “Operation Lifeguard” in the El Paso, Texas area in order to prevent migrant

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<sup>142</sup> Luigi R. Einaudi, “Trans-American Security: What’s Missing,” *Strategic Forum no. 228*, Institute for National Strategic Studies, National Defense University, September 2007, 6.

<sup>143</sup> Mark P. Sullivan, et al. “Latin America and the Caribbean: Issues for the 110<sup>th</sup> Congress,” *CRS Report to Congress* (August 31, 2007): 16.

<sup>144</sup> United States. Congress. House. Committee on Foreign Affairs. Subcommittee on the Western Hemisphere (2007), 15.

<sup>145</sup> Colleen W. Cook, Rebecca G. Rush and Mark P. Sullivan, “Mexico-U.S. Relations: Issues for Congress,” *CRS Report for Congress* (May 23, 2008): 11.

deaths and apprehend smugglers in the area. During FY2007, migrant deaths in the area fell 24%.<sup>146</sup> However, this statistic is hard to measure without looking to see if there were higher casualties in nearby areas.

Despite the denouncement of border fences by Mexican officials, the Mexican government has participated in cooperative efforts along the border with the United States. These efforts have included the sharing of information as well as mutual agreements. The “U.S.- Mexico Action Plan for Cooperation and Border Safety for 2004, as well as a Memorandum of Understanding on the Safe, Orderly, Dignified and Humane Repatriation of Mexican Nationals” was signed in 2004 by DHS Secretary Tom Ridge and Mexican Government Secretary Santiago Creel. The agreement was also strengthened by the implementation of six new Secure Electronic Network for Traveler’s Rapid Inspection (SENTRI) lanes in 2006.<sup>147</sup> Even with the new memorandums and SENTRI lanes, there is still a large difference in the ease of travel for Mexicans and across the Mexican border as compared to that of Canadians and their border. The six-month travel visa allowed for Canadians whereas no such concessions are provided for Mexican citizens can evidence the disproportion.

The contradictions in provisions and relative discriminatory treatment of undocumented immigrants from Latin America had damaged relations with Latin American governments. While the United States has sent positive signals for trade integration, the U.S. government has failed to follow through on true regional integration. Additionally, the use of deportations has not only been ineffective as a counterterror tool, it placed too much emphasis on Latin Americans. The lack of successfully applying priorities for terrorism and violent illegal immigrants did not demonstrate a real focus on counterterror and overall public safety.

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<sup>146</sup> Cook, 12.

<sup>147</sup> Cook, 12.

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## V. CONCLUSION

Keeping the United States safe from terrorism and crime is almost impossible but have the changes in immigration policy actually produced any measureable results? Increasing enforcement under the guise of counterterror legislation without first identifying the underlying reasons for increased enforcement is misleading and inaccurate. Undeniably, the events of 9/11 expanded deportation policy, but there is little evidence that the increased deportations have yielded any counterterror benefit, especially since the majority of those deported are Latin Americans. That does not mean that deportation policy has not helped the immediate security needs of the United States by deporting criminals. However, by fueling transnational criminal networks, deportation policy undermined the long-term security of the United States and key Latin American nations.

The changes to immigration policy after 9/11 are not as drastic as publically perceived, but they did seek to reinforce the new objective to deter terrorist attacks. The legislative provisions outlined in the IIRIRA and AEDPA in the 1990s set the precedent for a parallel between immigrants and terrorism. The creation of the Department of Homeland Security, however, changed the function of those agencies whose previous purpose was to facilitate applications. The implementation of the DHS, whose primary mission is to secure the nation, changed the organizational culture of immigration agencies from assistance to suspicion. The consequences of the pre 9/11 and post 9/11 acts, such as the Homeland Security Act and the PATRIOT Act may be unintentional, but they still affect the disposition of thousand of immigrants who seek a better life in the United States and not just terrorist suspects.<sup>148</sup> The objective of deporting potential terrorists or terrorist supporters is not without merit, however the application of these principles does not always apply to Latin Americans and is therefore misused if solely using a counterterror defense.

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<sup>148</sup> Thomas Donovan, "Immigration Policy Changes After 9/11: Some Intended and Unintended Consequences," *The Social Policy Journal* 4 (1) (2005): 35.

Preventing terrorist attacks is the primary mission of the DHS, but there must be metrics to measure success other than the simple absence of successful attack within the United States since 2001. The metrics used, when compared to prior to 9/11 statistics, offer some contradictions that raise more questions to the true success rate of U.S. tactics. For example, 6,400 individuals were prosecuted for terror-related crime within the first two years after 9/11. These crimes included minor offenses and only 16 convictions resulted in a prison sentence of more than five years, hardly a sentence associated with actual terrorism. This evidence suggests that prosecutors are willing to settle for convictions of lesser offenses, but that does not make the nation safer in the long run.

Logic also leads us to question the value of using deportation as a means to counter actual terrorist threats (or even criminal threats). If an individual does threaten the United States, losing physical control over that individual is not tactically savvy. The expanded authorizations of the PATRIOT Act and FISA would suggest that there are more mechanisms for gathering information on foreign threats operating within the country than less. Simply deporting the individual fails to truly contain or exploit the threat, but detaining individuals without due process indefinitely leads to human rights violations concerning rights to liberty and undermines the constitutional principles. There is also no evidence that Latin Americans are being targeted based on origins that are known to have higher levels of terrorist activity.

The dynamics along U.S. borders and ports as well as from within the interior of the country make the task daunting and unending, but it is still a necessary endeavor. Combating crime is essential to national security and focusing on threats from foreign enemies is an appropriate strategy. When the strategy and the methods do not match, confusion and mistrust are able to cause significant problems that hinder efforts on all counts and increase ideological differences. Since there is a disproportionate focus on the southern U.S. border with Mexico as opposed to the northern border with Canada, there is a tendency to believe that U.S. policies are more culturally motivated.

The security of the entire hemisphere is dependent on integration and cooperation, but conflicting messages over economic and social matters do not encourage positive dialogue. Deportation policies that disproportionately target Latin Americans subvert the

basis for cooperation and, more importantly, increase the criminal threat that struggling Central American countries are ill equipped to handle. More emphasis on reintegration assistance and not just communication on deportees will provide long-term benefits for both the United States and Latin American nations whose law enforcement capacity is significantly less. Reintegration assistance that is focused on education and rehabilitation can help provide individuals with the necessary skills they require to perform jobs in their own country as well as make gang life an unattractive option. Latin American nations appear willing and eager to join in long-term efforts focused on this strategy, but the United States has yet to change course from barriers and drug eradication policies. Currently Central American leaders are pushing for inclusion of Guatemala into the temporary visa program that El Salvador, Honduras and Nicaragua are party to in addition to slowing the deportation of their citizens back into the region.<sup>149</sup>

In 2009, the United States has a new chance for increasing the dialogue with Latin America. Promises of transparency and international accountability and law resonate with Latin America. The Obama administration would be well served by establishing long-term strategies and policies that are initiated by Latin American governments and seek to benefit both nations and not just the United States. The President should also capitalize on his current popularity within Latin America and increase relations with Mexico after U.S. Senators criticized the country's ability to govern certain parts of the Mexican country. The Bush administration expressed a desire early, but 9/11 set the country on a new path and a focus on positive Latin American relations was lost. A new opportunity has emerged and it should be taken quickly and the administration should not lose focus on Latin America.

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<sup>149</sup> "Central American Leaders Ask U.S. to Slow Deportations," *The Washington Times*, March 30, 2009, <http://www.washingtontimes.com/news/2009/mar/30/central-america-leaders-ask-us-slow-deportations/>.

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